

In the Supreme Court of the State of Grace

KIT POLITTE AND COREY TOWLES,
Petitioner

v.

HORTON HOPKINS SCHOOL DISTRICT AND KEENA SMALLS,
Respondent

*ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF GRACE*

BRIEF FOR RESPONDENT

Competitor No. 4
Counsel of Record

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that Horton Hopkins School District and Principal Smalls, in ordering Kit Politte and Cory Towles to shut down their webpages, did not violate their free speech rights under the First Amendment, when Ms. Politte's webpage labeled individuals as drug dealers, Mr. Towles' webpage incited student defiance against school administrators, and both webpages caused students to access them at school during school hours.

2. Whether the court of appeals erroneously concluded that Horton Hopkins School District and Principal Smalls, in conducting a search of Mr. Towles' outer clothing, violated the Fourth Amendment's prohibition against unreasonable searches, when the search for illegal drugs was conducted in response to a corroborated student tip and carried out by a male school official in a private room.

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CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV.

The First and Fourth Amendments apply to state actors through the Fourteenth Amendment. *See e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

STATEMENT OF THE CASE

This Court is being asked to affirm in part and reverse in part, the decision of the Court of Appeals of the State of Grace which upheld a summary judgment order in favor of Respondents Horton Hopkins School District and Keena Smalls (“Principal Smalls”), principal of Horton Hopkins High School (“Horton Hopkins”). Record (hereinafter, “R.”) 9, 12. The Badger County District Court entered the order, finding that the school district and Principals Smalls did not violate the constitutional rights of Petitioners Kit Politte (“Ms. Politte”) and Corey Towles (“Mr. Towles”) under the First and Fourth Amendments. R. 8.

Everyday, schools must combat disruptions, drugs and other disturbances that hinder their mission to provide education to their students. One such school is Horton Hopkins, which operates as a public high school under Horton Hopkins School District in Hopkinsville, State of Grace. R. 1. Its problems with student drug use have been staggering. R. 1. In the last five years, drug use has increased in both the high school and Hopkinsville. R. 1. In the span of two months, fifteen students were caught using illegal drugs on school grounds, and a total of twenty-five were suspended in one year. R. 1. Tragically, the community had to witness first-hand the devastating effects of illegal drug use when seventeen-year-old Kelly Smith, captain of the high school’s volleyball team, died of a drug overdose at a party. R. 1.

Recognizing the destructive effects that illegal drug use poses to Horton Hopkins and Hopkinsville, the school district adopted a “Drug and Alcohol Use Policy” called for by Principal Smalls. R. 1, 15. According to the policy, Horton Hopkins may conduct searches of students, their belongings and any school property they use, regardless of whether the student gives consent. R. 15. The policy explicitly mandates that a faculty member of the same sex conduct personal searches. R. 15. Horton Hopkins may also implement drug-testing procedures

and may contact the student's parent or legal guardian. R. 15. If students are caught with illegal drugs, parents must be notified and the police may be contacted. R. 15. They are suspended for at least three days, and banned from athletic and extra-curricular activities for the rest of the year. R. 15. Finally, the policy states that the school district "will balance the likelihood the student possesses drugs against the risk of infringing the student's individual rights." R. 15.

Petitioners are Horton Hopkins students. R. 2. Ms. Politte is an eighteen-year-old senior and Mr. Towles is a sixteen-year-old sophomore. R. 2. Ms. Politte is the creator and administrator of a webpage called Fighting All Dealers ("FAD") which can be found in a social networking website, Friendkepedia. R. 2. Friendkepedia allows users to set up networks that permit access to the user's webpage. R. 2. While FAD is directed to Hopkinsville residents who are members of the website, Friendkepedia is geared towards high school and college students. R. 2. Working from her personal computer at home, Ms. Politte asked members of her network to submit information about potential drug dealers, hoping that submissions would lead to arrests of local dealers. R. 2. Tips were e-mailed directly to Ms. Politte herself through a link on the webpage. R. 2. She posted the "strongest" tips, maintaining the tipsters' anonymity. R. 2.

Of the 235 members of Ms. Politte's network, 198 members (almost 85%) are students at Horton Hopkins. R. 2. Her network also includes all 130 members of a school-sponsored student organization called Drug Use Damages Schools ("DUDS"). R. 2. Ms. Politte started DUDS in September 2008 to help curtail illegal drug use among students. R. 2. The organization promotes a drug-free lifestyle by posting flyers and organizing school assemblies. R. 2. Ms. Politte's decision to create FAD came after a speaker at one assembly told her that "the only way to stop the drug problem is to point out drug dealers and users to the entire community." R. 2.

One Horton Hopkins student incriminated by a submission to Ms. Politte's network was Mr. Towles. R. 3. He had transferred from a high school in the State of Disarray. R. 2. While an honor student with no past disciplinary actions against him, Mr. Towles coveted being a member of Horton Hopkins' baseball team. R. 2. So, on October 3, 2008, he attended a house party at the home of a Horton Hopkins junior named Jeff Tweegs ("Mr. Tweegs"). R. 2. Mr. Tweegs had been suspended earlier in September for a week after Principal Smalls caught him smoking marijuana on school grounds. R. 2. Indeed, rumors circulated all over the school for a week that students would bring marijuana to the party. R. 2.

Mr. Towles stayed for two hours at the party, from 9 pm to 11 pm. R. 3. Although he spent most of his time outside tossing a football with other students, he did witness alcohol and tobacco use at the party. R. 3. Sometime during his stay, someone took a photograph of him together with two other students, Frank Conrad and John Thomson – both Horton Hopkins sophomores. R. 3. The photograph showed them outside Mr. Tweegs' house during the party, where Mr. Conrad was smoking. R. 3. Although not identified by name, Mr. Towles' face was clearly visible. R. 3. At around 11:30 pm on October 3, the police arrived to respond to noise violations at Mr. Tweegs' house and eventually cited five high school students for underage drinking. R. 3. Officers also issued a citation to Mr. Conrad for marijuana possession after finding him in the backyard with a marijuana joint. R. 3.

