
Docket No. 254

**In The
Supreme Court of the State of Grace**

SPRING TERM, 2009

**KIT POLITTE
and CORY TOWLES,**

Petitioners,

v.

**HORTON HOPKINS SCHOOL DISTRICT
and KEENA SMALLS,**

Respondents.

**On Writ Of Certiorari To The
State Of Grace Court Of Appeals**

BRIEF FOR PETITIONERS

TEAM 35

Attorneys for Petitioners

QUESTIONS PRESENTED

- I. WHETHER HORTON HOPKINS SCHOOL DISTRICT, AND KEENA SMALLS, IN HER OFFICIAL CAPACITY AS PRINCIPAL OF HORTON HOPKINS HIGH SCHOOL, VIOLATED KIT POLITTE'S AND COREY TOWLES'S FIRST AMENDMENT RIGHTS WHEN THE DECISION WAS MADE TO FORCE THE STUDENTS TO SHUT DOWN THEIR INDIVIDUALS WEBSITES, WHICH WERE CREATED OFF-CAMPUS AND ACCESSED OFF SCHOOL PROPERTY?

- II. WHETHER RESPONDENTS' WARRANTLESS STRIP SEARCH OF PETITIONER TOWLES ON SCHOOL GROUNDS VIOLATED PETITIONER TOWLES'S FOURTH AMENDMENT RIGHTS WHEN PETITIONER TOWLES HAD AN UNBLEMISHED DISCIPLINARY RECORD, THE ANONYMOUS TIP WAS NOT INDEPENDENTLY CORROBORATED, AND THE SEARCH OF HIS LOCKER AND BOOKBAG TURNED UP NO EVIDENCE OF DRUG USE OR POSSESSION?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINONS BELOW ix

CONSTITUTIONAL PROVISIONS ix

STATEMENT OF THE CASE 1

 I. SUMMARY OF THE FACTS 1

 II. SUMMARY OF THE PROCEEDINGS 5

SUMMARY OF THE ARGUMENT 6

ARGUMENT 6

 I. Standard of Review 6

 II. THIS COURT SHOULD REVERSE THE ORDER OF THE DISTRICT COURT WHICH GRANTED THE RESPONDENT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE FORCED CESSATION OF COREY TOWLES’S AND KIT POLITTE’S WEBPAGE CREATED OFF-CAMPUS WAS A VIOLATION OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION 7

 A. Student’s Freedom of Speech Rights in the Comfort of Their Own Home... 7

 B. School District’s Interest in the Privacy Rights of Other Students 11

 C. The “Substantial Disruption” Test uUder *Tinker*..... 13

 D. Corey Towles’s and Kit Politte’s Websites Are in a Public Forum, Were Created Off-Campus and Therefore Are Entitled to First Amendment Protection 14

 III. THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS WHICH HELD THAT THE RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE UNCONSTITUTIONALITY OF WARRANTLESS STUDENT STRIP SEARCHES WAS NOT CLEARLY ESTABLISHED AT THE TIME OF CORY TOWLES’S INTRUSIVE STRIP SEARCH 17

 A. Towles’s Unwarranted Strip Search Was Not Reasonable, Lacked Probable Cause, and Was Not Justified Given Towles’s Unblemished

School Record18

B. Towles’s Unwarranted Strip Search Was Excessively Intrusive Given
the Humiliating Nature of the Search and Towles’s Young Age.....21

C. Keena Smalls is not Entitled to Qualified Immunity Because She
Violated Towles Clearly Established Fourth Amendment Rights22

D. Horton Hopkins School District Should be Held Liable for the
Unconstitutional Unwarranted Strip Search of Towles23

CONCLUSION25

CERTIFICATE OF COMPLIANCE.....27

CERTIFICATE OF SERVICE.....27

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Adams v. Williams,
407 U.S. 143, 147 (1972)..... 18

Alabama v. White,
496 U.S. 325 (1990)..... 18

Almeida-Sanchez v. United States,
413 U.S. 266 (1973)..... 17

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986)7

Bd. of County Comm'rs v. Brown,
520 U.S. 397 (1997)23

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986)8, 10

Brandon v. Holt,
469 U.S. 464 (1985)22

Camara v. Mun. Court,
387 U.S. 523 (1967)..... 17

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)7

Cohen v. California,
403 U.S. 15 (1971)12

Elkins v. United States,
364 U.S. 206 (1960)..... 17

Hafer v. Melo,
502 U.S. 21 (1991).....22

Hague v. CIO,
307 U.S. 496, 515 (1939)14

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

<i>Kentucky v. Graham</i> , 473 U.S. 159 (1985)	23
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	7
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	22
<i>Monell v. Dep't of Soc. Servs. of City of New York</i> , 436 U.S. 658 (1978)	23
<i>Moore v. City of Wynnewood</i> , 57 F.3d 924 (10th Cir. 1995)	22
<i>Morse v. Frederick</i> , 127 S. Ct. 2618 (2007)	8, 10, 11
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985).....	passim
<i>Owen v. City of Independence, Mo.</i> , 445 U.S. 622 (1980)	23
<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469 (1986)	24
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	17
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	9, 10
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969)	passim
UNITED STATES COURT OF APPEALS CASES	
<i>Amaechi v. West</i> , 237 F.3d 356 (4th Cir. 2001)	4
<i>Boroff v. Van Wert City Bd. Of Educ.</i> , 220 F.3d 465, 468-71 (6th Cir. 2000).....	15
<i>Cornfield v. Consol. High Sch. Dist. No. 230</i> , 991 F.2d 1316 (7th Cir. 1993)	19, 20, 21

