

QUESTIONS PRESENTED

- I. Under the First Amendment's prohibition against restrictions on free speech, did the Court of Appeals properly grant the Respondents' motion for summary judgment when it concluded that the Respondents' attempt to regulate students' Internet speech created off-campus was not a violation of Petitioners' First Amendment rights?

- II. Under the Fourth Amendment, is a warrantless student strip search by school officials reasonable where a principal, in accordance with a school drug policy, instructed a male teacher to conduct a search of the Petitioner on the grounds that he was in possession of marijuana due to a photograph posted on a drug prevention website showing the Petitioner sitting next to a fellow student who: was smoking; was cited for marijuana possession by police that same night; and who was found to have a small baggie of marijuana in his locker immediately prior to the search of the Petitioner?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

CONSTITUTIONAL PROVISIONS INVOLVED.....vi

STANDARD OF REVIEW.....vi

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....4

ARGUMENT.....7

I. THIS COURT SHOULD AFFIRM THE ORDER GRANTING THE RESPONDENTS’ MOTION FOR SUMMARY JUDGMENT BECAUSE PRINCIPAL SMALL’S REGULATION OF TOWLES’S AND POLITTE’S INTERNET SPEECH CREATED OFF-CAMPUS WAS NOT A VIOLATION OF THE STUDENTS’ FIRST AMENDMENT RIGHTS.....7

A. BECAUSE THE COURTS HAVE NOT COME TO A CONSENSUS AS TO HOW TO ADDRESS THE FIRST AMENDMENT ISSUE PRESENTED IN THIS CASE, IT IS NECESSARY TO BALANCE THE INFLUENTIAL FACTORS THAT FREQUENTLY ARISE IN THE ANALYSIS OF THIS ISSUE TO DECIDE WHETHER THE STUDENT’S RIGHTS HAVE BEEN VIOLATED.....7

B. IN BALANCING THE VARIOUS FACTORS RECOGNIZED BY CASE LAW, THE REGULATION OF THE WEBSITES DID NOT VIOLATE THE PETITIONERS’ RIGHT TO FREE SPEECH UNDER THE FIRST AMENDMENT11

1. When the Student Intends the Speech to Reach Campus, It is More Likely That Limiting the Speech is Appropriate Because its Potential to Cause a Disruption on Campus is Much Higher.....11

2. The Number of Listeners That the Student Speaker Reaches, the More Likely it is to Reach the School, Cause a Disruption and Render it Subject to Regulation by the School Administration.....11

3. <u>The Closer the Nexus Between the Speech and a Potential Interference with the Operation and Discipline of the School, the More Likely it is that an Actual Disruption Will Result and that the School Officials Must Step in to Prevent Interference with the Educational Process</u>	14
---	----

II. THIS COURT SHOULD AFFIRM THE ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF HORTON HOPKINS HIGH SCHOOL AND PRINCIPLE SMALLS BECAUSE THE WARRANTLESS SEARCH OF PETITIONER TOWLES BY SCHOOL OFFICIALS WAS REASONABLE UNDER THE FOURTH AMENDMENT.....17

A. THE WARRANTLESS SEARCH DID NOT VIOLATE TOWLES’ FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCH AND SEIZURE BECAUSE THE SEARCH BY HORTON HOPKINS SCHOOL OFFICIALS WAS REASONABLE ACCORDING TO THE <i>TLO</i> TEST.....	18
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1. <u>Horton Hopkins School Officials were Justified in Their Search of Towles Because the Photograph Posted on the FAD Webpage Acted as a Reliable Tip, Which Was Further Supported by Other Incriminating Evidence, so that There Was Reasonable Suspicion that Towles Was in Possession of Illegal Drugs</u>	18
---	----

2. <u>The Strip Search of Towles Was Permissible in Scope Because it Served to Protect Horton Hopkins’ Interest in Maintaining a Drug-Free Campus, it Was Not Excessive in Light of the Potential Illegal Drug Possession Violation it Sought to Prevent, and it Was Conducted in a Reasonable Manner by a School Official of the Same Sex in a Private Place</u>	23
---	----

B. EVEN IF THIS COURT DETERMINES THAT THE STRIP SEARCH CONSTITUTED AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT, HORTON HOPKINS SCHOOL OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW REGARDING STUDENT SEARCHES UNDER THESE CIRCUMSTANCES WAS NOT “CLEARLY ESTABLISHED” AT THE TIME SCHOOL OFFICIALS CONDUCTED THE SEARCH.....	28
--	----

CONCLUSION.....	30
-----------------	----

TABLE OF AUTHORITIES

United States Supreme Court Cases

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) 8, 11

Chambers v. Maroney, 399 U.S. 42 (1970) 17

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)..... 9

Morse v. Frederick, 127 S. Ct. 2618 (2007) 9

New Jersey v. T.L.O., 469 U.S. 325 (1985)..... 17, 18, 20, 23, 28

Pearson v. Callahan, 2009 U.S. LEXIS 591 (Jan. 21, 2009) 28

Thornhill v. Ala., 310 U.S. 88 (1940) 10

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). 7, 8

Vernonia Sch. Dist. v. Wayne, 515 U.S. 646 (1995)..... 17, 18, 29

United States Court of Appeals Cases

Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008) 11, 14

Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005)..... 25, 28

Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966)..... 10, 17

Boucher v. School Bd., 134 F.3d 821 (7th Cir. 1998)..... 13

Cornfield v. Consol. High Sch. Dist. No. 290, 991 F.2d 1316 (7th Cir. 1993). vii, 23, 24

Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) 12, 13, 14, 16

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997)..... 28

Lavine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001) 14

Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007) 11, 14, 15

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

Porter v. Ascension Parish Sch. Bd., 393 F.3d 608 (5th Cir. 2004)..... 10, 11

Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071 (9th Cir. 2008) 24, 25

Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979) 11

U.S. v. Dennis, 183 F.2d 201 (2d Cir. 1950)..... 10

Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991). 19, 20

Wisniewski ex rel. Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007) 8, 13, 15

State Court Cases

Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998)..... 15

J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000)..... 10

Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001) 11, 12

Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007) 10, 15

Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D. Mich. 2002) 12

Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272 (W.D. Wash. 2007) 8, 17

Constitutional Provisions

U.S. Const. amend. IV. vii, 17

U.S. Const. amend. XIV, § 1. vii

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

“Congress shall make no law . . . abridging the freedom of speech.”

U.S. Const. amend. I.

Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”

U.S. Const. amend. IV.

Fourteenth Amendment

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

U.S. Const. amend. XIV, § 1.

