

Docket No. 05-1338

In The Supreme Court of the State of Grace

Kit Politte and Cory Towles,

Petitioners

v.

Horton Hopkins School District and Keena Smalls,

Respondents

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

Oral Argument Requested

Brief for the Petitioners

Team 27
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QUESTIONS PRESENTED

1. The U.S. Supreme Court has ruled that in order for a school to punish a student's speech, it must substantially and materially interfere with the educational process. Although no measureable disruption occurred, the Respondents suspended the Petitioners for refusing to take down their websites created entirely at home. Is this attempt to regulate the Petitioners' speech a violation of their First Amendment rights?
2. The U.S. Supreme Court has declared that in order for a warrantless search of a student on school grounds to pass constitutional muster it must be reasonable under all circumstances. The Respondents, based on the Petitioner Towles' association with a known drug user and an uncorroborated, anonymous tip, searched Towles for drugs. Could the Respondents search of Towles be found reasonable under the Fourth Amendment as applied to the states through the Fourteenth Amendment based on these circumstances?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....v

STATEMENT OF JURISDICTION.....v

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....3

STANDARD OF REVIEW.....6

ARGUMENT.....6

I. BECAUSE THE PETITIONER’S SPEECH WAS ENTIRELY OFF CAMPUS, THEY ARE AFFORDED NO DIFFERENT RIGHTS THAN ANY OTHER CITIZEN, AND THEREFORE ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.....6

 A. Because both Politte and Towles’ speech originated off campus, and was not brought on campus, it should be afforded full First Amendment protection.....7

 B. Because neither Politte, nor Towles accessed their website at school, or distributed their speech on campus, their speech has not been brought onto campus subject to Supreme Court precedent.....8

II. IF THE COURT APPLIES *TINKER’S* “SUBSTANTIAL DISRUPTION” TEST, THERE ARE INSUFFICIENT FACTS TO SHOW THAT THERE WAS “MATERIAL AND SUBSTANTIAL INTERFERENCE WITH THE EDUCATIONAL PROCESS.”.....11

III. THE WARRANTLESS SEARCH OF TOWLES VIOLATED THE FOURTH AMENDMENT BECAUSE IT WAS NOT REASONABLE AT ITS INCEPTION OR IN ITS SCOPE.....17

 A. The search of Towles was not reasonable because the preliminary facts would not lead a reasonable person to conclude that a search of Towles would uncover evidence that there was a violation of the law or school rules.....17

B. If the court believes that the search was justified at its inception, the search must still be deemed unreasonable because its intrusive nature was not reasonably related to the objective of making sure the school was drug free.....22

 i. Using the traditional *T.L.O.* scope test the search was excessively intrusive in light of the objectives of the search..... 22

 ii. The Respondents lack of individualized suspicion that Towles possessed drugs coupled with Towles’ legitimate expectation of privacy rendered the highly intrusive search unreasonable in its scope.....23

C. The Respondents are not entitled to qualified immunity under 42 U.S.C. § 1983 because the search of Towles violated a clearly established constitutional right of which a reasonable person would have been aware.....26

CONCLUSION.....29

APPENDICIES

APPENDIX “A”A

APPENDIX “B”B

TABLE OF AUTHORITIES

Beard v. Whitmore Lake School Dist., 402 F.3d 598 (6th Cir. 2005).23, 24, 28

Bethel School District v. Fraser, 478 U.S. 675 (1986).....12, 13

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

Bystrom v. Fridley High School, Independent School Dist. No.14, 822 F.2d 747 (8th Cir. 1987).....9, 10

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

Emmett v. Kent School District, 92 F.Supp.2d 1088 (W.D. Wash. 2000).....9

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).....12, 13

J.S. v. Bethlehem Area School District, 807 A.2d 847 (Pa. 2002).....9, 10, 13

Killion v. Franklin Regional School District, 136 F.Supp.2d 446 (W.D.Pa. 2001).15, 16

Klein v Smith, 635 F.Supp. 1440 (D.Me. 1986).....9

Layshock v. Hermitage School District, 496 F. Supp.2d 587 (W.D. Pa. 2007).....15, 16

<u>LaVine v. Blaine Sch. Dist.</u> , 257 F.3d 981 (9th Cir. 2001)	16
<u>Lowery v. Euverard</u> , 497 F.3d 584 (6th Cir. 2007)	16
<u>New Jersey v. T.L.O.</u> , 469 U.S. 325 (1985).....	17, 18, 19, 21, 22, 23, 25, 26, 27, 28
<u>Morse v. Frederick</u> , 127 S.Ct. 2618 (2007).....	12
<u>Pearson v. Callahan</u> , 129 S.Ct. 808 (2009).....	26, 27
<u>Phaneuf v. Fraikin</u> , 448 F.3d. 591 (2nd Cir. 2006).....	6, 19, 20, 21
<u>Porter v. Ascension Parish School Board</u> , 393 F.3d 608 (5th Cir. 2004).....	8, 9, 10
<u>Redding v. Safford Unified School District #1</u> , 531 F.3d 1071 (9th Cir. 2008)....	20, 22, 27, 28, 29
<u>Saucier v. Katz</u> , 533 U.S. 194 (2001)	26
<u>Thomas v. Board of Ed., Granville Cent. Sch. Dist.</u> , 607 F.2d 1043 (2nd Cir. 1979).....	7, 9, 10
<u>Tinker v. Des Moines Independent Com. Sch. Dist.</u> , 393 U.S. 503 (1969).....	11, 13, 14, 16, 17
<u>Vernonia School Dist. 47J v. Acton</u> , 515 U.S. 646 (1995)	23, 24, 28
<u>Williams by Williams v. Ellington</u> 936 F.2d 881 (6th Cir. 1991).....	24, 25, 26

CONSTITUTIONAL AMENDMENTS

U.S. Const. amend. I.....	A
U.S. Const. amend. IV.....	A
U.S. Const. amend. XIV § 1.....	A

STATUTORY PROVISIONS

42 U.S.C. § 1983.....	B
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STATEMENT OF JURSDICTION

The Badger County District Court entered judgment in October term 2008. The state of Grace Court of Appeals issued judgment in January term 2009. The jurisdiction of this court is invoked pursuant to the grant of *certiorari* to the Supreme Court of the State of Grace on January 26, 2009.