<i>Guzman v. Sheahan</i> , 495 F.3d 852 (7th Cir. 2007)	23
<i>Justice v. City of Peachtree City</i> , 961 F.2d 188 (11th Cir. 1992)	4
<i>Klebanowski v. Sheahan</i> , 540 F.3d 633 (7th Cir. 2008)	23
<i>Miller v. Smith</i> , 220 F.3d 491 (7th Cir. 2000)	22
<i>Moore v. City of Wynnewood</i> , 57 F.3d 924 (10th Cir. 1995)	22
<i>Phanuef v. Fraikin</i> , 448 F.3d 591 (2d Cir. 2006)	18, 19
<i>Pirant v. United States Postal Serv.</i> , 542 F.3d 202 (7th Cir. 2008)	3, 4, 6
<i>Redding v. Safford Unified Sch. Dist. # 1</i> , 531 F.3d 1071 (9th Cir. 2008)	19
<i>United States v. Gagnon</i> , 373 F.3d 230 (2d Cir. 2004)	18
<i>Wood v. Hancock County Sheriff's Dep't.</i> , 354 F.3d 57 (1st Cir. 2003).....	4
STATE COURTS CASES	
<i>J.S. v. Bethlehem Area Sch. Dist.</i> , 807 A.2d 847 (Penn. 2000).....	13
CONSTITUTIONAL PROVISIONS	
U.S. CONST. amend. I	ix, 8
U.S. CONST. amend. IV.....	ix, 17
U.S. CONST. amend. XIV.....	ix
FEDERAL STATUTES AND RULES	
42 U.S.C. § 1983.....	23, 24

Fed. R. Civ. P. 56(c)7

SECONDARY AUTHORITY

Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*,
7 B.U.J. SCI. & TECH. L. 243 (2001)13

Rhoda J. Yen, *Censorship of Student Expression on the Internet and the First Amendment*,
2000 UCLA BULL. L. & TECH. 1 (2000).....15

OPINIONS BELOW

The Opinion of the District Court for Badger County can be found at *Kit Politte v. Horton Hopkins Sch. Dist.*, No. 521 (Grace Dist. Oct. 2008). The Opinion of the Court of Appeals for the State of Grace can be found at *Kit Politte v. Horton Hopkins Sch. Dist.*, No. 254 (Grace Ct. App. Jan. 2009). These Opinions have not been reported or published as of the March 2, 2009, the date of submission to the Supreme Court of the State of Grace.

CONSTITUTIONAL PROVISIONS INVOLVED

I. First Amendment:

The First Amendment to the United States Constitution provides that:

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

U.S. CONST. amend. I

II. Fourth Amendment:

The Fourth Amendment to the United States Constitution provides that:

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

U.S. CONST. amend. IV

III. Fourteenth Amendment:

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

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; . . .

U.S. CONST. amend. XIV, § 1

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Horton Hopkins High School (“Horton Hopkins”) is a public school located in Hopkinsville, Grace. R. at 1. In the past five years, Horton Hopkins has seen an increased presence of drugs on the high school campus. *Id.* In 2007, Principal Keena Smalls (“Principal Smalls”), along with other members of the school staff, caught fifteen students smoking marijuana on school grounds. *Id.* Last year, Principal Smalls had to suspend twenty-five students for using illegal drugs while on school grounds. *Id.* The foregoing increase in student drug use culminated in the death of a student who had overdosed while at a party. *Id.*

In the spring semester of 2007, Horton Hopkins passed a strict, zero-tolerance drug policy. *Id.* The policy gives school officials the power to perform drug tests, such as urinalysis, on students and among other things, “. . . conduct personal searches of students, as well as searches of lockers, desks, other school property, and book bags and other personal containers.” App. A. According to the policy, before a student can be searched, he or she should be given an opportunity to consent to the search, but if the student “refuses” consent the “school may continue with a search” without the student’s permission. *Id.* It is within the discretion of the Horton Hopkins School District (“District”) whether or not to contact the student’s parents before “commencing a personal search.” *Id.* at § (a). The bodily search of the unwilling student shall be conducted by “a faculty member of the same gender as the student.” *Id.*

Kit Politte (“Politte”), an 18 year old Horton Hopkins’ senior, started a school-sponsored club known as Drug Use Damages Schools (“DUDS”), which was directed at reducing student drug use. R. at 2. Since the club’s inception, DUDS’s membership has grown to include 130 student members. *Id.* The student-led club routinely post flyers throughout the school grounds

that advocate for a drug-free lifestyle. *Id.* Horton Hopkins demonstrates support for DUDS by allowing the club to organize and hold school assemblies, thus promoting the DUDS's anti-drug message. *Id.* After one such assembly had ended, speaker Jeffie Zarling told DUDS's founder Politte that the most efficacious way to dissuade drug use is "to point out drug dealers and users to the entire community." *Id.*

Following the cogent advice of Jeffie Zarling, Politte, while at home and using her personal computer, took the initiative and created Fighting All Dealers ("FAD") on Friendkepeida, a social networking website. *Id.* at 2, n. 1. FAD's message was directed to the townspeople of Hopkinsville who had to be members of Friendkepeida to view the website's contents. *Id.* at 2. The purpose of FAD was to collect and submit information about potential drug dealers on the webpage in the hopes that such "tips" would be funneled to the local police to assist in the arrest of local drug dealers. *Id.*

Politte retained administrative control over the webpage by placing a link on the webpage that allowed "tipsters" to e-mail Politte with information from which she chose to post the "strongest" tips on the webpage. *Id.* The tips posted to the FAD's webpage remained anonymous to encourage community members to submit tips without fear of retaliation. *Id.* During a DUDS meeting on September 15, 2008 Politte announced her new webpage and encouraged participation. *Id.* The meeting took place on the grounds of Horton Hopkins but after school hours. *Id.* Matching the growth of DUDS's membership, FAD's membership exploded with numbers exceeding 230, of which nearly 200 members are Horton Hopkins's students and of which 130 are DUDS's members. *Id.*

Cory Towles ("Towles"), 16 years old, is currently a sophomore at Horton Hopkins. *Id.* Prior to transferring to Horton Hopkins, Towles attended a high school in the State of Disarray.

