

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 Court of Appeals of the State of Grace

————— ◆ —————
BRIEF FOR THE PETITIONER

Team 31

Questions Presented

- I. Whether Respondents' attempt to regulate students' Internet speech created off-campus was a violation of Petitioners' First Amendment rights.

- II. Whether Respondents' warrantless search of Petitioner Towles on school premises violated Towles' Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment.

Table of Contents

Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Constitutional Provisions or Statutes Involved.....	vii
Statement of the Case.....	1
Summary of the Argument	3
Argument.....	5
I. The Court Should Reverse the Appellate Court’s Incorrect Holding that Applied the <i>Tinker</i> Substantial Disruption Test to the Students’ Internet Speech Created Off-Campus Because Off-Campus Speech is Fully Protected by the First Amendment.....	5
A. <i>Lower Courts are Divided on Whether to Apply the Tinker Substantial Disruption Test to Off-Campus Student Speech</i>	6
1. The <i>Tinker</i> Substantial Disruption Test was Intended for On-Campus Student Speech Only.....	6
2. Lower Courts have Taken Several Contrasting Approaches in Dealing with Student Internet Speech Cases.....	10
B. <i>The Court Should Create a Brightline Rule Clearly Distinguishing Between On-Campus and Off-Campus Speech</i>	15
C. <i>A Brightline Rule Would be Easy to Administer and Would not Inhibit the Schools from Maintaining Order</i>	18
II. The Court Should Reverse the Appellate Court’s Decision Because the Illegal Searches of Towles, and Horton Hopkins School Policy Upholding the Searches, Violated Towles’ Fourth Amendment Right to be Free from Unreasonable Search and Seizure	20
A. <i>The Searches of Towles Were not Justified at Their Inception Because the Student Tip and Guilt-By-Association Evidence Were not Enough to Justify a Search</i>	21

B. *The Searches of Towles Were not Reasonably Related in Scope to the Circumstances Because There was not Enough Evidence that Towles Possessed Drugs to Justify any Search, Let Alone Searches as Intrusive as Those Performed*..... 25

C. *The Defendants Are not Entitled to Qualified Immunity Because the Law Clearly Established that such Intrusive Searches cannot be Justified with Such Little Evidence*..... 27

Conclusion 30

Table of Authorities

Constitutional Provisions

U.S. Const. amend. I 5

U.S. Const. amend IV..... 20

U.S. Const. amend XIV, Section 1 5

42 U.S.C. § 1983 (2006)..... 21

Cases

Alabama v. White,
496 U.S. 325 (1990) 25

Almeida-Sanchez v. U.S.,
413 U.S. 266 (1973) 21

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

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 6, 8

Beussink v. Woodland R-IV School District,
30 F. Supp. 2d 1175 (E.D. Mo. 1998) 10, 11

Bd. of Educ. of I.S.D. 92 v. Earls,
536 U.S. 822 (2002) 21, 26

Camara v. Mun. Ct. of City and Co. of S.F.,
387 U.S. 523 (1967) 20

Cornfield v. Consol. High Sch. Dist. No. 230,
991 F.2d 1316 (7th Cir. 1993)..... 26

Doninger v. Niehoff,
527 F.3d 41 (2nd Cir. 2008)..... 10, 12, 16

Donovan v. Ritchie,
68 F.3d 14 (1st Cir. 1995)..... 13, 14

Emmett v. Kent Sch. Dist.,
92 F. Supp. 2d. 1088 (W.D. Wa. 2000) 14, 15

<i>Fenton v. Sear</i> , 423 F.Supp. 767 (W.D. Pa. 1976)	14
<i>Griffin v. Wis.</i> , 483 U.S. 868 (1987).....	21
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	27
<i>Hazelwood Sch. Dist. v. Kulmeier</i> , 484 U.S. 260 (1988)	6, 8, 9
<i>Jenkins by Hall v. Talladega City Bd. of Educ.</i> , 115 F.3d 821 (11th Cir. 1997).....	28
<i>Joint Anti-Fascist Refugee Comm. v. McGrath</i> , 341 U.S. 123 (1951)	23
<i>J.S. v. Bethlehem Area School District</i> , 757 A.2d 412 (Commw. Ct. Pa. 2000)	13
<i>LaVine v. Blaine Sch. Dist.</i> , 257 F.3d 981 (9th Cir. 2001).....	12
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	20
<i>Morse v. Frederick</i> , 127 S. Ct. 2618 (2007).....	6, 9
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	20, 21, 22, 25, 26
<i>Phaneuf v. Fraikin</i> , 448 F.3d 591 (2nd Cir. 2006).....	23, 24, 25, 29
<i>Pluet v. Frazier</i> , 355 F.3d 381 (5th Cir. 2004).....	5
<i>Redding v. Safford U.S.D. 1</i> , 531 F.3d 1071 (9th Cir. 2008).....	23, 24, 29
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	5

