
No. 05-1338

IN THE
Supreme Court of the State of Grace

SPRING TERM, 2009

KIT POLITTE AND CORY TOWLES,
PETITIONERS

V.

HORTON HOPKINS SCHOOL DISTRICT AND KEENA SMALLS,
RESPONDENTS

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

BRIEF FOR RESPONDENT

TEAM No. 6

QUESTIONS PRESENTED

- (1) Does the First Amendment permit school officials to control websites that students created off campus, but which triggered a drug search of other students, created a risk of an unruly protest, and which were accessed on campus?

- (2) Does the Fourth Amendment permit school officials to enact a drug policy allowing the search of a student's person and possessions, and to implement that policy to search for drugs where the school officials based their suspicion on information that they could confirm through other sources and that linked the student to others with a history of drug possession, and where the search was conducted privately, in the presence of only one school official of the same sex, solely to look for drugs?

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CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part that:

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

The Fourth Amendment to the United States Constitution states in pertinent part that:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause”

Both these Amendments apply to the States through the Fourteenth Amendment to the United States Constitution, which specifies in pertinent part that: “No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”

STATEMENT OF THE CASE

Factual Background

Horton Hopkins High School (“Horton”) has seen increased drug use in the past five years, escalating from twenty-five students caught using illegal drugs on school property last year to fifteen caught in just the first two months of the current school year. R. at 1. The “community is still reeling” from the death of a local student who overdosed on cocaine at a party. *Id.* With twenty years’ experience as Horton’s principal, Keena Smalls responded to the escalation by asking the district to enact a strict, zero-tolerance drug policy in January 2007. *Id.* The policy allows school officials to conduct searches of the person and possessions of students suspected of having drugs on school property. *Id.*; *see also* Appendix A, *id.* at 15.

In September 2008, junior Kit Politte started a school-sponsored club, Drug Use Damages Schools (DUDS), to combat the increase in drug usage. *Id.* at 2. The group of 130 students posts flyers and organizes assemblies to promote drug-free living. *Id.* After a guest told Politte that the only way to stop drug dealers and users would be to publicize their actions to the community, she created a network page called Fighting All Dealers (FAD) on Friendkepedia, a social networking site geared toward students. *Id.* On the page, which she made at home, she solicited tips on potential dealers, with the “strongest” to be posted anonymously so that sources would feel comfortable speaking up. *Id.* She publicized the page at an on-campus meeting of DUDS and the membership of the network quickly grew to 235 members, with all 130 DUDS members and a total of 195 Horton students joining. *Id.*

On October 3, sophomore Cory Towles attended a party hosted by the captain of the baseball team, Jeff Tweegs. *Id.* at 2. Tweegs had been suspended in September for smoking marijuana and there were rumors that marijuana would be at the party. *Id.* Towles attended

from 9 to 11 p.m., where he claims he saw nothing more than underage alcohol consumption and cigarette smoking. *Id.* at 3. At 11:30 p.m., neighbors reported Tweegs to the police for excessive noise. *Id.* In breaking up the party, the police cited five students for underage drinking, and one student, Frank Conrad, for marijuana possession. *Id.* The police notified Principal Smalls of the citations the following day. *Id.*

Politte received an emailed photo the day after the party, which showed Towles there with Conrad and another student, John Thomson. *Id.* The picture showed a clear image of the boys' faces, and that Conrad was smoking. *Id.* She posted the photo on FAD with the caption: "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" *Id.*

In response to the police notification, and several calls from parents who had seen the photo on FAD, Principal Smalls called Towles, Conrad, Thomson, and Tweegs into her office individually for questioning. *Id.* After they all denied possessing drugs, she followed the school's policy in searching their lockers and book bags. *Id.* She found marijuana in Conrad's locker, which caused her to request a search of the boys' persons. *Id.* She followed the school's policy, which did not require their consent, and had the gym teacher, Mr. Waters, take them individually to a private room to search their clothes for drugs. *Id.* In order to avoid touching them, he had the boys remove their clothing. *Id.* He found marijuana in Thomson's jeans. *Id.*

After the search, Towles created his own Friendkepedia network page, Students Against Defamatory Statements (SADS), on his personal computer. *Id.* On his page he criticized DUDS for invasion of privacy and defamation. *Id.* at 3-4. He also called for all Horton students to "fight against this injustice" and "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." *Id.* at 4.

After students began accessing both pages from lab and library computers throughout the day, Principal Smalls worried that the sites “were causing too much of a disturbance and interrupting” other students’ education. *Id.* In seeking to maintain discipline and order, and to prevent a student protest that she viewed as dangerous to that, she asked both Politte and Towles to remove their sites. *Id.* When they refused, she suspended them until they agreed to take down the sites. *Id.*

Procedural History

On October 15, 2008, Petitioners Towles and Politte filed suit in the Badger County District Court pursuant to 42 U.S. C. § 1983, naming Respondents Horton and Principal Smalls as defendants. *Id.* They both claimed that the forced removal of their websites violated their First Amendment free speech rights, and Towles also claimed that the search of his backpack, wallet, and person constituted an unreasonable search in violation of the Fourth Amendment; both amendments apply to the States through the Fourteenth Amendment. *Id.*

The District Court granted Respondents’ motion for summary judgment in its October Term. *Id.* at 5. The court reasoned that Petitioners’ websites met the *Tinker* “substantial disruption” test as applied to online speech, and that the search of Towles was reasonable at its inception, based on the evidence the school possessed, and was not excessively intrusive in light of the government’s interest. *Id.* at 5-8.