On October 4, Ms. Politte received an e-mail with an attachment containing the photograph taken of Mr. Towles. R. 3. Ms. Politte decided to post the photograph on her FAD webpage, attributing the photograph to "an anonymous Horton Hopkins student." R. 3. Ms. Politte posted the photograph, including the caption, "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" R. 3.

Principal Smalls spent the next morning fielding calls from several school parents who had viewed the photograph on FAD, concerned about illegal drug use. R. 3. Hopkinsville police also alerted Principal Smalls about the students they cited at the party. R. 3. The FAD webpage and photograph prompted Principal Smalls to question Mr. Towles, Mr. Conrad, Mr. Thomson and Mr. Tweegs in her office individually. R. 3. All four students denied possessing drugs. R. 3. Principal Smalls, following the Drug and Alcohol Use Policy, searched each of their lockers and book bags. R. 3. After finding a small baggie of marijuana in Mr. Conrad's locker, she asked each of them to submit to a personal search individually and in private. R. 3. Although each student refused, gym teacher Jim Waters conducted a search of each boy in a private room per the Drug and Alcohol Use Policy. R. 3.

During the search, Mr. Waters never touched any of the boys. R. 3. Instead, Mr. Waters searched the boys' clothing pockets after telling each one to remove their outer clothing. R. 3. Although Mr. Waters did not find illegal drugs in Mr. Towles' possession, he did find a small amount of marijuana in Mr. Thomson's jean pockets. R. 3.

Believing that Ms. Politte's webpage mischaracterized him as a drug dealer, Mr. Towles started his own Friendkepedia webpage, Students Against Defamatory Statements ("SADS"). R. 3. Creating the webpage on his own computer, he wrote:

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

R. 3-4.

After hearing of Mr. Towles' call to fight against "injustice," students began accessing both Ms. Politte's and Mr. Towles' webpages, not only from their homes, but also from school computer labs and the library, during their free time throughout the school day and after school hours. R. 4. Realizing the situation was getting worse, and fearing potential student disruption, Principal Smalls became concerned with keeping discipline and order at the school. R. 4. While she was upset with Mr. Towles' vilification of the school administration, her primary concern became Ms. Politte's and Mr. Towles' webpages which she believed were causing too much of a disruption of the other students' education. R. 4. Therefore, Principal Smalls required Ms. Politte and Mr. Towles to remove their webpages from the Friendkepedia network. R. 4. Both students refused, and Principal Smalls suspended them until they agreed to comply. R. 4.

On October 18, 2008, Ms. Politte and Mr. Towles filed a complaint in Badger County District Court pursuant to 42 U.S.C. §1983. R. 4. They asserted that Principal Smalls, by requiring them to remove their webpages, violated their free speech rights under the First Amendment. R. 4. Further, Mr. Towles claimed that the search was unreasonable under the Fourth Amendment. R. 4. Horton Hopkins and Principals Smalls moved for summary judgment on both counts. R. 4.

The Badger County District County granted summary judgment in favor of Horton Hopkins and Principal Smalls, finding that: 1) Principal Smalls reasonably forecasted a substantial disruption to students' education; and 2) their search of Mr. Towles' person was justified at its inception and permissible in scope. R. 5-8. The Court of Appeals of the State of Grace affirmed; however, as to Mr. Towles' Fourth Amendment claim, it instead found that the school district and Principal Smalls were entitled to qualified immunity. R. 11-12.

On January 26, 2009, this Court granted certiorari. R. 14.

SUMMARY OF THE ARGUMENT

Horton Hopkins School District and Principal Smalls did not violate Ms. Politte's and Mr. Towles' constitutional rights under the First and Fourth Amendments. It was constitutional for Principal Smalls to order their webpages taken down because they caused and would cause substantial disruption to students' education. Ms. Politte's webpage posed a risk of interfering with the rights of other students, and Mr. Towles defiantly encouraged others to inundate the school administration with complaints. Further, there is a sufficiently high nexus between the webpages and Horton Hopkins. Ms. Politte chose to locate her webpage in a social networking website specifically geared towards students, and Mr. Towles' webpage explicitly addresses Horton Hopkins students. Both students took advantage of the internet's pervasiveness and wide readership, necessitating action from Horton Hopkins. Moreover, although Ms. Politte was eighteen years old, Principal Smalls properly restricted her webpage because courts have drawn distinctions on First Amendment protections not necessarily on the speaker's age but on the differences between secondary and collegiate levels of education.

Additionally, the search of Mr. Towles' outer clothing was constitutional because it was justified at its inception and permissible in scope. Principal Smalls was justified in requesting a search of Mr. Towles' outer clothing because she acted on corroborated tips from parents and a student that he was violating the school district's drug policy. The search was reasonable in its scope because a staff member of the same sex searched Mr. Towles, a sixteen-year-old student, in a private room to determine whether he had concealed drugs. Finally, even if this Court determines that the search is unconstitutional, Principal Smalls and the school district are entitled to qualified immunity because the Supreme Court does not offer a clear rule against searches of a student's outer clothing, and because circuit courts have validated such searches.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT HORTON HOPKINS SCHOOL DISTRICT AND PRINCIPAL SMALLS DID NOT VIOLATE MS. POLITTE'S AND MR. TOWLES' FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT.

The First Amendment protects the freedom of speech. U.S. Const. amend. I. However, the right to free speech is not absolute in all circumstances. *See Watts v. United States*, 394 U.S. 705 (1969) (finding that true threats are not afforded full First Amendment protection).

Under the United States Supreme Court's decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, Principal Smalls reasonably concluded that the webpages would substantially disrupt Horton Hopkins students' education, given the webpages' controversial and defiant content. 393 U.S. 503 (1969). In fact, the webpages, which specifically address Horton Hopkins students, did materially interfere with students' rights and did cause substantial disruption to the school. Furthermore, this Court should not give determinative weight to the fact that the webpages were created off-campus. The internet is a ubiquitous presence in schoolchildren's lives, making regulation by school officials all the more important, especially in light of essential educational goals recognized by the Supreme Court. Finally, while Ms. Politte is eighteen years old, Principal Smalls may regulate her speech because she is nonetheless a high school student.

A. Horton Hopkins School District and Principal Smalls are constitutionally permitted to order Ms. Politte's and Mr. Towles' webpages taken down because the webpages caused and would cause substantial disruption to students' education, and because there is a sufficiently high nexus between the webpages and Horton Hopkins.

