

Case No. 05-1338

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IN THE  
SUPREME COURT OF THE STATE OF GRACE

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Kit Politte and Corey Towles,  
*Petitioners,*

v.

Horton Hopkins School District  
and Keena Smalls,  
*Respondents,*

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Brief for Petitioner

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

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TEAM 39

Attorneys for Petitioners

## **QUESTIONS PRESENTED**

- I. Whether Respondents' attempt to regulate students' Internet speech created off-campus was a violation of Plaintiffs' First Amendment rights.
  
- II. Whether Respondents' warrantless search of Petitioner Towles on school premises violated Towles' Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment.

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## OPINIONS BELOW

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourth Amendments to the United States Constitution as applied to the states through the Fourteenth Amendment. These Amendments are reproduced in Appendix “A.” The Horton Hopkins School District Drug and Alcohol Abuse Policy, also at issue in this case, is reproduced in Appendix “B.”

## STATEMENT OF THE CASE

***Horton Hopkins High School and Principal Smalls.*** Horton Hopkins High School (“Horton Hopkins”) is a public high school in the town of Hopkinsville, State of Grace. (R. at 1). Keena Smalls has been the principal of Horton Hopkins for the past 20 years. (R. at 1).

***Kit Politte and Drug Use Damages Schools.*** Kit Politte was an eighteen-year-old senior at Horton Hopkins in the fall of 2008. (R. at 2). During her time at Horton Hopkins, she has witnessed an explosion in drug use in her school. During the first part of the fall 2008 semester alone, fifteen Horton Hopkins students were suspended for drug use on school property. (R. at 1). The entire Hopkinsville community still feels the effects of the tragic death of one of Politte’s classmates from a cocaine overdose. In September of 2008, in reaction to these terrible events, Politte formed a school-sponsored club called Drug Use Damages Schools (DUDS). (R.

at 2). The purpose of DUDS is to promote a drug-free lifestyle. (R. at 2). During a presentation at a school-sponsored assembly, a speaker told Politte that the best way to achieve her goal of stopping the drug problem is to identify drug dealers and users to the community. (R. at 2).

***The Fighting All Dealers Group.*** Politte took the speaker's advice to heart and decided to fight back against the scourge of drugs on her community. She created an online group on the Friendkedia social networking site called "Fighting all Dealers" to help Hopkinsville law enforcement identify and arrest drug dealers. (R. at 2). She created this group on her own computer and in her own spare time. (R. at 2).

Politte was the "administrator" of the group, which quickly attracted 235 members, the majority of which are students at Horton Hopkins. (R. at 2). Politte promoted the group during an after-hours session of DUDS, after which the members of DUDS joined the FAD group. Politte felt that having a system of anonymous tips would encourage witnesses to come forward—she personally vetted the tips to ensure that only the "strongest" were posted online. (R. at 2).

***Corey Towles.*** Corey Towles is a sixteen-year-old sophomore who recently transferred to Horton Hopkins. (R. at 2). Towles had a clean academic record except for two minor infractions in his second year at his previous school. (R. at 2). Towles was an honor student at his previous school and was also a member of the junior varsity baseball team. (R. at 2).

Towles hoped to meet and befriend some of the baseball players on the Horton Hopkins team in order to increase his chances of making the team. (R. at 2). On October 3, 2008, he attended a house party at the home of Jeff Tweegs, one of the captains of the baseball team and a junior at Horton Hopkins. (R. at 2). Tweegs had a history of involvement in drug use, and there were rumors that some students may be bringing drugs to the party. (R. at 2).

Towles briefly attended the party, spending his time playing football with some other sophomores. (R. at 3). He witnessed some drinking and tobacco smoking, but no drug use. (R. at 3). A half-hour after Towles had left the party, a noise complaint caused the police to arrive and cite five students for underage drinking. (R. at 3). Frank Conrad, also a sophomore, was cited for marijuana possession. (R. at 3).

***The FAD Posting.*** The day after the party, Politte received an emailed tip from a source containing a picture showing Towles, Conrad, and another sophomore outside of Tweegs' house during the party. (R. at 3). Conrad was smoking an unidentified substance. (R. at 3). Towles was not specifically identified in the picture, but his face was clearly identifiable. The photograph was captioned "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (R. at 3).

***The Strip Searches.*** Principal Smalls received several calls from concerned parents about the photographs on the FAD site as well as the Hopkinsville Police Department. (R. at 3). She then personally viewed the FAD Friendkepedia posting including the photograph. (R. at 3). After viewing the photograph, she called Towles, Conrad, Tweegs, and the other sophomore into her office for questioning. (R. at 3). She performed a search of each student's locker and bookbag as authorized by the school's drug policy. (R. at 3). She found a small baggie of marijuana in Conrad's locker. (R. at 3). She then demanded that each student undergo a strip search.

All four students protested an invasive search. (R. at 3). Disregarding their pleas, Smalls ordered the gym teacher to perform a strip search of the three boys. (R. at 3). They were taken to an isolated room and told to strip to their undergarments. Waters then searched their clothing while they stood before him. (R. at 3). Waters found a small amount of marijuana in Thomson's

pocket. (R. at 3). No drugs were found on Towles. (R. at 3).