STANDARD OF REVIEW

A district court’s grant of summary judgment is reviewed *de novo*, “drawing all factual inferences in favor of the non-moving party.” *Phaneuf v. Fraikin*, 448 F.3d 591, 595 (2d Cir. 2006). Unless there is sufficient evidence to sustain a verdict in favor of the non-moving party, the reviewing court “will affirm the grant of summary judgment.” *Cornfield v. Consol. High Sch. Dist. No. 290*, 991 F.2d 1316, 1320 (7th Cir. 1993).

STATEMENT OF THE CASE

Horton Hopkins High School (“Hopkins”), Respondent, has had an increase in drug use over the last five years. R. 1. During the first two months of the fall 2008 semester alone, fifteen students were caught smoking marijuana on campus and in 2007 twenty-five students were suspended for using illegal drugs on campus. R. 1. That same year, the 17-year-old captain of Hopkins’ volleyball team died as the result of a cocaine overdose at a party. R. 1. Her death greatly affected the Hopkinsville community. R. 1.

Keena Smalls (“Smalls”), Respondent, has witnessed the increase in drug use on campus during her twenty years as principal at Hopkins. R. 1. In January 2007, Smalls requested that the Horton Hopkins School District institute a strict, zero-tolerance drug and alcohol policy. R. 1. The District recognized the need to protect its students and enacted the “Drug and Alcohol Use Policy.” R. 15. The policy provides that school officials may perform searches of students’ book bags, clothing, and lockers if drug use or possession on campus is suspected. R. 1, 15.

Pursuant to the same concerns about drug use by Hopkins students, senior Kit Politte (“Politte”) started a school-sponsored club, “Drug Use Damages Schools” (DUDS). R. 2. The club had 130 members and engaged in proactive activities to promote a drug free lifestyle and discuss the dangers of drug use. R. 2. Also, Politte created a webpage on Friendkepedia at home from her personal computer, which was designed to identify and expose drug dealers in the community. R. 2. The webpage is a part of the social networking site aimed at residents of Hopkinsville and purposed to solicit anonymous tips regarding possible drug dealers. R. 2. Politte, as the website administrator posts the “strongest” tips for others to view. R. 2. Politte promoted the website at a DUDS meeting, and thereafter, all 130 DUDS members were among the 235 members of Politte’s network on the website. R. 2.

Petitioner, Corey Towles (“Towles”), a sophomore at Hopkins, attended a house party hosted by the team captain and Hopkins junior, Jeff Tweegs, on October 3, 2008 in hopes of improving his chances of making the baseball team. R. 2. Tweegs had recently been suspended from school for smoking marijuana on campus and the week prior there were rumors that some students would bring marijuana to the party. R. 2.

Frank Conrad, a Hopkins sophomore, was cited for marijuana possession late that night when police found him holding a marijuana joint at the party. R. 3. Police also cited five other high school students for underage drinking. R.3. Towles had left the party by the time the police arrived and although he claims that he did not see any drug use, he did admit to witnessing several students drinking beer. R. 3. He had also been photographed at the party with Conrad. R. 3.

The following day, that photograph was posted on the FAD webpage. R. 3. The caption of the photo read: “Police find drug use at a local high school party. Are Horton Hopkins students becoming drug dealers?” R. 3. Though his name was not specifically disclosed, Towles face was clearly visible accompanied by Conrad, who was smoking something. R. 3.

The next morning, police alerted Smalls about Conrad’s drug possession citation and the underage drinking citations. R. 3. Within hours, several parents of Hopkins students called Smalls with their concerns regarding drug usage after viewing the photograph of Towles, Conrad, and Thomson on the FAD webpage. R. 3. Smalls called Towles, Conrad, Thomson and Tweegs individually into her office for questioning and each student denied possessing drugs. R. 3. When Smalls searched each of the students’ lockers and book bags according to the school’s drug policy, a small baggie of marijuana was found in Conrad’s locker. R. 3.

In response, Smalls asked each boy to consent to a search of their person in private. R. 3. Although all four students refused, gym teacher, Jim Waters, conducted a search of each boy in a private room. R. 3. None of the boys were touched during the search and were simply instructed to remove their outer clothing so that their pockets could be thoroughly searched. R. 3. No drugs were found on Towles, but marijuana was discovered in Thomson's jeans. R. 3.

Reacting to the FAD webpage photograph of him, Towles created his own webpage on the Friendkepedia network entitled, "Students Against Defamatory Statements" (SADS). R. 3 From his personal computer at home, Towles angrily accused DUDS members of committing a "gross invasion" of his privacy rights and defamation and condemned Hopkins school officials of causing a "far worse injustice" by searching his friends and him and their lockers. R. 3-4. Towles then incited students "to fight this injustice" stating, "I call for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment," and concluded by inducing students to "speak out against Smalls and the rest of those Hopkins idiots." R.4.

As students became aware of Towles' website they began accessing it not only from their homes, but also from the school computer labs and library. R.4. Concerned with keeping discipline and quelling a potentially hostile environment ripe for a student protest, Smalls asked Towles and Politte to close their webpages. R.4. Smalls feared that the pages could be causing too much of a disturbance and interrupting the educational process. R.4.

Towles alleges that the search of his person by Hopkins school officials' constituted an unreasonable search under the Fourth and Fourteenth Amendment, and along with Politte, alleges that the request that they take down their webpages was a violation of the First Amendment. R. 4. Respondents moved for summary judgment on both counts, arguing that the

search was reasonable under the circumstances and raised the doctrine of qualified immunity as a defense in the event the search was ruled to be unreasonable. R. 4, 5. Badger County District Court determined that none of the students' rights had been violated and granted Respondent's motion for summary judgment on both allegations. R. 8.

The State of Grace Court of Appeals affirmed the order granting summary judgment in favor of the Respondents. R. 12. The court held that the search of Towles was unreasonable because it was not justified at its inception and the search was unreasonable in scope. R. 10-11. However, because the constitutionality of a student strip search by school officials was not clearly established at the time of the search, the Respondents were entitled to qualified immunity. R. 11-12. Additionally, the court determined that the webpages "created a substantial disruption" and the request to remove them was not a violation of the First Amendment. R. 10.

The Supreme Court of the State of Grace granted Petitioner's petition for writ of certiorari to determine whether Respondents' warrantless search of Towles on school premises violated his Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment, and whether the Respondents' attempt to regulate students' Internet speech created off-campus was a violation of Petitioner's First Amendment rights. R. 14.

SUMMARY OF ARGUMENT

Regulation of the Petitioner's speech did not violate the First Amendment because it was justified and necessary under the circumstances. Further, the warrantless strip search of the Petitioner did not violate his Fourth Amendment right to be free of unreasonable searches because the strip search was justified at its inception and it was permissible in its scope. Through this appeal, the Respondent's, Horton Hopkins and Principal Smalls, ask this court, on

de novo review, to find that the Court of Appeals correctly affirmed the order granting summary judgment in favor of the Respondent's.