<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (U.S. 1974).....	27
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	21, 25
<i>Thomas v. Bd. of Educ.</i> , 607 F.2d 1043 (2nd Cir. 1979).....	17
<i>Tinker v. Des Moines Indep. Community Sch. Dist.</i> , 393 U.S. 503 (1969)	5, 6, 7, 9, 13, 16, 20
<i>U.S. v. Cortez</i> , 449 U.S. 411 (1981).....	21
<i>U.S. v. Lanier</i> , 520 U.S. 259 (1997)	28
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	22
<i>Williams by Williams v. Ellington</i> , 936 F.2d 881 (6th Cir. 1991).....	26
<i>Wilson v. Layne</i> , 526 U.S. 603 (1999).....	28
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975)	29

Secondary Sources

Alexander G. Tuneski, <i>Online, Not on Grounds: Protecting Student Internet Speech</i> , 89 Va. L. Rev. 139 (2003)	10, 11, 13, 15, 17, 18, 19
Clay Calvert, <i>Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground</i> , 7 B.U.J. Sci. & Tech. L. 243, 247 (2001)	19

Constitutional Provisions or Statutes Involved

First Amendment:

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

U.S. Const. amend. I.

Fourth Amendment:

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

U.S. Const. amend IV.

Fourteenth Amendment:

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

U.S. Const. amend XIV, Section 1

Section 1983 – Civil Action for Deprivation of Rights

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.

42 U.S.C. § 1983 (2006).

Horton Hopkins School District Drug and Alcohol Use Policy, in pertinent part:

“[w]hen drug use or possession is suspected on school property, the District reserves the right to conduct personal searches of students, as well as searches of lockers, desks, other school property, and book bags and other personal containers.”

R. at 15.

Statement of the Case

This case arises from the suspension of Kit Politte (Politte) and Cory Towles (Towles) by Horton Hopkins High School principal, Keena Smalls (Principal Smalls) for refusing to take down their personal webpages when instructed to do so by Principal Smalls. (R. at 1.) This case also arises from the search of Cory Towles' book bag, wallet, and person by Horton Hopkins school officials at the direction of Principal Smalls, and under the authority of the school policy set by the Horton Hopkins school board. (R. at 1.) The Horton Hopkins School District drug use policy states that, "[w]hen drug use or possession is suspected on school property, the District reserves the right to conduct personal searches of students, as well as searches of lockers, desks, other school property, and book bags and other personal containers." (R. at 15.)

In September 2008, Politte created a friendkipedia page, a social networking website, called Fighting All Dealers (FAD) for the purpose of reducing drug use at Horton Hopkins High School. (R. at 2.) Politte created the FAD webpage at home on her personal computer. (R. at 2.) She created the webpage so that anonymous tipsters could send her information about potential drug dealing or drug use by Horton Hopkins students. (R. at 2.) Politte would then post these tips to the FAD webpage to create more awareness about the issue. (R. at 2.) Politte promoted her webpage at a meeting of Drug Use Damages Schools (DUDS), a student organization that she organized to create student awareness of the drug problems. (R. at 2.) The DUDS meetings were held at the high school after school hours. (R. at 2.)

On October 4, 2008, Politte posted a photograph taken at a party to the FAD website from an anonymous student tipster picturing John Thompson (Thompson), Frank

Conrad (Conrad), and Towles in which Conrad was smoking. (R. at 3.) The record does not indicate whether Conrad was smoking marijuana, a cigarette, or something else.

After Politte posted this photo to the FAD website she added a caption stating, “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. at 3.)

The next day, Principal Smalls viewed the FAD webpage and the photograph in question. (R. at 3.) As a result, Principal Smalls called Thompson, Conrad, Towles, and Jeff Tweegs (Tweegs), the student whose house the party was at, into her office for questioning. (R. at 1.) All four students denied possessing drugs, but Principal Smalls proceeded in conducting a search of the students’ lockers and book bags. (R. at 3.) After finding a small baggie of marijuana in Conrad’s locker, Principal Smalls subjected all four students to a strip search performed by the school’s gym teacher. (R. at 3.)