***Towles Creates SADS.*** Towles, angered at his treatment, started his own Friendkepedia group, Students Against Defamatory Statements (SADS). (R. at 3). He called upon all Horton Hopkins students to “let our administrators know that we will not tolerate this kind of treatment” and for them to “speak out against [Principal] Smalls and the rest of these Hopkins idiots.” (R. at 4). He created this site entirely on his own time and on his own home computer. (R. at 3).

***Smalls’ Takedown Demand.*** After this controversy had come to light, students began accessing the page from school computers. (R. at 4). Claiming that the situation had “gone out of control”, Principal Smalls decided to take matters into her own hands. (R. at 4). She called both Politte and Towles and demanded that they remove their Friendkepedia postings. (R. at 4). They refused. (R. at 4). Smalls, admittedly “angry” about the situation and worried about students protesting her decisions, decided to suspend Politte and Towles for refusing to bow to her demands. (R. at 4).

***The District Court.*** On October 15, 2008, Politte and Towles sued in Badger County District Court. (R. at 4). Horton Hopkins and Principal Smalls moved for summary judgment on both the First and Fourth Amendment issues. (R. at 4). On the First Amendment issue, the district court found that Principal Smalls was justified in demanding the posting’s removal on the basis that she could reasonably foresee them being disruptive. (R. at 6).

The district court also determined that the search of Towles was permissible under the Fourth Amendment. (R. at 6). The district court found that the search was both justified at its inception and permissible in scope. (R. at 7). Upon that finding, the district court did not examine the issue of qualified immunity. (R. at 8).

*The Court of Appeals.* Politte and Towles appealed their case to the State of Grace Court of Appeals. (R. at 9). The Court of Appeals affirmed the district court in finding that the postings on Friendkepedia “created a risk of substantial disruption” and could be censored. (R. at 10). Evans, J., dissented, arguing that off-campus Internet speech is “appropriate for disciplinary action by the parents” rather than by school authorities. (R. at 12).

The court of appeals disagreed with the district court on the issue of whether the search was permissible. (R. at 10). They stated that the search was neither justified at its inception nor was it reasonable in its scope. (R. at 10–11). However, the court of appeals determined that the defendants were protected by the doctrine of qualified immunity. (R. at 12). The court of appeals found that there was no clearly established right for students to be free of strip searches. (R. at 12).

## SUMMARY OF THE ARGUMENT

Students have the right under the U.S. Constitution to be free of unreasonable and invasive strip searches, and to comment publicly and critically about matters of community interest. By ruling for Horton Hopkins, the lower court misinterprets the First and Fourth Amendments as applied to the states through the Fourteenth Amendment. This Court should uphold these individual rights and reverse the decisions of the lower courts.

### I.

The authority of a school administrator to control student speech should not extend beyond the confines of the schoolhouse gate. Only in cases where off-campus speech constitutes a clear threat should they be allowed to intervene. Here, Principal Smalls is attempting to exercise her authority beyond its limits to censor criticism of her policies. School authorities should not have the plenary right to censor online criticism unless students have availed themselves of the school environment to create that speech.

Alternately, even if this speech were to be seen as within the scope of school authority, it is neither substantially disruptive nor does it materially interfere with the business of the school. Students have a more limited subset of First Amendment rights than the general populace, but those limits do not allow a school administrator to censor speech based on the mere apprehension of a disruption. A school administrator does not have the right to avoid criticism by silencing legitimate debate on issues of public comment. That student speech may engender further debate is not in itself a reason to silence that speech—rather it indicates that speech is an effective example of public comment.

This Court should reverse the Court of Appeal's holding on the First Amendment issue.

## II.

The invasive strip search performed on Corey Towles was a violation of his right to be free of unreasonable searches. The strip search was not justified at its inception as it was based solely on an anonymous and unverified tip. The strip search was not reasonable in its scope as it was highly invasive and violative of Towles' personal dignity.

This appeal requests this court to hold that the Court of Appeals of the State of Grace erred in finding Petitioner Towles' Fourth Amendment rights were not clearly established. The Court of Appeals' holding follows clearly established law in determining the strip search was unconstitutional, yet claims that the law was not clearly established. The lower court alleges that a disagreement between the circuits regarding strip searches has created confusion. In fact, there is no disagreement between the circuits, and there should be no confusion. Courts have only upheld strip searches when there is sufficient quality and quantity of information to believe a student is carrying contraband on their person. When strip searches based on uncorroborated information are challenged, courts do not hesitate to find them unconstitutional.

## ARGUMENT

### I. PRINCIPAL SMALLS VIOLATED POLITTE AND TOWLES' FIRST AMENDMENT RIGHTS TO FREE EXPRESSION

The suspension of Towles and Politte was a violation of their First Amendment rights. In the seminal *Tinker* free-speech case, the Supreme Court unequivocally stood by the premise that “[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.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). *Tinker* dealt specifically with student protests against the Vietnam War, noting that the wearing of black armbands was “closely akin to ‘pure speech’” and thus protected. *Id.* at 505.

Social networking sites like Friendkepedia are a reality of life for young adults in the 21st Century. Sixty-one percent of those aged between 14-17 utilize social networking sites like Facebook, MySpace, Friendster, and others.<sup>1</sup> These sites are used for everything from personal conversations to statements of political solidarity. To extend to school administrators the power to censor speech made outside the home that has the mere potential to reach campus is to give them plenary power to regulate all online student speech and cause students to lose their critical rights of free speech.