It is necessary to balance several factors that often arise in the analysis of the First Amendment to decide whether the student's rights have been violated. This is the most efficient and equitable manner of addressing this issue in the absence of any direct Supreme Court precedent on this issue and the inconsistent approaches taken by lower courts.

In balancing these factors, the Respondents' request for the Petitioner's to remove their websites was reasonable and constitutional. The websites were both intended to create a reaction that was to occur on campus and the content therein was specifically directed at Hopkins students regarding other students and the school administration. This intentionality combined with the enormity of the possible audience for the speech rendered it particularly important for the administration to limit the imminent disruption on campus.

Furthermore, the closer the nexus between the speech and a potential interference with the operation and discipline of the school, the more likely it is that an actual disruption will result and that the school officials must step in to prevent interference with the educational process. Smalls reasonably foresaw a disruption on campus when the websites came to her attention because the speech called for action on the part of the students that was likely to manifest on campus and, given the climate in the community regarding drug use by high school students, it was very likely that parents and townspeople would be concerned and contact the school directly. Moreover, the websites did not just threaten these foreseeable reactions, but they actually occurred, confirming that Smalls' decision to limit the Petitioner's speech was reasonable, necessary and constitutional.

In addition, summary judgment was properly granted in favor of Horton Hopkins and Principal Smalls because the strip search of Towles was reasonable under the Fourth Amendment. The U.S. Supreme Court in *T.L.O.* determined that “special needs” exist in schools where a search of a student by school officials is reasonable absent probable cause. The *T.L.O.* test provides school officials the flexibility to maintain order on campus while ensuring that the privacy interests of students will not be invaded more than necessary to achieve that legitimate need. The reasonableness of any student search by public school officials under the *T.L.O.* test is determined by: (1) whether the search was justified at its inception; and (2) whether the scope of the search was reasonable. A search based on reasonable suspicion that the student violated, or is in the process of violating, either school rules or the law is sufficient to justify a search. Further, the scope of a search is permissible when the method employed is reasonably related to the objectives of the search, not excessively intrusive in light of the students’ age and sex, and is not excessively intrusive in light of the nature of the infraction.

Reasonable suspicion existed to justify Smalls to order a strip search of Towles. A photo posted on a drug prevention website showed Towles at a party sitting next to Conrad, who was smoking. That same night, Conrad was cited by police for marijuana possession after he was found holding a joint. Further, after Smalls ordered the initial search of the boys’ book bags and lockers, a small bag of marijuana was found in Conrads’ locker. Therefore, the evidence before Smalls provided her reasonable suspicion that Towles’ association with a known drug user, based on the photographic tip, would lead her to find that he was in possession of marijuana as well.

A strip search furthered Horton Hopkins’s legitimate need to maintain a drug-free campus, especially in light of the increase in drug use among its students. A strip search under

these circumstances is the most effective and least intrusive method of determining whether a student has illegal drugs on his person, when compared to a pat-down search, which requires physical contact. Although Towles may have been extremely self-conscious at his age, the search was conducted by the male gym teacher in a private place without any physical contact and where Towles was allowed to wear his undergarments. Because marijuana possession by students on campus poses a serious threat to the safety of the student body, a strip search in order to prevent drug use and possession is a reasonable method in order to protect the student body. Thus, this Court should affirm the order granting summary judgment on the grounds that the strip search was reasonable. However, should this Court find that the search was unreasonable, this Court should affirm the order granting summary judgment on the grounds that Horton Hopkins school officials are entitled to qualified immunity because the law governing student searches in regards to Towles Fourth Amendment rights was not “clearly established” at the time.

ARGUMENT

II. THIS COURT SHOULD AFFIRM THE ORDER GRANTING THE RESPONDENTS’ MOTION FOR SUMMARY JUDGMENT BECAUSE PRINCIPAL SMALL’S REGULATION OF TOWLES’S AND POLITTE’S INTERNET SPEECH CREATED OFF-CAMPUS WAS NOT A VIOLATION OF THE STUDENTS’ FIRST AMENDMENT RIGHTS.

A. BECAUSE THE COURTS HAVE NOT COME TO A CONSENSUS AS TO HOW TO ADDRESS THE FIRST AMENDMENT ISSUE PRESENTED IN THIS CASE, IT IS NECESSARY TO BALANCE THE INFLUENTIAL FACTORS THAT FREQUENTLY ARISE IN THE ANALYSIS OF THIS ISSUE TO DECIDE WHETHER THE STUDENT’S RIGHTS HAVE BEEN VIOLATED.

The Supreme Court has never concluded whether an attempt to regulate students’ Internet speech created off-campus was a violation of their First Amendment rights. It is well established that students do not “shed their constitutional rights of freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

However, student rights in public schools “are not automatically coextensive with the rights of adults in other settings,” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986), and must be recognized in a way that complies with “the special characteristics of that school environment.” *Tinker*, 393 U.S. at 506. First, it is important to examine Supreme Court precedent for guidance.

Tinker, as the first Supreme Court Decision on the issue, is regarded as the "magna carta of students' expression rights." *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1280 (W.D. Wash. 2007). There, students wore black armbands to voice their opposition to the conflict in Vietnam. *Id.* In invalidating a limit on the passive speech, the Court established that student speech may be regulated if it is found that it: (1) “would substantially interfere with the work of the school,” or (2) would cause “material and substantial interference with schoolwork or discipline,” or (3) “would materially and substantially disrupt the work and discipline of the school,” or (4) “might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities” *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007). This is the Supreme Court standard with the widest berth and is most often employed in off-campus student speech cases because of its general applicability. It is often simply referred to as the “substantial disruption test” and will be applied to the current facts below.

Fraser addressed a speech given by a student in a school assembly and established that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission.” *Fraser*, 478 U.S. at 685. The court stressed that “the objectives of public education as the ‘[inculcation of] fundamental values necessary to the maintenance of a democratic political system,’” *Id.*, and that “schools must teach by example” because “inescapably, like parents, they are role models.”

Id. Fraser's holding is inapplicable to our facts, however, because the websites cannot legitimately be classified as vulgar or lewd, however, the court's reasoning is helpful in understanding the competing interests at stake and illustrates the importance of giving deference to school administrations.

Hazelwood involved the censorship of a school newspaper article and held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Hazelwood is particularly illustrative to our facts because Politte's speech was also a "school sponsored expressive activity" subject to regulation. R. 2. She created FAD pursuant to a conversation with a guest speaker at DUDS and promoted the website at a DUDS meeting in a Hopkins classroom. The website would thus appear to be school sponsored and Towles even identified DUDS as "school organization" and the one to blame for the posting of the photograph on its website, FAD. R. 3. *Hazelwood* suggests that administrators can prohibit such expressive speech. However, even if this court determines that *Hazelwood* is not applicable to Politte's speech, the regulation thereof was justified because it was reasonably foreseeable that the speech would cause a material disruption on campus.