Id. There, Towles was an honor student and, as a freshman, played baseball on the junior varsity team. *Id.* He had an exemplary disciplinary record at his former high school. *Id.*

On the night of October 3, 2008, Towles visited a Horton Hopkins junior's home, Jeff Tweegs ("Tweegs"), who was hosting a party. *Id.* Towles, a devoted baseball player, wanted to become familiar with the guys on the varsity baseball team, as he was going to try-out the following fall with them. *Id.* Towles only stayed at the Tweeg's residence for a short while, and mostly played football in the backyard before deciding to head home. *Id.* at 3. Sometime after Towles left the party, a few police officers showed up and cited five students for underage drinking and one student for possession of a marijuana cigarette. *Id.*

The following day after the party, on October 4, Politte received an e-mail with a photograph attached depicting Towles sitting next to Frank Conrad ("Conrad") and John Thomson ("Thomson"). *Id.* In the photograph it shows Conrad smoking a cigarette.¹ *Id.* Politte with full administrative control decided to post the photograph on her FAD webpage attributing the photograph to "an anonymous Horton Hopkins student." *Id.* The caption underneath the photograph read: "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?"² *Id.*

The photograph posted on Politte's webpage garnered a lot of attention, especially from the parents of Horton Hopkins' students. *Id.* After speaking with a few parents and the police, Principal Smalls called Towles, Conrad, Thomson, and Tweegs down to her office for questioning. *Id.* Even though Towles denied possessing any drugs, his locker and book bag

¹ The record is ambiguous as to the type of cigarette Conrad was smoking. However, "all facts and reasonable inferences" shall be drawn in favor of the Petitioners, the non-moving parties, according to the standards set forth in Rule 56(c). *Pirant v. United States Postal Serv.*, 542 F.3d 202, 206 (7th Cir. 2008). Therefore, the cigarette shall be viewed in the light most favorable to the Petitioners, and therefore, not one containing marijuana, but tobacco.

² Towles's name did not appear anywhere in the caption or the webpage. R. at 3.

were still searched without his consent. *Id.* Principal Smalls also searched Conrad’s locker and found a small bag of marijuana. *Id.* Determined to find more drugs, Principal Smalls asked Towles to submit to a warrantless search of his person in private to which he refused. *Id.* The other three boys were asked to submit to a search, but they refused as well. *Id.* Towles and the other three boys were taken to the boys locker room and forced to strip down to the underwear in front of each other³ while a gym teacher, Jim Waters, performed a strip search⁴ of the boys’ clothing for drugs. *Id.* No drugs were found in Towles’s locker or bookbag or on his person; Towles was completely clean. *Id.* However, Waters did find a small bag of marijuana in Thomson’s jean pockets. *Id.*

First, feeling humiliated, and then, outraged, Towles responding to his humiliating warrantless strip search by creating his own network page on Friendkepedia called Students Against Defamatory Statements (“SADS”). *Id.* Like Politte, he too had complete administrative control over the contents of his webpage, created the webpage at home and hosted the webpage from his home computer. *Id.* In one of his first posts, Towles wrote:

“By taking unauthorized photographs of me during a Friday night out with my friends, and then posting inaccurate captions, DUDS, as school organization under the guise of its website FAD, committed a gross invasion of my privacy and defamed me in front of my friends and peers. What we do on our own time for fun is our business. Horton Hopkins school officials committed a far worse injustice when the subjected my friends and me not only to an unreasonable search of our lockers, but also to strip searches. We need to fight this injustice. I call for all Horton Hopkins students to let our school administrators know that we

³ The record is ambiguous as to whether Petitioner Towles was forced to strip in view of the other boys. However, “all facts and reasonable inferences” shall be drawn in favor of the Petitioners, the non-moving parties, according to the standards set forth in Rule 56(c). *Pirant v. United States Postal Serv.*, 542 F.3d 202, 206 (7th Cir. 2008). Therefore, the strip search of Petitioner Towles, viewed in the light most favorably to the Petitioners, should be viewed as having been conducted in the presence of the other boys.

⁴ The Eleventh Circuit has held that when a person in authority orders a person to strip down to the underwear that is considered a “strip search.” *Justice v. City of Peachtree City*, 961 F.2d 188, 190 (11th Cir. 1992); *see also Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001); *Wood v. Hancock County Sheriff’s Dep’t.*, 354 F.3d 57, 63 n. 10 (1st Cir. 2003) (holding “that a strip search may occur when an inmate is not fully disrobed”).

will not tolerate this kind of treatment. Let's speak out against Smalls and the rest of these Hopkins idiots.”

Id. at 3-4. This post created a flurry of Internet activity, as students began reading the posts from both Politte's and Towles's webpages. *Id.* at 4. The students accessed both webpages from their personal home computers, in the school computer labs after school hours, and in their free time throughout the day. *Id.* In the ultimate act of blatant censorship, Principal Smalls issued Politte and Towles an ultimatum, shut down their private webpages or face indefinite suspension. *Id.* Feeling like their rights were being taken away from them, Politte and Towles refused to shut down their webpages, thereby triggering suspension. *Id.*

According to Principal Smalls's own admission, she ordered the webpages shut down because she was angry that Towles criticized her administration openly, and that she feared a student protest would create disorder. *Id.* She also believed the webpages were causing a “disturbance and interrupting other high school students' education.” *Id.*

II. SUMMARY OF THE PROCEEDINGS

Petitioners filed suit in the Badger County District Court in the State of Grace, claiming that the Respondents, Horton Hopkins School District and Keena Smalls, violated the First Amendment rights of Kit Politte and Cory Towles and, further, that the Respondents violated Cory Towles's Fourth Amendment rights.

The Badger County District Court held that the Respondents did not violate the Petitioners First Amendment rights when Principal Smalls forced the Petitioners to shut down their personal webpages. Furthermore, the District Court held that the strip search of Petitioner Towles's was reasonable and therefore constitutional.

The State of Grace Court of Appeals affirmed the ruling of the District Court as to the Petitioners First Amendment claims. However, the Court of Appeals affirmed the judgment of

the District Court, but under the doctrine of qualified immunity, declaring the strip search of Petitioner Towles to be unconstitutional, but not clearly established law.

The Supreme Court of the State of Grace granted the Writ of Certiorari on January 26, 2009 as to both the First and Fourth Amendment claims.

SUMMARY OF ARGUMENT

The Court should find that the Badger County District Court erred in granting the Motion for Summary Judgment in favor of Horton Hopkins School District and Keena Smalls because the Respondents violated the First Amendment rights of the Petitioners, Corey Towles and Kit Politte, by forcing the students to cease operation of their individual websites and by suspending Towles and Politte from school until they agreed to take down the webpages.