OPINIONS BELOW

The Badger County District Court opinion is listed in the record at pages 1-8. The State of Grace Court of Appeals opinion is listed in the record at pages 9-13.

STATEMENT OF THE CASE

Kit Politte and Cory Towles are both exemplary high school students attending Horton Hopkins High School (“Horton Hopkins”). (R. at 1) As a senior, Politte started Drug Use Damages Schools (“DUDS”) which aimed to rein in drug use among the students at Horton Hopkins. (R. at 2) The group gained popularity and grew to 130 students. After a DUDS meeting, Polite was inspired to start a webpage on Friendkepeidea “to point out drug dealers and users to the entire community.” (R. at 2) She created Fighting All Dealers (“FAD”), at home on her personal computer, calling on members of the community to “submit information about potential drug dealers.” (R. at 2) As administrator of the webpage, Politte asked for people to email her information, which she would in turn post the best tips anonymously. (R. at 2). On September 15, 2008, Politte mentioned FAD at a meeting of DUDS, which took place after school hours in a high school classroom. (R. at 2)

On October 4, 2008, Politte received an email containing a photograph of Towles with two other students, Frank Conrad and John Thomson. (R. at 3) The photo pictured Conrad smoking marijuana. (R. at 3) Quickly, Politte posted the picture giving credit to “an anonymous Horton Hopkins student” with the caption reading, “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. at 3) The photo was from a party the night before on October 3, at the home of Jeff Tweegs, a Horton Hopkins student. (R. at 3) Even though Towles, a virtually discipline free student, had left the party 30 minutes before the police arrived to find underage drinking and marijuana possession, Towles was intimated as a drug dealer in Politte’s picture. (R. at 2 -3)

At school the next day, Horton Hopkins Principal Keena Smalls was alerted of the content of FAD’s webpage, and that Conrad had been cited for marijuana possession. (R. at 3)

After viewing the photograph, Smalls interrogated Towles, Conrad, Thomson, and Tweegs, who all denied possessing drugs. (R. at 3) Smalls, who had recently introduced an ambitious school drug policy, searched each of the student's lockers and book bags. (R. at 3) Smalls only found drugs in Conrad's locker, however, forced all four boys to submit to a strip search over their objections. (R. at 3) Mr. Jim Watters, the gym teacher, compelled the boys to strip down to their underwear. (R. at 3) While searching the boys pockets, Mr. Watters found a little marijuana in Thomson's pocket. (R. at 3) Towles was not found to have any illegal drugs on him in his locker or book bag during the strip search. (R. at 3)

Towles, angered by Politte's posting, created his own personal website from home called "Students Against Defamatory Statements ("SADS"). (R. at 3) Towles accused FAD of being a front for DUDS, and invading his privacy. (R. at 3, 4) Additionally, Towles admonished the school administration for subjecting him to a strip search, and called on his fellow students to "speak out" against the treatment he received courtesy of "Smalls and the rest of [the] Hopkins idiots." (R. at 4)

As the students at Horton Hopkins heard about the websites, they accessed them while at school in the computer labs and in the library, but only during their free time and after school hours. (R. at 4). Principal Smalls, angry about Towles' criticism of her, demanded that both Towles and Politte shut down their websites. (R. at 4). Both Towles and Politte refused and were suspended until they agreed to take down the websites. (R. at 4).

On October 15, 2008, both Politte and Towles filed this action pursuant to 42 U.S.C. §1983. (R. at 4)

SUMMARY OF THE ARGUMENT

The Defendant should be restricted from punishing the Petitioner's student speech because it was entirely off campus, and therefore is entitled to full First Amendment protection. As a threshold issue, the Court must first determine whether the student speech occurred on or off campus. If the student speech is off campus, it is entitled to no less First Amendment protection than afforded any other citizen. Additionally, even if the speech originates off campus, it can be brought onto campus by the student if the connections are substantial enough. Both Kit Politte and Cory Towles' speech originated off campus. Both created their websites entirely off school campus, from home on their personal computers. Kit Polite and Cory Towles "conceived, executed, and distributed" their message outside the school through their network webpages on Friendkepedia. Moreover, the students did not bring their speech onto campus by Towles encouraging his fellow students to contact the administration, or Polite mentioning FAD during a meeting of DUDS. These "scant and insignificant school contacts" are *de minimis* and insufficient to establish the school district's jurisdiction for purposes of punishment. Therefore, because Towles and Politte originated the expression off campus, and did not bring it onto campus, their speech is entitled to full First Amendment protection.

If the court is hesitant to delineate between the level of protection that on and off campus speech receives, and instead opts to apply *Tinker's* "substantial disruption" test, an examination of the record reveals that no "material and substantial interference with the education process" occurred in this case. The record indicates that no measurable disruption occurred at Horton Hopkins. "No classes were cancelled, no wide spread disorder occurred, and there was no violence." There was no evidence that the teachers or principal at Horton Hopkins "were incapable of teaching or controlling their classes." The only actions taken by Horton Hopkins

students subsequent to the web postings was accessing the websites “from the school computer labs and library during their *free time* throughout the school day and *after school hours*.” No rational interpretation of these actions could deem them to be disruptive, let alone materially and substantially disruptive.

Although *Tinker* does not require actual disturbance, when “forecast[ing] substantial disruption” “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” The record in this case is void of a substantial basis upon which a Horton Hopkins school administrator could forecast a disruption upon something more than an “undifferentiated fear or apprehension of disturbance.” Both Politte and Towles were exemplary students. Although Horton Hopkins students viewed the student’s websites, only Towles’ website called for students to “let [the] school administrators know that we will not tolerate this kind of treatment” and for them to “speak out.” Principal Smalls suspended the students because she was angry about the criticism of the administrators and because she wanted to prevent a potential student protest. Although Towles called for students to speak out, it does not establish enough of a nexus that this would turn into a disruptive protest. It may have been a peaceful protest as in *Tinker*. Principal Smalls overreacted, trampling both Towles and Pollite’s First Amendment rights because she was angry about the criticism of her administration. Therefore, because the “material and substantial disruption” standard articulated in *Tinker* is not met in this case, the First Amendment prohibits school administrators from punishing the expression.