Lastly, *Morse* is the most recent and most narrow decision articulated by the Court on student speech rights. *Morse v. Frederick*, 127 S. Ct. 2618 (2007). Therein, the Court determined that the school did not violate a student's rights when it confiscated a banner that read, "BONG HiTS 4 JESUS" that was displayed at an off-campus, school-sponsored event. *Id.* at 2622. The Court held that "schools may take steps to safeguard those entrusted to their care

from speech that can reasonably be regarded as encouraging illegal drug use.” *Id.* Though the holding itself is groundbreaking, it is not controlling here because there is no allegation that either website was promoting illegal drug use.

Although the aforementioned cases partially address the issue of Internet speech created off campus and some state and appellate cases have taken a stab at the issue, no two courts have agreed on an approach of how to solve the problem in the future. The quandary has been commented on in many cases. The court in *Porter* aptly noted that commentators have been “[f]rustrated by these inconsistencies” and pointed out that “a reasonable school official facing this question for the first time would find no ‘pre-existing’ body of law from which he could draw clear guidance and certain conclusions.” *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 620 (5th Cir. 2004); *see also J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 419 (Pa. Commw. Ct. 2000) (stating that “there is little case law addressing such an issue.”); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) (“The difficulty is in articulating the appropriate constitutional boundaries as to the breadth of public school disciplinary authority in this particular factual scenario.”).

Because of this lack of consistent precedent, it is imperative to balance the factors applied in cases that have previously dealt with the issue. In limiting free speech, “decisions must be made on a case by case basis,” *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 754 (5th Cir. 1966), and “it is incumbent on the courts to ‘weigh the circumstances’ and ‘appraise the substantiality of the reasons advanced.’” *Thornhill v. Ala.*, 310 U.S. 88, 96 (1940). The infamous Learned Hand wisely stated that courts “must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” *U.S. v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

The Supreme Court applied a balancing approach in student speech case, stating, “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.” *Fraser*, 478 U.S. at 681; *see also Porter*, 393 F.3d at 611 (outlining the need to balance “a safe and effective learning environment” versus constitutional rights.); *e.g. Barr v. Lafon*, 538 F.3d 554, 568 (6th Cir. 2008); *Lowery v. Euverard*, 497 F.3d 584, 592 (6th Cir. 2007); *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1049 (2d Cir. 1979).

B. IN BALANCING THE VARIOUS FACTORS RECOGNIZED BY CASE LAW, THE REGULATION OF THE WEBSITES DID NOT VIOLATE THE PETITIONERS’ RIGHT TO FREE SPEECH UNDER THE FIRST AMENDMENT.

Several factors have repeatedly arisen in the analysis of this issue and will be examined to determine whether the students’ First Amendment rights have been violated: (1) the number of listeners exposed to the speech; (2) whether the student intended for the speech to reach campus; (3) and the nexus between the speech and a potential disruption on campus.

1. When the Student Intends the Speech to Reach Campus, It is More Likely That Limiting the Speech is Appropriate Because its Potential to Cause a Disruption on Campus is Much Higher.

“Private writings made and kept in one's home enjoy the protection of the First Amendment . . . [f]or such writings to lose [that] protection, something more than their accidental and unintentional exposure to public scrutiny must take place.” *Porter*, 393 F.3d at 617-618.

Killion involved a list of insults composed by a student after hours and in his home about the school’s athletic director. *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001). The court decided that the student’s rights had been violated because the list was merely emailed by the student to a few friends, it was not injected onto campus and it was

on campus for several days before the administration become aware of it. *Id.* at 455. Similarly, in *Mahaffey*, regulation of a website was found unconstitutional when it was created “for laughs” and that the student never meant “anyone else to see it.” *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002). The court explained that “[a]lthough other students did see the website, there [was] no evidence that they did so because Plaintiff ‘communicated’ the website to them or intended to do so.” *Id.*

The express purpose of the FAD website was to expose drug dealers in the community and presumably on the Hopkins campus in hopes of creating a stigma against them and decrease their illegal activity. Politte’s actions to those ends provoked the creation of Towles’s webpage wherein he rallied students to “fight this injustice,” called for students to “let our school administrators know that we will not tolerate this kind of treatment” and to “speak out against Smalls” and the school officials, whom he termed, “idiots.” R. 4. This speech on both these sites is much more intentional than a website created “just for laughs” or an email that was sent to friends and took place entirely off campus.

In *Doninger* a student wrote disparaging comments about school officials on her personal website that was created off campus. *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008). Upset by the administration having postponed a school event, she asked students via her blog to call the school and complain. *Id.* “The district court concluded that the content of the message itself suggested that her purpose was ‘to encourage her fellow students to read and respond to the blog.’” *Id.* The Second Circuit held that it was reasonably foreseeable that the student’s posting would reach campus and that it would cause a “substantial disruption within the school environment,” rendering it subject to regulation. *Id.* at 50.

In *Boucher*, the student wrote an article in an underground newspaper, entitled "So You Want To Be a Hacker," that sought to provide all the information necessary to hack into the school's computers. *Boucher v. School Bd.*, 134 F.3d 821, 828-829 (7th Cir. 1998). In concluding that the discipline was not a violation of Boucher's constitutional rights, the court observed that the article was "a call to action detrimental to the tangible interests of the school," and advocated "on-campus activity." *Id.*

The speech here is analogous to that of encouraging on-campus activity that occurred in *Doninger* and *Boucher*. The school's request to remove the webpages was especially justified because the speech was specifically directed at that school's administration and another student by name and purposed "to encourage . . . fellow students to read and respond to the blog." Given the blatant call to arms and solicitation to the school and community, the Petitioners' speech can be considered no less than a deliberate appeal for their words to effectuate a dramatic reaction on campus.

2. The Number of Listeners That the Student Speaker Reaches, the More Likely it is To Reach the School, Cause a Disruption and Render it Subject to Regulation by the School Administration.

The number of listeners is a particularly prominent factor when the speech is transmitted via the Internet because the potential audience size is nearly infinite as websites are viewable from any computer in the world. In *Wisniewski* the court found the school's regulation of speech as constitutional when the icon was viewed by a maximum of only 15 of the student's "buddies" in a three-week time period. *Wisniewski*, 494 F.3d at 36. In *Doninger*, like all Internet cases, the speech communicated via the blog was available for all the students and parents to see.