#### A. Towles and Politte Used Off-Campus Speech Beyond the Reach of School Officials

The issue of whether this speech is on- or off-campus is a threshold issue in this case. It is akin to a jurisdictional issue in the courts. In the context of personal jurisdiction, the Supreme Court has considered whether the exercise of jurisdiction over an out-of-state defendant violates “traditional notions of fair play and substantial justice.” *World-Wide Volkswagen Corp v.*

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<sup>1</sup> See AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, PRIVACY & ONLINE SOCIAL NETWORKS 11–12 (2007), [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Privacy\\_SNS\\_Report\\_Final.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Privacy_SNS_Report_Final.pdf)

*Woodson*, 444 U.S. 286, 292 (1980) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This concept is rooted the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *Int'l Shoe*, 326 U.S. at 319. Since these theories are based on fundamental grounds of due process, if this speech is not on-campus speech, then Principal Smalls has no authority to punish it without offending both the First and Fourteenth Amendments. Here, Principal Smalls has asked both Politte and Towles to surrender their ability to comment critically on a matter of social importance despite both of them having never once purposefully availed themselves of the school environment. Principal Smalls should not have the authority to censor off-campus speech without the requisite minimum contacts with the school environment.

### **1. Courts have limited school control over off-campus speech**

The Supreme Court has not ruled on this issue of whether *Tinker* applies to off-campus speech—all of their school speech jurisprudence has focused on in-school speech. However, lower courts that have examined the issue have tended to give deference to the rights of students to speak freely over the power of school administrators to censor. Only in cases of threatening speech have the courts willing to give school administrators the power to reach out beyond the schoolhouse gate to punish students for off-campus speech.

In a pre-Internet case, the Second Circuit made it clear that the balancing of factors should weigh most heavily on the side of student's rights to free speech. *Thomas v. Granville*, 607 F.2d 1043 (2d Cir. 1979). In *Thomas*, a group of high-school students were suspended for printing an obscene publication. Despite the fact that the paper was partially written using school typewriters and secretly stored in a teacher's closet, the Second Circuit was still unwilling to justify the suspension. *Id.* at 1050. They noted:

We may not permit school administrators to seek approval of the community-at-large

by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve. The First Amendment will not abide the additional chill on protected expression that would inevitable emanate from such a practice.

*Id.* at 1051. This is precisely what has happened here. Politte and Towles are being punished for off-campus expression, and that punishment will inevitably chill yet more student speech. Other students who wish to speak out for or against the policies of Horton Hopkins High will do so at the risk of being called into the principal's office and facing a demand that they censor their criticisms. This is not the role of the school administrator, and it comes perilously close to allowing school to become the "enclaves of totalitarianism" that *Tinker* warned against. *Tinker*, 393 U.S. at 511.

Even in the context of the Internet, courts have been reticent to allow school administrators the power to punish off-campus student speech. In *Layshock v. Hermitage*, the Western District of Pennsylvania determined that as a quasi-jurisdictional matter, the school district had the burden of proof to show that they had the authority to punish a student for a parody MySpace profile of his school principal. *Layshock v. Hermitage*, 496 F. Supp. 2d 587 (W.D. Penn. 2007). As the District Court succinctly put it: "[t]he mere fact that the internet may be accessed at school does not authorize school officials to be censors of the world-wide web." *Id.* at 597. Other courts have followed similar lines of analysis. See *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002); *Emmett v. Kent*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (finding that a student's webpage was "entirely outside of the school's supervision or control.").

## **2. The reach of *Wisniewski* should be narrowly applied to threatening speech**

The Court of Appeals cited to a recent Second Circuit case for the proposition that off-campus speech could be censored not only if it could foreseeably create a risk of substantial disruption on campus, but also if it was foreseeable that the off-campus expression could merely

reach campus. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007). Were this proposition correct, *Wisniewski*'s reach would essentially swallow all student online speech. It is always foreseeable that content on the Internet could reach campus.

Rather, *Wisniewski* can be harmonized by existing precedent by limiting it “potentially threatening” speech. *Id.* at 39. In *Wisniewski*, a student was suspended when he used an instant messaging icon that graphically depicting the killing of a schoolteacher. The Second Circuit did not overrule their judgment in *Thomas*, rather they merely noted that threats of violence are likely to cause substantial disruptions wherever they may issue. *Id.* (citing *Thomas*, 607 F.2d at 1052 n.17). Were it otherwise, *Wisniewski* would stand as an outlier that would allow nearly unbridled power for school officials to censor online commentary they deemed to be even potentially disruptive. Nearly all case in which off-campus speech has led to student punishment has involved threats of violence rather than political speech. *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Commw. Ct. 2000) (student permanently suspended for soliciting funds to pay for the assassination of a teacher); *Doe v. Pulaski Cty. Spec. Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (student's off-campus letter graphically threatening the rape and murder of a classmate found to not be protected on First Amendment grounds). Neither *Politte* nor *Towles* engaged in any speech that can be colorably called threatening under these line of cases.

At no point did either *Politte* or *Towles* avail themselves of school computers or resources. While it is possible that students may have been able to access the sites from school, that is merely part and parcel of the nature of online communications. As *Thomas* makes clear, “our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate.” *Thomas*, 607 F.2d at 1044–45. In an age of omnipresent online

communications, school administrators should not be allowed to reach so far beyond the schoolhouse gate that they may censor any thoughts of students that they feel may foreseeably reach campus and potentially cause a substantial disruption.

