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No. 05-1338

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IN THE  
SUPREME COURT OF THE STATE OF GRACE  
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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 RESPONDENTS**  
\_\_\_\_\_

**Team 34**

**ATTORNEYS FOR RESPONDENTS**

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## **QUESTIONS PRESENTED**

- I. Whether the First Amendment permits school officials to regulate students' online speech when the speech causes a substantial disruption of school activities, invades the rights of others, and could be reasonably perceived to carry the school's imprimatur.
- II. Whether the Fourth Amendment permits school officials to conduct a personal search of a student when there are reasonable grounds for suspecting that the search will uncover drug possession on school property and the search's scope is reasonably tailored to its objectives.

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## **OPINIONS BELOW**

The unreported opinion of the Badger County District Court appears in the record at pages 1–8, 15. The unreported opinion of the State of Grace Court of Appeals 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. U.S. Const. amend. I, IV, XIV; *see* App. A. This case also involves Title 42, Section 1983 of the United States Code. 42 U.S.C. § 1983 (2006); *see* App. B.

## STATEMENT OF THE CASE

This case involves student discipline at a public high school. Two students brought this claim against Horton Hopkins School District (“School District”) and its high school principal, Keena Smalls, for events related to the enforcement of a high school drug policy. (R. at 1.)

***The Drug Problem at the High School.*** Over the past five years, Principal Smalls has witnessed increased drug use throughout the community and particularly on the high school campus. (R. at 1.) In the previous three semesters alone, forty students were caught using illegal drugs on school grounds. (R. at 1.) In 2007, the Hopkinsville community was shaken by the death of 17-year-old Kelly Smith, the captain of the volleyball team, who overdosed on cocaine at a party. (R. at 1.) Hopkinsville had an obvious drug problem and needed a solution. (R. at 1.)

Principal Smalls recognized this problem and called on the School District to strengthen its drug policy. (R. at 1.) In 2007, the School District enacted a strict, zero-tolerance drug policy in an effort to deter drug use on school grounds. (R. at 1, 15.) Pursuant to the new drug policy, school officials are permitted to conduct a search of a student when drug use or possession is suspected on school property. (R. at 1, 15.) School officials may search lockers, desks, and students’ personal property, including book bags and clothing. (R. at 1, 15.) Additionally, the policy authorizes a search of the student’s person when warranted. (R. at 15.) School officials will first request consent before beginning a search, however, the school may proceed with a search even if the student refuses to give consent. (R. at 15.)

***The Student Accusations.*** Corey Towles, a 16-year-old sophomore, recently transferred to Horton Hopkins from a high school in the State of Disarray. (R. at 2.) In October 2008, Towles learned that Jeff Tweegs, a junior at Horton Hopkins, planned to throw a house party. (R. at 2.) Tweegs, a known drug user, had been suspended for a week in September after Principal Smalls

caught him smoking marijuana during lunch. (R. at 2.) The week prior to the party, word spread throughout school that some students would bring marijuana to the party. (R. at 2.) Nonetheless, Towles attended the party on October 3. (R. at 2.)

Kit Politte, an 18-year-old senior at Horton Hopkins, is the leader of Drug Use Damages Schools (“DUDS”), a school-sponsored club with approximately 130 members. (R. at 2.) Politte started DUDS in September 2008 in response to the growing drug problem at Horton Hopkins. (R. at 2.) Following a school assembly organized by DUDS, the guest speaker approached Politte and told her the only way to stop Hopkinsville’s drug problem is to point out drug dealers and users to the entire community. (R. at 2.)

Acting on this advice, Politte created a network webpage on Friendklopedia, a website that allows users to set up networks or groups that other users with similar interests may join. (R. at 2.) Politte’s network webpage, “Fighting All Dealers” (“FAD”), was directed toward the community of Hopkinsville. (R. at 2.) The purpose of the webpage was to encourage community involvement in stopping Hopkinsville’s drug problem. (R. at 2.) Politte called on community members to submit information about potential drug dealers by emailing tips to the network webpage. (R. at 2.) Politte promoted her webpage at an after school DUDS meeting held on campus. (R. at 2.) It was readily apparent that the community shared the same interest as Politte. An astonishing 235 members from Hopkinsville joined the FAD network. (R. at 2.)

On October 4, the day following Tweegs’ party, Politte received an email on the FAD webpage. (R. at 3.) An attachment to the email contained a photograph of Horton Hopkins sophomores, Towles, John Thomson and Frank Conrad, sitting outside at Tweegs’ party. (R. at 3.) The photograph showed Conrad smoking, with Towles and Thomson sitting around him. (R. at 3.) Politte posted the photograph on the FAD webpage accompanied by the following caption:

“Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. at 3.)

***Enforcing the Drug Policy.*** On October 5, concerned members of the community called on Principal Smalls to answer the question posted on the FAD webpage. (R. at 3.) Immediately upon arriving at school that morning, Principal Smalls began fielding calls from worried school parents directing her to visit the FAD webpage. (R. at 3.) The Hopkinsville police also called to inform Principal Smalls that several students had been busted for underage drinking at Tweegs’ house party. (R. at 3.) Additionally, the police cited Conrad for drug possession after they found him outside smoking a marijuana joint. (R. at 3.)