The Respondents violated Towles’ Fourth Amendment rights as applied through the Fourteenth Amendment. A warrantless search of a student on school grounds must first be justified at its inception and reasonable in its scope to be deemed reasonable under the Fourth Amendment of the U.S. Constitution.

First, the search of Towles was not reasonable at its inception because there were no reasonable grounds for determining that searching Towles would uncover evidence that he was using drugs. The Respondents searched Towles based on an uncorroborated, anonymously submitted photograph showing Towles sitting next to Conrad, another student who was smoking marijuana. After searching both students' belongings, Towles was found to be drug free while his associate did have drugs. With nothing more than an uncorroborated photographic tip and a futile initial search, the Respondents could not have reasonably concluded a more intrusive strip search of Towles would reveal drug use or possession.

Alternatively, if the Court believes the search was reasonable at its inception, the strip search still fails to pass constitutional muster because it was not reasonable in its scope. First, the search fails because once all of the student's possessions had been searched and drugs were found in another student's locker, the school's objective of making sure the school was drug free was accomplished. With no indication that drugs were on Towles person, the Respondents had no reason to continue with the search by forcing an adolescent boy to strip in front of a staff member.

Furthermore, being that none of the evidence implicated Towles in drug use, the school had no reason to suspect that Towles was individually involved in drugs. Without individualized suspicion the Respondent must show that student did not have a legitimate privacy interest, the search was not overly intrusive, and the school had a compelling reason for initializing the search. As a student with a drug free disciplinary record, Towles had every right to expect his privacy would be respected in school. Secondly, the search of was overly intrusive based on the initial futile search and the lack of evidence that Towles had drugs on his person. Thus, while the

importance of keeping school drugs free cannot be argued, the search of Towles was not reasonable in its scope under these circumstances.

Finally, the Respondents should not be granted qualified immunity because a student's right to be free from unreasonable searches on school grounds is uncontested. This right was clearly established at the time of Towles was searched because a student's right to privacy is inherent; common sense would force the conclusion that the search of Towles under these facts was unreasonable. Alternatively, if detailed guidance is needed as to when a student can be searched, Towles case was so factually similar to other Circuit Court decisions that the Respondents should have known that the strip search of Towles was clearly unreasonable under these particular facts.

ARGUMENT

I. BECAUSE THE PETITIONER'S SPEECH WAS ENTIRELY OFF CAMPUS, THEY ARE AFFORDED NO DIFFERENT RIGHTS THAN ANY OTHER CITIZEN, AND THEREFORE ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

Standard of Review

The district court's grant of summary judgment should be reviewed de novo. The appellate court is required to "view the evidence in the light most favorable to the party opposing summary judgment." *Phaneuf v. Fraikin*, 448 F.3d 591, 595 (2nd Cir. 2006).

Although the Supreme Court has considered what First Amendment rights to free speech and expression high school students possess on campus, it has yet to take up the novel issue presented by public school administrators punishing students for internet speech composed entirely off campus. As a threshold issue, the Court must first determine whether the student speech occurred on or off campus for the purposes of applying past Supreme Court precedent. If the student speech is deemed to be "on campus," the landmark Supreme Court cases involving

student speech would apply. However, if the speech is deemed to be off campus, the student is subject to no more censorship than other citizens.

A. Because both Politte and Towles' speech originated off campus, and was not brought on campus, it should be afforded full First Amendment protection.

The initial inquiry when evaluating whether a school district may punish a student for speech is where the speech originated. The Second Circuit Court of Appeals set parameters to guide the analysis of the distinction between off campus and on campus student speech in *Thomas v. Board of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2nd Cir. 1979). In *Thomas*, several students produced “*Hard Times*” a publication emulating *National Lampoon* which included articles on masturbation and prostitution. *Id.* at 1045. The court found that “only an occasional article was composed or typed within the school building, always after classes.” *Id.* Because the publication “was conceived, executed, and distributed outside the school,” the court held it was outside of the domain of the school district for purposes of punishment. *Id.* at 1050. Additionally, the court admonished school districts attempting to expand their jurisdiction beyond the schoolhouse gate saying, “[p]arents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *parens patriae*.” *Id.* at 1051.

The court dismissed the “scant and insignificant school contacts” holding that this publication fell outside of student speech precedent because (1) “all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate,” (2) the publication was “printed outside the school,” (3) “no copies were sold on school grounds,” (4) and “any activity within the school itself was *de minimis*.” *Id.* at 1050. Concluding the school could not punish the students’ publication, the court stated, “because school officials have ventured out of the school yard and into the general community where the freedom

accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.” *Id.* Therefore, the court ruled that student speech is considered off campus and, thus outside of the jurisdiction reach of the school, where all but *de minimis* activity is outside of the school.

B. Because neither Politte, nor Towles accessed their website at school, or distributed their speech on campus, their speech has not been brought onto campus subject to Supreme Court precedent.

Even if the determination is made that the student speech originated off campus, off campus student expression may be brought onto campus where (1) the off campus speech is accessed at school by the originator, or (2) the student distributes speech on campus.

The Fifth Circuit Court of Appeals evaluated student speech in light of where the speech was received in *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004), and was asked to determine whether the student speech was on or off campus where a student’s drawing was brought to school by his brother. The picture depicted the school under siege surrounded by “various armed persons.” *Id.* at 611. Nearly two years after the picture was drawn, the sketch made its way to school by way of his brother and the student was punished. *Id.* The Court declined to extend student speech precedent finding the writing was created off campus, and therefore was fully protected speech. *Id.* at 615. Specifically, the Court said it was off campus student speech because (1) the drawing was completed at home, (2) it was never intended to be brought to campus, and (3) he took no action that would increase the chances of it getting to school. *Id.* Thus, the court ruled that where the student does not intend for the off campus speech to reach school grounds, the school district cannot punish the student if the expression finds its way to the school by an avenue apart from the student.

However, as noted in *Bystrom v. Fridley High School, Independent School Dist. No. 14*, 822 F.2d 747 (8th Cir. 1987), student expression created off campus, but distributed on campus is subject to punishment and censorship by the school district subject to the *Tinker's* “substantial disruption” standard. Important to the concept of off campus speech being brought onto campus, is the general principle that it must be “brought onto the school campus or accessed at school by its originator.” *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 865 (Pa. 2002).