**B. Even if Characterized As On-Campus Speech, Towles and Politte Are Still Protected by the *Tinker* Standard**

The Supreme Court has limited the *Tinker* standard in three key areas: obscenity, school-sponsored speech, and most recently speech advocating the usage of illegal drugs. Even though the Supreme Court has narrowed the reach of *Tinker* in subsequent cases, they have not narrowed it as far as Respondents may wish. The limitations are not applicable to the facts here for the reasons set out below.

**3. Politte and Towles’ speech was not obscene**

The Supreme Court has upheld restrictions on student speech where that speech is indecent or obscene. *Bethel Sch. Dist No. 403 v. Fraser*, 478 U.S. 675 (1986). In *Fraser*, a public high school student gave a nominating speech filled with graphic sexual references in front of an audience of 600 students, many of them fourteen-year-olds. *Id.* at 677–78. The Court held that such sexual content was innately more disruptive and less worthy of protection than the non-disruptive political speech involved in *Tinker*.

Here, Politte and Towles’ speech was not graphic or sexual in any way. The closest that either of them came to being offensive was Towles’ referring to Smalls and the school administration as “idiots” in his Friendkepedia posting. (R. at 2–3). Such a word may be impolitic or even rude, but the holding of *Fraser* is limited to content that is “offensively lewd and indecent. . .” rather than merely impolite. *Fraser*, 478 U.S. at 685. The speech at issue here is not subject to censorship based on *Fraser*.

#### **4. Politte and Towles' speech was not school-sponsored**

The Supreme Court carved out another exception from the *Tinker* rule in the context of school-sponsored publications. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The Court distinguished between two First Amendment questions: whether a school must tolerate certain forms of speech; and whether they must affirmatively promote certain forms of speech. *Id.* at 270–71. *Hazelwood* involved a student expose in a student newspaper on issues of teenage pregnancy and the effect of divorce on teens. The articles deleted the names of the students involved, but the school's principal believed that the identities could be reconstructed and pulled two pages out of the issue. The Court held that “educators do not offend the First Amendment by exercising editorial control over . . . student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 272–73.

The issues here are readily distinguishable from those in *Hazelwood*. While Politte's DUDS organization was a student-sponsored club, her Friendkepedia group Fighting All Dealers (FAD) was not—it was created and administrated outside of school and without the use of school resources. (R. at 2). It is coincidental that all the members of DUDS chose to join the FAD group, but that in itself does not imply school sponsorship. Unlike the student paper in *Hazelwood*, FAD was not sponsored by the school, it was not governed by the rules for student groups, and it was not funded by the school. The exception to the *Tinker* rule for student-sponsored speech is inapplicable here.

#### **5. Neither Politte nor Towles advocated the use of illegal drugs**

The most recent Supreme Court case to deal with student speech issues involved a student displaying a banner reading “BONG HiTS 4 JESUS” outside a school-sponsored fieldtrip to view the Olympic Torch Relay. *Morse v. Frederick*, 127 S.Ct. 2618 (2007). In *Morse*, the

Supreme Court further limited *Tinker* by excluding protection for speech that “can reasonably regarded as encouraging illegal drug use.” *Id.* at 2622. Contrary to *Morse*, however, here there is no advocacy or encouragement of illegal drug use—quite the opposite. Politte’s group was expressly anti-drug, and Towles’ group existed to protest the very accusation that Towles and his friends were involved with illegal drugs. *Morse*’s limited holding is not applicable to the facts of this case.

### **C. Politte and Towles Speech Posed No Substantial Disruption or Material Interference With School Activities**

Under the *Tinker* standard, regulation of student speech is limited to situations in which the student speech would create “substantial disruption or material interference” with the school’s activities or the rights of others. *Tinker*, 393 U.S. at 514. *Tinker* places important limits on what activity counts as a substantial disruption or material limitation. A school administrator may not use their powers to censor speech that they find critical or unpleasant, nor may they based their decision to censor based on “undifferentiated fear or apprehension.” *Id.* at 508. Here, that is precisely what Principle Smalls did when she suspended the two students for refusing to cave in to her demands for censorship. Politte and Towles asked students to engage in dialog, to “speak out” on issues of great concern to the community. To argue that such a call forecasts a substantial disruption or material interference with a school is an argument that school administrators have the plenary power to censor and discussion about key issues in the school setting.

Politte and Towles’ acts of speech on a critical issue are deserving of First Amendment protection and are neither substantially disruptive nor do they materially interfere with school activities. The Ninth Circuit has held that student distribution of non-school-sponsored materials cannot be prohibited “on the basis of undifferentiated fears of possible disturbances or

embarrassment to school officials.” *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988). Horton Hopkins and Ms. Smalls’ decision to censor Towles and Politte was based on nothing more than undifferentiated fear. Both Towles and Politte were commenting on matters of public concern to the school and the community. The District Court employed a rather curious bootstrapping argument to justify their findings that the postings created a material disruption. They assert that “Politte’s webpage induced Towles to create his own webpage, and therefore contributed to any potential disruption.” (R. at 6). The very point of free speech is to engender conversation and critical discussion. That Politte’s act of speech induced others to speak out does not make Politte’s speech disruptive—the whole point of political speech is to engender comment and debate. To assert that the existence of dialogue is proof of disruption is to eviscerate the very heart of the First Amendment’s protections of free speech.