After Principal Smalls viewed the photograph and caption on the FAD webpage, she invited Towles, Thomson, Conrad and Tweegs into her office individually for questioning. (R. at 3.) When each student denied possessing drugs, she examined the contents of each boy’s locker and book bag, pursuant to the school’s drug policy. (R. at 3.) She recovered a small baggie of marijuana during the locker search, which prompted Principal Smalls to request that each boy submit to a personal search. (R. at 3.) Despite the boys’ refusal to consent, the guidelines of the drug policy expressly authorized the school to proceed with a more thorough search when warranted. (R. at 3.) As such, Jim Waters, a male coach, took the four male students separately into a private room and proceeded with the search. (R. at 3.) Outside the presence of one another, the boys removed their shirts and pants so that Mr. Waters could search the pockets. (R. at 3.) At no time did Mr. Waters touch, much less, search any of the student’s person. (R. at 3.) Mr. Waters found marijuana in one of the student’s jeans. (R. at 3.)

***The Student Retaliation.*** When Towles learned of the drug accusations posted on the FAD webpage, he decided to fight back. Towles created his own Friendkepedia network webpage

called “Students Against Defamatory Statements” (SADS), directed toward the Horton Hopkins students. (R. at 3.) There, Towles unleashed his attack on the school. First, Towles declared that, “DUDS, a school organization under the guise of its website FAD,” grossly invaded his privacy and defamed him in front of the community. (R. at 3–4.) Then, he lashed out against the school officials for enforcing the new drug policy against him and his friends. (R. at 4.) Lastly, seeking retribution for the school’s actions, he rallied his fellow students: “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 4.) News of Towles’ outburst spread quickly through the school. Students, intrigued by the war of words, began accessing both Towles and Politte’s webpages from the schools’ computer labs and library throughout the school day and after school hours. (R. at 4.) Worried that the webpages were causing a disturbance and interrupting other students’ education, Principal Smalls requested that Towles and Politte shut down their respective webpages. (R. at 4.) When both students refused, Principal Smalls suspended them until they agreed to take them down. (R. at 4.) This suit ensued.

*The District Court.* Politte and Towles sued the School District and Principal Smalls alleging that their First Amendment rights had been violated when the school required them to shut down their respective webpages. (R. at 1.) Additionally, Towles sued the School District and Principal Smalls alleging that his Fourth Amendment rights had been violated when the school conducted a search of his person. (R. at 1.) The School District and Principal Smalls moved for summary judgment on both counts, which the Badger County District Court granted. (R. at 4, 8.) The district court found the school’s attempt to regulate student speech did not “impermissibly infringe the students’ First Amendment rights to expression.” (R. at 1, 8.) First,

the court found that the “substantial disruption” test applied to student Internet speech. (R. at 6.) Second, under the “substantial disruption” test, the court determined that the school demonstrated it could reasonably “forecast” a disruption from the students’ webpages. (R. at 6.)

Next, the district court found the search of Towles was a permissible search under the Fourth Amendment. (R. at 6.) The court determined that the search was justified at inception and the scope of the search was permissible. (R. at 6, 8.)

*The Court of Appeals.* Politte and Towles appealed to the State of Grace Court of Appeals, which affirmed the district court’s order granting summary judgment to the School District and Principal Smalls. (R. at 9, 12.) First, the court of appeals determined that the school’s regulation of the students’ speech was permissible “in order to prevent disruption during school hours.” (R. at 9.) Second, the court found that the search of Towles was impermissible under the Fourth Amendment because it was not justified at its inception and it was unreasonable in scope. (R. at 10–11.) However, the court determined the School District and Principal Smalls were entitled to qualified immunity because the constitutionality of personal searches was not clearly established at the time of the search. (R. at 11–12.)

The dissent argued that because the student webpages were created off school campus, they were beyond the reach of the school officials’ authority. (R. at 12–13.)

## **SUMMARY OF THE ARGUMENT**

### **I.**

The court of appeals correctly held that the Horton Hopkins school officials did not violate Politte or Towles’ First Amendment rights when they disciplined the students for refusing to shut down their webpages. Although the students created their respective webpages from home, the court of appeals found that the students’ webpages were a clear example of off-campus speech

reaching campus. Under *Tinker*, a school district may regulate student speech that causes or threatens to cause a substantial disruption to school activities or invades the rights of others. In applying the test set forth in *Tinker*, the court of appeals held that the school officials could have reasonably concluded that the comments posted on the students' webpages would cause a substantial disruption to the school environment. Thus, the school officials were permitted to regulate the students' speech.

Because the court of appeals held that the school officials were permitted to regulate the students' speech according to *Tinker*, it did not decide whether regulation of the students' speech was authorized under *Kuhlmeier* as well. Under *Kuhlmeier*, a school may regulate student speech that could be reasonably perceived as bearing the imprimatur of the school. Because the students' webpages could have been erroneously attributed to the school, the school officials could permissibly regulate the speech.

This Court should affirm and hold that there was no violation of the students' rights under the First Amendment.

## **II.**

The court of appeals erred in holding that the Horton Hopkins school officials violated Towles' Fourth Amendment rights when they conducted a search of his person. Under the standard enunciated in *T.L.O.*, the constitutionality of a search conducted by public school officials is gauged on the reasonableness of the search under all the circumstances. In light of the facts surrounding the search, the court erred in finding that the school officials did not have reasonable suspicion that the search of Towles would turn up evidence that he was using or possessing drugs on school property. In doing so, the court failed to properly weigh the substantial interests schools have in maintaining order and discipline within the school setting.

The court of appeals' decision threatens to hinder the ability of school officials to make on-the-spot judgments concerning student safety.

Ultimately, the court of appeals determined that because *T.L.O.* does not offer any clear guidance for applying the reasonable suspicion test to searches of a student's person, the school officials could not have reasonably believed that their actions were unconstitutional. As such, the court of appeals held the school officials were entitled to qualified immunity. Although the court of appeals erred in applying the *T.L.O.* standard to the search performed by the school officials, it ultimately made the right decision.

This Court should affirm the judgment of the court of appeals.