The State of Grace Court of Appeals affirmed the decision in its January Term, 2009, but with slightly different reasoning. *Id.* at 9. The court held that the Petitioners’ internet speech clearly reached campus, and thus affirmed the District Court’s finding of a substantial disruption. *Id.* 10. It then held that the search was not justified at its inception, reasoning that the internet tip was not sufficiently corroborated and that, to justify searching Towles, the school officials had

inappropriately used a theory of “guilt by association.” It nonetheless affirmed the decision of the District Court because Respondents were protected by qualified immunity. *Id.*

This Court granted a timely petition for certiorari on January 26, 2009. *Id.* at 14.

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the Court of Appeals, based on the District Court’s reasoning. First, Respondents acted constitutionally in shutting down Petitioners’ websites. Second, Respondents acted constitutionally in both the enactment of its drug policy and the application of it to Petitioner Towles.

Respondents did not infringe on Petitioners’ First Amendment rights in requiring Petitioners to remove websites that they had created off campus because the sites had sufficiently reached campus to be considered on-campus speech and the sites either created a substantial disruption, or a reasonable forecast of further disruption, in the school to satisfy the *Tinker* standard.

The sites reached campus, and should thus be considered on-campus speech, because other students accessed both sites on school computers, Petitioner Politte’s site caused parents to contact the school and triggered a search of several students on campus, and Petitioner Towles’ site was designed to create an effect on campus. The sites caused substantial disruption on school property when the students interrupted the school’s educational process by accessing the sites, and when the parental reaction and searches triggered by Politte’s site interrupted both administrative and educational processes. Further, Towles’ call for protest on his site created a reasonable forecast of further disruption if other students were to join his antagonism toward the school in an unruly manner.

Respondents did not infringe on Towles' Fourth Amendment rights because the both district's drug policy and the search of Towles pursuant to that policy were reasonable under the circumstances. The policy was constitutionally authorized because the school's interest in creating a drug-free campus outweighed the students' limited expectation of privacy. The search of Towles was permissible because it was both justified at its inception and reasonable in scope.

The search was justified at its inception because Principal Smalls had reasonable suspicion to believe that Towles was in possession of drugs: she had received information from a reliable source, which was sufficiently corroborated, and which linked Towles to individuals who had a history of drug possession. The search was legitimate in scope because it was reasonably related to the objective of the search and it was not excessively intrusive in light of the manner in which the search was conducted. First, since the objective of the search was to determine whether Towles was in possession of marijuana, it was reasonable to search all areas where drugs could reasonably be hidden. Second, the search was performed in a manner that was reasonable under the circumstances; Towles was searched individually by only one school official of the same sex, he was not required to remove his undergarments, and, at no point during the search was he physically touched.

ARGUMENT

This case presents two issues, both related to students' constitutional rights in the context of public schools: (1) the constitutionality of school officials exercising control over student websites created at home, and (2) the constitutionality of a school's drug search policy as applied to Petitioner Towles. The case comes as a result of a grant of summary judgment, with no issues of material facts. Therefore, this Court will evaluate the constitutional questions *de novo*. *Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004).

Supreme Court precedent has established that students retain constitutional protections within the context of school. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). However, the “nature of those rights is what is appropriate for children in school.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). The result is that students have First Amendment rights to free speech, but the school has more leeway than the general government in exercising authority over it; similarly, students retain Fourth Amendment expectations of privacy, but the school’s interest can more easily outweigh it.

This Court should affirm the judgment of the Court of Appeals on both issues, based on the reasoning of the District Court. First, Respondents acted constitutionally in shutting down Petitioners’ websites, because both sites had reached the threshold to be considered on-campus speech and met the substantial disruption test in *Tinker*. Second, Respondents acted constitutionally in enacting the district’s drug policy and in applying it to Petitioner Towles because the school’s interest in preventing drug use outweighed the students’ expectation of privacy and the search of Towles was both justified in its inception and reasonable in its scope.

I. THE SCHOOL HAD AUTHORITY OVER PETITIONERS’ WEBSITES BECAUSE THE SITES REACHED THE SCHOOL AND CREATED, OR CREATED THE RISK OF, SUBSTANTIAL DISRUPTIONS.

The primary standard for school control of speech, established by *Tinker*, focused on the results stemming from it, allowing schools to prohibit expression that “materially disrupts class work or involves a substantial disorder or invasion of the rights of others.” *Tinker*, 393 U.S. at 508, 512-13. Later decisions by the Supreme Court clarified that substantial disruption was not the only standard, but that schools could also prohibit vulgar, lewd, or plainly offensive speech, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), and maintain editorial control over school-sponsored speech, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1986). While

Internet expression, or cyberspeech, appears to be beyond the school's authority when it involves sites created off-campus, the Supreme Court has recognized that some speech, though physically off-campus, could be directed toward the campus in such a way as to constitute speech at school. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

This Court should find the Horton school officials' exercise of control over Politte and Towles' websites constitutional. First, because the sites constitute speech affecting the school sufficient to be considered on-campus; and second, because the content on the sites caused, or could reasonably be forecasted to cause, substantial disruptions.

A. School officials have authority over off-campus internet speech that reaches the premises.

The action that school officials took in response to Petitioners' websites was a legitimate use of school authority because the off-campus speech both reached and affected the school. A school can forbid on-campus student speech that is "inconsistent with its basic educational mission." *Kuhlmeier*, 484 U.S. at 266. Courts' willingness to defer to school officials' control of such speech "rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1044-45 (2d Cir. 1979). However, the Supreme Court has ruled that what constitutes "beyond the schoolhouse" is not limited to merely the school's physical boundaries. *Morse*, 127 S. Ct. at 2634 (actions "during school hours, at a school-sponsored activity," though away from the school, were still on-campus speech).