A public school may prohibit student speech if: 1) the student's expressions caused substantial disruption to the school environment and materially interfered with the rights of others; or 2) if they would have reasonably led school officials to forecast substantial disruption of, or material interference with, school activities and the rights of other students. *Tinker*, 393 U.S. at 509-14; *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d

Cir. 2007); *see also Lowery v. Euverard*, 497 F.3d 584, 592-93 (6th Cir. 2007) (“*Tinker* does not require certainty, only that the forecast of substantial disruption be reasonable...*Tinker* does not require disruption to have actually occurred.”). The Supreme Court has never considered off-campus student speech in the context of the internet (also known as “cyber speech”).¹

A large majority of jurisdictions have decided on student cyber speech issues by applying either the *Tinker* standard, or a “sufficient nexus” test analyzing the likelihood that such expressions would reach school property. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008); *Wisniewski*, 494 F.3d at 38; *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 2008 WL 4279517, *4 (M.D. Pa. 2008); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007); *Coy ex rel. Coy v. Bd. of Educ. of the North Canton City Schools*, 205 F. Supp. 2d 791, 801 (N.D. Ohio 2002) (finding genuine issues of material fact as to proper application of *Tinker* on unauthorized website); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (“The overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*.”); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying *Tinker* to website created by student while off-campus using vulgar language to criticize school officials); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865-68 (Pa. 2002) (upholding the expulsion of student where sufficient nexus existed between student’s website and school and where student’s website caused disruption beyond “some mild distraction or curiosity created by the speech.”).

Student expression away from school property “does not necessarily insulate [a student] from school discipline.” *Wisniewski*, 494 F.3d at 39. The Second Circuit held that a school

¹ In *Morse v. Frederick*, the Court, in upholding the discipline of a student who unfurled a banner promoting drugs, rejected the student’s claim that because he was standing across the street from the school, he was essentially not on-campus. 127 S.Ct. 2618, 2623-24 (2007). As such, the Court passed on deciding the extent to which school authorities may regulate speech off-campus.

district was constitutionally permitted to suspend a student who, while off-campus, used his instant messaging software to transmit an icon depicting a pistol firing a bullet at a person's head, to fifteen of his schoolmates. *Id.* at 40. The court found there was a reasonably foreseeable risk the icon, created off-campus, would come to the attention of school officials, causing a material and substantial disruption to school operations. *Id.* at 38-39.

A student may be disciplined for her internet expression where she understands the substantial likelihood that students would read them. The Second Circuit has held that a student may be penalized for her expressions on a blog post² she created while off-campus. *Doninger*, 527 F.3d at 53. The student referred to school officials as “douchebags” and allowed others to leave comments to her post, one of which called the school superintendent “a dirty whore.” *Id.* at 45. The blog also called for students to inundate school officials with phone calls and messages protesting a recent decision to postpone a student event. *Id.* The court found that the student purposely designed for her blog to come onto campus and that there was a reasonably foreseeable risk of substantial disruption to the school environment because: 1) the student used offensive and potentially disruptive language; 2) the blog alleged misleading information which the school had to correct; and 3) the student was a student government leader. *Id.* at 50-52.

Lower courts have also applied the “sufficient nexus” standard in addition to considering *Tinker* in off-campus, student cyber speech cases. *See Snyder*, 2008 WL 4279517 at *7. For example, the District Court for the Middle District of Pennsylvania held that a school was constitutionally permitted to suspend a student who created a mock website crudely portraying the school principal, because of a high connection “between the off-campus action and on-

² According to Wikipedia, “a blog (a contraction of the term weblog) is a website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video....Many blogs provide commentary or news on a particular subject; others function as more personal online diaries.” Wikipedia, <http://en.wikipedia.org/wiki/Blog> (last visited Feb. 26, 2009).

campus effect.” *Id.* Crucial to the court’s finding was that the website addressed the principal, its intended audience was students at the school, and a copy was brought to school. *Id.*

1. Principal Smalls may regulate the webpages in this case under the Tinker standard.

The court below correctly found that Ms. Politte’s and Mr. Towles’ webpages are similar to the students’ expressions in *Wisniewski* and *Doninger*, which were found to have created a reasonably foreseeable risk of substantial disruption to the school environment. 494 F.3d at 39; 527 F.3d at 50-52. That their webpages were created off-campus does not insulate Ms. Politte and Mr. Towles from school discipline, especially in light of the fact that their intended audience was significantly wider than the 15 students in *Wisniewski*, 494 F.3d at 39.

Mr. Towles used offensive and potentially disruptive language. His webpage publicly announced a need to fight an “injustice,” specifically addressing *all* Horton Hopkins students. R. 4. It invited them to speak out “against Smalls and the rest of these Hopkins idiots.” R. 3-4. Such disparaging language is comparable to the blog post in *Doninger*, in which school officials were referred to as “douchebags.” 527 F.3d at 45. Mr. Towles’ call to fight invites an inundation of phone calls and messages of dissent against Horton Hopkins. Moreover, his webpage put forth misleading information that Horton Hopkins would have had to correct. *Id.* at 50-52. Mr. Towles stated that he and other students were subjected to “strip searches.” R.4. Readers could have mistakenly believed that he was nude during the search and that he was actually touched. Finally, because he characterized FAD as a school-sponsored webpage, it is reasonable to conclude that complaints against school officials were inevitable. Mr. Towles blamed *all* of what had happened to him on Horton Hopkins and Principal Smalls, while specifically calling for potentially disruptive acts of opposition.

Similarly, as in *Doninger*, where a student leader's conduct risked disruption to school operations, Ms. Politte's webpage created a reasonable risk of disruption at Horton Hopkins and materially interfered with the rights of others – including the rights of Horton Hopkins students. 527 F.3d at 50-52. Almost 85% of her network consists of Horton Hopkins students. Identification of potential drug dealers likely would have eventually included other students, and such labeling could result in stigmatization and other serious harms to their reputation. After all, Ms. Politte chose to caption the photograph of Mr. Towles by insinuating that “Horton Hopkins students [are] becoming drug dealers...” R.3. In addition, any member of the network who feels unfairly identified as a dealer could very well attribute such labeling to Horton Hopkins itself. Regardless of whom Ms. Politte specifically intended to address, her webpage reasonably led Principal Smalls to forecast substantial disruption of or material interference with school activities because of the strong potential of harm to students' rights. *Tinker*, 393 U.S. at 509-14.