### **ARGUMENT AND AUTHORITIES**

The students brought their claim under Section 1983, which provides a cause of action against individuals who, under color of law, violate the "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2006); *see* App. B. Section 1983 confers no substantive rights, but rather is a mechanism through which other rights may be vindicated. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979). It simply authorizes a cause of action based on the deprivation of rights guaranteed by other Acts of Congress or the United States Constitution. *Id.* A Section 1983 plaintiff must show: 1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and 2) that the act or omission was committed by a person acting under color of law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). In this case, the dispute focuses solely on whether the students met their burden of showing they were deprived of constitutional rights.

The district court resolved the dispute by granting summary judgment on First and Fourth Amendment grounds, finding the Horton Hopkins school officials did not violate the students'

constitutional rights. (R. at 5.) On appeal, an order granting summary judgment is reviewed de novo. *See Tas v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

**I. THE HORTON HOPKINS SCHOOL OFFICIALS DID NOT VIOLATE THE PETITIONERS' FIRST AMENDMENT RIGHTS WHEN THEY DISCIPLINED THE STUDENTS FOR REFUSING TO SHUT DOWN THEIR WEBPAGES.**

The role of the public education system is to instill in our nation's youth "the fundamental values necessary to the maintenance of a democratic political society." *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979). To effectively carry out this vital objective, our education system "necessarily relies upon the discretion and judgment of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). Thus, the United States Supreme Court has explained that students' First Amendment rights must be applied in "light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1986) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

The First Amendment specifically provides that every person have "freedom of speech," free from government intrusion. U.S. Const. amend. I; *see* App. A. While the First Amendment's plain language appears to confer this right without limitation, the right of free speech is "not absolute at all times and under all circumstances." *Texas v. Johnson*, 491 U.S. 397, 430 (1989) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). At the same time, however, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Nonetheless, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Based on these guiding principles, in determining whether a school may regulate students' speech, the students'

First Amendment rights must be balanced against the school's interest in carrying out its educational mission. *Kuhlmeier*, 484 U.S. at 272.

The United States Supreme Court has “repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.” *Tinker*, 393 U.S. at 506–07. Principal Smalls’ decision to discipline Politte and Towles after refusing to shut down their respective webpages was necessary to maintain an orderly environment conducive to learning. Accordingly, the School District and Principal Smalls did not unconstitutionally restrict the students’ First Amendment rights.

#### **A. The Horton Hopkins School Officials Permissibly Regulated Student Speech.**

Although the United States Supreme Court has yet to speak on the scope of a school’s authority to regulate student speech that originated off-campus, the majority of lower courts addressing the issue have applied the student speech precedent in this context.<sup>1</sup> Student speech may be regulated where school officials reasonably conclude that it will substantially disrupt school activities or invade the rights of others. *Id.* at 509. Additionally, even without fear of substantial disruption, school officials may regulate students’ speech if such speech might

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<sup>1</sup> See, e.g., *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) (stating “[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*”); see also *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) (court applied *Tinker* to student’s website created at home); *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007) (court applied *Tinker* to student’s Internet icon that other students could see); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (court applied *Tinker* to student’s web blog); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998) (court applied *Tinker* to student’s underground newspaper written off-campus); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007) (applied *Tinker* to student’s Internet webpage); *Latour v. Riverside Beaver Sch. Dist.*, No. 05-1076, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. Aug. 24, 2005) (applied *Tinker* to student’s rap songs written at home); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387 (D. Minn. 1987), *aff’d*, 855 F.2d 855 (8th Cir. 1988) (applied *Tinker* to student speech in an underground newspaper written-off campus); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071 (5th Cir. 1973) (applied *Tinker* where off-campus speech made its way to the campus); *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517 (C.D. Cal. 1969) (applied *Tinker* to underground newspaper).

erroneously be perceived as bearing the imprimatur of the school. *Kuhlmeier*, 484 U.S. at 271. Thus, the school district’s actions here were constitutionally permissible.

**1. Under *Tinker*, a school district may regulate student speech that causes or threatens a substantial disruption to school activities or invades the rights of others.**

According to *Tinker*, regulation of student speech is permissible where the speech causes a “substantial disruption” with the work of the school or invades the rights of others. 393 U.S. at 509. The Court explained that “conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder . . . is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Id.* at 512–13. There, a group of students wore black armbands to school to express their objections to the Vietnam War. *Id.* at 504. School officials, upon learning of the students’ plan, adopted a policy that any students wearing such armbands must remove them or face suspension. *Id.* Notwithstanding the policy, the students went forward with their plan and were suspended. *Id.* The Court held the school officials could not constitutionally prohibit the black armbands because no evidence suggested the students caused any disruption of school activities or invaded the rights of other students. *Id.* at 514. What was missing in *Tinker* is present in this case.

***a. The students’ webpages threatened to substantially disrupt school activities.***

Under *Tinker*’s “substantial disruption” test, Horton Hopkins school officials were permitted to regulate Politte and Towles’ speech. Ample evidence in the record demonstrates the students’ webpages caused an actual disruption. Foremost, on October 5, the day after Politte posted the content on the FAD webpage, Principal Smalls spent the morning fielding phone calls from worried school parents regarding the photograph and caption. (R. at 3.) As a result,

Principal Smalls was diverted from her core educational responsibilities. Further, Politte's webpage induced Towles to create a retaliatory webpage directed at Horton Hopkins and its students. (R. at 3–4.) This induced other students to access and read both webpages from school computers during school hours. (R. at 3–4.) Not only did the webpages disrupt the students' activities, it once again diverted Principal Smalls from her responsibilities. Principal Smalls was required to depart from her administrative duties to monitor the situation and put an end to it.