1. Off-campus expression brought to school should be considered on-campus.

Schools can exercise authority over speech that reaches campus, either physically or through effect, whether or not students bring the speech to school. While some courts have held that speech produced off-campus cannot justify on-campus authority, *see Thomas*, 607 F.2d

1043, numerous other courts have held that writings drafted outside school, but brought to campus, fall within the arm of school authority. *See, e.g., Boucher v. Sch. Dist. of Greenfield*, 134 F.3d 821, 828-29 (7th Cir. 1998) (underground newspaper distributed on school grounds); *Donovan v. Ritchie*, 68 F.3d 14, 19 (1st Cir. 1995) (off-campus copying of explicit material “led to the distribution” on school premises). Additionally, the speech is still on-campus when someone other than the speaker physically brought it there. *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 626-27 (8th Cir. 2002) (threatening letter brought to school by another student); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1075-77 (5th Cir. 1973) (underground newspaper distributed near school, with knowledge that it would be carried onto the grounds). Even when the speech did not physically arrive on campus, courts have held speech to fall under the school’s authority when it is either directed at or concerning the school. *Fenton v. Stear*, 423 F. Supp. 767 (W.D.Pa. 1976) (school authority over obscene speech directed at a teacher in public parking lot).

In *Thomas*, the Second Circuit Court of Appeals determined that students who had created a vulgar newspaper mostly off-campus could not be punished by the school, despite having sold it to other students on school grounds. 607 F.2d at 1045. The court decided that since the content was generated off-campus, any punishment based on content would therefore be impermissible punishment of off-campus speech. *Id.* at 1050. Operating solely under *Tinker*, before the Supreme Court’s holding in *Fraser* that allows schools to punish lewd speech, the *Thomas* court determined that without a substantial disruption, the speech could not be considered on-campus despite its physical presence there. *Id.* at 1052. By contrast, both the Fifth Circuit in *Sullivan* (pre-*Thomas*) and the Seventh Circuit in *Boucher* (post-*Thomas*) recognized that the physical presence of the writings on campus has effectively brought the

speech to campus. In *Sullivan*, the student had not even brought his paper onto campus himself; rather, the fact that he distributed it just outside the school, with the knowledge that readers would be taking the paper into the school, was enough to consider him in violation of the school's rule requiring permission for distribution at school. 475 F.2d at 1073-74. Additionally, the Supreme Court in *Morse* explicitly held that there are situations in which speech, even though never physically arriving on campus, can be considered on-campus speech, which brings the holding in *Thomas* into question as to whether it remains good law. 127 S. Ct. at 2634.

The common thread of this precedent is that the effects of the expression are felt on campus, whether brought there physically by the student or not. Either physical presence or effect on campus is sufficient to consider the speech at school, which, when combined with the other factors required to allow school control of speech, gives school officials the ability to exercise authority over it.

2. Petitioners' websites constitute on-campus speech, both through physical arrival and through impact on campus.

Petitioners' websites should be considered on-campus speech because their sites reached and affected the school. In the realm of cyberspeech, which is at once everywhere and nowhere, courts have considered websites to be on-campus speech, allowing school authority both where the site was accessed on school computers and where off-campus cyberspeech was intended to reach, affect, or cause events on campus. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 48-50 (2d Cir. 2008) (blog concerning school events was sufficient to be on-campus when posted with intent to reach campus and to encourage other students to read and respond to school officials); *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007) (creating and transmitting threatening IM icon off-campus did not insulate from school discipline); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (implicitly finding website to be

on-campus speech where students and teacher accessed site on school computers); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) (“sufficient nexus” between website and campus where site was directed at specific school and/or personnel and was accessed at school).

In *Doninger*, the administration told members of the student council that an event would either be postponed or moved to another venue. 527 F.3d at 44. In response, the students sent an email prompting other students to contact the administration to complain. *Id.* This message resulted in a deluge of calls and emails, and as a result, caused the principal and district superintendent to miss other school activities. *Id.* at 51. Later, one of the student council members posted a blog entry encouraging people to “write . . . or call [the principal] to piss her off more.” *Id.* at 45. While the court could not tell whether the continued contact was a result of the blog or the original email, it said that the original disruption showed that the blog had at least the potential to cause further disturbance, and thus the *Tinker* substantial disruption standard was appropriately met. *Id.* at 51.

Similar to *Doninger*, both Politte and Towles created their websites off-campus, but with clear intent to reach, affect, or cause on-campus activities. Politte’s Friendkepedia page was designed to reach the entire community, but the high percentage of Horton students in the network (198 of the 235 members and all 130 members of her school-sponsored club DUDS) show that, as in *Doninger*, both she and the school could reasonably anticipate the effect of the page to spread through the campus. Further, by promoting the webpage at an on-campus DUDS meeting, she effectively brought it to the school. Thus, she clearly intended the website to create results on-campus, hand-in-hand with her on-campus group, which renders the website on-campus speech through both its promotion on campus and its effect there.

Regardless of her intent, however, the website was accessed on campus by students in the school's computer labs and library, which is on-campus activity of the sort at issue in *Beussink* and *J.S.* In addition to the student access on campus, the effect of the site reached campus, as in *Doninger*, by interrupting normal school operation when parents called the school with concerns related to information on the website.

Towles also directed his website toward Horton's student body. First, he used Friendkpeedia, an internet site designed to network among student peers. Second, his site directly called for Horton students to speak out against the administration, indicating he intended his readers to be primarily Horton students. Additionally, his site, like Politte's and the sites in *Beussink* and *J.S.*, clearly reached the school when it was accessed by multiple students on school grounds, on school computers.