Building on the principles articulated in *Thomas, Porter, Bystrom*, and *J.S.*, other courts have seconded the partition of power between on and off campus student speech. In *Emmett v. Kent School District*, 92 F.Supp.2d 1088 (W.D. Wash. 2000), the court ruled that the school could not punish a student for content on a web page the student created at home on the internet without using school resources or school time, because it was “entirely outside the school’s supervision or control,” and demonstrated no violence. *Id.* at 1090. Additionally, the court in *Klein v. Smith*, 635 F.Supp. 1440 (D.Me. 1986), held a school district violated a student’s First Amendment rights when it suspended him for “giving the finger” to a teacher at a restaurant off school grounds.

In applying the rules established above to the facts in issue, both Polite and Towles’ speech is entitled to full First Amendment protection. In accordance with *Thomas*, both students speech originated off campus. (R. at 2,3) Kit Politte and Cory Towles created their websites entirely off school campus, from home on their personal computers. Kit Polite “conceived, executed, and distributed” FAD’s message outside the school through her network webpage on Friendkepedia. The only tangential connection Politte’s website, FAD, had with the school was when she mentioned her webpage at the September 15th DUDS meeting. This is exactly the kind of “scant and insignificant school contacts” disregarded in *Thomas*. The record does not reflect

that Towles took any action to bring his speech onto campus other than encouraging “Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment.” (R at 4) Surely, encouraging his fellow students to contact the administration is not tantamount to distributing his material on campus.

Furthermore, Politte’s action of mentioning FAD during a meeting of DUDS does not amount to bring off campus speech onto campus. As the courts in *Porter*, *Bystrom*, and *J.S.* recognized, where a student expression is completed at home and is not brought onto school grounds by the originator, the school district is unable to punish the publication. Here, although Politte promoted her website at a meeting of DUDS, the meeting took place after school hours. (R. at 2) Like *Thomas*, this contact is not significant enough to bring the speech under student speech precedent. The only contact with the school grounds occurred when other students viewed the website. However, they only looked at the websites during their free time and after school hours. (R. at 4) This *de minimis* activity does not rise to the level of the line of cases which hold that distributing a publication produced off campus subjects the students to punishment by the school district. As stated in *J.S.*, the expression must be “brought onto the school campus or accessed at school by its originator.” *J.S.*, 807 A.2d 847, 865 (Pa. 2002). Allowing the school district to punish Politte and Towles’ speech because of the actions of other students allows for schools to bootstrap their jurisdiction in a way that is inconsistent with the principles of the First Amendment. This kind of rule would encourage a heckler’s veto, allowing those who disagree with a student’s opinion to stifle his speech by accessing, or bringing the speech onto campus, thereby triggering the schools power to punish.

Because both Politte and Towles’ speech originated off campus, and was not sufficiently brought onto campus, there is not any connection with the school substantial enough trigger the

Supreme Court’s student speech precedent. Therefore, Politte and Towles’ speech is entitled to full First Amendment Protection.

II. IF THE COURT APPLIES *TINKER*’S “SUBSTANTIAL DISRUPTION” TEST, THERE ARE INSUFFICIENT FACTS TO SHOW THAT THERE WAS “MATERIAL AND SUBSTANTIAL INTERFERENCE WITH THE EDUCATIONAL PROCESS.”

If the court is hesitant to delineate between the level of protection that on and off campus speech receives, and instead opts to apply *Tinker*’s “substantial disruption” test regardless of the forum, an examination of the record reveals that no “material and substantial interference with the education process” occurred in this case.

The Supreme Court has issued opinions defining the First Amendment rights possessed by public school students. However, because none of the Supreme Court decisions have dealt directly with off campus student speech, the vacancy has offered an opportunity for lower courts to try their hand at piecing together a patchwork standard for evaluating off campus speech. Not surprisingly, the resulting hodgepodge of decisions has failed to produce a uniform standard for defining the First Amendment rights possessed by students off campus.

Some courts that take a expansive approach to regulating student speech expand the ruling of the landmark case of *Tinker v. Des Moines Independent Com. Sch. Dist.*, 393 U.S. 503 (1969). *Tinker* introduced the problem of *on campus* student speech to American jurisprudence during the tumultuous period surrounding the Vietnam War. In *Tinker*, three siblings were suspended for refusing to remove black armbands which they wore *on campus* to symbolize their protest of the hostilities in Vietnam. *Id.* at 504. As a threshold issue, the Court stated “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The *Tinker* Court flatly stated that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to

freedom of expression.” *Id.* at 508. Importantly, the Court declared, “[a]ny spoken word spoken in class ... that deviates from the views of another person may ... cause a disturbance. But our Constitution says we must take this risk.” *Id.* Ultimately, the Court said, in order for school officials to justify suppression of student expression they must be able to show that the expression “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Id.* at 513. The court noted that the school feared disruption from some students that were friends with someone who had died in Vietnam. *Id.* at 509. However, the court said that the school could not demonstrate facts sufficient to “forecast substantial disruption or material interference with school activities.” *Id.* at 514. Although the students “caused discussion outside of the classrooms” they did not interrupt school activities or interfere with work or school order. *Id.* Therefore, the Court declared the regulation an unconstitutional restriction of the students First Amendment rights. *Id.* at 514.

It is important to note that the “mode of analysis set forth in *Tinker* is not absolute.” *Morse v. Frederick*, 127 S.Ct. 2618, 2627 (2007). The Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), certainly did not employ *Tinker*’s “substantial disruption” test. However, if the Court decides to apply existing Supreme Court student speech precedent, *Fraser* and *Kuhlmeier* are inappropriate to apply in the instant case. The Court in *Kuhlmeier*, primarily based its decision to allow the school newspaper to be censored on the fact that “the public might reasonably perceive to bear the imprimatur of the school.” In this case, although DUDS is a school-sponsored club, FAD is a private organization. Simply because the head of DUDS is also the head of FAD is insufficient to make it a school sponsored club. Additionally, even though all of the members of DUDS are also members of FAD, there are 68 Horton Hopkins student

members of FAD who are not members of DUDS and 37 members of FAD that are not Horton Hopkins students or a member of DUDS. (R. at 2) Additionally, *Fraser* is inapplicable because the Court in *Fraser* focused on the fact that a student gave a speech laden with sexual innuendo at an *on campus* assembly students were required to attend. Here, there is no captive audience and no allegation of lewd or sexually explicit speech.