Other courts have found that this type of students' speech created an actual disruption. *See J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850–51 (Pa. 2002) (holding substantial disruption established after student's website containing offensive statements directed at teacher was accessed at school and prompted teacher to take a leave of absence); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1392 (D. Minn. 1987), *aff'd*, 855 F.2d 855 (8th Cir. 1988) (holding substantial disruption established after students disrupted class to read students' writing); *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517 (C.D. Cal. 1969) (holding substantial disruption established based on diminished control of students, disruption and interference with classroom study and teaching following distribution of off-campus newspaper). Although the students' webpages caused a substantial disruption at school, *Tinker* does not require a showing that an actual disruption occurred. 393 U.S. at 514; *see also West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1367 (10th Cir. 2000) (stating school district had “power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance.”). Under *Tinker*, student speech may be regulated where school officials reasonably conclude that it will substantially disrupt school activities. 393 U.S. at 509.

In *Doninger v. Niehoff*, the Second Circuit Court of Appeals held “that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ or at least when it was similarly foreseeable that the off-campus expression might also reach campus.” 527 F.3d at 42 (quoting *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)). There, a student posted a blog which expressed her disagreement with a teacher’s decision to cancel a school-sponsored music event. *Id.* at 44. The blog posting, although created off-campus, “was purposely designed by [the student] to come onto campus.” *Id.* at 50. The blog posting called the school’s administration bad names and encouraged the students to call the school’s principal about the music event to “piss her off more.” *Id.* at 51. The court found that the blog posting reached its intended audience and several students responded to the blog by expressing their dissatisfaction as well. *Id.* The day following the blog posting, the school’s administration fielded many phone calls regarding the cancelled music event. *Id.* at 45. As a result of all the phone calls, the school’s principal was unable to attend several school activities. *Id.* at 46. Based on these facts, the court held that the blog posting would foreseeably create a risk of substantial disruption within the school environment. *Id.* at 53.

Following the logic underlying the court’s decision in *Doninger*, Horton Hopkins school officials could regulate Politte and Towles’ speech because it was foreseeable that their respective webpages would create a risk of substantial disruption within the school environment. Similar to the student’s blog posting in *Doninger*, both Politte and Towles’ webpages, although created off-campus, were directed toward Horton Hopkins students. (R. at 2, 4.) Like the student’s blog, Politte’s webpage prompted several school parents to call Principal Smalls taking

her away from her other obligations. (R. at 3.) Towles' webpage, like the blog in *Doninger*, called on fellow students to take action against the school officials. (R. at 4.) The blog encouraged students call to the school administration "to piss them off" about their decision to cancel the music event. Similarly, Towles' webpage rallied his fellow students to "speak out against Principal Smalls and the rest of these Hopkins idiots." (R. at 4.) Like the student's blog, Politte's webpage prompted several school parents to call Principal Smalls taking her away from her other obligations. (R. at 3.) Even without a showing of actual disruption, the Horton Hopkins school officials permissibly regulated the students' speech because it was foreseeable that their respective webpages would create a risk of substantial disruption within the school environment.

***b. The students' webpages invaded others' rights.***

*Tinker* also permits schools to regulate student speech where the speech invades other students' rights. 393 U.S. at 509. The black armbands in *Tinker* were a "silent, passive expression of opinion" and no evidence suggested that the students' expression "collided with the rights of other students to be secure and to be let alone." *Id.* at 508. The "right to be let alone" has been recognized as "the most comprehensive of rights and the right most valued by civilized men." *Hill v. Colorado*, 530 U.S. 703, 716–17 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Additionally, the Constitution protects an individual's interest not to be defamed. *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (speech or writing that is defamatory is not constitutionally protected under First Amendment). Although name-calling is ordinarily protected outside the school context, "students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

The Internet is an invaluable tool to provide information instantly to a worldwide audience. Despite the short period of time it takes to disseminate such information, the effects of speech published through the Internet can be both devastating and long-term.<sup>2</sup> As such, when students target schools, teachers, or other students with defamatory, disparaging, or harassing comments on the Internet, the school has an obligation in carrying out its interests in preserving an environment conducive to learning to regulate such speech.

The photograph on Politte's webpage, accompanied by the accusatory caption, invaded Towles' privacy interest to be let alone and defamed him in front of the Hopkinsville community. An individual has an interest in keeping photographs of himself off the Internet for the whole world to see. This interest is even greater when the photograph is supplemented with an accusation that he is a drug dealer. The whole situation was compounded by the fact that the community was still reeling from the death of a teenage girl due to a cocaine overdose. (R. at 1.) With one click of a mouse button, Towles was branded in the community as a drug dealer. In light of recent tragedies such as the Columbine shooting and the Virginia Tech massacre which allegedly stemmed from harassment and bullying, the Horton Hopkins school officials made a cautionary choice to request that both Politte and Towles take down their webpages before the situation further escalated.

Based on recent court decisions finding that harassing comments posted on the Internet can seriously harm the victim of such harassment psychologically as well as pose a threat to the

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<sup>2</sup> The Journal of Adolescent Health reported that given the role of such tools as social networking sites, "educators should be concerned about the issue of electronic media in the lives of their students" and "should be aware of the effect that violence, bullying, and harassment can have on children's well-being, including behavior and academic achievement." M.R. Worthen, *Education Policy Implications from the Expert Panel on Electronic Media and Youth Violence*, 41 J. Adolescent Health S61, S63 (2007).

learning environment, it is imperative that schools protect the interests of its students by regulating such speech. *See, e.g., J.S.*, 807 A.2d at 852 (discussing that cyberharassment<sup>3</sup> caused psychological harm to teacher and effected learning environment because teacher was unable to return to school and three substitutes had to be used in her absence). Accordingly, because Politte’s webpage ‘collided with the Towles rights to be secure and to be let alone,’ the Horton Hopkins school officials were permitted to regulate such speech.