Towles is a sixteen-year-old student who had just recently transferred to Horton Hopkins from another school at which Towles was an honor student, played sports, and had never been disciplined for anything except tardiness. (R. at 2.) Upset because of the search and the FAD website posting, Towles created his own webpage called Students Against Defamatory Statements (SADS) on which Towles criticized the fact that the school officials performed a strip search of him and his friends. (R. at 3-4.) Towles created and edited his SADS website on his personal computer at home only. (R. at 3.)

Principal Smalls became aware of the FAD and SADS websites and that Horton Hopkins students were accessing them at home and during free periods at school. (R. at 4.) Principal Smalls was angry about Towles’ website and its criticism of the searches of him and his friends. (R. at 4.) She demanded that Politte and Towles shut down the FAD

and SADS webpages. (R. at 4.) Both students refused and, as a result, Principal Smalls suspended them both until they agreed to take down their webpages. (R. at 4.)

Summary of the Argument

The Court should reverse the incorrect holding of the State of Grace Court of Appeals because Politte's and Towles' First Amendment and Towles' Fourth Amendment rights were violated. The First Amendment protects an individual's freedom of expression. Principal Smalls and the Horton Hopkins School District violated both Politte's and Towles' First Amendment rights when they required them to remove their Internet blogs created off-campus. Lower courts are confused and divided over how to balance between the need for school officials to maintain order in public schools and the need to protect students' freedom of expression.

The appellate court relied on flawed opinions from other courts when it decided to apply the *Tinker* substantial disruption test to the students' off-campus Internet speech. In order to fully protect off-campus student expression, the Court should adopt a brightline rule that clearly distinguishes between on-campus and off-campus Internet speech. The rule should focus on the origination and dissemination of the Internet speech. By focusing on where the speech originates and is disseminated from, students, school officials, and parents can easily tell if the speech came from school servers or if it came from outside the schoolhouse gates.

A brightline rule would be easy to administer and would not inhibit the schools ability to maintain order. The school could still maintain order in three ways: (1) school officials could still punish disruptive behavior that originates on-campus; (2) school officials can maintain order by speaking with the students' parents and allowing the

parents to discipline their children as they see fit; and (3) school officials, in the most egregious situations, can rely on the civil and criminal justice systems to punish unprotected student speech.

The appellate court should not have relied on the *Tinker* substantial disruption test because both Politte and Towles created and edited their blogs off-campus in the privacy of their own homes. Principal Smalls and the Horton Hopkins School District clearly lacked jurisdiction over the students' speech.

Additionally, the search of Cory Towles' personal property and strip search of his person by Horton Hopkins school officials, and the school district policy supporting such searches constituted an unreasonable invasion of Towles' Fourth Amendment right to privacy. The searches of Towles' person and property were not justified at their inception because the school officials had no valid evidence that Towles possessed drugs. The searches were not reasonably related in scope to the circumstances used to justify the searches in the first place because the school officials lacked sufficient evidence to justify the searches at their inception. Furthermore, the scope of the searches cannot be reasonably reconciled with the circumstances, because the evidence used to justify the searches was inconsequential and the searches performed were too intrusive.

The Horton Hopkins school officials are not entitled to qualified immunity for their actions because the law regarding such searches of students was clearly established. This Court, along with several federal circuit courts, has offered sufficient guidance to school officials in this type of situation. The opinions make it clear that school officials cannot rely on a minimal amount of evidence when performing such intrusive searches as

those performed on Towles. Therefore, because the school officials lacked reasonable suspicion, the searches performed on Towles were entirely unconstitutional.

Argument

I. The Court Should Reverse the Appellate Court’s Incorrect Holding that Applied the *Tinker* Substantial Disruption Test to the Students’ Internet Speech Created Off-Campus Because Off-Campus Speech is Fully Protected by the First Amendment.

When Principal Smalls and the Horton Hopkins School District required Politte and Towles to remove their private Internet blogs, created entirely off-campus, from the web, they interfered with the students’ freedom of expression. The First Amendment to the federal Constitution ensures that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend I. The First Amendment is applied to the States through the Fourteenth Amendment. U.S. Const. amend XIV. The Fourteenth Amendment protects citizens against the State itself and all of its creatures – School Boards of Education included. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507 (1969). The Court reviews an affirmation of summary judgment under Fed. R. Civ. P. 56(c) *de novo*. See e.g., *Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004).