Among the courts that have stretched *Tinker's* “substantial disruption” test to encompass off campus speech, there has been no uniform list of factors guiding the courts analysis of what constitutes a substantial disruption. Predictably, there has been a broad spectrum of what amount of disruption, if any, amounts to a substantial disruption. In *J. S. v. Bethlehem Area School Dist.*, 757 A.2d 412 (Pa. Comwlth 2000), the Pennsylvania Supreme Court employed *Tinker's* substantial disruption test to determine whether a school district could expel a student for his internet creation, made at home, which made threatening and derogatory comments about a teacher and a principle. Included in this creation was a picture of his teacher’s “severed head dripping with blood, a picture of her face morphing into Adolf Hitler, and a solicitation ... for funds to cover the cost of a hit man.” *Id.* at 412. Key to the courts’ determination that the website “materially and substantially interfered with the educational process,” the court noted the effect on the teacher, namely, she “was unable to complete the academic year and eventually took a medical leave of absence for the following school year.” *Id.* at 421. Additionally, the court cited that the teacher “continues to suffer, both physically and emotionally.” *Id.* The Court concluded that “[g]iven the contents of Student’s web-site and the effect it had upon [the principal], [the teacher] and the school community” the students First Amendment rights were not violated.

In *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008), the court was called on to decide whether a school principal could prevent a student from running for senior class secretary who

published derogatory comments about the principal on her independent website which she created off campus. On this website, the student called the administration “douchebags,” and encouraged students to call the office to “piss her off more.” *Id.* at 45. The court stated that the school could punish the student “even for conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus.” *Id.* at 48. As a result of this posting, both the principal and the teacher “received a deluge of calls and emails, causing both to miss or be late to school-related activities.” *Id.* at 51.

Additionally, the court cited as a disturbance the fact that because the students made the controversy worse, they had to be “called away either from class or other activities ...because of the need to manage the growing dispute.” *Id.* In deciding that *Tinker* standard was met the court focused on three factors: (1) the language used to contact the administration was “plainly offensive, and potentially disruptive of efforts to resolve the ongoing controversy,” (2) the post contained misleading and/or false information amidst threats to disrupt school activities by staging a sit in, and (3) the student’s extracurricular role in student government constituted a privilege which could be taken away. *Id.* at 51, 52. Thus, the court held that off campus speech can be punished when the expression foreseeably creates a risk of substantial disruption.

However, not all courts that adopt the *Tinker* standard in the context of off campus student speech find that the student’s expression “materially and substantially interfered with the education process.” In *Beussink v. Woodland R-IV School District*, 30 F.Supp.2d 1175 (E.D.Mo. 1998), a student created a webpage entirely at home, without using school resources, that used vulgar language to convey his opinion regarding his teachers and principal. *Id.* at 1177.

Additionally, the website encouraged people to contact the administration and give their opinion. Although a student viewed the website at school, the court held there was no material and substantial interference to justify discipline, even though the principal and teacher were angry and upset over the posting.

Indeed, multiple courts have found the standard of a material and substantial disruption difficult to meet. In *Layshock v. Hermitage School District*, 496 F.Supp.2d 587 (W.D. Pa. 2007), the court found no substantial disruption where any disruption that occurred was caused by the students objections to the administrations action rather than any students activity. Additionally, “no classes were cancelled, no wide spread disorder occurred, and there was no violence or student disciplinary action.” *Id.* at 600. Moreover, the court noted that if in *Tinker*, a “far more boisterous and hostile environment sparked by the children wearing anti-Vietnam war armbands, did not give school officials a reasonable fear of disturbance sufficient to overcome their right to freedom of expression,” this situation certainly would not. *Id.*

In *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (W.D.Pa. 2001), the court concluded “that there was no evidence that teachers were incapable of teaching or controlling their classes because of the [a top ten list, about the athletic director a student had created on his home computer,] had been circulating for several days before the administration became aware of its existence and took action.” *Layshock*, 496 F.Supp.2d 587, 600. The court in *Killion* concluded although the list was “rude and demeaning, and its intended audience ‘was undoubtedly connected’ to the school, the lack of substantial disruption” prevented the school from punishing the student. *Id.* Thus, the court concluded where there was no showing of a substantial disturbance, the school could not punish the student’s expression.

An application of the rules listed above to the facts in the instant case reveals that there was no showing of disruption, let alone “substantial and material disruption.” The record indicates that no disruption occurred at Horton Hopkins. Like *Killion*, *Layshock*, and *Beussink* no measureable disruption occurred. “No classes were cancelled, no wide spread disorder occurred, and there was no violence.” *Layshock*, 496 F.Supp.2d at 600. There was no evidence that the teachers or principal at Horton Hopkins “were incapable of teaching or controlling their classes.” *Id.* The only actions taken by Horton Hopkins students subsequent to the web postings was that some students accessed the websites “from the school computer labs and library during their *free time* throughout the school day and *after school hours*.” (R. at 4) (emphasis added) No rationale interpretation of these actions could deem them to be disruptive, let alone a material and substantial disruption.

It may be contended that actual disruption need not be shown. As stated in *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007), “[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.” The court in *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001), noted “*Tinker* does not require school officials to wait until disruption actually occurs before they may act.” Indeed, *Tinker* does not require actual disturbance. However, when “forecast[ing] substantial disruption,” “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression... [because] any departure from absolute regimentation may cause trouble.” *Tinker*, 393 U.S. 504 at 508.

The record in this case is void of a substantial basis upon which a Horton Hopkins school administrator could forecast a substantial disturbance based on anything other than “undifferentiated fear or apprehension.” Both Politte and Towles were exemplary students.

Although Horton Hopkins students viewed the student's websites, only Towles' website called for students to "let [the] school administrators know that we will not tolerate this kind of treatment" and for them to "speak out." (R. at 4) Principal Smalls suspended the students because she was angry about the criticism of the administrators, and because she wanted to prevent a potential student protest." (R. at 4) Although Towles called for students to speak out, it does not establish enough of a nexus that this would turn into a disruptive protest. It may have been a peaceful protest as in *Tinker*. Principal Smalls overreacted, trampling both Towles and Pollite's First Amendment rights because she was angry about the criticism of her administration.