**2. Under *Kuhlmeier*, a school district may regulate student speech that could be reasonably perceived as bearing the school’s imprimatur.**

*Hazelwood School District v. Kuhlmeier* established that a school could regulate students’ “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” 484 U.S. 260, 271 (1986). There, student staff writers of a high school newspaper sued their school when it chose not to publish two of their articles. *Id.* at 262. The school decided not to publish the articles because one concerned teenage pregnancy, which the school concluded was age inappropriate, and the other pertained to divorce, which the school concluded was unfair to the father of the student interviewed about her parents’ divorce. *Id.* at 267–70. The United States Supreme Court explained that a “school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate . . . conduct otherwise inconsistent with ‘the shared values of a civilized social order.’” *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683). The Court concluded that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech

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<sup>3</sup> “Cyberharassment” is when an adult is “tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another [individual] . . . using the Internet, interactive and digital technologies or mobile phones.” Markey, *supra*, at 130 nn.6–7. “Cyberbullying” is when a child is the subject of such behavior. *Id.*

in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. The same rationale applies here.

***a. The students’ webpages could have reasonably been perceived as being sponsored by Horton Hopkins.***

Because it is reasonable to conclude that the Hopkinsville community could believe that Politte and Towles’ webpages were school-sponsored, the Horton Hopkins school officials were permitted to regulate the students’ speech. The same rationale set forth in *Kuhlmeier* for allowing the school to regulate student speech in a school-sponsored newspaper can be properly applied to the facts of this case. While the regulated speech in *Kuhlmeier* was in fact school-sponsored, the express language of the opinion extends to student speech that “*might* reasonably [be] perceive[d] to bear the imprimatur of the school.” *Id.* at 271 (emphasis added).

***b. The FAD webpage could have reasonably been perceived as being sponsored by Horton Hopkins.***

The Horton Hopkins school officials were also reasonable to conclude that the students, parents or members of the Hopkinsville community might erroneously believe that the FAD webpage was school-sponsored. Foremost, Politte, who is the leader of the Horton Hopkins student organization DUDS, promoted the launch of the FAD webpage at a DUDS meeting held in a Horton Hopkins classroom. (R. at 2.) Further the overwhelming majority of FAD members are Horton Hopkins students. The FAD network webpage has 235 members, 198 of which are Horton Hopkins students, including all 130 DUDS members. (R. at 2.) FAD and DUDS are in all respects the same organization, composed of the same student members whose mission is exactly the same—stopping drug use in Hopkinsville. (R. at 2.) Based on this information alone, those viewing the webpage could have presumed that FAD was a student organization sponsored by Horton Hopkins. However, if this was not enough to warrant such a presumption,

those who viewed the comments on FAD’s rival webpage, SADS, would have certainly believed FAD was associated with Horton Hopkins. (*See R.* at 3) (posting the comment “DUDS, a school organization under the guise of . . . FAD, committed a gross invasion . . .”). Based on these facts, the students, parents and members of the Hopkinsville community could reasonably believe that FAD was merely an extension of DUDS.

*c. The SADS webpage could have reasonably been perceived as being sponsored by Horton Hopkins.*

The Horton Hopkins school officials reasonably concluded that the Hopkinsville community could erroneously believe that Towles’ webpage was sponsored by Horton Hopkins. The name of the network webpage alone is suggestive of this: “*Students Against Defamatory Statements.*” Further, the content on the webpage pertains exclusively to matters pertaining to Horton Hopkins and was purposefully directed toward Horton Hopkins and its students. (*See R.* at 4) (SADS “call[s] for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment.”)

In *Kuhlmeier*, the United States Supreme Court explained that “a school may . . . ‘disassociate itself,’ not only from speech that would ‘substantially interfere with [its] work . . . or impinge upon the rights of other students,’” but also from “conduct otherwise inconsistent with ‘the shared values of a civilized social order.’” 484 U.S. at 271 (quoting *Fraser*, 478 U.S. at 683, 685; *Tinker*, 393 U.S. at 509). Further, a school may refuse to “associate the school with any position other than neutrality on matters of political controversy.” *Id.* at 272. In this case, the Horton Hopkins school officials were faced with a situation threatening to undermine the school’s most basic educational mission—to provide a safe and orderly environment conducive to learning. Accordingly, for the same reasons set forth in sections I.A.1.a and b above, the Horton Hopkins school officials were permitted to regulate the students’ speech because their

respective webpages could have reasonably been perceived as bearing the imprimatur of Horton Hopkins.

**B. Even if the Students' Speech Was Constitutionally Protected, This Court Should Remand to Allow the District Court to Consider if the School Officials Are Entitled to Qualified Immunity.**

Because the lower courts determined that the students did not show a constitutional deprivation, the lower courts did not address whether the school officials had qualified immunity. Should this Court disagree with the lower courts' conclusions, the case should be remanded. In this circumstance, the students would have the burden of establishing that the school officials are not entitled to qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

**II. THE HORTON HOPKINS SCHOOL OFFICIALS DID NOT VIOLATE TOWLES' FOURTH AMENDMENT RIGHTS.**

Towles alleges that Horton Hopkins school officials violated his Fourth Amendment rights to be free from unreasonable search on school property. (R. at 1.) While the express language of the Fourth Amendment dictates that searches be reasonable, the United States Supreme Court has explained that, "what is reasonable depends on the context within which a search takes place." *T.L.O.*, 469 U.S. at 337; U.S. Const. amend. IV; *see* App. A. It is well understood that Fourth Amendment rights are different in public schools than elsewhere because of the "schools' custodial and tutelary responsibility for children." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). A "student's privacy interest is limited in a public school environment." *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830 (2002) (citing *Vernonia*, 515 U.S. at 656); *see also T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) ("[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally.").