The strip search of Cory Towles did not satisfy the two prongs of *New Jersey v. T.L.O.*, and, therefore, was conducted in violation of Cory Towles's Fourth Amendment rights. The Court of Appeals' decision was erroneous as the United States Supreme Court has unequivocally declared that when school officials are sued in their official capacity they cannot raise the defense of qualified immunity. Similarly, a school corporation is not afforded any immunity as its defenses, and so the decision granted qualified immunity to Horton Hopkins is against the manifest weight of authority and a clear error of law. Thus, the Court of Appeals' decision to grant Respondents' motion for summary judgment inappropriate as a matter of law and should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The District Court's decision to grant the Respondent's motion for summary judgment is reviewed by the Supreme Court *de novo*. *Pirant v. United States Postal Serv.*, 542 F.3d 202, 206

(7th Cir. 2008). On review, all facts and reasonable inferences are construed in the light most favorable to the nonmoving party. *Id.* The Federal Rules of Civil Procedure establish that motions for summary judgment shall be granted “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

Furthermore, Rule 56(c) requires the entry of summary judgment against a party “who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Thus, to demonstrate a genuine issue of fact, the non-moving party must do more than raise some metaphysical doubt as to the material facts; the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

II. THIS COURT SHOULD REVERSE THE ORDER OF THE DISTRICT COURT WHICH GRANTED THE RESPONDENT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE FORCED CESSATION OF COREY TOWLES’S AND KIT POLITTE’S WEBPAGE CREATED OFF-CAMPUS WAS A VIOLATION OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Student’s Freedom of Speech Rights in the Comfort of their Own Home

This Court should reverse the district court's holding as to the respondent’s Motion for Summary Judgment because there are genuine issues of material facts and Horton Hopkins School District is not entitled to judgment as a matter of law. The forced cessation of Corey Towles and Kit Politte’s website, combined with their suspension from school, infringed their

freedom of speech rights because students are entitled to limited constitutional rights in schools, as long as those rights are not detrimental to the school's learning environment.

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment's right to grant individuals the freedom of speech has long been applied to students in the public school system. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, the United States Supreme Court found that the wearing of an armband by public school students in protest of the Vietnam War was "pure speech" and therefore was subject to First Amendment protection. *Id.* at 506. According to the Supreme Court, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* Although this right has been established, the Supreme Court has determined that the right of students to express disruptive opinions that are detrimental to the learning environment can be limited by the schools. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 676 (1986). In *Fraser*, the Supreme Court held that just because an item of speech cannot be prohibited constitutionally with regards to adults, the same does not apply in regards to children within the walls of the school system. *Id.* In *Fraser*, when a student was suspended for showing signs during a assembly that were extremely vulgar in nature, the Supreme Court ruled that the public school systems were allowed to forbid certain types of free speech because the message the speech portrays was contrary to a positive learning environment. *Id.*

The most recent decision rendered on the educational system and student's freedom of speech rights is *Morse v. Frederick*, 127 S. Ct. 2618 (2007). In *Morse*, the school allowed students to leave school early in order to watch the "Winter Olympics Torch Relay." *Id.* at 2622. Frederick, a student at the public high school, attended the event, and displayed a poster saying

“BONG HiTS 4 JESUS.” *Id.* In response to the poster, Frederick was suspended for violating the school policy of refraining from showing anything that was considered offensive. *Id.* The Supreme Court held that Frederick could be suspended from school without the school violating his freedom of speech rights because the message that he was supporting encouraged the usage of an illegal substance. *Id.* at 2625; *Compare with* (Brennan, J. opinion); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”). The Court also advised that although Frederick was not on school property when the event occurred, he was still bound by school policy because the school had authorized the event. *Id.*

Here, the Horton Hopkins School District violated the First Amendment rights of Corey Towles and Kit Politte by suspending them from school until they ended their individual websites because students in a school-learning environment have limited First Amendment rights. Like the situation present in *Tinker*, Towles and Politte were using their self-created website, which was created in the comfort of their own homes, to present their personal ideas on events happening in their lives, including those occurring in school. Following *Tinker*, it is clear that Towles and Politte are entitled to some First Amendment protection while in school. This protection prevents the Horton Hopkins School District from reaching into the private home and punishing them with school sanctions. In addition, gossip frequently occurs in the school setting, regardless of whether a website encourages it or not. Unlike the situation in *Fraser*, Towles and Politte’s speech was not disruptive to the learning environment and did not cause chaos in the school. The website’s created in question merely caused controversy, which is acceptable within First Amendment protection.

The facts present in Towles and Politte's case and the *Morse* case are extremely different in nature and this Court should distinguish *Morse* from the present fact situation. Unlike the facts present in *Morse*, Towles and Politte were not publicly displaying a sign or image that was offensive or illegal. Instead, Towles and Politte were simply voicing their personal beliefs in a public forum, more specifically on the internet. The website's used by Towles and Politte did not contain offensive messages that could be seen as illegal activities, unlike the situation in *Morse*. In *Morse*, the Supreme Court dealt with the promotion of illegal drug usage, which is extremely different than the facts of this case. The websites used by Towles and Politte did not promote any illegal activities, but instead voiced the personal opinions of Towles and Politte against illegal drug use, which is protected under the First Amendment. As the Court reasoned in *Texas*, even if Towles and Politte's opinions were offensive to one individual, the First Amendment still allows some protection. Also contrary to *Morse*, Towles and Politte did not bring this web site to school like the students who brought speech to a school assembly in *Morse*. The websites were created in the comfort of their own home.

Therefore, Towles and Politte's actions did not fall within Horton Hopkins' power to suspend them. This Court should distinguish the ruling made in *Morse* and find that Towles and Politte's First Amendment rights were violated by the mandatory cessation of their website. Lastly, this Court should find that their First Amendment rights were violated when Horton Hopkins suspended them from school until their websites were no longer operating.