Doninger, 527 F.3d at 50. In that case the district court found that the student knew that her

message was likely to reach other members of her school community, which tipped the scales in favor of regulation. *Id.*

Such a wide audience was also available here when Towles and Politte posted their webpages on the Internet. Their speech was likely to reach a huge amount of people in a very short amount of time because it was targeted to reach all 235 members of Politte's network including all 130 DUDS members. In fact, the page was directed at the Hopkinsville residents in general but anyone was able to access both webpages. R. 2, n. 2. The entire purpose of Politte's website was to gather information from a wide body of people that might have information in order expose possible drug dealers so they may be caught by the authorities or at the very least be forced to limit their illegal activity. In short, the aim of Politte's website was to expose the information to as many people as possible and as quickly as possible. This is evidenced by the speed by which the photograph of Towles was posted for public consumption, even though it was likely defamatory and misleading. Therefore, given the high degree of foreseeability that a disruption would occur, the administration's regulation of the speech was warranted in order to fulfill its "duty to prevent disturbances." *Lowery*, 497 F.3d at 592.

3. The Closer the Nexus Between the Speech and a Potential Interference with the Operation and Discipline of the School, the More Likely it is that an Actual Disruption Will Result and that the School Officials Must Step in to Prevent Interference with the Educational Process

"Tinker does not require school officials to wait until the horse has left the barn before closing the door," *Id.* at 591-592, in that, "Tinker does not require certainty that disruption will occur." *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *see also Barr*, 538 F.3d at 565. This is imperative because otherwise "school officials would be between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation," which "would be disastrous public policy," because, "requiring school officials to

wait until disruption actually occurred before investigating would cripple the officials' ability to maintain order." *Lowery*, 497 F.3d at 596. However, "[w]hile speech may be limited based upon a fear or projection of such disruption, that fear must be 'reasonable' and not an 'undifferentiated fear' of a disturbance." *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). "In cases involving off-campus speech . . . the school must demonstrate an appropriate nexus." *Layshock*, 496 F. Supp. 2d at 599.

In *Wisniewski*, a student was punished for transmitting an image depicting the killing of his teacher because it posed "a reasonably foreseeable risk that the icon would come to the attention of school authorities and 'materially and substantially disrupt the work and discipline of the school.'" *Wisniewski*, 494 F.3d at 39. In applying the *Tinker* standard, the court concluded the fact that the speech was created off campus "does not necessarily insulate him from school discipline," *Id.* at 39, and specifically pointed out that the speech, "*once made known to the teacher and other school officials*, would foreseeably create a risk of substantial disruption within the school environment." *Id.* at 40 (emphasis added).

Here, the websites in tandem created more than enough friction off campus that it was reasonably foreseeable that students would heed the exhortations, on Towles's website specifically, and contact the school officials as he suggested or act out in other ways. What begins as voicing displeasure can quickly transform into outright disrespect. Like in *Wisniewski*, the speech was not only likely to come to the attention of school officials but actually did when concerned parents called in response to seeing the FAD website.

In *Donniger*, a sufficient nexus was found and regulation was considered constitutional because the student's conduct "posed a substantial risk that . . . administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate

misguided anger or confusion” regarding the subject matter of the student’s speech. *Doninger*, 527 F.3d at 51-52. The court also noted that, the speech “risked not only disruption of efforts to settle the . . . dispute, but also frustration of the proper operation of . . . student government.” *Id.* at 52.

Tinker simply requires that a disruption be foreseeable in order for the speech to be subject to regulation. The reaction to websites in this case was foreseeable not only because drug use by high school students is an undeniably grievous issue, but also because the Hopkinsville community was particularly sensitive to the effects of drug use in the wake of the death of Hopkins student Kelly Smith who had died of a drug overdose in late 2007. Given the circumstances in this community and school specifically, it was reasonably foreseeable that the websites would spark a response that the school officials would need to address, above and beyond their normal responsibilities.

Furthermore, the website did not just threaten this foreseeable reaction, but it actually occurred when parents called Smalls after viewing Politte’s website. Analogous to *Doninger*, Politte’s and Towles’s websites resulted in concern from the parents in the form of phone calls which took time away from Smalls and other school officials going about their duties and maintaining a safe and well functioning educational institution. Therefore, Smalls’s request that the students remove their webpages was not only constitutional because the speech posed a reasonably foreseeable risk that the speech would disrupt the work of the school, but it actually did interfere when Smalls had to address parent phone calls, when she was forced to take time to question Conrad, Towles, Thomson and Tweegs after viewing Politte’s webpage and Waters had to spend time searching the boys to ensure that drugs were not on campus.

Moreover, in *Blackwell*, the court determined that it was not only “proper” but “necessary” to regulate a student’s speech that was “calculated to undermine the school routine.” *Blackwell*, 363 F.2d at 753. Also, as aforementioned, the students here fully intended on their speech to spark a reaction and hoped that it would reach campus and “undermine the school routine,” by students standing up to school officials. In fact, the *Requa* court elaborated on the Tinker standard in stating that “[t]he ‘work and discipline of the school’ includes the maintenance of a civil and respectful atmosphere toward teachers and students alike.” *Requa*, 492 F. Supp. 2d at 1280. The call to arms and barefaced solicitations for information to expose possible drug dealers certainly disrupted the maintenance of a civil and respectful atmosphere towards the campus community, which under *Requa* renders the speech subject to regulation.

II. THIS COURT SHOULD AFFIRM THE ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF HORTON HOPKINS HIGH SCHOOL AND PRINCIPAL SMALLS BECAUSE THE WARRANTLESS SEARCH OF PETITIONER TOWLES BY SCHOOL OFFICIALS WAS REASONABLE UNDER THE FOURTH AMENDMENT.

The Court of Appeals correctly affirmed the order granting summary judgment in favor of Horton Hopkins school officials for the warrantless strip search of Towles. Under the Fourth Amendment, the Federal Government shall not violate “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” U.S. Const. amend. IV; see *Vernonia Sch. Dist. v. Wayne*, 515 U.S. 646, 652 (1995). The Fourteenth Amendment extends this constitutional protection to searches and seizures of school students by public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). In general, the Fourth Amendment requires a warrant based upon probable cause for a search to be reasonable. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). However, an exception to the warrant requirement is made when there are “special needs” to justify a search absent probable cause. *Vernonia Sch. Dist.*, 515 U.S. at 653.

The U.S. Supreme Court determined that the “special needs” exception exists in public schools. *Id.* In balancing the privacy interests of students and the need for school officials to have the freedom to maintain order in the school, the U.S. Supreme Court held that the search of a student “depend[s] simply on the reasonableness, under all the circumstances, of the search.” *T.L.O.*, 469 U.S. at 341. To ensure that teachers and school administrators have the flexibility to protect our students from the threat of illegal drugs on campus, we respectfully ask this Court to find that the search of Towles was reasonable under the circumstances.

A. THE WARRANTLESS SEARCH DID NOT VIOLATE TOWLES’ FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCH AND SEIZURE BECAUSE THE SEARCH BY HORTON HOPKINS SCHOOL OFFICIALS WAS REASONABLE ACCORDING TO THE *TLO* TEST.