Finally, Towles' site directly called for action that would affect the school. He proclaimed the need to "fight this injustice" and called for Horton students to "let our school administrators know that we will not tolerate this" and to "speak out against" the administration. Regardless of whether any students had yet acted on that call to action, as in *Doninger*, Towles created the site with the intent that they would, which projects a reasonable forecast that the speech would result in an effect on campus.

Both websites reached campus and affected school activities to an extent that satisfies the threshold for speech to be considered on campus through their intended audiences, the resulting on-campus access and parental reaction, and the call to future action.

B. School officials properly exercised authority over Petitioners' websites because the sites either created, or had the potential to create, a substantial disruption.

Respondents acted appropriately by instructing Petitioners to remove their websites, as they were reacting to, and attempting to prevent, substantial disruptions at school. Even when

applied to cyberspeech, *Tinker*'s requirement that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school'" holds true. *Wisniewski*, 494 F.3d at 38 (quoting *Morse*, 127 S. Ct. at 2626). In addition, speech that intrudes on the rights of others bears no constitutional protection. *Tinker*, 393 U.S. at 508. As with *Tinker*, the online speech must do more than merely upset school officials to merit punishment, *Beussink* 30 F. Supp. 2d at 1180, but the standard does not require that the disturbance actually occur before the school is permitted to act, *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (noting that "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place"); *see also LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001). In predicting the results of speech, schools need not have absolute certainty, but only "facts which might reasonably lead school officials to forecast substantial disruption." *Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 673 (7th Cir. 2008) (citing *Boucher*, 134 F.3d at 827-28; *LaVine*, 257 F.3d at 989).

Courts have generally granted schools extreme deference in determining what speech is appropriate because school officials are charged with the responsibility for public education and thus need the authority to "proscribe and control conduct in the schools." *LaVine*, 257 F.3d at 988. Conclusions that certain terms are "inherently disruptive," on their own, tend not to be sufficient in predicting a substantial disruption. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530-31 (9th Cir. 1992) (noting no proof in the record to support assertion that "scab" buttons were inherently disruptive, but allowing for the possibility of proof on remand). Rather, the court looks to the totality of the circumstances to determine if the school's prediction was reasonable. *LaVine*, 257 F.3d at 989. While violent speech, on its face, more clearly shows the

potential for disruption, courts have also recognized the disruptive nature of non-violent speech that reaches campus. See *Doninger*, 527 F.3d 41 (website encouraged other students to contact school officials to complain, which “diverted [them] from their core educational responsibilities”); *Wisniewski*, 494 F.3d 34 (IM suggesting specific teacher be shot); *Boucher*, 134 F.3d 821 (underground paper explaining how to disrupt school computer system).

Though neither Politte’s nor Towles’ websites offered language of the directly threatening sort in *Wisniewski*, both do meet the substantial disruption requirement. The consequences resulting from Politte’s site, as in *Doninger*, interrupted the administration’s “core educational responsibilities” in two ways: first, by creating cause for complaint from parents that forced the administration to respond, and second, by creating suspicion of on-campus drug use based on information that forced the administration to investigate. While dealing with parents and preventing drug use are both part of the administration’s function, the extent to which this was necessary was greater because of Politte’s website than if she had gone through proper channels. Had she reported her concerns to the administration, it could have handled them discreetly, without worrying parents and having to repeatedly answer panicked queries. If the matter resulted in the need to inform all parents, the school would have been able to do so on its own terms, thus minimizing the disruption from unnecessary parental fear. Additionally, while the information Politte posted was enough to justify a search, it might not necessarily have required one. Again, the administration could have exercised its own judgment as to the extent of response necessary had she used proper channels. Because she made the information public, however, the administration was forced into a role of reaction instead of purposeful initial action.

Further, by placing the administration in that position, Politte’s site created the situation in which Towles found himself, both in causing him to be subjected to a search and in giving

him the impetus to create his own site. She therefore shares in responsibility for the disruption resulting from his site, as well as for the disruption caused to the students in the search of their persons and their possessions. While the search here was constitutional, Politte's actions created a risk of invading the rights of others, tantamount to a substantial disruption under *Tinker*.

Towles' website is constitutionally under the school's authority because it falls into the category of a reasonable forecast of disruption. The continued and escalating access of his site on campus appeared to be leading to access during class and increased student reactions, both of which would have caused a severe distraction. Even more importantly, he directly called for action by his fellow students. Just as the call for action in *Doninger* led to a high volume of calls that disrupted the administration of the school, Towles' call to "speak out" could easily have led to a similar result of students bombarding officials with complaints. But an even greater risk was Towles' call to protest. While the *Tinker* rule allows students to protest peaceably if it does not lead to a disruption, Towles' call was not inclined towards peace for two reasons. First, he did not suggest a peaceful method of protest, such as wearing armbands in silent objection, and second, his tone was clearly hostile, indicating that he was trying to incite an angry protest.

As courts have been inclined to grant deference to school officials regarding what speech is appropriate in the school context, because they know their students and are more capable of accurately judging likely reactions, this Court should similarly grant deference to the school in determining the extent of the risk regarding disruptive protest. Here, Principal Smalls indicated that she was worried about the possibility of a protest, and the resulting interruption of other students' education. Based on Towles' tone and the specifics of his call to action, her fear of disturbance was reasonable, thus allowing her to exercise control over his speech.

This Court should affirm the holding of the Court of Appeals because Petitioners' websites arrived at the school both through on-campus access and on-campus consequences, which caused a substantial disruption, or a reasonable forecast of one, therefore allowing the school to constitutionally exercise control over the sites.