Within the school setting, the typical warrant requirement to conduct a search is excused and the level of suspicion needed to justify a search of a student is reduced. *T.L.O.*, 469 U.S. at 340-41. As such, “the legality of a search of a student . . . depend[s] simply on the reasonableness, under all the circumstances, of the search.” *Id.* at 341. This standard acknowledges the school’s custodial responsibility and accommodates the school’s substantial interest in maintaining order and discipline. *Vernonia*, 515 U.S. at 656. In fact, the Court has upheld student searches even without a finding of individualized suspicion. *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. 646.

While the school’s custodial responsibility to schoolchildren has been an undercurrent guiding the United States Supreme Court’s decisions regarding searches in public schools, this precedent is also largely shaped in response to an increasing drug problem amongst our Nation’s youth. In *T.L.O.*, the United States Supreme Court took notice that maintaining order in the classroom is a difficult task, particularly since “drug use and violent crime in the schools have become major social problems.” 469 U.S. at 339. Similarly, in *Earls*, it was noted that “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.” 536 U.S. at 834; *see also id.* at 839 (Breyer, J., concurring) (citing study showing that more than one-third of all students use illegal drugs before completing eighth grade and more than half before completing high school). Further, *Vernonia* made clear that “the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty.” 515 U.S. at 662. Accordingly, the United States Supreme Court has accorded great deference to the judgment of school officials where their conduct stems from the pursuit to deter student drug use to maintain discipline and order within the school setting.<sup>4</sup>

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<sup>4</sup> The United States Supreme Court has “repeatedly emphasized the need for affirming the comprehensive authority of . . . school officials . . . to prescribe and control conduct in the schools.” *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507 (1969).

**A. The Horton Hopkins School Officials Conducted a Permissible Search of the Student Under the Standard Set Forth in *T.L.O.***

With these guiding principles in mind, the Court, in *New Jersey v. T.L.O.*, established the framework under which a search conducted in a public school will be deemed constitutional. The reasonableness of a student search is determined by whether the search was justified at its inception and whether its scope was reasonably related to the circumstances. 469 U.S. at 341-42. Under the *T.L.O.* standard, a search is justified at its inception “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* at 342. Further, a search is permissible in its scope “when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.*

**1. The search of Petitioner was justified at its inception.**

Similar to the drug problems faced by the schools in *T.L.O.*, *Vernonia*, and *Earls*, the Horton Hopkins was in the process of waging its own war on drugs. Less than one year earlier, a 17-year-old Horton Hopkins female died after overdosing on cocaine at a high school party. (R. at 1.) In the previous three semesters alone, forty students were caught using illegal drugs on school grounds. (R. at 1.) Consequently, when Principal Smalls was investigating the allegation that Towles and other students may be using or dealing drugs, these very recent experiences gave her reason to take the threats seriously. On the day of the search, concerned parents directed Principal Smalls to the photograph on FAD, a Friendkepedia network webpage providing tips on suspected community drug dealers. (R. at 3.) When Principal Smalls viewed the photograph, she read the following caption: “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. at 3.) The photograph showed Towles with two

other students, John Thomson and Frank Conrad, outside at Jeff Tweegs' house party. (R. at 3.) In the photograph, Conrad was smoking, with Towles and Thomson sitting around him. (R. at 3.) The Hopkinsville police also called Smalls to inform her that Conrad, shown smoking in the photograph, was cited for drug possession after they found him outside at Tweegs' party smoking a marijuana cigarette. (R. at 3.) During the week leading up to the party, word had spread throughout school that "*some students*" would bring marijuana to Tweegs' party. (R. at 2.)

The information derived from the photograph—that certain, identifiable Horton Hopkins students were using drugs at a high school party—was corroborated when Hopkinsville police called Principal Smalls to inform her that Conrad had been cited at Tweegs' party for drug possession.<sup>5</sup> (R. at 3.) The photograph, along with the independent information provided to Smalls by the police, gave Principal Smalls reason to suspect that Towles was smoking as well. This is based on the fact Towles is shown sitting in close proximity to Conrad as Conrad was smoking.<sup>6</sup> Smalls already had reason to suspect Tweegs was using drugs because she had previously caught him with illegal drugs on school grounds earlier in the semester. (R. at 2.) The fact that Towles would attend a party at a known drug user's house with knowledge that drugs would be there, gave Smalls reasonable suspicion to believe he had violated the law. All

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<sup>5</sup> The photographic tip was attributed to an anonymous Horton Hopkins student. (R. at 3); *see Alabama v. White*, 496 U.S. 325, 327 (1990) (finding that an anonymous tip, corroborated by independent police work, exhibits sufficient indicia of reliability to provide reasonable suspicion); *see also Williams by Williams v. Ellington*, 936 F.2d 881, 887-89 (6th Cir. 1991) (noting that information provided by an informant can serve as the basis for a reasonable suspicion that a student may be engaged in illegal activity).

<sup>6</sup> In determining whether the search was justified at its inception under *T.L.O.*, all the school must show is reasonable grounds for suspecting the student violated the law. 469 U.S. at 342. Assuming *arguendo* that Conrad was smoking a tobacco cigarette, this would still give Smalls reasonable grounds for suspecting Towles violated the law because he is only 16 years old. (R. at 2.)

of these facts combined with the rumors that *some students* would bring marijuana to Tweegs' party, gave Smalls reasonable grounds to suspect that Towles may have been the student bringing the drugs to the party.