In this instance, it is simply not a tenable idea that the school officials reasonably anticipated disruption. Because no showing of actual or potential disruption has been made, the school district may not constitutionally punish Towles or Politte's speech.

III. THE WARRANTLESS SEARCH OF TOWLES VIOLATED THE FOURTH AMENDMENT BECAUSE IT WAS NOT REASONABLE AT ITS INCEPTION OR SCOPE.

A. The search of Towles was not reasonable because the preliminary facts would not lead a reasonable person to conclude that a search of Towles would uncover evidence that there was a violation of the law or school rules.

The warrantless search of Towles violated the Fourth Amendment, as applied through the Fourteenth Amendment because it was unreasonable at its inception. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the leading case on student searches, the Court recognized that the standard of warrant approved searches supported by probable cause was too high in the educational setting. In *T.L.O.*, a 14 year old girl had her purse searched in the principles office after she was caught smoking in the bathroom by a teacher. *Id.* at 328. The young woman denied smoking in the bathroom or ever. *Id.* Upon her purse being searched cigarettes as well as wrapping paper,

which is normally used for drugs, was found and led the principle to search the purse further. *Id.* The principal then discovered marijuana and several other drug related items. *Id.*

First, conceding a school setting does require “modifications” the Court held “school officials need not obtain a warrant before searching a student who is under their authority.” *Id.* at 340. Secondly, the Court determined that the legality of a search of a student should depend simply on the reasonableness. *Id.* at 341. The Court ruled in “[d]etermining the reasonableness of any search involves a twofold inquiry”: (1) “whether the ... action was justified at its inception,” and (2) whether the search as actually conducted “was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 341.

“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. Such 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.” *Id.* at 341-42. The Court held that searching the student’s purse was reasonable based on the teacher’s observations. *Id.* at 345-46. The Court reasoned “it was the sort of common sense conclusion about human behavior upon which practical people including government officials are entitled to rely. *Id.* at 346. The Court stated that “sufficient probability, not certainly, is the touchstone of reasonableness under the fourth amendment.” *Id.* at 346. The reasonableness standard was soon adopted and applied by many courts around the nation.

The court in *Phaneuf v. Fraikin*, 448 F.3d 591 (2nd Cir. 2006), applied the reasonableness standard and concluded that uncorroborated student tips do not give rise to a high

enough level of suspicion to allow a search to be justified at its inception. In *Phaneuf*, a “trustworthy” student reported that the plaintiff had drugs on her person. *Id.* at 593. Because of her suspicious denial of the allegation and her past disciplinary problems, the plaintiff was brought to the nurse’s office, her mother was called and forced to perform the search on her daughter. *Id.* at 593-94. No drugs were recovered. *Id.* at 594. The court declared, “although *T.L.O.* held that reasonable suspicion is the governing standard, the reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion. ... We review the totality of the circumstances, looking first at those that might have created a reasonable suspicion that such a search was justified at its inception. This review necessarily requires us to base our determination on only those facts known to the school officials prior to the search.” *Id.* at 596-97. The court reasoned that the student tip was not enough to justify the search because the principal “did not investigate, corroborate, or otherwise substantiate it prior to ordering the strip search.” *Id.* at 598. The court further recognized, “[A] face-to-face informant must, as a general matter, be thought more reliable than an anonymous tipster, for the former runs the greater risk that he may be held accountable if his information proves false.” *Id.* Thus, uncorroborated, anonymous student tips will not suffice to make a search reasonable at its inception.

Further interpreting the “inception” prong of the rule, the court in *Redding v. Safford Unified School District #1*, 531 F.3d 1071 (9th Cir. 2008), recognized that guilt by association did not give rise to a reasonable suspicion that would justify a search at its inception. In *Redding*, a thirteen year old girl named Savana lent her planner to friend, which was later found containing weapons and cigarettes. *Id.* at 1076. The friend was also caught with contraband prescription pills and blamed Savana for giving them to her. *Id.* at 1076-77. The principle searched Savana’s

backpack and found nothing. *Id.* at 1075. The search continued with her being strip searched in the nurses office. *Id.* The court then adopted the standard that guilt by association is not an acceptable way of garnering reasonable suspicion. “The technique is guilt by association-one of the most odious institutions of history...[g]uilt in our system is personal.” *Id.* at 1084. The court reasoned, “the friendly relationship with the girl caught with the pills is nothing more than “guilt by association” which cannot give rise to a “substantial intrusion into Savana’s expectation of privacy.” *Id.* Thus, strips searches based on guilt by association will not justify a search at its inception.

Applying the above rules to the case at hand, the search of Towles was not justified at its inception because uncorroborated, anonymous tips and guilt by association are not enough to justify a highly intrusive search. In *Phaneuf*, the court determined that an uncorroborated, in person student tip was not enough to justify a strip search. The court in *Redding*, expanded this rule by stating guilt by association also was not enough to justify a search at its inception. Here, the Respondents relied on a photo taken and submitted by an anonymous source showing one of Towles’ associates smoking at a party. (R. at 3) Upon further investigation it was determined that the associate was cited for drugs at the party, not Towles. (R. at 3) When the students’ lockers and backpacks were searched this same associate was caught with drugs, not Towles. (R. at 3) With absolutely no indication that drugs were on Towles’ person, the school initiated this highly intrusive search on a virtually discipline free student. (R. at 2) Even though one student in the photo, Thomson, who was not smoking had drugs in his pants pocket, this discovery was still not enough to justify the strip search at its inception being that the Court can only look at only “those facts known to the school officials prior to the search.” *Phaneuf*, 448 F.3d at 597. Thus, this intrusive search was based solely on an anonymous, uncorroborated tip and friendly relationship

with the guilty party, which the court has denounced as being sufficient to justify a search at its inception.

Although the search in *T.L.O.* was upheld, it is obvious that the case is factually distinguishable being that the student was caught smoking by a teacher and only had her purse searched. The smaller nature of the intrusion and the much higher level of suspicion in *T.L.O.* justified that search at its inception. In the case at hand, the search of Towles' locker and backpack may be deemed reasonable based upon a "common sense conclusion about human behavior". *T.L.O.*, 469 U.S. at 346. However, being that there was nothing more than an unreliable tip and a social relationship to justify the initial futile search of the backpack and locker, a reasonable person would not be able to further conceive a high level of suspicion that Towles had drugs on his person and justify the more intrusive strip search.