Principle Smalls contends that she was “angry” about Towles’ criticisms of her handling of the drug problem. (R. at 4). However, “[d]isliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.” *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d. 1175, 1180 (E.D. Mo. 1998). School administrators must “be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* Politte was acting as a concerned citizen trying to stop the invidious effects of drugs in her school. Towles was asking students to “speak out” against what he saw (justifiably) as a violation of his rights. Absent either of these sites, these issues were not going to go away. Smalls actions did little to prevent any “substantial disruption or material interference” with Horton Hopkin’s education mission—rather, by trying to censor speech critical of her efforts, she has only fanned the flames of controversy.

The Court of Appeals relies primarily on *Doninger* for the principle that “school officials could punish a student for blogging critically about school administrators.” (R. at 9); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). Were this the actual holding of *Doninger* it would be a blatant violation of the basic principles of the First Amendment as set out in *Tinker*. However, the holding of *Doninger* was far less broad than that blanket assertion. The holding of *Doninger* was limited to the narrow circumstances of whether a student could be punished by disqualifying them from holding student office. *Doninger*, 527 F.3d at 52–53. The district court expressed reluctance to broaden their holding to “other factual contexts or if the discipline imposed on Avery were different.” *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. 2007). On appeal, the Second Circuit noted that they were “mindful that, given the posture of this case, we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.” *Doninger*, 527 F.3d at 53. Here, both the factual contexts and the discipline imposed were different—Politte and Towles are being punished for a much less provocative act of speech, and they have been suspended from school for refusing to comply with the school’s request for self-censorship. *Doninger* supplies no precedent justifying the actions of the Horton Hopkins School District or Principal Smalls. Quite the opposite, its own reasoning suggests that the Second Circuit would not have reached a similar decision in factual circumstances such as these.

By demanding that Politte and Towles censor themselves, Principle Smalls is attempting to extend her authority far beyond the schoolhouse gate. Even if that were not so, her unsubstantiated fears do not justify her actions under the standard set in *Tinker*. The First Amendment protects the rights of students to critically, even pointedly, discuss issues relevant to their lives. To stifle such voices is to stifle the development of an inquisitive citizenry. This

Court should overturn the Court of Appeals and vindicate Politte and Towles' rights under the First Amendment.

**II. RESPONDENT'S UNREASONABLE SEARCH OF PETITIONER TOWLES VIOLATED HIS RIGHT TO BE FREE OF UNREASONABLE SEARCHES.**

The strip search conducted by Horton school officials was an unreasonable violation of Towles' Fourth Amendment rights. The Fourth Amendment is applicable to the states under the Fourteenth Amendment of the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court of Appeals correctly determined that the search of Towles was neither justified at its inception, nor reasonable in its scope. (R. at 11). The Court of Appeals determination follows clearly established law in finding school officials cannot strip search a sixteen-year-old student based on an unreliable assumption. At the inception of the search the only information known to school officials came in the form of an online photograph of Towles and several other students with one of the students appearing to be smoking. What is important about this photograph is that it clearly depicted Towles doing nothing illegal. In addition, the photograph in no way indicated that Towles was in possession of anything illegal on October 4, 2008.

The Supreme Court has long held that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials, and is not limited to searches conducted by law enforcement officers. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). School officials are not held to the requirement that searches be based on probable cause to believe that the search has violated the law. Rather, the legality of a search depends simply on the reasonableness, under all circumstances, of the search. In order for school searches to be reasonable under the Fourth Amendment the search must be: (1) justified at its

inception, and (2) reasonably related in scope to the circumstances justifying the interference in the first place. *Id.* at 341 (citing *Terry v. Ohio*, 329 U.S. 1 (1968)).

**A. The Search Carried Out by School Officials Was Not Justified at Its Inception.**

The search of Towles was not justified at its inception. A search will be justified at its inception when there are grounds for suspecting that the search will turn up evidence that the student violated the law or school rules. *T.L.O.*, 469 U.S. at 342. The only information known to school officials prior to the initial was a photograph of Towles standing near three other students with one of the students appearing to be smoking. Although school officials were aware one of the students was cited for marijuana possession the day before, there was no reason to believe Towles was in possession of drugs when he was searched.

Although justification for school searches need not be based upon probable cause, the information's "veracity," "reliability," and "basis of knowledge" – remain highly relevant in determining reasonable suspicion. *Alabama v. White*, 496 U.S. 325, 328–29 (1990) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). The opinion in *Gates* recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity. *Id.* at 329. In order to determine the reliability of the photograph the school could have conducted an additional independent investigation to determine the circumstances surrounding the time and place of which the picture was taken. An anonymous photograph electronically forwarded to a site administrator, which is later posted on the site, does not provide school officials with sufficient reliable information to justify the reasonableness of a search as intrusive as a strip search.

Even though school officials did find marijuana on another student Towles knew, there was not enough evidence to believe Towles had marijuana in his possession. The Court of Appeals correctly determined that searching Towles as a result of finding drugs on Conrad is nothing more than guilt by association. "Guilt by association is one of the most odious

institutions of history. . . . Guilt in our system is personal.” *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951). Under all of the circumstances the search carried out by school officials was not justified at its inception.

**B. The Circumstances Surrounding the Search Did Not Warrant the Invasive Scope of the Search.**

Since the Court of Appeals correctly determined the search carried out by Horton Hopkins officials failed the first prong of the reasonableness test it is unnecessary to go on to the second prong. However, even if the search was justified at its inception, the circumstances surrounding the search did not warrant the scope of the search.