Based on these facts, Principal Smalls had reasonable grounds for suspecting Towles had violated or was violating either the law or the rules of the school. Thus, because the search was conducted to recover marijuana or cigarettes, it was reasonable for Principal Smalls to believe that the contraband was located in Towles' backpack, wallet or on his person. *See T.L.O.*, 469 U.S. at 346 (stating if student did have cigarettes the obvious place in which to find them would be her purse). Additionally, upon searching Conrad, Smalls recovered a small baggie of marijuana. (R. at 3.) Because it was reasonable for Smalls to suspect that Towles was smoking with Conrad at the party, it would follow that it was also reasonable for her to suspect that they would be planning to smoke together at school based on the finding of marijuana. Therefore, in light of the surrounding facts coupled with the school's overwhelming drug problem, the search of Towles' backpack, wallet, and person was justified at its inception.

## **2. The search of Towles was permissible in its scope.**

The United States Supreme Court has repeatedly refused to "declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Vernonia*, 515 U.S. at 663. The *T.L.O.* reasonableness standard does not require an exact fit between the objectives of the search and the measures adopted. Rather, it is designed to provide school officials "a certain degree of flexibility in school disciplinary procedures" to enable them to effectively maintain order within the school setting. *T.L.O.*, 469 U.S. at 340.

In determining whether a scope of a search was reasonably related to the circumstances, courts have taken a common-sense approach. *T.L.O.*, 469 U.S. at 346; *United States v. Cortez*,

449 U.S. 411, 418 (1981). The following factors have been considered in analyzing the permissibility of a search's scope: (1) the nature of the contraband,<sup>7</sup> *Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189 (D.S.D. 1998) (recognizing drugs and weapons pose imminently serious harm to other students but money does not); (2) the size of the object sought, *Williams by Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991) (upholding search where object sought was a small vial); (3) the privacy of the environment where the search is conducted, *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (upholding search conducted in the privacy of boys' locker room); *Williams*, 936 F.2d at 883 (upholding search conducted in administrator's office); *Singleton v. Bd. of Educ. USD 500*, 894 F. Supp. 386, 390-91 (D. Kan. 1995) (upholding search conducted in the privacy of administrator's office); (4) the sex of the person conducting the search, *Cornfield*, 991 F.2d at 1323 (upholding search of male student conducted by male administrator and male teacher); *Williams*, 936 F.2d at 883 (upholding search of female student conducted by female administrator in female secretary's presence); *Singleton*, 894 F. Supp. at 391 (upholding search of male student conducted by two male administrators); (5) whether the student was required to remove underwear, *Singleton*, 894 F. Supp. at 391 (upholding search where student not required to remove underwear); and (6) whether the student was touched inappropriately, *Bridgman v. New Trier High Sch.*, 128 F.3d 1146, 1150 (7th Cir. 1997) (upholding search where student not touched during search except to take blood pressure and pulse); *Cornfield*, 991 F.2d at 1323 (student not touched during search); *Singleton*, 894 F. Supp. at 391 (upholding search where student not touched inappropriately).

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<sup>7</sup> The "reasonableness of the scope of a search may be tempered by the nature of the contraband." Ralph D. Mawdsley & Jacqueline Joy Cumming, *Student Informants, School Strip Searches, and Reasonableness: Sorting Out Problems of Inception and Scope*, 230 Educ. L. Rep. 1, 8 (2008).

The search of Towles complied with all the factors employed by courts to determine whether a search of a student is permissible in scope. First, the nature of the contraband searched for in this case demands a more thorough search for two reasons. Foremost, the possession of illegal drugs pose an imminent threat of harm to everyone within the school environment.<sup>8</sup> *See Vernonia*, 515 U.S. at 662 (finding “the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty”). Additionally, marijuana was included in a class of substances that had the entire community in a panic. Based on the increased drug problems witnessed over the preceding five years, Horton Hopkins had made significant changes in its drug policy to directly counter the use or possession of illegal drugs on school grounds. (R. at 1-2.) The United States Supreme Court has recognized that deterring drug use is a compelling and immediate governmental interest. *See Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007). As such, Horton Hopkins school officials had a substantial interest in prohibiting the contraband that Towles was suspected of using or possessing. Second, the school officials were looking for a substance that could have reasonably been hidden in all the locations searched and even in places that the school officials did not search.<sup>9</sup> Based on the size of the object, requiring Towles to remove his clothing was not unreasonable under the circumstances. *See Phaneuf v. Fraikin*, 448 F.3d 591, 598-99 (2d Cir. 2006) (requiring female student to remove her pants was not unreasonable where school officials

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<sup>8</sup> Illegal drugs, such as marijuana, have been linked to the increased amount of crime in schools and, as such, have been described as “the biggest outside impediment to learning in the schools.” J. Bates McIntyre, *Empowering Schools to Search: The Effect of Growing Drug and Violence Concerns on American Schools*, 2000 U. Ill. L. Rev. 1025, 1029.