The strip search of Towles by Horton Hopkins school officials was reasonable in order to secure a drug-free campus. According to *T.L.O.*, the policy behind the reasonableness standard is to allow school officials the flexibility of maintaining order on campus, while ensuring that the privacy interests of students will not be invaded more than is necessary to achieve that legitimate need. *T.L.O.*, 469 U.S. at 341. The reasonableness of any search of a student by public school officials is determined by: (1) whether the search was justified at its inception; and (2) whether the scope of the search was reasonable. *Id.* at 341-342 (hereafter the “*T.L.O.* test”).

1. Horton Hopkins School Officials were Justified in Their Search of Towles Because the Photograph Posted on the FAD Webpage Acted as a Reliable Tip, Which Was Further Supported by Other Incriminating Evidence, so that There Was Reasonable Suspicion that Towles Was in Possession of Illegal Drugs.

The photograph of Towles posted on the FAD webpage, coupled with other corroborating evidence, provided Horton Hopkins school official’s reasonable suspicion to justify the strip search of Towles. A search of a student is justified at its inception when school officials have reasonable suspicion to suspect that a search will reveal evidence that the student has violated, or is in the process of violating, either school rules or the law. *Id.* at 341-342. The quality and

quantity of an informant's tip is a factor in determining whether there is reasonable suspicion to justify a search. *Williams v. Ellington*, 936 F.2d 881, 888-889 (6th Cir. 1991). In *Williams*, a student informant ("Informant") reported to the school principal ("Principal") that she witnessed the student-plaintiff ("Student") and another girl ("Cohort") with a clear glass vial containing white powder in typing class the day before. *Id.* at 882. The Principal then spoke with the typing teacher ("Teacher") who indicated that the Cohort's behavior was strange that day and that during the previous semester, the Teacher found a note under the Students' desk that made reference to parties where she used the "rich man's drug." *Id.* Several days later, the Cohort's father reported to the Principal that he believed his daughter might be using drugs. *Id.* Later that week, Informant told the Principal that she observed the Student and the Cohort in the bathroom with the white powdery substance again. *Id.* at 883.

In response, the Principal and the Assistant Principal confronted them with their suspicions of drug possession. *Id.* The Cohort produced a small brown vial from her purse containing a volatile substance, which was known to be illegally used for inhalation. *Id.* Because the brown vial did not match the description provided by the Informant, the Assistant Principal searched the Students' locker, but no drugs were found. *Id.* The Student was then asked to empty her pockets, remove her T-shirt, lower her jeans, remove her shoes and socks, and pull the elastic of her undergarments in front of the Assistant Principal (a female). *Id.* No drugs were found. *Id.* At issue was whether the strip search of the plaintiff was justified at its inception based on the Informants' tip that the Student and the Cohort possessed a white powdery substance while on school grounds. *Id.* at 886-887.

The court held that the strip search was justified since the Principal could reasonably suspect that the Student was concealing evidence of illegal drugs on her person because: (1) the

Informants' two tips were determined not to be based on an improper motive towards the Student and the Cohort after a careful inquiry by the Principal; (2) the initial tip by the Informant was supported by the discovery of the Students' letter found in typing class and the suspicions of the Cohorts' father; and (3) the subsequent tip by the Informant was supported by the Cohorts' production of the brown vial containing a volatile substance. *Id.* at 889. Thus, even though the strip search did not result in any evidence of illegal drugs, the court concluded that strip search was justified at its inception based on the quality and quantity of information supporting the Informants' tips. *Id.*; *cf. Phaneuf*, 448 F.3d at 599 (court held that a strip search based on the tip of a student-informant that the student-plaintiff planned to hide marijuana "down her pants" was not justified at its inception partly because: (1) there was no evidence to support the school officials' belief that the informant was a reliable source; and (2) the school official did not attempt to corroborate, investigate, or substantiate the tip in any way prior to the strip search); *see T.L.O.*, 469 U.S. at 347 (court found that the discovery of evidence that indicates a student may have illegal drugs on their person provides reasonable suspicion to school officials to justify further exploration of the student's person).

Here, the photograph posted on the FAD website acted as a tip to alert Smalls that Towles would be in possession of illegal drugs, similar to *Williams*. Although the Informants' tip in *Williams* was based on her first-hand account of what she personally saw, whereas the photograph here is simply a graphic depiction from an anonymous source, the photographic tip in the present case strongly establishes reasonable suspicion for Smalls to justify an initial search of Towles. Further, additional evidence came to light after the posting of the photo that strengthened the reliability of the tip. First, like *Williams*, there is no evidence that the photo was posted on the FAD website out of improper motive towards Towles. Second, like *Williams*, the

initial search of Towles' book bag was justified because the photographic tip of him sitting with a known drug user was supported by additional evidence that indicated he may be in possession of marijuana. Specifically, the photo showed Towles at Tweegs' house party, where it was rumored that marijuana would be readily available. Further, the host of the party, Tweegs, was recently suspended for marijuana use on campus. Considering Towles went to the party in hopes of meeting some of the baseball players to better his chances of making the team, it would not be unreasonable to link Towles to possible drug use and/or possession due to his association with Tweegs, the captain of the baseball team.

Moreover, Towles was pictured in the photo sitting with Conrad, who was smoking. Two days after the photo was taken and before the initial search, police notified Smalls that Conrad was cited for smoking marijuana at the party. The fact that Conrad was cited for marijuana possession at the party is significant because the photo showed Towles sitting next to Conrad while he is smoking, which would lead a reasonable person to infer that Towles may also be in possession of, and/or using, marijuana. Although each individual piece of evidence by itself may not provide reasonable suspicion to believe that Towles was in possession of marijuana, the totality of the evidence would provide school officials with reasonable suspicion to justify the initial search of Towles' and the other boys lockers and book bags because, like *Williams*, the photographic tip was strengthened by each piece of evidence.

The second search, the strip search of Towles, was justified at its inception because after Smalls conducted a search of the four student's lockers and book bags, she found a small bag of marijuana in Conrads' locker. This is significant because, like *T.L.O.*, the discovery of illegal drugs during the initial search of the students' lockers and book bags provided Smalls the reasonable suspicion to justify a further exploration of the boys to determine if they had drugs on

their person. Furthermore, although it was Conrad, and not Towles, who was caught with illegal drugs, this evidence would nonetheless justify a strip search of Towles. Like *Williams*, where the strip search of the student was justified partly on the discovery of a brown vial possessed by the Cohort due to their association with each other, here, Conrad's possession of the marijuana would justify a search of Towles because of Towles association with Conrad via the photographic tip.