A search will be “permissible in its scope” when “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *T.L.O.*, 469 U.S. at 342. Studies indicate that when young people reach puberty their self-awareness begins to increase. Being forced to strip down and searched nude is a traumatic event for any adolescent. Strip searches should only be used in the most extreme circumstances; schools must have a “reasonable suspicion that a strip search will protect the school from serious harm before conducting such a consequential search of a child.” *Phaneuf v. Frainkin*, 448 F.3d 591, 596 (2d Cir. 2006); *Cornfield v. Consolidated High Sch. Dist No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993).

“What may constitute reasonable suspicion for a search of a locker or even a pocket...may well fall short of reasonableness for a nude search.” *Cornfield*, 991 F.2d at 1321. As the intrusiveness of the search of a student intensifies, so too does the standard of the Fourth Amendment reasonableness. *Id.* Courts of Appeals have regularly held unconstitutional a strip search of a student based on an uncorroborated tip that the student possessed a controlled substance. *Phaneuf v. Fraikin*, 448 F.3d 591 (2d. Cir. 2006); *Bilbrey ex rel. Bilbrey v. Brown*,

738 F.2d 1462 (9th Cir. 1984); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980). In addition, courts have held strip searches unconstitutional even when informant alleges the student is hiding a substance underneath his or her clothing. *Phaneuf*, 448 F.3d at 600–01.

Searches that are an intrusion on one’s personal dignity of this magnitude must require that some justifiable basis exist. Even strip searches of adults have been characterized by various witnesses, and by judges in some other cases, as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission. *Tinetti v. Wittke*, 479 F.Supp. 486, 491 (D.C. Wis. 1979). The health and emotional well being of young people require that only the most extreme circumstances can justify the intrusiveness of strip searching a student.

Towles’ presence in a photograph that appears to show another individual smoking does not provide school officials with sufficient indicia of reliability as to the thing and place to be searched. Nothing in the photograph indicated Towles was smoking anything. Moreover, nothing in the photograph indicated Towles was concealing contraband under his clothing on October 4, 2008. Horton Hopkins officials had absolutely no reason to believe Towles was hiding anything under his clothing, as a result forcefully removing his clothing and conducting a search went far beyond what the Fourth Amendment allows.

**C. Since School Officials Violated Petitioner Towles’ Clearly Established Rights They Are Not Entitled to Protection Under the Doctrine of Qualified Immunity.**

The Court of Appeals erroneously determined that Towles’ Fourth Amendment rights were not clearly established at the time school officials strip searched him. However, case law, common sense, and human decency all indicate that Horton school officials should have known that a strip search of a teenage student is unreasonable. Applying the well established law to the

facts in this case it is clear that a high school principle of twenty years knew, or should have known that under these circumstances, a strip search was unreasonable.

**1. Petitioner's Fourth Amendment rights were clearly established.**

Determining whether a right was clearly established depends on whether it was clear to a reasonable school official that the strip search was unlawful in the situation he or she confronted. *Saucier v. Katz*, 533 U.S. 194 (2001). Qualified immunity only protects government officials so long as they could have reasonably believed that their conduct was consistent with the alleged victim's clearly established rights. *Anderson v. Creighton*, 483 U.S. 635 (1987). If school officials knew or should have known that their conduct would violate a student's constitutional rights, the immunity defense should fail since a reasonably competent official should know the law governing this conduct. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In *Redding v. Safford Unified School District #1*, the Ninth Circuit held that the strip search of honor student Savana Redding "was neither 'justified at its inception,' nor, as a grossly intrusive search of a middle school girl to locate pills with the potency of two over-the-counter Advil capsules, 'reasonably related in scope to the circumstances' giving rise to its initiation." *Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071 (9th Cir. 2008). The court made it clear that while probable cause is not required to search a purse, school officials must act "according to the dictates of common sense" *Id.* at 1080. In addition, the court held that "these constitutional principles were clearly established by the United States Supreme Court twenty years before the Safford school officials conducted the strip search of thirteen-year-old Savana." *Id.* at 1089. Even though *Redding* clearly finds strip searches based on an unsupported claim unreasonable, "it is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness was apparent in light of existing law." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060–61 (9th Cir. 2003).

**2. Strip searches have only been upheld in certain situations; there is no disagreement among the circuits.**

The State of Grace Court of Appeals states that the discrepancy in circuit court case law alone demonstrates the law is not “clearly established.” (R. at 12). Although some student searches have been upheld under *T.L.O.* and others have been declared unconstitutional, it is hardly surprising that a fact based balancing test leads to different results in different cases. The fact that different results are reached in different situations does not mean there is a conflict in the circuits on the applicable legal standard. Though some student strip searches have been upheld under the *T.L.O.* standard, our case may be distinguished from them.