II. THE DISTRICT'S DRUG POLICY AND THE SCHOOL'S APPLICATION OF IT TO SEARCH TOWLES WERE REASONABLE UNDER THE FOURTH AMENDMENT.

The Fourth Amendment's assurance of "the right of the people to be secure in their persons, houses, papers, and effects . . . against unreasonable searches and seizures," U.S. Const. amend. IV, extends to searches by state officers, including public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). However, the Supreme Court has determined that in a public school setting, the standard does not require a warrant or probable cause, as such rigid requirements would significantly "interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340.

The district's drug policy and application of it to search Towles were both constitutional because the school's interest in preventing drug use on campus outweighed the students' expectation of privacy and the search was both justified at its inception and reasonably related in scope; thus, while the Court of Appeals erred in its analysis, it correctly affirmed the District Court's order granting summary judgment to Respondents.

A. The district's drug policy was reasonable because the school's interest outweighed the students' expectation of privacy.

The district's drug policy allowing searches was reasonable because the school's interest in having a drug-free campus outweighed the students' limited expectation of privacy. To determine the constitutionality of the district's drug policy, a standard of reasonableness must balance an individual's Fourth Amendment guarantees against the government's legitimate

interests in conducting the search. *T.L.O.*, 469 U.S. at 337; *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995). Searches are reasonable when there is immediacy in the governmental concern that outweighs the students' expectation of privacy. *Acton*, 414 U.S. at 660-61. In general, minor students have a lower expectation of privacy because they are under the control of their parent or guardian, and thus when school officials act in the capacity of a guardian, they are entitled to exercise "a degree of supervision and control that could not be exercised over free adults." *Id.*, 515 U.S. at 654-56. The "primary duty of school officials and teachers is the education and training of young people." *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring). The school, therefore, has a strong interest in maintaining security and order on campus, *id.* at 339, and in the health and safety of its students, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822, 830-31 (2002), both of which make "the nationwide drug epidemic . . . a pressing concern in every school," *id.* at 834. The safety interest in preventing drug use is "undoubtedly substantial." *Id.* 536 U.S. at 836. Broad language does not undermine the constitutionality of a search policy because school officials are entitled to a level of "flexibility in school disciplinary procedures" to be able to maintain security and order on campus. *T.L.O.*, 469 U.S. at 340. With the school's interest established, the reasonableness standard in judging the application of the policy ensures that the extent of the search will not infringe on the student's interest any more than required to maintain order. *T.L.O.*, 469 U.S. at 343.

Horton shares with other schools the substantial safety interest in preventing drug use. The only way to meet their responsibility in the "education and training" of their students is for schools to cultivate an environment that is amenable to learning. A classroom filled with drugs

is the antithesis of that environment because the student not only jeopardizes his own education, but also disrupts the educational process for everyone else.

In addition to the universal safety concerns, Horton has even more particular circumstances which accentuate its interest in fighting drug possession on campus. Recent years have shown a marked increase in drug use at school, as evidenced by the increased number of suspensions for drug use in 2008 from 2007. In addition, just one year ago the school dealt with the loss of one of its students to a cocaine overdose, which naturally resulted in the disruption of the well-being and focus of the students left to grieve.

In light of both the presumed universal interest of a school in fighting drug use, and the specific conditions of drug use at Horton, the policy put into place by the Horton School District is a valid step to prevent drug use on campus. While the balance between the school's interest and that of the student can be shifted if the school abuses the policy in a specific search, the policy itself is reasonable. The school's interest in preventing further drug problems is significantly stronger than the students' limited privacy interest.

B. The school's search of Towles' person was reasonable because it was both justified at its inception and reasonable in its scope.

Principal Smalls' search of Towles' person was permissible because the search was both justified at its inception and reasonable in its scope.¹ The Supreme Court established a two-step framework to determine the legality of a search in a public school context. *T.L.O.*, 469 U.S. at

¹ The following arguments also show that Respondents are entitled to qualified immunity. "If the law did not put the officer on notice that his conduct would be clearly unlawful," qualified immunity is proper. *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (noting qualified immunity protects all but those "who knowingly violate the law")). This section indicates that even if this Court should find the search unconstitutional, the state of current law is such that Principal Smalls did not knowingly violate it.

341. A search is reasonable if, first, “the action was justified at its inception,” and second, it was conducted in a manner “reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* Here, the search is constitutionally permissible because both of these elements are met.

1. The school’s search of Towles’ person was justified at its inception because it was based on a tip from a reliable source that was sufficiently corroborated, and because Towles was linked to students who had a history of drug possession.

The search of Towles was permissible because it was justified at its inception. “A search is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *T.L.O.*, 469 U.S. at 342. The reasonableness of these grounds should be based on the totality of the circumstances, which includes both the quality and content of the information. *Phaneuf v. Fraikin*, 448 F.3d 591, 597 (2d Cir. 2006). As a result of the special needs of a public school, the Supreme Court permits school officials to utilize a standard lower than probable cause to justify a search. *T.L.O.* 469 U.S. at 341, 346. While the original grounds for a search must be based on what was known prior to its start, *Phaneuf*, 448 F.3d at 597, new evidence discovered in the search will permit officials to escalate the extent of the search. *T.L.O.* 469 U.S. at 343-44. Further, a student’s association with known drug users can help provide the reasonable suspicion necessary to conduct a search. *United States v. Feliciano*, 45 F.3d 1070, 1074 (7th Cir. 1995).

a. School officials had reasonable grounds for the search of Towles because it was based on information from a reliable source that was independently corroborated.