Lastly, the initial search and the subsequent strip search of Towles, based on the photographic tip, was justified because, unlike *Phaneuf*, the photo was provided by a reliable source and the credibility of the source was further substantiated by Smalls before conducting the search. Unlike *Phaneuf*, the photo was posted on a drug prevention webpage where the administrator, Politte, claimed to post only the "strongest" tips for the purpose of curbing drug use among the student body and to provide police with leads to arrest local drug dealers. In addition, 198 Hopkins students are members of the FAD webpage. This indicates that the photograph was a reliable tip since it was likely that the photo was taken by one of the numerous student members who may have seen first-hand the drug use by one of the boys in the photo and wished to report it. Further, unlike *Phaneuf*, Smalls did not conduct any of the searches based solely on the photographic tip. The tip was substantiated by the police report of Conrad's use of marijuana at the party and the discovery of marijuana in Conrad's locker. Therefore, this court should conclude that the strip search of Towles was justified at its inception because the photograph on the FAD webpage served as a reliable tip, which, in conjunction with the discovery of additional evidence by Smalls, provided reasonable suspicion to believe that Towles had marijuana on his person.

2. The Strip Search of Towles Was Permissible in Scope Because it Served to Protect Horton Hopkins' Interest in Maintaining a Drug-Free Campus, it Was Not Excessive in Light of the Potential Illegal Drug Possession Violation it Sought to Prevent, and it Was Conducted in a Reasonable Manner by a School Official of the Same Sex in a Private Place.

The method of search employed by Hopkins school officials was not unreasonable in scope. The scope of any student search is permissible when the methods used to search are: (1) reasonably related to the objectives of the search; (2) not excessively intrusive in light of the students' age and sex; and (3) not excessively intrusive in light of the nature of the infraction. *T.L.O.*, 469 U.S. at 743. The scope of a student strip search is permissible when it is used as a highly effective, but minimally intrusive, method of determining whether a student is carrying illegal drugs. *Cornfield*, 991 F.2d at 1323. In *Cornfield*, a teacher's aide alerted the Dean (a male) and the students' male teacher, that a male, 16-year-old student appeared "too well-endowed." *Id.* at 1319. The next day, the student was boarding the school bus when the teacher and the dean (collectively "School Officials") took the student aside and asked him to accompany them to the deans' office. *Id.*

The School Officials confronted the student with their suspicions that he was "crotching" drugs due to the unusual bulge in his crotch area for the second day in a row. *Id.* The School Officials escorted the student to the boy's locker room to conduct a strip search. *Id.* The School Officials believed that a strip search would be the most effective and least intrusive method of determining whether the student had drugs in his crotch area, as compared to a pat-down search. *Id.* The School Officials locked the locker room door, after ensuring that there was no one else in the locker room. *Id.* Without physically touching the student, the School Officials inspected the students' naked body and physically inspected his clothes while the student put on gym clothes. *Id.* No evidence of drugs was found. *Id.*

The court addressed the issue of whether the scope of the search was permissible based on the reasonable suspicion that the student was “crotching” drugs. *Id.* at 1323. It held that a completely nude strip search was permissible in scope, even though the Student was at an age where children are extremely self-conscious about their bodies, because: (1) a strip search was the least intrusive method of determining whether the Student had drugs in his crotch area; (2) the School Officials were both males; (3) the search was conducted in the privacy of the boy’s locker room with no other witnesses; (4) the School Officials did not physically touch the Student; and (5) the School Officials allowed the Student to put on gym clothes instead of standing there naked. *Id.* Thus, even though drugs were not found as a result of the strip search, the court concluded that the search was not unreasonable in scope. *Id.*; *see Bd. of Educ. of Indep. Sch. Dist. No. 92*, 536 U.S. 822, 834 (implementation of a blanket drug testing policy for all students participating in extracurricular activities was held to be reasonable because it was reasonably related to the schools objective of preventing, deterring, and detecting drug use and protecting school children from the health risks of drug use, especially in light of the recent increase of drug use on campus).

A student search is permissible in scope when the nature of the infraction is proportional to the method used. *Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1085 (9th Cir. 2008). In *Redding*, a 13-year-old, female student was strip searched by two female school officials (“School Officials”) to determine if the student had either prescription or over-the-counter ibuprofen pills on her person. *Id.* at 1075. First, the School Officials had the student remove her socks and jacket, but nothing was found. *Id.* Then the student removed her T-shirt and stretch pants and sat in her bra and underwear while the School Officials examined her clothes. *Id.* Still no pills were found. *Id.* School officials then instructed the student to pull her

bra out to the side and shake it, which cause her naked breasts to be exposed. *Id.* Even though no pills were found, the School Officials requested the student to pull out her underwear at the crotch and shake it, revealing her pelvic area. *Id.* Since no pills were found at this point, the School Officials told the student to put her clothes back on. *Id.* The only evidence that the School Official's had that linked the student to the alleged possession of ibuprofen was the accusation of another student ("Informant"). *Id.* The Informant, who was caught with several ibuprofen pills on her person by the School Officials prior to the strip search of the student, claimed that she obtained them from the Student. *Id.*

At issue was whether the strip search was reasonable in scope. *Id.* at 1085. The court held that the search was not reasonable under these circumstances because a strip search is disproportionate to the objective of locating prescription and/or over-the-counter ibuprofen on the Students' person when the most logical place to find the pills would be in her pockets, purse, or bags, which was previously searched to no avail. *Id.* Further, the nature of the alleged infraction posed no imminent danger to her or other students because the substances in question are available over the counter and commonly available. *Id.* Because the nature of the alleged infraction was minor compared to the method of search implemented, the court concluded that the school's legitimate need to maintain order on campus would not be furthered by this unreasonable strip search. *Id.* at 1087; *see Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 605 (6th Cir. 2005) (a student strip search to find money "serves a less weighty governmental interest than a [strip] search undertaken for items that pose a threat to the health or safety of students, such as *drugs . . .*") (emphasis added).

Here, like *Cornfield*, although Towles was of an age that he would likely be self-conscious of his body, the other factors that supported the permissibility of the strip search in

that case are present here. First, like *Cornfield*, a strip search is the least intrusive method of searching a student when there is reasonable suspicion to believe there are illegal drugs on his person. A strip search of Towles for illegal drugs was permissible, like *Cornfield*, because it would be more effective at detecting drugs than a pat down search of his outer clothing would be. Further, a strip search would be less intrusive since there would be no physical contact of his body, including the crotch area, which a 16-year-old boy would be very self-conscious of. In addition, Towles was not made to strip down to his naked body, like the Student in *Cornfield*. Rather, Towles wore his undergarments during the search, which would mean, at a minimum, Towles was able to cover his crotch area with underwear. This is significant because wearing undergarments would actually be a less intrusive search when compared to the strip search in *Cornfield*, which would further support the permissibility of the strip search in the present case. Furthermore, like *Cornfield*, a male gym teacher conducted the strip search of Towles in a private room where Towles was never physically touched.