In *Williams v. Ellington*, Angela Williams, a minor, challenged the warrantless strip search performed by officials of Graves County High School. *Williams v. Ellington*, 936 F.2d 881, 889 (6th Cir. 1991). The Sixth Circuit held “that based on the totality of the circumstances there existed both the quality and quantity of information for school officials to reasonably suspect Williams was concealing evidence of illegal activity on her person.” *Id.* The *Williams* court likened the allegations of a student, implicating a fellow student in unlawful activity, to the reliability of an informant’s tip. *Id.* at 889 (citing *Alabama v. White*, 496 U.S. 325 (1990)). The court noted that some tips may lack reliability and school officials would be required to investigate the matter before a search would be warranted. *Id.* The court went on to say, some tips, though unverified, are reliable, and since school officials questioned the informant about any improper motives for making the allegations the information was sufficient in its quality and quantity. *Id.*

Our case can be distinguished from *Williams* in that based on the totality of the circumstances, school officials had both the quality and quantity of information to reasonably suspect Williams was concealing evidence of criminal activity. In contrast, Principal Smalls had

no information that Towles had ever been in possession of an illegal substance. Although the caption under the online photograph of Towles read “[p]olice find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?”, Horton Hopkins officials did not have sufficient quality or quantity of information to strip search Towles. Nothing about this caption indicates Towles was engaged in any unlawful activity. Furthermore, nothing about this caption indicates Towles was concealing anything illegal under his clothing. The caption merely asks a question, it does not accuse Towles of possessing anything illegal on October 4, 2008.

In *Cornfield by Lewis v. Consolidated High School Dist. No. 230*, the Seventh Circuit held that a strip search of a sixteen-year-old male student in behavioral disorder program who was suspected of “crotching” drugs was reasonable under the Fourth Amendment. *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993). Although the Seventh Circuit determined the search was reasonable, our case can be distinguished from *Cornfield* in several ways. First, in *Cornfield* the student was in a behavioral disorder program for troubled students and police had previously informed school officials that he was suspected of selling marijuana. In our case, Towles is an honor student, was a member of the State of Disarray junior varsity baseball team, and was not suspected by police for distribution of marijuana. Second, in *Cornfield* the student had a prior history of carrying contraband on school grounds, once he was found in possession of a live bullet. In our case, Towles had no disciplinary actions taken against except for being tardy the previous year. Third, in *Cornfield* the school bus driver had reported the smell of marijuana from where Cornfield was sitting, and two students gave independent reports of having observed Cornfield in possession of marijuana at two different times. In our case, there were no reports of Towles ever being in possession of drugs. Lastly, Cornfield was acting erratically, appeared to have a bulge in his pants, and had previously

claimed to “crotch” drugs during a police raid. In our case, school officials had no reason to suspect Towles was carrying anything illegal or concealing anything under his pants.

In *Bridgman v. New Trier High School District*, the Seventh Circuit determined that a school officials acts ordering a medical assessment and searching a student’s outer clothing were reasonable. *Bridgman v. New Trier High School Dist.*, 128 F.3d 1146, 1150 (7th Cir. 1997). Unlike the student in *Bridgman*, Towles had never been caught in possession of contraband on school grounds. In addition, the student in *Bridgman* was displaying “unruly behavior”, had “bloodshot eyes”, and “dilated pupils”. Horton school officials never observed Towles exhibiting abnormal behavior and had no reason to suspect he was in possession of anything illegal October 4, 2008. Furthermore, the search in *Bridgman* consisted of taking his vital signs and when they appeared abnormal he was asked to take off his outer clothing. At no time did *Bridgman* remove his pants or his under shirt. In contrast, Towles appeared physically normal, yet was forced to strip down to his underwear. Horton Hopkins officials had no reason to suspect Towles was in possession of drugs, yet the search was greater in scope than the search in *Bridgman*.

More recently, the Third Circuit concluded that the testing of bodily fluids of a student suspected of being under the influence of drugs did not violate the Fourth Amendments prohibition on unreasonable searches and seizures. *Hedges v. Musco*, 204 F.3d 109 (3d Cir. 2000). Although the Third Circuit determined the searches of Tara Hedges were reasonable under all the circumstances, our case is dissimilar to *Hedges* in several ways. First, the school officials in *Hedges* had reason to believe Tara was under the influence of an illegal substance and she “looked sick.” *Id.* at 113. In our case, Towles did not exhibit any abnormal behavior, nor did he appear under the influence of anything. Horton Hopkins officials had no reason to believe

Towles was under the influence of an illegal substance. Second, the level of intrusion resulting from a urine sample is far less than the level of intrusion resulting from a strip search. In *Hedges*, the school district's procedure for urine samples requires females to produce the samples in an enclosed stall, with a female monitor only listening for sounds of tampering. The court noted these conditions are nearly identical to public restrooms. The level of intrusion resulting from being searched naked in a room greatly exceeds that of providing a urine sample in a private room at a hospital.

There is no disagreement among the circuits regarding student strip searches. The Third, Sixth, and Seventh Circuit decisions all indicate that in order to conduct a strip search school officials must have something more than an uncorroborated tip. In order to conduct such an intrusive search, the totality of the circumstances must provide both the quality and quantity of information for school officials to reasonably suspect a student is concealing evidence of illegal activity on their person. It is uncommon for school officials to search students based on an uncorroborated tip - when they do, courts of appeals regularly hold that the searches are unconstitutional. *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006); *Bilbrey ex rel. Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980); *Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071 (9th Cir. 2008).