In conclusion, it was unreasonable for the school to believe searching Towles' person, based on an uncorroborated tip and an association with the real culprit, would reveal evidence of drug use. Hence, the search was not justified at its inception.

B. If the court believes that the search was justified at its inception, the search must still be deemed unreasonable because its intrusive nature was not reasonably related to the objective of making sure the school was drug free.

i. Using the traditional T.L.O. scope test the search was excessively intrusive in light of the objectives of the search.

Considering the inherently invasive nature of strip searches, the court in *Redding*, 531 F.3d 1071 (9th Cir. 2008), acknowledged that even a same sex, private, no contact strip search of a teenager is highly intrusive, especially when there is no indication that drugs were on the student's person. In the case a thirteen year old girl was forced to remove her clothes in the school nurses office. *Id.* at 1075. The court ruled in order for a strip search to be "reasonably related in scope to the circumstances which justified the inference in the first place" the measures

used must be “reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction.*” *Id.* at 1085. The court “conclude[d] the strip search was not reasonably related to the search for [drugs], as the most logical places where the pills might have been found had already been searched to no avail, and no information pointed to the conclusion that the pills were hidden under her panties or bra.” *Id.* The court further reasoned that just because Savana was searched in private by women and not touched, the procedure “do[es] not diminish the trauma experienced by the child.” *Id.* at 1086.

Applying the aforementioned rule to the case at hand, the search of Towles was not reasonable in its scope because of its intrusive nature and lack of relation to the objectives of the search. Initially, all of the facts, which included a photo showing someone else smoking and information that this same student had been cited for drugs by the police, pointed away from Towles. (R. at 3) Nonetheless, Towles’ locker and backpack were searched and found to be drug free. (R. at 3) Just as in *Redding*, the most likely places to find drugs were searched to no avail. The school’s objective of making sure the school was drug free had been accomplished at this point. Yet, the school proceeded to subject a sixteen year old boy to an embarrassing strip search. (R. at 3) Therefore, because the intrusive nature of the search can not be diminished simply because it was performed without contact by same sex staff, the strip search could not be justified within its scope without a more substantial suspicion that Towles had drugs on his person.

ii. The Respondents lack of individualized suspicion that Towles possessed drugs coupled with Towles’ legitimate expectation of privacy rendered the highly intrusive search unreasonable in its scope.

Although *T.L.O.* did not hold that individualized suspicion was necessary for a search to be reasonable, the U.S. Supreme Court has recognized searches conducted without

individualized suspicion require consideration of three case specific factors instead of the basic *T.L.O.* scope test. In *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), student athletes were subject to drug testing through urinalysis because of their drug use and leadership in the drug culture at school. The students remained fully dressed when tested and were monitored by same sex personnel standing several feet away. *Id.* at 650. As a result of the testing policy, a junior high student was denied the right to play football because his parents would not consent to the drug test. *Id.* at 651. He subsequently challenged the rule under the Fourth Amendment. *Id.* “[I]n the absence of individualized suspicion...the Court looked to three factors: (1) the student's legitimate expectation of privacy, (2) the intrusiveness of the search, and (3) the severity of the school system's needs that were met by the search.” *Beard v. Whitmore Lake School Dist. 47J* 402 F.3d 598, 604 (6th Cir. 2005). Upholding the searches as constitutional the Court reasoned, “students within the school environment have a lesser expectation of privacy than members of the population generally.” *Vernonia*, 515 U.S. at 657. The Court also determined that “legitimate privacy interest[s] are even less with regard to student athletes” at which the program was directed. *Id.* The Court further reasoned that the nature of the intrusion was slight, in light of the compelling need of the school system to deter student drug use. *Id.* at 661.

Conversely, the court in *Beard*, 402 F.3d 598 (6th Cir. 2005), adopting the *Veronia* rule recognized that in general students do have a legitimate privacy interest especially when the search is highly intrusive in light of the situation.. In *Beard*, a student reported to her teacher that her prom money had been stolen sometime during gym class. *Id.* at 601. The students in the gym class had their backpacks searched first, then the male and female students were strip searched separately by same sex staff. *Id.* at 601-02. Finding the search unconstitutional, the court first determined the privacy interest here was great. “Students of course have a significant privacy

interest in their unclothed bodies.” *Id.* at 604-06 Second, the character of the intrusion was far more invasive than the character of the urinalyses in *Vernonia*, where students remained fully clothed. *Id.* at 605. Finally, the court determined the government interest in recovering stolen money is not as great as reducing student drug use. *Id.* at 605. Thus, students have a legitimate privacy interest which must be considered in light of the intrusive nature of a strip search.

Applying the *Veronia-Beard* test, the Court should first acknowledge that the facts gave no indication that Towles was individually involved in illegal drug use at school because every fact including the photo, the police citation, and the locker and backpack exonerated Towles of any wrongdoing. (R. at 3) Moreover, the search of Towles was far more intrusive than the search of the student athletes in *Veronia* because Towles was forced to take off all of his clothing except his underwear. Additionally, unlike *Veronia* and similar to *Beard*, Towles, an average student with good behavior, was not an athlete and had no diminished interest in maintaining privacy. Furthermore, based on the tip and initial unsuccessful search there was no indication that Towles personally possessed any drugs, differing from *Veronia* where the athletes were known drug users. Thus, having no indication that an invasive strip search of Towles, a student with a legitimate privacy expectation, would uncover illegal drugs the search was not justified in its scope.

It has been suggested that the search of Towles could pass constitutional muster. In *Williams by Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991), the court upheld the strip search of a student as justified in inception and scope based on a corroborated student tip and the small size of the drugs in question. In *Williams*, the principal was told by another student that Williams and a friend were sniffing white powder (drugs) out of a small vial. *Id.* at 882. Upon further investigation the tip was corroborated by Williams’ teacher who found a note written by

Williams with drug references. *Id.* After searching the friend's purse and finding drugs, the principal then searched the Williams' locker, books, and purse to no avail. *Id.* The search culminated with Williams being strip searched in the nurse's office. *Id.* at 883.