The search of Towles’ person was permissible because the tip was provided by a reliable source and was sufficiently corroborated. The quality of information used to justify a search

depends on the reliability of its source, while the content depends on how much of the information can be independently corroborated. *Phaneuf*, 448 F.3d at 597. An informant's veracity, reliability and basis of knowledge are highly relevant considerations in giving weight to a tip. *Alabama v. White*, 496 U.S. 325, 328-29 (1990); *Massachusetts v. Upton*, 466 U.S. 727, 733-34 (1984). School administrators may usually take tips from students at face value, so long as there is no other information indicating untrustworthiness. *S.C. v. State*, 583 So.2d 188, 192 (Miss. 1991). Self-identification in providing information and evidence of firsthand knowledge support the reliability of the informant. *Breeding v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996) (citing *United States v. Harris*, 403 U.S. 573, 583-84 (1971) (noting that "common sense" would indicate that an informant who places himself at risk of prosecution is more reliable); *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993); *Williams v. Ellington*, 936 F.2d 881, 889 (6th Cir. 1991). The Court has specifically recognized that a tip from an anonymous source can contribute to generating the reasonable suspicion necessary for a search as long as it is sufficiently corroborated. *White*, 496 U.S. at 332. Finally, evidence discovered during a search that merits a more extensive investigation may supplement the initial justification and validate an escalated search. *T.L.O.*, 469 U.S. at 343 (initial search of student's purse turned up rolling papers that generated necessary suspicion to render more extensive search of purse reasonable).

In *Breeding*, the student informant was credible where he provided a direct tip to the administrators, based on information from another student, about the plaintiff's drug possession and sale plans. 82 F.3d at 388. The court placed significant emphasis on the fact that if the information was disingenuous, the known-student informant could have been subject to disciplinary action. *Id.* The court reasoned that even though there was no way to assess the

anonymous source's basis of knowledge, the known student would not likely pass on false information if doing so would cause him to be subject to disciplinary repercussions. *Id.* Similarly, the court in *Williams* held that the known-student informant was credible where the principal questioned the informant about her relationship with the alleged drug users, and was satisfied that no animosity existed. 936 F.2d at 889. The court noted that it was appropriate for the principal to rely on the tip because there was no concern that the information was only being supplied to get the other students in trouble. *Id.*

The Court in *Upton* held the anonymous informant reliable where the informant claimed to have seen stolen goods and was able to give a description of them. 466 U.S. at 731, 729. Since the informant had observed the items firsthand, and was able to supply proof of her basis of knowledge through accurate descriptions, she was considered to be credible. *Id.* at 731. The informant was also able to provide a plausible motive for wanting to preserve her anonymity; she was afraid that the thief would seek revenge if he discovered that she was the source of the information. *Id.* at 727.

Similarly, the Court in *White* justified reliance on an anonymous tip where it was sufficiently corroborated. 496 U.S. at 327. The informant told the police numerous details about the plaintiff and her plans. *Id.* The police corroborated the tip through independent investigation by driving to the specified address, spotting the described vehicle, and witnessing the plaintiff drive the most direct route to the motel the informant had named. *Id.* The court found that the police did not need to verify every detail because when “an informant is shown to be right about some things, he is probably right about [the] other facts . . . including the claim that the object of the tip is engaged in criminal activity.” *Id.* at 331.

The facts in this case support the credibility of both Politte and her anonymous source. As with the known informants in *Breeding* and *Williams*, the school administrators had no reason to doubt Politte's motive for posting the tip. Her involvement in DUDS meant that she was known as being active in the fight against drugs, plus there was no evidence that she had any ill-will towards the students who were searched. Rather, her only motive for putting up the website was to help police and lead to the arrest of local dealers. Further, like the known informants in *Breeding* and *Williams*, Politte posted the tip on her website at a risk that if the information was fabricated she could have been subject to disciplinary action. It is unlikely that Politte would willingly put herself, and the reputation of both her website and DUDS, at risk by knowingly posting false information.

Likewise, Politte's anonymous source was a credible informant. While *Breeding* indicates that Politte could be trusted regardless of her source's reliability, the facts show that her source is more reliable than even the one in *Upton*. Politte's source was able to supply physical evidence of his presence at the party, giving stronger proof of his firsthand basis of knowledge than the anonymous source in *Upton*. While the anonymous source did not provide predictive information in his tip, the photographic foundation he offered for further speculation was sound. Further, like the anonymous informant in *Upton*, Politte's source had a justifiable reason for wanting to maintain anonymity. Common sense would indicate that a student in high school would be worried that his fellow classmates would label him as a "nark" and treat him as an outcast. Politte confirmed this logic by stating that she keeps her tips anonymous in order to "be sure that community members feel comfortable sending in information."

Finally, the tip in this case was sufficiently corroborated. Like the police in *White*, Principal Smalls did not base her decision to search exclusively on the tip. Aside from receiving

a photographic tip that Towles was at a party that allegedly had drugs, Principal Smalls also received a phone call from the police informing her that they had cited a student for marijuana possession at Tweegs' party. Since the caption of the photograph included the accurate fact that police had observed drug use at a local high school party, it is entirely reasonable for Principal Smalls to be suspicious that other facts alleged by the tip were also correct. If the allegation that students were dealing drugs proved true, it would indicate that these students would probably be in possession of drugs on campus to facilitate sales.