**3. Given the circumstances Principal Smalls should have known the strip search was unreasonable.**

Although the need to maintain safety in our school systems requires applying a different standard to school searches, the ultimate test for the legality of a search is still its reasonableness. Even so, "it does not take a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude." *Renfrow*, 631 F.2d at 92–93. Keena Smalls has been principal of Horton Hopkins High School for the past twenty

years, she should have had no doubt under the circumstances a strip search was unreasonable. One of the most common anxiety dreams experienced among children is the dream of being nude or inappropriately dressed in a public setting.<sup>2</sup> It should not come as a surprise to Principal Smalls that standing in a room naked being accused of a crime would be highly traumatic for a young student. Psychological experts have testified that victims of strip searches often suffer post-search symptoms including sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions, some victims have been moved to attempt suicide.<sup>3</sup> A principal of twenty-years should know that a school should be a place where students feel safe, and it is the job of school administration to further that goal.

Most importantly, the Horton Hopkins School District's own Drug and Alcohol Use Policy indicate school officials were aware this type of search exceeded their authority. Section (a) of the District's Drug Policy sets forth the standard regarding personal searches of students:

a) Personal Search

The District may contact a student's parent or legal guardian before commencing a personal search, but this is not mandatory. The District may judge if parental involvement is necessary on a case-by-case basis. A faculty member of the same gender as the student will conduct the search.

Although the policy states that contacting the student's parent or guardian is not "mandatory" before each search, the policy does state that the District may judge if parental involvement is "necessary" on case-by-case basis. A strip search is the most personal and intrusive search available to school officials. It would be difficult to imagine that when the School Board drafted the personal search policy that something beyond a strip search would be necessary to require parental notification. It would be even more difficult to imagine that the parents who elected the

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<sup>2</sup> See DR. PATRICIA GARFIELD, *THE UNIVERSAL DREAM KEY: 12 MOST COMMON DREAMS AROUND THE WORLD*, 153 (2001).

<sup>3</sup> See Stephen F. Shatz, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991).

Board Members would not wish to be notified before their children's teachers force their children to strip in front of them.

**4. Horton School Officials are not entitled to the protection of qualified immunity.**

The Court of Appeals correctly determined that school officials violated Towles' Fourth Amendment rights, but erred in holding that Towles' rights were not clearly established at the time of the search. The Court of Appeals holding is contradictory—the holding is grounded in established case law and long held Fourth Amendment principles, yet it claims these principles have not been clearly established. It has been and should be unconstitutional for a school official to strip search a student based on uncorroborated information. While the standard set forth twenty-five years ago in the seminal *T.L.O.* case did not require school officials to apply a probable cause standard to searches, it plainly required them to act “according to the dictates of reason and common sense.” *Redding*, 531 F.3d at 1080.

The defense of qualified immunity exists to protect government officials from the specter of damages liability for judgment calls made in a legally uncertain environment. *Ryder v. U.S.*, 515 U.S. 177, 185 (1995) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)). Principal Smalls' twenty-years of experience, the school district policy regarding personal searches, and common sense clearly indicate that this search was certainly unreasonable. Corey Towles is an honor student, an athlete, and has no prior criminal problems, nor any drug related problems. Yet Principal Smalls forced Towles to strip and submit to a search based on a photograph that clearly showed him doing nothing illegal. Moreover, Keena Smalls had absolutely no reason to believe Towles was concealing anything on his person or under his clothing. Horton Hopkins school district along with Keena Smalls, are not exempt from liability, because they knew or

should have known that under the circumstances, conducting a strip search of Cory Towles was an unreasonable intrusion of his Fourth Amendment rights.

**CONCLUSION**

This Court should reverse the decisions below and find that the Horton Hopkins School District and Keena Smalls violated Katha Politte and Corey Towles' rights under the First and Fourth Amendments.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

## **APPENDIX A**

### **U.S. Const. amend I.**

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

### **U.S. Const. amend IV.**

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

### **U.S. Const. amend XIV, § 1.**

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

## APPENDIX B

### Horton Hopkins School District DRUG AND ALCOHOL USE POLICY

Horton Hopkins School District recognizes that the illegal use of alcohol and drugs is unacceptable and that the problems associated with it pose a significant threat to our school community and to society in general. The District further understands that the use of chemical substances can have a profound impact on the student's own education, as well as other students' educational opportunities. The District therefore takes the following steps to maintain a drug-free school system.

#### Suspicion of Drug Use or Drug Possession

When drug use or possession is suspected on school property, the District reserves the right to conduct personal searches of students, as well as searches of lockers, desks, other school property, and book bags and other personal containers. The District will request consent before beginning a search, however, the school may continue with a search even if the student refuses to give consent. The District may also conduct drug testing by urinalysis on an as-needed basis. The District will balance the likelihood the student possesses drugs against the risk of infringing the student's individual rights.

#### a) Personal Search

The District may contact a student's parent or legal guardian before commencing a personal search, but this is not mandatory. The District may judge if parental involvement is necessary on a case-by-case basis. A faculty member of the same gender as the student will conduct the personal search.

#### b) Consequences

##### 1. Illegal drugs

In cases where students are found in possession or under the influence of illegal drugs, the school may contact police, and must contact the student's parent or legal guardian. Discipline will be decided on a case-by-case basis, but the offending student will receive a suspension of no less than three days.

##### 2. Alcohol or tobacco

A parent or guardian will be notified in cases where a student is found in possession or under the influence of alcohol or tobacco. The District will dispose of all alcohol or tobacco, and notify the parent or guardian of the disposal.

##### 3. Extra-curricular activities

Students in violation of this policy will be banned from all athletic and other extra-curricular activities for the remainder of the school year.