Likewise, the webpages caused substantial disruption to the school environment, and materially interfered with the rights of others. This case therefore substantially differs from *Tinker*, in which silent passive expressions did not disrupt the work of the school or any class. *Id.* at 508. As soon as Mr. Towles' webpage circulated among Horton Hopkins students, whom he *specifically* targeted, they began accessing his webpage from school computer labs and the library throughout the school day. Ms. Politte, by labeling Mr. Towles a drug dealer, materially interfered with his rights to a clean reputation. Her webpage told *at least* 235 members of the Hopkinsville community that Mr. Towles was a potential drug dealer.

The webpages differ from the speech in *Killion* in which the “boorish antics” of a student in an e-mail was not a substantial disruption because the e-mail did no more than to upset school officials. 136 F. Supp. 2d at 455. Here, the webpages did more than upset Principal Smalls.

They negatively affected other students and disrupted school operations. Both webpages' effect on the school and on Horton Hopkins students was substantial, and their content did much more than cause "some mild distraction or curiosity..." *J.S.*, 807 A.2d at 868. To the contrary, Ms. Politte's webpage had great detrimental effect to Mr. Towles' reputation and education, and Mr. Towles prompted students to access his webpage, inviting them to challenge school authority.

Therefore, under *Tinker*, Horton Hopkins School District and Principal Smalls properly prohibited Ms. Politte's and Mr. Towles' webpages. It was reasonable for Principal Smalls to conclude that the webpages posed a large risk of substantial disruption to the operation of the school and the school environment. Furthermore, the webpages caused disruption to students' education and materially interfered with the rights of other Horton Hopkins students.

2. In this case, a sufficient nexus exists between the webpages and Horton Hopkins.

This Court may also find it appropriate to apply the "sufficient nexus" test as other jurisdictions have. *See Doninger*, 527 F.3d at 50; *Wisniewski*, 494 F.3d at 38; *Snyder*, 2008 WL 4279517 at *4; *J.S.*, 807 A.2d at 861-62. As in *Doninger* and *Wisniewski*, it was reasonably foreseeable that the webpages in this case would reach school property. 527 F.3d at 50; 494 F.3d at 38. Mr. Towles specifically aimed his expressions at "all Horton Hopkins students," criticizing not only school officials but also DUDS. R. 4. He therefore purposely designed his webpage to come onto campus, encouraging *student action* against Principal Smalls and Horton Hopkins. Therefore, he must have known that other Horton Hopkins students were likely to read his posting.

Likewise, it was reasonably foreseeable that Ms. Politte's webpage would come on campus. Although the page is directed towards all residents of Hopkinsville, Ms. Politte named herself the administrator, locating the webpage on a website specifically geared towards students.

198 members of her network are Horton Hopkins students, including all 130 DUDS members. Moreover, she promoted the webpage at a DUDS meeting that was held in a Horton Hopkins classroom. Consequently, a strong link exists between the webpages and Horton Hopkins.

The webpages bore a high connection to the school because it was so likely that they would reach school property. This case is therefore distinguishable from *Layshock*, in which there were “several gaps in the causation link between...off-campus conduct and...disruption of operations in the school.” 496 F. Supp. 2d at 600. In that case, the school could not demonstrate that the webpage at issue was the one causing disruptions (there were other similar webpages).

Id. Here, the facts establish “a connection between the off-campus action and on-campus effect.” *Snyder*, 2008 WL 4279517 at *7. Ms. Politte and Mr. Towles addressed Horton Hopkins students, and indeed, students accessed their webpages while at school.

Therefore, the school district and Principal Smalls were constitutionally allowed to prohibit the webpages in this case under the “sufficient nexus” test. It was reasonably foreseeable that the webpages would reach school property, and there is a substantial relationship between the webpages and Horton Hopkins.

B. This Court should reject the narrow “territoriality” approach requiring on-campus speech because the pervasiveness of the internet and the special characteristics of schools recognized by the Supreme Court, necessitate giving school officials broad authority to regulate speech.

“[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.”³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Indeed, the Supreme Court has consistently recognized the special characteristics of the school environment, finding that speech may constitutionally be prohibited if it is inconsistent with a school's basic educational mission and declaring that students do not enjoy the

³ The Court was referring to a case in which it found that the First Amendment protected the public display of a four-letter expletive written on an adult's jacket. *See Cohen v. California*, 403 U.S. 15 (1971).

conventional First Amendment protections afforded to speech in traditional and limited public forums.⁴ *Tinker*, 393 U.S. at 506; *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988) (holding that school newspaper published by students did not qualify as public forum such that school may restrict speech).

Nevertheless, a small number of courts have chosen to adopt a “territoriality” approach and reject a school’s prohibition of cyber speech where the speech was “entirely outside of the school’s supervision or control.” *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); *see also Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (requiring on-campus creation of a website where *Tinker* standard cannot be met). These cases closely follow the Second Circuit’s decision in *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.* and its progeny, involving written speech and gestures by students while off-campus. 607 F.2d 1043, 1051 (2d Cir. 1979) (“First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon.”); *see also Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 618 (5th Cir. 2004) (finding no student speech where drawing was brought to school by accident).

Requiring the student-speaker to use on-campus resources to create, view or bring the expression on campus, demonstrates too narrow of a perception of the reality of the internet and schools today. The Supreme Court has recognized that “[f]rom the publishers’ point of view, [the internet] constitutes a vast platform from which to address and hear from a worldwide audience of readers, viewers, researchers, and buyers. Any person...with a computer connected to the [i]nternet can ‘publish’ information.” *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

Likewise, in 2007, it was reported that 93% of teens use the internet – 64% of which engaged in

⁴ Justice Brennan has even recognized that “education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 63 (1973) (Brennan, J., dissenting) (emphasis added).