The initial search that Principal Smalls conducted of the students' personal belongings further corroborated the tip when she found marijuana in Conrad's locker. Since the original tip had correctly linked Conrad to marijuana possession, there was a possibility that the other three students could also possess drugs. Like the rolling papers found in *T.L.O.*'s purse, the marijuana found in Conrad's locker gave Principal Smalls reason to believe that more evidence could be found upon a more detailed search. Thus, as in *T.L.O.*, Principal Smalls was justified in escalating the search. While the Court of Appeals concluded that Principal Small's escalation of the search required further outside investigation, namely questioning teachers and parents about Towles, the Supreme Court has never held that such a duty exists. Rather, the credibility of Politte and her source, combined with the independent corroboration of the tip and the results of the initial search, all suffice to meet the *T.L.O.* standard to justify extending the search to Towles' person.

- b. Towles' association with Tweegs and Conrad, who had possessed drugs at school, provides reasonable suspicion that a search of his person would reveal evidence that he, too, had drugs.**

Principal Smalls had reasonable suspicion to believe that Towles was in possession of drugs because Towles was photographed at a party that had drugs, with individuals who have a

past history of drug use. *See Phaneuf*, 448 F.3d at 599 (noting “a student’s past history of drug use can be a factor adding to the mix in a school official’s decision to conduct a strip search”). The Supreme Court has acknowledged that the Fourth Amendment poses no requirement of individualized suspicion. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (noting “in certain limited circumstances, the government’s need... is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion”). While some courts have held it inappropriate to base suspicion of a student on who his friends are, *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1084 (9th Cir. 2008), others have held that association with known offenders can be used to support reasonable suspicion, *Feliciano*, 45 F.3d at 1074.

The *Feliciano* rule is more appropriate for the school setting because “teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child.” *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). This relationship gives them a level of expertise similar to law enforcement officers, who can take “objective facts, meaningless to the untrained ... combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion.” *United States v. Cortez*, 449 U.S. 411, 419 (1981). Further, it is likely that the *T.L.O.* Court would have agreed with the application of *Feliciano* in the school context, because it said that officials are allowed to rely on logical “conclusions about human behavior.” 469 U.S. at 346 (quoting *Cortez*, 449 U.S. at 418); *see also State v. N.G.B.*, 806 So.2d 567, 568 (Fla. 2d Dist. App. 2002) (holding that student’s association with marijuana users, *inter alia*, rendered search for marijuana reasonable).

In *Feliciano*, the court considered it important that an officer had recognized the plaintiff as a “gang member” where another officer had been suspicious that the plaintiff had been trying to mug someone. 45 F.3d at 1074. The court explained that although this type of information cannot, and should not, be used to prove someone’s guilt, it can be used to contribute to the reasonable suspicion inquiry. *Id.* The consequences of being held guilty are too high to be based simply on membership in a gang, or in a certain group; the consequences of further investigation, however, are minor enough that mere “suspicion by association” is applicable..

By contrast, the *Redding* court determined that the plaintiff’s friendship with a student who had been linked to drug use was irrelevant. 531 F.3d at 1084. The court reached this decision based on faulty reasoning because it applied “guilt by association,” when in actuality it was only “suspicion by association.” Further, the rule used by the *Redding* court does not take into account the common sense understanding of the self-conscious teenage mind. Teenagers are always worried about fitting in with their peers, which is why they tend to copy their friends’ behaviors, clothing and habits. Therefore, if an administrator were to discover that an individual’s friends were all engaging in drug use, this would help generate suspicion that the individual may also be involved with drugs. Working with children every day gives school officials, like law enforcement officers, the knowledge and expertise to understand what others may not. Both the Court of Appeals and the court in *Redding* underestimated that expertise in determining the impact of a student’s associations on the likelihood of him succumbing to peer pressure and being involved with drugs. Thus, this Court should apply the rule in *Feliciano* that association with individuals involved in drug-related activities can help generate the reasonable suspicion necessary to search for drugs.

Applying the reasoning in *Feliciano*, there was reasonable suspicion to search Towles. First, Towles was seen in a photograph attending a party hosted by someone who had been suspended for marijuana use less than a month before, and attending despite rumors that there would be marijuana there. Second, a student in the photograph with Towles was cited at the party for possession of marijuana, and marijuana had been discovered in his locker during Principal Smalls' initial search. Since the photograph linked Towles to a party where police had found drugs and to these individuals who had possessed drugs on campus, Principal Smalls had reasonable suspicion to believe that Towles was also involved with drugs. The Court of Appeals erred by not affording appropriate deference to Principal Smalls' twenty years of experience with students at Horton, finding inappropriate "guilt by association" instead of recognizing her use of that experience to find acceptable "suspicion by association." Therefore, the search was justified at its inception because the credible, corroborated tip linked Towles with confirmed violators of the campus drug policy.

2. The school's search of Towles was reasonable in its scope because it was directly related to determining whether Towles had drugs and was not excessively intrusive in light of the manner in which it was conducted.

The school's search of Towles was reasonable in scope because the methods used in applying the policy to Towles were both related to the objective of the search and not excessively intrusive. The manner of the search is acceptable when "the measures adopted are reasonably related to the objectives of the search." *T.L.O.*, 469 U.S. at 342. The school is not obligated to choose the least intrusive means of search, *Acton*, 515 U.S. at 663 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 (1989)), so long as the manner by which the means are executed is "not excessively intrusive in light of the age and sex of the student and nature of the infraction," *T.L.O.*, 469 U.S. at 342.

a. The search of Towles' person was reasonably related to the objective of determining whether he possessed marijuana.