Horton Hopkins School District and Keena Smalls will argue that they did not violate Towles's and Politte's First Amendment right to freedom of speech because the students' actions were disruptive to the school learning environment. The School District will argue that, like the situation in *Fraser*, the websites were detrimental to the school learning environment, which is

evidenced through the student gossiping and computer use during school hours, hardly disruptive in nature. Further, the School District will argue that *Morse* should be the leading precedent in this situation because the websites were offensive to some people, most likely those whose faces or names are mentioned in the pictures. Although the websites may be viewed as offensive, according to *Tinker*, students do not lose their constitutional rights when they enter a school building. Therefore, even if some individuals or administration believed the content to be offensive, the website is still protected by the First Amendment freedom of speech.

B. School District's Interest in the Privacy Rights of Other Students

This Court should reverse the district court's holding as to the respondent's Motion for Summary Judgment because there are genuine issues of material facts and Horton Hopkins School District is not entitled to judgment as a matter of law. Horton Hopkins School District's interest in the privacy rights of other students is outweighed by Towles and Politte's strong interests in their freedom of speech.

The United States Supreme Court determined in *Hazelwood Sch. Dist. v. Kuhlmeier* that judicial intervention will be required when there is not a legitimate educational interest in the schools censorship of student speech. 484 U.S. 260, 273 (1988). Schools may censor student publications and student speech only when there is a strong educational interest in doing so. *Id.* In *Kuhlmeier*, the student newspaper's article failed to adequately protect the identities of the individuals involved with such controversial issues, such as teenage pregnancy and divorce. *Id.* at 274. According to *Tinker*, students are not "closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511. Students retain the ability to choose which positions they want to advocate, and schools are unable to regulate those opinions unless they are detrimental to the school learning environment. *Id.* Students possess fundamental

rights, just as ordinary citizens, which must be respected by the education system. *Id.* Since students possess the fundamental right to freedom of speech, it follows that if an individual finds the material presented to be offensive, that individual should “advert their eyes” to the message. *Cohen v. California*, 403 U.S. 15, 21 (1971).

The Horton Hopkins School District’s interest in protecting the privacy interest of other students does not outweigh Towles and Politte’s First Amendment protections. Unlike the situation present in *Kuhlmeier*, the website’s created by Towles and Politte did not cover controversial topics, such as teenage pregnancy and divorce. Since the issues presented on the websites were not controversial topics, the School District’s interest in protecting the privacy of the other students is severely diminished. In addition, according to *Tinker*, students are not required to be billboards for what the school feels is an appropriate opinion. Accordingly, Towles and Politte have a fundamental right to express themselves in a manner which is not disruptive to the school learning environment. Since the school district failed to show that the websites are not a legitimate disruption in the school district, Horton Hopkins School District is required to allow their students to express themselves to the fullest extent of the First Amendment.

The Horton Hopkins School District will argue that the situation present in *Kuhlmeier* and the current situation are extremely similar and therefore this Court should follow the precedent established in *Kuhlmeier*. The School Board will argue that because the websites created dealt with private issues in students’ lives, they should be able to censor the websites in order to protect the privacy of those students. In addition, the School District will argue that they foresaw disruptions occurring, although no evidence was presented demonstrating disruption at the public high school.

This Court should overrule the ruling of the district court in regards to Horton Hopkins School District's Motion for Summary Judgment because there are issues of material facts and the School District is not entitled to judgment as a matter of law. Towles and Politte's First Amendment rights were violated when the school suspended them because the students' speech was not disruptive to the school learning environment or illegal, and therefore they are entitled to move forward with their claim. Schools must adjust to new challenges created by Internet use by students, but not at the expense of the First Amendment.⁵ In addition, the Horton Hopkins School District's interest in the privacy rights of other students is outweighed by Towles and Politte's First Amendment rights.

C. The "Substantial Disruption" Test Under *Tinker*

Since the Supreme Court is yet to address Internet speech in schools, most courts will apply the *Tinker* "substantial disruption" test to questions involving online speech. Under the *Tinker* test, in order for the school to prohibit certain expression, they must show that the action taken was caused by something more than just discomfort or unpleasant viewpoints. *Tinker*, 395 U.S. at 509. Furthermore, the *Tinker* test mandates school officials desiring to suppress speech to demonstrate "facts which might reasonably have led school authorities to forecast substantial disruption...with school activities." *Id.* at 514. Therefore, schools may prohibit speech if the school meets its burden of establishing that the student speech materially disrupts class work, creates substantial disorder invades the rights of others or it is reasonably foreseeable to do so. *Id.*; *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 862 (Penn. 2000).

Here, Horton Hopkins and Principal Smalls failed to show that Towles's and Politte's

⁵ See generally Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U.J. SCI. & TECH. L. 243 (2001) (discussing the proliferation of Internet use by students to express their viewpoints and what the First Amendment's role should be).

websites created a substantial disruption. After the party, Towles created his own website to speak out against the school invading his privacy. Principal Smalls felt that Towles' call to action on his webpage, "[l]et's speak out against Smalls and the rest of these Hopkins idiots" constituted a future disruption. Speaking out is not a threat, acting out would be. *Tinker* stands for the proposition that the school must show the speech was more than just discomfort, which they have failed to do. The District and Principal Smalls are prohibiting speech because it is discomforting and presents uncomfortable viewpoints of their student. Lastly, the District has not met their burden *Tinker* requires to prohibit speech. There is no evidence of school riots, any planned or potential uprising or any threats to anyone in the school district.

Therefore, this Court should overrule the district court in regards to Horton Hopkins School District's Motion for Summary Judgment because there are issues of material facts and the School District is not entitled to judgment as a matter of law. The school failed to meet its burden under the *Tinker* test that the student's web pages created a substantial disruption in school.

D. Corey Towles's and Kit Politte's Websites Are in a Public Forum, Were Created Off-Campus and Therefore Are Entitled to First Amendment Protection.

This Court should reverse the district court's decision to grant the Horton Hopkins School District Motion for Summary Judgment because there are genuine issues of material fact and the School District is not entitled to judgment as a matter of law. Towles's and Politte's website are in a public forum and were created away from school premises and therefore should be entitled to the full protections afforded by the First Amendment of the United States Constitution.