In *Reno v. ACLU*, the Court determined that Internet speech is subject to the same First Amendment protections as print media. 521 U.S. 844, 870 (1997). While the Court has addressed the protections afforded Internet speech in general, it has not specifically addressed the protections afforded to students’ Internet speech. In recent years, the world-wide-web has grown tremendously providing students the ability to communicate on a global level from the privacy of their own homes or at school. This medium of expression has created controversy because a minority of students have posted derogatory comments

and images of other students, teachers, and even the school administration on the Internet. As a result, school officials have punished students for their off-campus speech under the theory that the speech satisfies the *Tinker* substantial disruption test.

A. Lower Courts are Divided on Whether to Apply the Tinker Substantial Disruption Test to Off-Campus Student Speech.

The *Tinker* test was created to help school officials regulate and/or punish students for inappropriate on-campus student expression. Because there is no brightline rule, lower courts have incorrectly applied the *Tinker* substantial disruption test to off-campus student speech in violation of the students' First Amendment rights.

1. The Tinker Substantial Disruption Test was Intended for On-Campus Student Speech Only.

The Court has not addressed whether school officials have the ability to punish students for off-campus activity. However, clear precedent has been established explaining the authority of school officials to punish students for inappropriate on-campus activity. See *Tinker*, 393 U.S. 503; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kulmeier*, 484 U.S. 260 (1988); and *Morse v. Frederick*, 127 S. Ct. 2618 (2007). In recent years lower courts have misapplied the on-campus precedent to cases involving student expression taking place off-campus. In order to fully understand the flawed application it is necessary to review the on-campus school jurisprudence.

Tinker was the first significant case addressing students' freedom of expression. 393 U.S. 503. In *Tinker*, the Court essentially created a balancing test for students' First Amendment speech while on school property. *Id.* at 514. The case involved students' political expression against the Vietnam War. *Id.* at 504. A few students chose to wear

black armbands on their sleeves to show their disapproval of the war. *Id.* Once school officials were warned of the students' plan they created a school policy banning black armbands. *Id.* The policy stated that "any student who wore the armband would be asked to remove it, and if he refused, he would be suspended until he returned to school without the armband." *Id.* The students, aware of the new policy chose to wear the armbands to school anyway. *Id.* When they were asked to remove the bands they refused and were suspended from school until they agreed to return without the armbands. *Id.*

The Court placed emphasis on the Free Speech Clause of the First Amendment by stating, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The Court noted the magnitude of balancing these important rights with the need to maintain order within the public school system when it stated, First Amendment rights must be applied "in light of the special characteristics of the school environment." *Id.* The Court indicated that the purpose of the public school system is to prepare young people for citizenship. *Id.* at 507. For this reason, the Court noted that there must be "scrupulous protection of Constitutional freedoms of the individual." *Id.* The Court emphasized that if students didn't realize these freedoms they might "discount important principles of our government as mere platitudes." *Id.*

In an effort to address the situation the Court created a test commonly referred to as the "substantial disruption test." In order for school officials to regulate and/or punish student on-campus behavior they deem to be inappropriate the officials must be able to reasonably predict that student speech will create a "substantial disruption or material interference" with school activities or invade the rights of others. *Id.* at 514. The Court

made it clear that school officials may not suppress student speech out of distaste or out of “undifferentiated fear or apprehension.” *Id.* at 510. The Court declared that the “mere desire to avoid the discomfort and unpleasantness that always accompany the unpopular viewpoint,” or “urgent wish to avoid the controversy which might result from the expression” do not provide public school officials with the authority to prohibit students’ freedom of expression. *Id.*

The Court stressed that “vigilant protection of constitutional freedoms” is extremely important within the public school system. *Id.* The Court stated that:

“[t]he classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”

Id. Ultimately, the substantial disruption test applies a cost-benefit analysis to balance the students’ speech interest against the weight of the competing societal interest, on a case-by-case basis.

Since *Tinker*, the Court has continued to mold the boundaries of school officials’ authority regarding regulation of students’ freedom of expression. In *Fraser*, the Court emphasized that “[t]he constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings.” 478 U.S. at 682. There, school officials punished a student for making vulgar, sexual innuendos during a school assembly. *Id.* at 678-79. The Court held that public school officials have the authority to regulate student expression that is “offensively lewd and indecent.” *Id.* at 685.

In *Kulmeier*, the Court expanded the authority of public school officials by allowing them to exercise control over school-sponsored activities. 484 U.S. at 273.