<sup>9</sup> Unlike the school officials in *Redding v. Safford Unified School District No. 1*, the Horton Hopkins school officials did not require Towles to pull out his underwear to determine if he was “crotching” anything. 531 F.3d 1071.

were searching for marijuana). Third, the search of Towles was conducted in a private room. (R. at 3.) This spared Towles the embarrassment of undressing in front of others. Fourth, pursuant to the school’s drug policy, a male faculty member conducted the search of Towles. (R. at 3, 15.) This spared Towles the embarrassment of undressing in front of a member of the opposite sex. Fifth, although the school officials were searching for contraband that could have been hidden in Towles’ underwear, he was not required to remove his underwear during the search. (R. at 3.) Nor did the school official request that Towles pull his underwear out to expose his pelvic region.<sup>10</sup> See Footnote 6. Sixth, the school official did not touch Towles at any time during the search. (R. at 3.) The school official requested that Towles remove his shirt and pants so that the school official could search the articles of clothing. (R. at 3.) In searching Towles, the Horton Hopkins school officials employed only those measures reasonably related to the objectives of the search. Thus, the search was permissible in its scope under the standard set forth in *T.L.O.*

**B. The Horton Hopkins School Officials Are Entitled to Qualified Immunity Because the Constitutionality of the Search Was Not Clearly Established at the Time Towles Was Searched.**

In the context of a school setting, the purpose of qualified immunity is to allow school officials to make on-the-spot judgments concerning the safety of schoolchildren without the fear of liability or the burdens of litigation. See *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Entitlement to qualified immunity turns on whether a constitutional right was “clearly

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<sup>10</sup> The school official conducting the search was a male gym coach at Horton Hopkins and Towles was an athlete. (R. at 2, 3.) Courts have noted that there are even fewer legitimate privacy expectations with regard to student athletes. See *Vernonia*, 515 U.S. at 657 (“School sports are not for the bashful. They require ‘suiting up’ before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford.”); see also *Schall by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988) (noting there is an “element of ‘communal undress’ inherent in athletic participation”).

established” at the time of its alleged violation such that no reasonable official could have believed her actions were lawful. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The United States Supreme Court has described this standard as giving “ample room for mistaken judgments” by protecting “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 343 (1986). To determine whether the right was clearly established, the Court must look to United States Supreme Court precedent and then to circuit court decisions at the time Horton Hopkins school officials authorized the search of Towles. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005).

**1. *T.L.O.* offers no clear guidance for applying the reasonable suspicion test to the strip search of a student.**

*New Jersey v. T.L.O.* provides the standard to determine whether a search conducted in a public school is constitutional, however, it fails to offer clear guidance for applying the reasonable suspicion test to a strip search of student. The lack of clarity that *T.L.O.* provides was first recognized by the *T.L.O.* dissenters. In his dissenting opinion, Justice Brennan warned that application of this “unguided” balancing test “will likely spawn increased litigation and greater uncertainty among teachers and administrators.” *T.L.O.*, 469 U.S. at 356, 365-66 (Brennan, J., dissenting). Justice Stevens also noted that the standard “is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context.” *Id.* at 385 (Stevens, J., dissenting).

**2. The lower court cases are split on the constitutionality of strip-searches.**

Now, over two decades later, this predicted uncertainty is reflected in the split in decisions amongst the circuit courts. Many cases have upheld strip searches. For example, in *Cornfield v. Consolidated High School District No. 230*, the court upheld a strip search of a sixteen-year-old

student who officials had reason to believe was “crotching” drugs. 991 F.2d 1316, 1323 (7th Cir. 1993). In *Williams by Williams v. Ellington*, the court upheld a strip search of a high school student for an unknown drug, even though there was no evidence that the student actually possessed it under her clothes. 936 F.2d at 887. The court noted that “the [*T.L.O.*] Court did little to explain how the factors should be applied in the wide variety of factual circumstances facing school officials today.” *Id.* at 866. In *Singleton by & Through Smith v. Board of Education USD*, the court upheld a search of a 13-year-old boy in which the school official “patted” the boy’s crotch, removed the boy’s socks and shoes, lowered his pants, and “searched the inside waist band of his boxer shorts.” 894 F. Supp. 386, 389, 390-91 (D. Kan. 1995). And, finally, in *Jenkins ex rel. Hall v. Talladega City Board of Education*, 8-year-old second graders were stripped searched in an effort to find seven dollars that was allegedly stolen from a classmate’s purse. 115 F.3d 821, 822 (11th Cir. 1997) (en banc). The court did not decide the constitutionality of the searches, but nevertheless, granted qualified immunity to the officers because the *T.L.O.* test was too vague to give notice to the teachers. *Id.*

Other cases hold that strip-searches are unconstitutional. For example, in an Eleventh Circuit case, a teacher and police officer conducted a mass search of an entire fifth grade class for an envelope containing twenty six dollars. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 952 (11th Cir. 2003). The boys were taken into a restroom by the male police officer and required to undress in front of one another. *Id.* at 954. The male police officer actually pulled his own pants and underwear down to show the boys what they needed to do. *Id.* A female teacher took the girls into a restroom and required them to lower their pants and raise their shirts. *Id.* Some of the girls were touched in the process of the search. *Id.* The court found that the searches violated the Fourth Amendment, but granted qualified immunity, stating “if the salient

question is whether *T.L.O.* gave the defendants ‘fair warning’ that a ‘strip search’ of an elementary school class for missing money would be unconstitutional, then the answer must be ‘no.’” *Id.* at 954; *see also Beard*, 402 F.3d at 601-02 (granting official immunity for unconstitutional search of twenty male students and five female students underwent searches when a female student reported that a few hundred dollars had been stolen from her purse). *But see Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1084 (9th Cir. 2008) (holding strip search of a 13-year-old girl suspected of distributing ibuprofen unconstitutional and that the school official was not entitled to qualified immunity).

This discrepancy in the circuit courts also gives school officials little guidance in determining under which circumstances a strip search is constitutional. Thus, under the law at the time the Horton Hopkins school officials conducted the search of Towles, they were not put on notice that their conduct was unlawful. As such, the Horton Hopkins school officials are entitled to qualified immunity.

## CONCLUSION

This Court should AFFIRM the court of appeals’ judgment.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

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## 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; 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.

## **APPENDIX “B”**

### **STATUTORY PROVISIONS**

#### **42 U.S.C. § 1983 (2006)**

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