The Supreme Court has defined a public forum as a place that traditionally is used for

speech, assembly, and the communication or expression of ideas. *Hague v. CIO*, 307 U.S. 496, 515 (1939). A public school can be considered a public forum in the eyes of the courts if the school allows usage of its facilities for equal speech and the expression of ideas. *Kuhlmeier*, 484 U.S. at 267. In *Kuhlmeier*, the school principal edited a student newspaper because he felt that the content of the newspaper was inappropriate for the school learning environment. *Id.* The Supreme Court found that the school was not considered a public forum under the particular facts mainly because the students did not retain complete control over the school newspaper and the school had not opened the newspaper for outside inputs or views. *Id.* at 267-270. Although the *Kuhlmeier* Court determines that the school newspaper is not a public forum under the facts presented, the Court does advise that students may not be punished for expressing their personal views on school grounds, unless those views will seriously disrupt the school learning environment. *Id.* at 266.

Furthermore, schools overstep both their educational mission and authority when they attempt to punish off-campus speech. *Boroff v. Van Wert City Bd. Of Educ.*, 220 F.3d 465, 468-71 (6th Cir. 2000). The outcome is different when a student brings his or her off-campus website to schools. *Id.* at 469.⁶ However, when a teacher, student or principal hears about off-campus speech and then downloads it to a school computer for review, this alone does not constitute the intentional downloading of the respective website on-campus by the student who created it. Further, this act should not give the school legal grounds for claiming greater authority over the speech based on the fact it “showed up” on campus.

Here, Towles’s and Politte’s website is a public forum and therefore entitled to all the

⁶ See also Rhoda J. Yen, *Censorship of Student Expression on the Internet and the First Amendment*, 2000 UCLA BULL. L. & TECH. 1 (2000) (arguing if the website was created using school facilities and computers, then the school should be able to exercise greater control and authority over the speech because it controls the property that is used by the student). This is not the case present in the current record.

protection that the First Amendment extends. Unlike the school-sponsored newspaper in *Kuhlmeier*, the Internet has traditionally been viewed as a place of open expression and usable for free communication. School sponsored newspapers, on the other hand, are clearly a product of the school and, therefore, subject to censorship, as *Kuhlmeier* demonstrates. Towles's and Politte's websites should be considered a public forum since the Internet is traditionally viewed as a place where individuals can express their opinions. Further, according to *Kuhlmeier*, students cannot be punished for simply expressing their personal opinions, as long as those opinions are not disruptive to the school learning environment. The websites in dispute are not disruptive to the school learning environment, and the website is broadcast in a traditional public forum. Therefore, this Court should reverse the district court's grant of the Respondent's Motion for Summary Judgment since there are genuine issues of material fact and the School District is not entitled to judgment as a matter of law.

In addition, Towles and Politte did not bring their speech to campus. As stated above, the websites were created in the comfort of their own home. The School District will argue that students started viewing the websites on school grounds, thus creating the disruption. However, this argument fails because Horton Hopkins must not be able to attach jurisdiction over the speech with its own deliberate acts.

This Court should reverse the district court's granting of the Horton Hopkins School District's Motion for Summary Judgment because there are genuine issues of material fact dealing with the internet as a public forum and the School District is not entitled to judgment as a matter of law.

III. THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS WHICH HELD THAT THE RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE UNCONSTITUTIONALITY OF WARRANTLESS STUDENT STRIP SEARCHES WAS NOT CLEARLY ESTABLISHED AT THE TIME OF CORY TOWLES’S INTRUSIVE STRIP SEARCH.

The Fourth Amendment, incorporated through the Fourteenth Amendment, prohibits “unreasonable searches and seizures by state offic[ial]s.” *Elkins v. United States*, 364 U.S. 206, 213 (1960). This fundamental right further protects “the rights of students against encroachment by public school officials.” *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). The Fourth Amendment was enacted “to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). Under Fourth Amendment analysis, the underlying mandate is that searches and seizures must be reasonable in view of “balancing the need to search against the invasion which the search entails.” *Id.* at 536-37. The balance that must be struck weighs the individual’s “legitimate expectations of privacy and person security” against the government’s interest of establishing “public order.” *T.L.O.*, 469 U.S. at 337.

With rare exception, a search must be conducted upon a finding of “probable cause.” *See* U.S. CONST. amend. IV (stating “no Warrants shall issue but upon probable cause”); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). In exceptional cases, a warrantless search may be upheld if it was “reasonable” under the circumstances. *See generally id.* at 277 (describing a situation when reasonable suspicion can be grounds for a warrantless search).

In analyzing whether the warrantless search reasonable, the court must engage in a two-part inquiry. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). First, whether the warrantless search “was justified at its inception,” and, second, whether the warrantless search “was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* Under the first inquiry, a

warrantless search of a student will be justified at its inception when reasonable grounds exist to suspect the warrantless search will reveal evidence that the student has or is violating school rules. *T.L.O.*, 469 U.S. at 342. To uphold the second prong, the methods employed to perform the search must be “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.* This test is aimed at ensuring the student’s expectation of privacy “will be invaded no more than is necessary to the legitimate end of preserving order in the schools.” *Id.* at 343.

A. Cory Towles’s Unwarranted Strip Search Was Not Reasonable, Lacked Probable Cause, and Was Not Justified Given His Unblemished School Record.

Invariably, the evidence gleaned from an informant’s tip will “vary greatly in [its] value and reliability.” *Adams v. Williams*, 407 U.S. 143, 147 (1972). As a practical matter, a face-to-face informant’s tip is thought to be “more reliable than an anonymous [] tipster, for the former runs the greater risk that he may be held accountable if his information proves false.” *Id.* at 146-47. Based on the varying degrees of value and reliability, the Supreme Court has instructed courts to scrutinize the informant’s tips employing a “totality of the circumstances” test. *Alabama v. White*, 496 U.S. 325, 329 (1990). Such a test encompasses the tipster’s “veracity, reliability, and basis of knowledge”, and whether the information provided has been corroborated by independent investigation. *United States v. Gagnon*, 373 F.3d 230, 236 (2d Cir. 2004).