“content-creating” activity – and 55% of teens using the internet have social networking profiles such as Friendkpeedia. Sarah O. Cronan, *Grounding Cyberspeech: Public Schools’ Authority to Discipline Students for Internet Activity*, 97 Ky. L.J. 149, 150 (2008) (discussing the importance of prohibiting cyber-bullying). The staggering omnipresence of the internet presents difficult challenges to schools trying to maintain order and discipline such that their daily goals to educate students can be met uninterrupted. As such, the court in *Snyder* rightly acknowledged:

[T]he line between on-campus and off-campus speech is blurred with increased use of the internet and the ability of students to access the internet at school, on their own personal computers, school computers and even cellular telephones. *As technology allows such access, it requires school administrators to be more concerned about speech created off-campus – which almost inevitably leaks onto campus – than they would have been in years past.*

2008 WL 4279517 at *7 n.5 (emphasis added).

It required very minimal effort on the part of Ms. Politte and Mr. Towles to infringe on the rights of others or to call for protests against school officials. The effects of such seemingly small actions on the school environment, however, have been continually significant. That the internet is ubiquitous does not support an argument that cyber speech is beyond school authority unless physically and intentionally brought to school. On the contrary, it is precisely why courts should grant schools greater latitude in regulating student cyber speech. Such expressions have a way of reaching the campus almost instantaneously in a way that a finger gesture or drawing cannot. They can have profound effects on the school environment and operations, regardless of whether a student intentionally brought the website to school, or whether he viewed or shared it with others there.

Similarly, this Court must reject arguments that students have property rights to websites created in private servers to the extent that they are afforded full First Amendment protection.

See Rhoda J. Yen, Free Speech on the Internet: Regulating Web Authorship by Students, 2000

Computer L. Rev. & Tech. J. 61, 70 (2000) (asserting that websites created on private servers should be afforded protection from school censorship). The Supreme Court rejected such an assertion in *Fraser*, 478 U.S. at 682 (“It does not follow...that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political viewpoint, the same latitude must be permitted to children in a public school.”).

To be sure, not all forms of student expression, whether online or offline, should come within the purview of school authority. Courts have rightly declared that student speech that merely creates mild distraction or curiosity cannot be regulated. *J.S.*, 807 A.2d at 868. Therefore, a student’s online diary that is merely critical of a school administration, without more, is not subject to school regulation. However, when, as here, students take advantage of the internet’s resources, accessibility and wide readership to create expressions which substantially hinder schools in their educational missions and infringe upon the rights of others, schools must possess the constitutional authority to restrict such speech. Otherwise, the internet serves to assist a student’s desire to interrupt his fellow students’ education and to undermine his school’s objective of preparing “pupils for citizenship in the Republic.” *Fraser*, 478 U.S. at 675.

Therefore, courts should not adopt narrow views on school regulation of student speech, such as the “territoriality” approach embraced by the court in *Emmett*, 92 F. Supp. 2d at 1090. Instead, this Court should follow what the large majority of jurisdictions have done and apply either the *Tinker* standard or the “sufficient nexus” test. This Court cannot allow the internet to serve as a backdoor way for students to wear “Cohen’s jacket.” *Fraser*, 478 U.S. at 682.

C. Although Ms. Politte is eighteen years old, Principal Smalls may restrict her webpage because her age should not determine the outcome of this case.

Although persons who have attained the age of eighteen are generally entitled to more freedoms, courts have drawn First Amendment analysis distinctions not necessarily on the

speaker's age, but on the differences between secondary and collegiate levels of education. *See e.g., Widmar v. Vincent*, 454 U.S. 263, 276 n.14 (1981) (“University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.”); *Healy v. James*, 408 U.S. 169, 180-81 (1972) (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.”); *Bradshaw v. Rawlings*, 612 F.2d 135, 138-39 (3d Cir. 1979) (recognizing that colleges can no longer control general morals of students because they no longer exercise rights and duties *in loco parentis*).

In *Fraser*, the Court stated that the role of the public school system is to “inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” 478 U.S. at 681. The Court therefore recognized that the public interest in promoting such civility may outweigh a student's freedom of speech. *Id.* Once students leave the confines of secondary education however, they become adults in society. Some then enter universities – undoubtedly, marketplaces of ideas.

In this case, although Ms. Politte is eighteen, her age should not determine this Court's decision. Undoubtedly, many students reach the age of majority while seniors in high school, while some even earlier. Like Ms. Politte, they are not university students and have not yet entered society fully as adults. Regardless of their age, the same considerations involving the inculcation of habits and “manners of civility,” as well as school administrators' rights and duties *in loco parentis*, remain. *Fraser*, 478 U.S. at 681; *Bradshaw*, 612 F.2d at 138-39. Ms. Politte is a student at Horton Hopkins and her webpage nevertheless had a substantial impact on the

school's environment. She is therefore not entitled to full First Amendment protections simply because she is eighteen years old. Whereas a college institution would be a place in which Ms. Politte would be encouraged to think and independently create her own views – indeed, even controversial ones – Horton Hopkins has significantly different educational goals for its students.

Because Ms. Politte is a student at Horton Hopkins High School – and not Horton Hopkins University – she is entitled to the limited First Amendment freedoms subject to a balancing against the educational mission of her school. Therefore, her age should not be considered determinative and this Court should analyze the constitutionality of restricting her webpage under *Tinker* and other established precedent concerning student speech.

II. THE SEARCH OF MR. TOWLES' OUTER CLOTHING WHILE ON SCHOOL PREMISES DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES BECAUSE THE SEARCH WAS JUSTIFIED AT ITS INCEPTION AND PERMISSIBLE IN ITS SCOPE.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. Searches by school officials implicate the Fourth Amendment's protection as applied to state actors through the Fourteenth Amendment. *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). Generally, a search is considered unreasonable if it is not conducted pursuant to a judicial warrant issued after a demonstration of probable cause. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989). However, the Supreme Court has carved out an exception for cases where "special needs" exist beyond normal law enforcement that make the warrant and probable cause requirements impracticable. *Griffith v. Wisconsin*, 483 U.S. 868, 873 (1987). Cases that fit this exception allow searches based on the lower standard of "reasonable suspicion." *Terry v. Ohio*, 392 U.S. 1 (1968).