Adopting the rule from *T.L.O.* that a search must first be "justified at its inception" and then "reasonable in its scope" the court determined the search was reasonable. *Id.* at 886-87. The court first determined that based on the student's tip, the teacher's corroboration of alleged drug use, and the principal's discovery drugs in the friend's purse, the strip search was reasonable at its inception. *Id.* at 887. The court next concluded that based on the small size and shape of the vial that it was reasonable that the drugs could be located on Williams' person even after not finding any drugs on her belongings. *Id.*

In this case, the search of Towles was not reasonable at its inception because not one person corroborated the anonymous photographic tip that Towles had been using drugs, whereas, in *Williams*, there was a note written by Williams herself referring to drugs. In *Williams*, the school was able to pass the first prong of the test which enabled it to justify the search within its scope. In contrast to *Williams*, Towles' strip search was not justified at its inception. Therefore, although the search of Williams may have been justified in its scope based on the small size and shape of the drug package, by failing the first prong the Respondents in this case can not go on justifying the search in its scope. Thus, the search of Towles should be found unreasonable.

In conclusion, the Court should initially hold that the uncorroborated, anonymous tip and association with the guilty student was not enough to justify the search at its inception. Alternatively, if the court believes the search was reasonable at its inception, the intrusive strip search of an adolescent with a legitimate privacy interest, based on defective evidence that did not insinuate drugs were on Towles person, rendered the search unreasonable in its scope.

Therefore, under either prong of the *T.L.O.* test, the search violated Towles' Fourth Amendment rights.

C. The Respondents are not entitled to qualified immunity under 42 U.S.C. § 1983 because the search of Towles violated a clearly established constitutional right of which a reasonable person would have been aware.

If the Court finds the search unreasonable, the Court must go one step further and find that the Respondents are not entitled to qualified immunity because the right to be free from unreasonable searches is clearly established. In *Pearson v. Callahan*, 129 S.Ct. 808 (2009), evaluating the original qualified immunity test as laid out by *Saucier v. Katz*, 533 U.S. 194 (2001), the court decided that while it was not mandatory to decide whether there was a violation of a constitutional right to determine qualified immunity, it may be beneficial in some cases. In *Pearson*, an officer claimed qualified immunity after he entered and searched a suspect's home without a warrant. *Id.* at 814. In making its determination, the Court first looked at the original two prong test. "First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id.* at 816. The Court in *Pearson* then ruled, "on reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." *Id.* at 818.

In this particular case it would be somewhat difficult to determine if the right was clearly established without first determining exactly what the right was. In *T.L.O.*, the leading case on student searches, the U.S. Supreme Court recognized students have the right to be free from

unreasonable searches. *T.L.O.*, 469 U.S. at 334. Thus, the court must only decide whether this right was clearly established at the time of Towles' search.

The law, at the time of Towles' search, clearly established that the search of Towles was unreasonable under the specific facts of the case. While the Supreme Court has not offered much guidance in applying the "reasonable suspicion" test, Circuit Courts have offered guidance by ruling that certain rights are so fundamental that a factually on point case is not necessary for the court to determine that the law on student strip searches is clearly established. In *Redding*, 531 F.3d at 1074-76, a thirteen year old girl, with no disciplinary history, was strip searched based on an unreliable student tip and a friendly relationship with the guilty party. The court ruled even without a specific case on point, "[t]hese notions of personal privacy are 'clearly established' in that they inhere[nt] in all of us, ... and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches." *Id.* at 1088-89. After holding that student's rights on strip searches were clearly established, the court reasoned "some safeguards on government intrusion remain self-evident and do not require a case on point to prevent government officials from hiding behind the cloak of qualified immunity." *Id.* at 1088-89. The court further reasoned "the record before us leaves no doubt that it would have been clear to a reasonable school official in Wilson's position that the strip search violated Savana's constitutional rights." *Id.* at 1089. Thus, the law on strip searches need not fall squarely in a fact specific case to be clearly established.

Even, if the Court determined detailed guidance was necessary, based on the factual similarity between the current case and other Circuit Court decisions, the school administration would be compelled to determine that the search of Towles was unreasonable. In *Beard*, 402 F.3d 598 (6th Cir. 2005), several students were strip searched after it was reported that one

student's prom money had been stolen. The court determined, in order for the law to be clearly established as of the date of the incident, the law must "truly compel (not just suggest or allow or raise a question about), the conclusion ... that what defendant is doing violates federal law in the circumstances." *Id.* at 607. The court found that, although the search was unreasonable, the school officials were entitled to qualified immunity. *Id.* at 606. The court reasoned, given the lack of a factual context similar to that of this case, *T.L.O.* and *Vernonia* could not have "truly compelled" the defendants to realize that they were acting illegally when they participated in the searches of the students in this case. *Id.* at 607. The court then stated, "[a]n action's unlawfulness can be apparent even in novel factual circumstances "so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.*

Using the *Beard* rule and factual scenario set forth by *Redding*, it is evident that the law on student strip searches is clearly established. In *Redding*, a thirteen year old girl, with no disciplinary history, was strip searched based on an unreliable student tip and a friendly relationship with the guilty party. *Id.* at 1075-77. As pointed out by *Redding*, it is evident that strip searching a student based on nothing more than a faulty student tip and friendship with the guilty party would be insufficient in the mind of a reasonable person to justify a strip search. Furthermore, just as in *Redding*, Towles was a good student, with only an insignificant disciplinary record, none of which involved drugs. (R. at 2) He was strip searched based on an uncorroborated, anonymous tip, which did not indicate that he had any drugs on his person, and his friendly relationship with the true offenders. Based on these facts and their similarity to *Redding*, any person of ordinary common sense would know that the strip search was unreasonable. Thus, the law was clearly established.

In conclusion, Towles' Fourth Amendment right to be free from unreasonable searches in school has been violated because the search was neither justified at its inception nor reasonable in its scope. In order to remedy this violation, the court must find that the law that a student should be free to go to school without fear of being subjected to baseless strip searches was clearly established on October 5, 2008, rendering qualified immunity inapplicable.

CONCLUSION

For the reasons stated above the Court should reverse the Appeals Court's order granting summary judgment to the Respondents.

Respectfully Submitted,

Team 27

X _____
Counselors for the Petitioners

Appendix “A”

Constitutional Provisions

U.S. const. amend. I

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

U.S. const. amend. IV

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

U.S. const. amend. 14 § 1

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

Appendix “B”

Statutory Provisions

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.