The uncorroborated tip posted by Politte on FAD did not justify Principal Smalls to order a warrantless and intrusive strip search of Cory Towles. *See Phanuef v. Fraikin*, 448 F.3d 591, 598-99 (2d Cir. 2006). In *Phanuef*, Kelly, a high school senior, was forced to submit to a warrantless strip search because another student told a school official that Kelly had marijuana down her pants. *Id.* at 593-94. The school nurse refused to conduct the strip search, so Kelly’s mother was called to the office to do it. *Id.* at 594. Kelly’s mother expressed objected to the

search of her daughter but was given an ultimatum, perform the search or the police would get involved. *Id.* Kelly was forced to strip down to her underwear and reveal her naked breasts and buttocks to her mother. *Id.* No marijuana was recovered. *Id.* On review, the Second Circuit found the warrantless strip search of Kelly to be violation of her Fourth Amendment rights. *Id.* at 600. The Court reasoned that there existed no independent evidence linking Kelly to drugs beyond that of an anonymous student tip. *Id.* at 599. Furthermore, the Court holding that non-drug related past disciplinary problems cannot suffice for reasonable suspicion predicated an invasive strip search. *Id.* Based on the holding in *Phanuef*, Towles's unblemished school disciplinary record negates the reasonable suspicion required to initiate a highly intrusive and offensive warrantless strip search. Additionally, an anonymous student photograph cannot substantiate an intrusive strip search by school officials without some other form of independent or corroborated evidence. Following *Phanuef*, this Court should reverse the Court of Appeals' Order of Summary Judgment because the Respondents are not entitled to judgment as a matter of law.

“Nowhere does the *T.L.O.* Court tell us to accord school officials' judgments unblinking deference.” *Redding v. Safford Unified Sch. Dist. # 1*, 531 F.3d 1071, 1080 (9th Cir. 2008). In *Redding*, Savana, a 13 year old girl, was ordered to strip down to her undergarments and partially expose her breasts and genital region based on the a uncorroborated student tip. *Id.* at 1075. Marissa, the tipster, had been caught with ibuprofen, knives, a lighter, and cigarette. *Id.* at 1974. When questioned where she obtained the items, Marissa stated that she had borrowed Savana's planner and the items were hers. *Id.* Without further independent investigation, the principal ordered a school nurse to conduct a strip search of Savana, nothing was found. *Id.* at 1075. The Ninth Circuit found that warrantless strip search of Savana was unconstitutional because it was

not justified from its inception. *Id.* at 1085. The only evidence linking Savana to the ibuprofen was Marissa’s statement, a student with a track record of disciplinary problems. *Id.* Such thin and highly questionable evidence cannot reasonably raise suspicion to the level of conducting a warrantless strip search of a 13 year old girl. *Id.*

Similarly to facts in *Redding*, the only evidence suggesting Towles was in possession of drugs was an anonymous tip posted on Politte’s webpage. Like the Ninth Circuit hold in *Redding*, this sort of thin and questionable evidence cannot form the basis for reasonable suspicion triggering the need to perform a warrantless strip search of Towles. Based on *Redding*, this Court should find that Towles’s Fourth Amendment rights were violated because the warrantless strip search did not satisfy the first prong of *T.L.O.*.

“[A]s the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness.” *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). In *Cornfield*, a sixteen year old student was subjected to an invasive warrantless strip search of his person by school officials upon suspicion that he was “crotching” drugs on school grounds. *Id.* at 1319. The School’s suspicion was predicated upon several factors: (1) Cornfield’s own admission to drug use; (2) Cornfield’s unlawful possession of a live round on school grounds; (3) eye witness accounts of Cornfield using drugs; and (4) the unusual bulge in his pants. *Id.* at 1322. The Seventh Circuit concluded that the cumulative effect of these independent factors formed sufficient reasonable suspicion to search Cornfield, thus satisfying the first prong of *T.L.O.*. *Id.* at 1323. The decision in *Cornfield* represents a sharp contrast to the facts at present. The basis of the School’s suspicion in *Cornfield* was corroborated by school officials, other students, and observable physical evidence. Here, Principal Smalls relied on a photograph, in which Towles was not engaging in any illegal

conduct, and the mere fact that Towles was seen in close proximity to Frank Conrad. Unlike in *Cornfield*, there exists no scintilla of independent evidence demonstrating that Towles had engaged in drug use or had drugs on his person on school grounds. In fact, substantial evidence to the contrary exists that supports the opposite result. Before transferring to Horton Hopkins, Towles was an honor student at his former high school, where he had an unblemished disciplinary record. Therefore, the facts support the conclusion that the warrantless strip search of Towles was not justified at its inception in violation of the first prong of *T.L.O.* and therefore an unconstitutional violation of Towles's Fourth Amendment rights.

The Respondents' warrantless strip search of Corey Towles fails the first prong of *T.L.O.* which required the warrantless strip search be justified at its inception because the anonymous Internet tip was unsubstantiated and was not independently corroborated and, therefore, is a violation of Cory Towles's Fourth Amendment rights. Assuming *arguendo*, that the warrantless strip search was justified at its inception, the Respondents must still satisfy the second prong under *T.L.O.*: the scope of the warrantless strip search was reasonably related to the circumstances that allegedly justified the search initially.

B. Cory Towles's unwarranted strip search was excessively intrusive given the violative nature of the search and his young age

In *Cornfield, supra*, the Seventh Circuit additionally concluded that the second prong of *T.L.O.* was satisfied when Cornfield's search was conducted in the privacy of the boy's locker room, by school officials of the same sex, and without physically touching Cornfield. *Cornfield*, 991 F.2d at 1323. While the facts in *Cornfield* appear inseparable at first glance from the present facts, a deeper examination of the record reveals factual differences that when viewed in their totality amount to a constitutional violation of Towles Fourth Amendment rights. Here, Principal Smalls conducted a warrantless search of Towles' locker, and found nothing. Further

determined to find drugs, Principal Smalls, against Towles consent, ordered Jim Waters, a gym teacher, to strip search each of the four boys in the boy's locker room. The record is ambiguous as to whether the boys were forced the humiliation of stripping in front of each other, but in view of the standards of summary judgment taking all inferences in favor of the Petitioners, it can be inferred from the record that such a scene of personal degradation took place, revealing no drugs on Towles person or effects. The only facts commensurate with *Cornfield* were that the unwarranted strip search took place in the boy's locker room and without physical intervention. The differentiating facts that exist are that Towles had his locker searched in public, and was forced to strip down to his underwear in the presence of three other boys and stand there while his clothes, wallet, and book bag were searched. The personal intrusiveness and humiliation Towles underwent is elevated when compared to the facts in *Cornfield* and thus intensifying the Fourth Amendment's protection from unreasonable searches. *See Cornfield*, 991 F.2d at 1321.