In the school context, the reconciliation of a student's privacy interests with the school's interest in maintaining order is one of the "special needs" evaluated under the lower "reasonable

suspicion” standard. *T.L.O.*, 469 U.S. at 342. Under *T.L.O.*, the “reasonable suspicion” standard hinges on a two-prong test analyzed under the totality of the circumstances. *Id.* A search will be permissible under this standard if it is: 1) “justified at its inception;” and 2) “reasonably related in scope” to the circumstances justifying the interference in the first place. *Terry*, 392 U.S. at 20.

Here, the search of Mr. Towles’ outer clothing was justified at its inception because there were reasonable grounds to suspect the search would turn up evidence he had violated the school district’s drug policy. Additionally, the search of Mr. Towles’ outer clothing was permissible in scope because it was reasonably related to finding drugs and not excessively intrusive in light of his age and sex, and the nature of the infraction. Finally, even if this Court determined that this search violated the Fourth Amendment, Principal Smalls and the school district are entitled to qualified immunity because the unconstitutionality of such searches was not clearly established at the time it took place.

A. The search of Mr. Towles’ outer clothing was justified at its inception because there were reasonable grounds for school officials to suspect the search would turn up evidence that he had violated the school district’s policy against illegal drug use.

“Under ordinary circumstances, a search of a student by a teacher or other school official will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *T.L.O.*, 469 U.S. at 342. An inquiry into whether a search was justified at its inception must look at the totality of the circumstances. *Id.* Here, the search of Mr. Towles’ outer clothing was justified at its inception because it was based on individualized suspicion gleaned from parental tips and a student’s photographic tip that he was violating the drug policy. The search was not based on “guilt-by-association,” as the lower court incorrectly stated.

However, even in the absence of individualized suspicion, this search was still justified because such suspicion is not an absolute requirement in a “reasonable suspicion” analysis.

Student tips are more reliable than anonymous tips; however, even anonymous tips, when corroborated, can provide reasonable suspicion to conduct a valid search. In *C.B. By and Through Breeding v. Driscoll*, a student informed an assistant principal that CB was going to make a drug sale at school that day. 82 F.3d 383 (6th Cir. 1996). The student informant received the information from an anonymous student who said CB was hiding the drugs in his coat. *Id.* Based solely on the information provided in the second-hand tip, the school sent two staff members to remove CB from his classroom. *Id.* The two staff members conducted a search of CB’s outer clothing and pockets but discovered no illegal drugs. *Id.* The Sixth Circuit stated that because student informants are more reliable than other informants, the tip sufficiently satisfied reasonable suspicion. *Id.* Furthermore, because CB arrived at school wearing a coat, the tip was even stronger because it was partially corroborated. *Id.*

Additionally, school searches conducted in the absence of individualized suspicion are not automatically invalid. In *Beard v. Whitmore Lake Sch. Dist.*, the Sixth Circuit invalidated invasive student searches to find stolen money. 402 F.3d 598 (6th Cir. 2005). A student reported to a teacher that her prom money had disappeared during gym class, so school officials conducted nude strip searches of over twenty boys, and made at least five girls undress in front of each other to locate the money. *Id.* The court reaffirmed the *T.L.O.* principle that the lack of individualized suspicion does not *ipso facto* render a search unreasonable. *Id.* Declining to invalidate the searches solely because they lacked individualized suspicion, the court instead held that the searches were impermissible in scope because the intrusiveness of the searches outweighed the severity of the infraction. *Id.*

Here, the search of Mr. Towles' outer clothing was justified at its inception because it was based on reasonable suspicion garnered from both the student photographic tip, and the calls from concerned parents. Like the tip in *Driscoll*, the tip from Ms. Politte's webpage provided Principal Smalls reasonable suspicion to justify the search of Mr. Towles' outer clothing. As the court in *Driscoll* stated, student tips are more reliable than mere anonymous tips. 82 F.3d at 388. Additionally, independent corroboration in this case by Principal Smalls of both the photographic tip and the parental calls add to the tips' reliability and veracity. *See Alabama v. White*, 496 U.S. 325, 331 (1990) (finding that even corroborated anonymous tips satisfy reasonable suspicion because less reliable information can be used). Principal Smalls received a phone call from the police that corroborated the concerns of the parents and the photographic tip's caption that drugs were indeed found at the party. Moreover, the police call bolstered the reliability of the photographic tip because one of the boys in the photograph had indeed been cited for illegal drug use. Under the totality of the circumstances, this corroboration, coupled with the inherent reliability of a photographic tip, gave Principal Smalls reasonable suspicion that Mr. Towles might be in violation of the drug policy, and justified her decision to search his locker and bag. *See Phaneuf v. Fraikin*, 448 F.3d 591, 598-99 (2d Cir. 2006) (stating that even an uncorroborated tip justifies additional investigation by school officials).

Furthermore, once the initial search of the four boys' bags and lockers actually turned up a small amount of marijuana, Principal Smalls was justified in conducting a search of the boys' outer clothing to determine if they were concealing marijuana on their persons. *See T.L.O.*, 469 U.S. at 347 (finding that an initial search uncovering "rolling papers" corroborated school official's suspicion justifying second more intrusive search); *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1082 (9th Cir. 2008) (stating that corroborating physical evidence

found in an initial search justifies a second more intrusive search). Here, the discovery of marijuana further corroborated the tip, making a more intrusive search reasonable.

The search of Mr. Towles' outer clothing was based on the individualized suspicion that he was in violation of the drug policy. Principal Smalls was justified in searching his outer clothing because she reasonably suspected he was in possession of marijuana when he came to school on the day of the search. A week prior to Mr. Tweegs' party, rumors widely spread that the party would involve the circulation of marijuana. The party's host was a known drug offender, and Ms. Politte's photographic tip included a caption implicating Mr. Towles, Mr. Conrad, and Mr. Thomson of dealing drugs. The photograph plainly showed Mr. Towles' sitting with a student who was smoking at a party rumored to involve drug circulation and hosted by a known drug offender. Working with the corroborating knowledge that one of the students in the photograph had been cited for marijuana use, it was imminently reasonable for her to conclude that: 1) drugs had circulated at the party; 2) Mr. Conrad, who was cited for illegal drug use, may have shared his marijuana with the other boys in the photograph; and 3) Mr. Towles and the other boys might very well have walked away from the party with marijuana. When marijuana found in Mr. Conrad's locker corroborated this suspicion, a further search was justified.