The measures adopted by Principal Smalls in conducting the search of Towles were reasonably related to her objective in determining whether Towles possessed marijuana. A search is permissible in scope if it is “reasonably related...to the circumstances which justified its interference in the first place.” *T.J. v. State*, 538 So.2d 1320, 1332 (Fla. 2d Dist. App. 1989) (quoting *T.L.O.*, 469 U.S. at 341). Many courts have held that a search of a suspect's person is legitimate in scope when looking for drugs because, given the small size of drugs, it is not uncommon for drug users to keep drugs stored on their person. *Williams*, 936 F.2d at 887; see also *Cornfield*, 991 F.2d at 1322-23 (holding strip search permissible where the student was believed to have been hiding drugs in the crotch of his pants); *Tarter v. Raybuck*, 742 F.2d 977, 983 (6th Cir. 1984) (holding search of a student's pockets reasonable where the student was suspected of using drugs).

In *Williams*, the search was held to be related to its objective where the school officials searched a student's locker and purse because they suspected that she possessed a small vial containing a white powdered substance. 936 F.2d at 882-83. Even though no evidence of drugs was found during this initial search, the school officials still subjected the student to a search of her person where she had to remove her shirt, and “lower her blue jeans to her knees.” *Id.* The extended search was deemed to be related to its objective given “the size of the [item] that was sought.” *Id.* at 887.

In contrast, the search in *T.J.* was determined to be unrelated to its objective where a principal was searching the purse of a student after receiving a tip that the student had brought a knife to school. 538 So.2d at 1321. After the principal emptied the contents of the purse and failed to locate the knife, she unzipped a small zippered pocket inside the purse, despite the fact

that there was no bulge or evidence suggesting the presence of a weapon, and found a bag of cocaine. *Id.* The court reasoned that the cocaine was exposed “during a search extended by simple curiosity rather than suspicion” because the principal had admitted that she did not believe a knife would have been contained in the pocket. *Id.* at 1321-22.

The facts in this case show that the search was related to its objective. Like the search in *Williams*, and unlike the search in *T.J.*, the search of Towles was confined to the circumstances that justified the search, specifically, an allegation that he had drugs at school. Here, the objective of the search was not to establish past activity or find other contraband, but simply to determine whether Towles had drugs on campus. Since drugs can be easily concealed on a student’s person, Principal Smalls needed to have the students, as well as their possessions, searched for drugs. Further, like the glass vial in *Williams*, and unlike the weapon in *T.J.*, marijuana is small enough to reasonably fit inside Towles’ backpack, wallet or pockets. Thus, unlike the decision to extend the search to the small zippered pocket in *T.J.*, the decision to extend the search to Towles’ pockets and wallet was not simply out of curiosity. The search of Towles’ person was reasonable in scope because it was necessary to determine whether he possessed drugs on campus.

b. The search of Towles’ person was not excessively intrusive in light of the appropriate manner in which the search was performed.

Principal Smalls’ search of Towles was not excessively intrusive under the circumstances. A search is not excessively intrusive if it is executed in a manner that is not too invasive.² *Acton*, 515 U.S. at 658. The manner in which the search was undertaken was not

² Keeping the results of a search appropriately confidential is also necessary for a search to be reasonable, *Acton*, 515 U.S. at 658, but this case presents no challenge to the reasonableness of the search based on improper breach of confidentiality.

excessively intrusive because Towles was searched separately from the other students, he did not have to remove his undergarments, the search was conducted by only one school official of the same sex, and at no point during the search did a school official physically touch him. *Cornfield*, 991 F.2d at 1323; *see also Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 606 (6th Cir. 2005) (holding search unreasonable because “the searches of the female students did not occur in the presence of only school officials, but rather in the presence of other students”); *Reynolds v. City of Anchorage*, 379 F.3d 358, 365 (6th Cir. 2004) (noting that search was not excessively intrusive because it occurred “in the presence of only a single staff member”).

In *Cornfield*, the manner in which the search was performed was deemed to be permissible in its scope where the male dean and a male teacher searched a sixteen-year old male student privately in the boys’ locker room. 991 F.2d at 1323. The school officials stood more than ten feet away from the student as they had him change into a gym uniform. *Id.* at 1319. The school officials did not physically touch the student at any time, nor did they conduct a body cavity search. *Id.* at 1323. The court noted that although the student was at an age where he was probably insecure about his body, the school officials conducted the search in an appropriate way. *Id.*

The facts in this case are stronger than those in *Cornfield*. Like the search of the student in *Cornfield*, the search of Towles was conducted privately by a school official of the same sex. The fact that the search of Towles was not done in front of other students afforded Towles a certain element of privacy that renders this search reasonable. Also, like the school officials in *Cornfield*, Mr. Waters did not, at any point, physically touch Towles or perform a body cavity search upon him. Further, in contrast to the search in *Cornfield*, Towles was not required to remove his undergarments. While it is probably still uncomfortable for a student to stand in

front of a school official in his underwear, it is significantly less intrusive than if the student were nude. In addition, the search of Towles was only carried out by one school official, in contrast to the two in *Cornfield*. It is logical that as the number of officials present increases, so too will the student's embarrassment; thus the fact that only one official conducted this search makes it even less intrusive than the acceptable search in *Cornfield*.

The search of Towles' person was not excessively intrusive because Mr. Waters did only what was necessary to confirm or deny the allegation that Towles may have drugs on his person: he searched Towles independently from the other students, as a school official of the same sex, he did not make Towles remove his undergarments during the search, and he did not physically touch Towles during the search.

The search was reasonable in scope because the search was legitimately related to the objectives of the search and the manner in which the search was executed was not excessively intrusive. Therefore, this Court should hold that the search did not violate the Fourth Amendment.

CONCLUSION

For the reasons listed above, this Court should affirm the judgment of the Court of Appeals, on the reasoning of the District Court, that Respondents were constitutionally justified in their control over Petitioners' websites and in their search of Petitioner Towles.

Respectfully submitted,

TEAM NO. 6
Attorney for Respondents

March 2, 2009