The Respondents' warrantless strip search of Cory Towles fails the second prong of T.L.O. because it was excessively intrusive and the methods employed were unreasonable and therefore a violation of Towles's Fourth Amendment rights. Now having established that Towles's Fourth Amendment rights have been violated, the last issue to decide is whether the Respondents are entitled to the defense of qualified immunity.

C. Keena Smalls is not Entitled to Qualified Immunity Because She Violated Cory Towles Clearly Established Fourth Amendment Rights

The defense of qualified immunity only applies to government officials sued in their individual capacities. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (stating "officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law"); *Mitchell v. Forsyth*, 472 U.S. 511, 556 n. 10 (1985) (Brennan, J., dissenting and concurring) ("Of course, an official sued in his

official capacity may not take advantage of a qualified immunity defense”) (citing *Brandon v. Holt*, 469 U.S. 464 (1985)); *Miller v. Smith*, 220 F.3d 491, 494 (7th Cir. 2000). The defense of qualified immunity is only available to those defendants sued in their personal capacities. See *Moore v. City of Wynnewood*, 57 F.3d 924, 929 n. 4 (10th Cir. 1995) (“the defense of qualified immunity only applies to [defendants] in [their] individual capacit[ies]”).

The Petitioners filed suit against Horton Hopkins School District and Principal Smalls in her official capacity as Principal of Horton Hopkins. The inescapable conclusion is that the defense of qualified immunity does not apply to this case, because it is an official capacity suit and not an individual capacity suit. Therefore, the Court of Appeals’ decision to grant Principal Smalls qualified immunity is an egregious error of law, and thus summary judgment is improper as a matter of law and should be reversed.

Likewise, Horton Hopkins is not entitled to qualified immunity because the defense is not available to municipal corporations, such as schools. See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637 (1980) (stating “there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity”). Therefore, the Court of Appeals’ decision to grant Horton Hopkins qualified immunity is improper under the law and, thus, the Order of Summary Judgment should be reversed.

D. Horton Hopkins School District Should be Held Liable for the Unconstitutional Unwarranted Strip Search of Towles.

A suit against an official in her official capacity is the same as a suit against the entity itself. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); see also *Guzman v. Sheahan*, 495 F.3d 852, 859 (7th Cir. 2007) (stating that an “official capacity suit is tantamount to a claim against

the government entity itself”). Therefore, the official capacity suit against Principal Smalls is subsumed under the suit against Horton Hopkins.

Horton Hopkins can be sued and subjected to monetary damages and injunctive relief under § 1983 only if Towles can demonstrate that the “deliberate indifference” he suffered was the result of an official policy or custom established by Principal Smalls. *See Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 690-91 (1978); *see also Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 403 (1997). Under this context, three separate forms of unconstitutional policies or customs have been elucidated:

(1) an express policy that, when enforced, causes a constitutional deprivation; (2) a wide-spread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or used with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policy-making authority.

Klebanowski v. Sheahan, 540 F.3d 633, 637 (7th Cir. 2008).

Petitioner Towles concedes that there is not a “wide-spread practice” of conducting unconstitutional student strip searches at Horton Hopkins. Rather, Petitioner Towles argues that his constitutional injuries were caused by Principal Smalls because she was empowered with “final policy-making authority.”

Municipal liability may be imposed on the basis of a single decision by a final policy maker. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). In *Pembaur*, the United States Supreme Court held that municipal liability can attach to actions directed by an official who also sets the policy. *Id.* at 481. Here, Principal Smalls was primarily responsible for enacting the school’s policy against drug use. R. at 1. Further, Principal Smalls is the one responsible for ordering the unwarranted strip search of Petitioner Towles. R. at 3. In following *Pembaur’s* analysis, Principal Smalls’s actions were responsible for initiating the policy and

enforcing it – thus empowering her with final policy-making authority. The unconstitutionality of Towles’s search has been argued and demonstrated above, *supra*, and, therefore, the single decision of Principal Smalls to order a unreasonable warrantless strip search of Towles, without probable cause or reasonable suspicion, constitutes the basis for municipal liability under § 1983.

The standard set out in *T.L.O.* is unequivocally clear and should be used to assess the constitutionality of warrantless student strip searches. The holdings in *Phanuef*, *Cornfield* and *Redding* apply the *T.L.O.* standard without equivocation and therefore establish that the warrantless strip search of Cory Towles was in violation of his Fourth Amendment rights. Furthermore, Horton Hopkins and Principal Smalls are not entitled to qualified immunity as a matter of constitutional law. Principal Smalls had final policy-making authority when she ordered Waters to perform a warrantless strip search of Towles thereby attaching liability to the Horton Hopkins under § 1983. The Badger County District Court and the State of Grace Court of Appeals erred in granting the Respondents’ Motion for Summary Judgment, and therefore should be reversed and remanded for trial giving the Petitioners Kit Politte and Cory Towles their day in court.

CONCLUSION

The Court should find that the Badger County District Court erred in granting the Motion for Summary Judgment in favor of Horton Hopkins School District and Keena Smalls because the Respondents violated the First Amendment rights of the Petitioners, Corey Towles and Kit Politte, by forcing the students to cease operation of their individual website’s and by suspending Towles and Politte from school until they agreed to take down the web pages. Not only did the school fail to prove the web pages created a “substantial disruption” under *Tinker*, but the web pages were created off-campus in the privacy of each student. We pray this Court find that the

Hopkins School District and Keena Smalls violated the free speech of Towles and Politte under the First Amendment of the Constitution. The Badger County District Court's decision to grant Respondent's Motion for Summary Judgment was inappropriate, because Petitioner Cory Towles's Fourth Amendment rights were violated by the unreasonable search of his person and property with probable cause or reasonable suspicion. Accordingly, Petitioners, Kit Politte and Cory Towels, respectfully requests that this Court reverse the District Court and deny the Respondents' Motion for Summary Judgment.