Finally, even if this court were to find that Principal Smalls did not have individualized suspicion that Mr. Towles was in possession of illegal drugs, the search of his outer clothing was constitutionally reasonable because it: 1) was minimally intrusive; 2) did not excessively violate his legitimate expectation of privacy; and 3) served a weighty government interest. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (setting forth three-part balancing test to justify "suspicionless" school searches). The United States Supreme Court has found that the Fourth Amendment imposes no irreducible requirement of individualized suspicion. *T.L.O.*, 469

U.S. at 342 n.8; *see also Vernonia*, 515 U.S. at 653. Although at least one circuit has required individualized suspicion for a highly intrusive nude strip search, this case involves a much less intrusive search of a student's outer clothing. *See Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002), *reinstated*, 323 F.3d 950 (11th Cir. 2003) (finding strip searches of students without individualized suspicion unreasonable). Here, Mr. Towles was never touched and was never required to remove his underclothes.⁵

Therefore, the search of Mr. Towles' outer clothing was justified at its inception because it was based on the individualized suspicion that he was violating the school district's drug policy. This individualized suspicion was based on corroborated tips from concerned parents and a student's photographic tip. Furthermore, even if this court were to find that individualized suspicion did not exist, the search of Mr. Towles' outer clothing was still justified at its inception because such suspicion is not an absolute requirement in a Fourth Amendment analysis.

B. The search of Mr. Towles' outer clothing was permissible in scope because it was reasonably related to the objectives of the search, and was not excessively intrusive in light of the student's age, the student's sex, and the nature of the infraction.

Generally, "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. The United States Supreme Court has repeatedly refused to declare that only the "least intrusive" search practicable can be found reasonable under the Fourth Amendment, but has instead looked at the totality of the circumstances to determine the reasonableness of a particular search. *Vernonia*, 515 U.S. at 663 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 607 (1989)).

⁵ Significantly, the Supreme Court has stated that student athletes hold an even lesser expectation of privacy. *See Vernonia*, 515 U.S. at 657. Here, Mr. Towles was a student athlete. He played junior varsity baseball the prior year, and fully intended to try out for the team again this school year. *Vernonia* stated that by "choosing to go out for the team," student athletes voluntarily subject themselves to reduced expectations of privacy. *Id.*

In the school context, this Court must consider the age of the student searched to determine whether the search was excessively intrusive. In *Cornfield v. Consol. High Sch. Dist. No. 230*, the Seventh Circuit upheld the nude strip search of a sixteen-year-old student. 991 F.2d 1316 (7th Cir. 1993). The court found that “the ages of seven and fourteen are regarded as important transition periods in child development” and “serve as useful guideposts” in evaluating school searches. *Id.* at 1321. Therefore, since children over the age of fourteen are generally treated as adults for criminal purposes, the nude strip search of a sixteen-year-old was not unreasonable. *Id.* at 1323.

Additionally, in order to determine the reasonableness of a search in the school context, this Court must consider the sex of the student subject to the search. In *Bridgman v. New Trier High Sch. Dist. No. 203*, the Seventh Circuit upheld a search of a male student’s outer clothing although a female school staff member conducted the search. 128 F.3d 1146 (7th Cir. 1997). The Seventh Circuit recognized that generally, in considering the sex of the student, the school should have the search conducted by a teacher or staff member of the same sex as the student. *Id.* However, the court found that, although undoubtedly an uncomfortable experience, the search of a male student by a female staff member was reasonable because searching students’ outer clothing is far less invasive than a full strip search. *Id.*

Finally, in order to determine the reasonableness of a search in the school context, this Court must consider the nature of the infraction of which the student is accused. In *Beard v. Whitmore Lake Sch. Dist.*, the Sixth Circuit invalidated the mass strip search of over twenty male students in a gym class in order to find stolen money. 402 F.3d at 605. While the court assumed the searches were justified at their inception, it held that the searches were unreasonable in scope because the nature of the infraction was minimal compared to the highly intrusive search. *Id.*

The court held that school searches for stolen property did not serve as compelling an interest as school searches for drugs or weapons, and therefore was unreasonable in light of the intrusiveness of the search. *Id.*

The search here was reasonable in its scope in light of the maturity and post-pubescent age of Mr. Towles.⁶ As in *Cornfield*, the significantly less intrusive search in this case was permissible in its scope considering Mr. Towles' age. 991 F.2d at 1323; *see also Safford*, 531 F.3d at 1085 (invalidating strip search of thirteen-year-old student entering puberty as excessively intrusive). Because adolescents entering puberty "become more conscious of their bodies," nude strip searches of young schoolchildren present the possibility of "psychological trauma" not present in older children. *Safford*, 531 F.3d at 1086. Therefore, this case is far removed from the facts in *Safford*. If "common sense" informs us that "requiring a thirteen-year-old girl to remove her clothes, partially revealing her breasts and pelvic area" is excessively intrusive, then common sense also informs us that the far less intrusive search of a sixteen-year-old's outer clothing pockets was not excessively intrusive. *Id.* at 1085.

Additionally, the search here was permissible in scope because it was not excessively intrusive in light of Mr. Towles' sex. As in *Bridgman*, the search here was not as intrusive as nude strip searches because Mr. Towles was permitted to keep his underclothes on. 128 F.3d at 1146. In fact, the reasonableness of the search in this case was even stronger because a school employee of the same sex carried it out. *Id.*; *see also Cornfield*, 991 F.2d at 1320 (validating a nude strip search of a male student conducted by two male school employees); *Williams by Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991) (validating the strip search of a female

⁶ Medical experts report that the age of puberty for males generally falls between 9.5 to 14 years of age. Puberty: Adolescent Male, Harvard Medical School and Children's Hospital Boston, <http://www.childrenshospital.org/az/Site1499/mainpageS1499P0.html> (last visited Feb. 26, 2009).

student conducted by a female staff member). Here, because a male gym teacher searched Mr. Towles in a private room, the search was reasonable in light his sex.