The objective of the strip search was to determine whether Towles had illegal drugs on his person in order to secure a drug-free campus. Like *Board of Education of Independent District No. 92*, where a blanket drug testing policy was reasonable in scope because it was reasonably related to the schools objectives, here, the strip search of Towles is permissible because a strip search serves to uphold the legitimate need of Horton Hopkins to maintain a drug-free campus. Further, the individualized strip search exemplified in this case is even less intrusive, when compared to *Board of Education of Independent District No. 92* where drug testing was appropriate simply based on a category of students, not reasonable suspicion, because there was at least some level of reasonable suspicion to justify the search of Towles in the first place. Lastly, like *Board of Education of Independent District No. 92*, Horton Hopkins

goal of reducing the illegal drug problem on campus is reasonably served by a strip search when school officials have individualized suspicion of drug possession by one of their students.

Board of Education of Independent District No. 92 also indicates that preventing, deterring, and detecting drug use in order to protect the school children is a legitimate concern in schools, especially when there is evidence of increased drug use on campus. Thus, when a school official has reasonable suspicion that a student may be using or possessing drugs, the nature of an illegal drug offense is severe enough to warrant a strip search in order to further the schools' legitimate need of preventing drug use and possession. Here, unlike *Redding*, a strip search of Towles to determine if he has illegal drugs on his person is proportional to the type of method used to search him. Unlike *Redding*, where there was no imminent threat or danger to school children possessing or using ibuprofen, here, marijuana and other illegal drugs pose a significant threat to Horton Hopkins students, especially in light of the increase in drug use among its students and recent death of a student due to a drug overdose. Further, unlike *Redding*, illegal drugs such as marijuana require a closer search of a persons' body because, unlike ibuprofen pills, it would be more logical for an illegal drug possessor to hide drugs in a place where items are not commonly stored and not easily found. Therefore, this court should find that the strip search of Towles was permissible in scope because it served to protect Horton Hopkins students from illegal drugs, the threat of illegal drug possession on campus is a serious offense that warrants a strip search, and the strip search was not excessive in light of Towles age and sex.

B. EVEN IF THIS COURT DETERMINES THAT THE STRIP SEARCH CONSTITUTED AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT, HORTON HOPKINS SCHOOL OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW REGARDING STUDENT SEARCHES UNDER THESE CIRCUMSTANCES WAS NOT “CLEARLY ESTABLISHED” AT THE TIME SCHOOL OFFICIALS CONDUCTED THE SEARCH.

The law regarding the reasonableness of a student strip search by school officials for illegal drugs under these circumstances was not “clearly established.” The qualified immunity doctrine protects public school officials from civil liability as long as their conduct does not violate the clearly established constitutional rights of a student, that which a reasonable person would have known. *Pearson v. Callahan*, 2009 U.S. LEXIS 591, at *14 (Jan. 21, 2009). A public school official is entitled to qualified immunity if: (1) the facts alleged by the student establish that a constitutional right was violated; and (2) the constitutional right was not “clearly established” at the time of the alleged violation. *Pearson*, 2009 U.S. LEXIS 591, at *15-16 (sequence of the two-step rule is appropriate, but not mandatory).

A constitutional right is not “clearly established” when the law does not provide a concrete and factually defined context that would make it obvious to a reasonable public school official in the defendants’ shoes that the alleged misconduct violated the students’ constitutional right. *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823 (11th Cir. 1997) (back-to-back strip searches of two girls within the same day to uncover \$7.00 that was allegedly stolen by one of them was not a violation of a “clearly established” constitutional right because the *T.L.O.* test had never been applied to define the reasonableness of a search under a similar factual context); *Beard*, 402 F.3d at 606 (school officials were protected under qualified immunity for their participation in a constitutionally impermissible strip search of over twenty school children for stolen money because the law governing student strip searches (specifically *T.L.O.*, 469 U.S. 325 (1985) and *Vernonia*, 515 U.S. 646 (1995)) only set forth basic legal principles relating to school

searches, not specific guidance on how to apply the rules to the many distinct circumstances that school officials face).

Assuming that the facts Towles alleges establish that the strip search conducted by Horton Hopkins school officials was unreasonable under the Fourth Amendment, Towles constitutional right to be free of an unreasonable strip search was not “clearly established” so that a reasonable person in Smalls place would have realized a strip search under the circumstances was unreasonable. *T.L.O.*, the U.S. Supreme Court decision governing student searches based on individualized suspicion, would have led a reasonable principal based on the circumstances before Smalls to rely on its broad legal principles when determining if a search of a student is justified and whether a strip search would be permissible in scope. Like the reasoning in *Beard*, here, *T.L.O.* provides school officials the legal principles that govern student searches, but the decision fails to provide specific guidance on how the two-prong *T.L.O.* test is to be applied to strip searches based on the facts before Principal Smalls.

Further, like *Jenkins*, there is no other case law that provides a concrete and factually similar situation that would have put Smalls on notice that a strip search based on a photographic tip posted on the Internet would be unreasonable under the Fourth Amendment. On the contrary, similar cases dealing with strip searches to determine drug possession by a student, like *Cornfield*, would only provide school officials with the opposite conclusion that strip searches are in fact reasonable under these circumstances. In *Cornfield*, the Student was stripped naked solely on the basis that his crotch appeared “too well endowed,” while here, Towles was searched above his undergarments based on evidence that provided equal, if not greater, support to justify a search. A reasonable principal looking at *Cornfield* for guidance in dealing with strip searches for drugs would surely decide that a less intrusive type of strip search, like that

conducted on Towles, would not violate any “clearly established” rights. Thus, this court should find that Horton Hopkins school officials are entitled to qualified immunity because (1) *T.L.O.* provides insufficient guidance to school officials on how to apply the *T.L.O.* test to strip searches, and (2) a reasonable principal in the present case looking to other similarly factual cases would conclude that a strip search would not violate any of Towles “clearly established” constitutional rights.

CONCLUSION

The Court of Appeals properly affirmed the order granting summary judgment on both counts in favor Horton Hopkins and Principal Smalls. In appropriately balancing the various pertinent factors regarding the intent of the student when producing the speech, the number of listeners and the foreseeability of the speech creating a disruption on campus, the reasonably cautious request that the Petitioner’s remove their website was not a violation of the students’ First Amendment rights to free speech.

Also, Towles failed to allege facts sufficient to establish that the strip search violated his Fourth Amendment right to be free of unreasonable searches. If, however, this Court finds that the strip search was unreasonable, summary judgment would nonetheless be appropriate because Horton Hopkins school officials are entitled to qualified immunity since Towles constitutional right to be free of strip searches by school officials for suspicion of drug possession was not “clearly established.” Thus, the Respondents respectfully ask this Court to affirm the order granting summary judgment.