Finally, the search here was not excessively intrusive because Mr. Towles was suspected of illegal drug use. A school's interest in maintaining order is strongest when it seeks to protect the health and safety of students from illegal contraband like marijuana. *Vernonia*, 515 U.S. at 660 (stating that the prevention of drug use in schools is an important, perhaps even compelling interest); *Beard*, 402 F.3d at 605 (searches for money serve less weighty government interests than searches for drugs or weapons). The Supreme Court has consistently stated that the prevention of drug use in schools is a weighty interest because the "physical, psychological, and addictive effects" of drugs are most severe" during school years. *Vernonia*, 515 U.S. at 661.

Furthermore, the Supreme Court has found an enhanced interest in deterring drugs where there is an established drug problem like the one Horton Hopkins is facing. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002) (validating suspicionless drug testing policies to combat established drug problems on campus). Unlike the search for money in *Beard*, the search here served the weighty interest of protecting students against the known harms of drug use. 402 F.3d 598. Because invasive strip searches for small amounts of easily concealable illicit substances are reasonable, the far less invasive search of Mr. Towles' outer clothing for drugs was also reasonable. *See Williams*, 936 F.2d at 887 (finding that failure to find illegal drugs in student's locker or purse justified invasive strip search of student for possible concealed contraband).

Therefore, the search was permissible in scope because of Mr. Towles' maturity in age, the limited nature of the search, the privacy of the search conducted by a male staff member, and the weighty interest of protecting the student body from illegal drugs.

C. Horton Hopkins School District and Principal Smalls are entitled to qualified immunity because the unconstitutionality of the search of a student's person was not clearly established at the time of Mr. Towles' search.

A school staff member conducting a search is entitled to qualified immunity when “clearly established law” does not show that the search violated the Fourth Amendment. *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). This inquiry turns on the “objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.” 129 S. Ct. 808 (citing *Wilson v. Layne*, 526 U.S. 603, 614 (1999)).

In order to determine whether a right is “clearly established,” this court must first look at United States Supreme Court precedent, and then circuit court precedent. *Beard*, 402 F.3d at 606-07. Here, even if this Court were to find the search unconstitutional, Horton Hopkins School District and Principal Smalls are entitled to qualified immunity because the unconstitutionality of searching students' outer clothing was not “clearly established” at the time.

The leading Supreme Court decision on this issue, *T.L.O.*, does not offer sufficient guidance to show that the unconstitutionality of a search of a student's outer clothing is clearly established. The Eleventh Circuit has held that even the unconstitutionality of invasive student strip searches is not clearly established. *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997). In *Jenkins*, female second-graders were strip searched by female teachers for stolen money. *Id.* The court held that the school was entitled to qualified immunity because at the time, the law applying the Fourth Amendment to student searches was not developed such that the school would know its conduct was unconstitutional. *Id.*

Additionally, the endorsement of searching students' outer clothing by a number of circuit courts illustrates that the unconstitutionality of such searches is not clearly established. In

Pearson, an arrestee sued the state police claiming the search of his home under the "consent-once-removed" doctrine was unconstitutional. 129 S. Ct. at 822-23. The Supreme Court unanimously granted the state police qualified immunity because the Sixth, Seventh, and Ninth Circuits all issued opinions apparently endorsing police action under the doctrine. *Id.* Noting the apparent acceptance of the doctrine, the Court held that the unconstitutionality of searches pursuant to it was not clearly established. *Id.*

Here, even if this Court were to find that the search of Mr. Towles' outer clothing was unconstitutional, there is simply no way Principal Smalls would have been instructed by *T.L.O.* that her conduct clearly violated the Fourth Amendment. Not only did *T.L.O.* validate the search of a student for drugs, but it also expressly declined requiring school officials to make a showing of individualized suspicion. 469 U.S. at 342 n.8. Under the broad, encompassing language of *T.L.O.*, it was reasonable for Principal Smalls to believe that her conduct was constitutionally permissible. As circuit courts have found, *T.L.O.* does little to offer guidance to school officials evaluating the reasonableness of invasive strip searches, let alone the reasonableness of far less intrusive searches such as the one conducted here. *See Jenkins*, 115 F.3d at 827.

Moreover, a number of circuit courts have not only validated searches of student's outer clothing, but also searches that are more intrusive. *See Hedges v. Musco*, 204 F.3d 109 (3d Cir. 2000) (finding school-mandated student search for drug abuse constitutional); *Bridgman*, 128 F.3d 1146; *Driscoll*, 82 F.3d 383 (finding searches of student's outer clothing for drugs constitutional); *Cornfield*, 991 F.2d 1316 (finding nude strip search of a student for illegal drugs constitutional); *Williams*, 936 F.2d 881 (finding strip search of female student for drugs constitutional). While a smaller number of circuits have ruled against schools conducting student searches, these cases have invariably dealt with much more intrusive nude strip searches

for far less compelling reasons. *See Phaneuf*, 448 F.3d 591 (finding a nude strip search of female high school student based on uncorroborated tip unconstitutional); *Beard*, 402 F.3d 598 (finding nude strip search for stolen money unconstitutional); *Safford*, 531 F.3d 1071 (finding nude strip search of 13-year-old girl for ibuprofen unconstitutional).

Therefore, because the Supreme Court's decision in *T.L.O* does not offer a clear rule against a search of a student's outer clothing, and because circuit courts have validated such searches, Horton Hopkins School District and Principal Smalls are entitled to qualified immunity. The unconstitutionality of searching students' outer clothing was not clearly established at the time Mr. Towles was searched.

CONCLUSION

For the foregoing reasons, Respondents Horton Hopkins School District and Principal Keena Smalls respectfully request this Court enter a judgment affirming the lower court's finding that they did not violate Ms. Politte's and Mr. Towles' free speech rights under the First Amendment. Additionally, Respondents respectfully request this Court enter a judgment reversing the lower court's finding that their search of Mr. Towles was unreasonable under the Fourth Amendment, or, alternatively, affirming the lower court's finding that they are entitled to qualified immunity.

Respectfully submitted,

Horton Hopkins School District and Keena Smalls

By: _____/s/ Competitor No. 4

Counsel for Respondents

Date: February 28, 2009