There, a group of students in a journalism class objected when the principal made them redact two stories from the school paper. *Id.* at 263. One of the stories was about a few girls' experience with pregnancy, and the other discussed the impact of divorce on students in school. *Id.* The principal had the stories redacted because he was concerned about the students' anonymity. *Id.* The Court held that public school officials have the authority "to exercise editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. The Court recognized that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside of the school." *Id.* at 266.

Recently, in *Morse*, the Court upheld the *Tinker*, *Fraser*, and *Kulmeier* decisions. 127 S.Ct. at 2626. The opinion started out by reiterating, "[s]tudents do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 2622 (quoting *Tinker*, 393 U.S. at 506). The case dealt with a student who, during a school event, carried a huge banner stating "BONG HITS 4 JESUS." *Id.* The principal demanded that the student put down the banner and upon his refusal the principal confiscated it and later suspended the student from school. *Id.*

Interestingly, the student attempted to argue that the *Tinker* line of school jurisprudence cases should not apply because his actions did not take place on the school's campus. *Id.* at 2634. However, the court disregarded this argument because the student's expression took place during school hours and at a school event. *Id.* Ultimately, the Court chose to add speech advocating illegal drug use to the list of unprotected student speeches. *Id.* at 2627-29.

These cases illustrate the Court's desire to find a fair balance between the school officials' ability to maintain order in public schools and the students' rights to freedom of expression. The overall tone of *Tinker* strongly valued the expressive rights of students outside the special context of the school environment. Additionally, neither *Fraser*, *Kuhlmeier*, nor *Morse* suggest that schools have authority to reach beyond the campus except for school-sponsored events occurring away from the school. Nonetheless, lower courts have relied on these cases in allowing school officials to punish student expression created entirely off-campus.

2. Lower Courts Have Taken Several Contrasting Approaches in Dealing with Student Internet Speech Cases.

Without a brightline rule courts are divided on how to analyze the First Amendment rights of students' Internet speech when created off-campus. As a result, several contrasting approaches have emerged. See Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 Va. L. Rev. 139 (2003). The approaches relied on by most courts include: (1) courts that treat Internet speech viewed on-campus as having taken place on-campus and, therefore subject to the *Tinker* substantial disruption test; (2) courts that add a foreseeability standard to *Tinker* allowing school officials to punish students' Internet speech created off-campus if it is merely foreseeable that the speech could reach the campus; (3) courts that apply the substantial disruption test in all situations, even those where the expression was created off-campus; and (4) courts that fully protect Internet speech created off-campus. *Id.* at 153; See also *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008).

Beussink v. Woodland R-IV School District, provides an example of where a court chose to apply the *Tinker* substantial disruption test because the speech, while created

off-campus, was viewed on-campus. 30 F. Supp. 2d 1175 (E.D. Mo. 1998). In *Beussink*, a student created a homepage that was highly critical of his high school. *Id.* at 1177. His homepage included lewd and vulgar comments about the school's homepage, various teachers, and the principal. *Id.* His webpage invited students to comment about the school's website and the individuals mentioned on his webpage. *Id.* He even included a hyperlink so that students could go from his webpage directly to the school's. *Id.*

He claims he did not intend for other students to access his webpage while at school. *Id.* However, another student viewed his webpage during class and showed it to her teacher. *Id.* at 1178. The facts do not indicate that the viewing caused any sort of disturbance. *Id.* When asked by school officials, the student took down the webpage. *Id.* at 1179. The district court chose to apply the *Tinker* substantial disruption test to determine if the school officials had authority to punish the student without first analyzing whether the speech occurred on- or off-campus. Tuneski, *Online, Not on Grounds*, 89 Va. L. Rev. at 154. Tuneski illustrates that the court in a footnote dismissingly stated that they chose to apply *Tinker* because the webpage was accessed on-campus. *Id.* (citing *Beussink*, 30 F. Supp. 2d at 1180 n.4).

The court ultimately granted the student's motion for a preliminary injunction because the school officials failed to show that a substantial disruption took place. *Beussink*, 30 F. Supp. 2d at 1182. The court determined that the student suffered irreparable injury because his school suspension caused him to receive failing grades due to attendance. *Id.* at 1181. However, the opinion alluded to the fact that if the school had proven that a substantial disruption had taken place then the outcome would have differed. *Id.* at 1182.

Doninger, is a second-circuit case that demonstrates how lower courts have completely misapplied the *Tinker* substantial disruption test to off-campus Internet speech that is fully protected under the First Amendment. 527 F.3d at 41. In *Doninger*, school officials prohibited a student from becoming secretary of the senior class after she made some rather lewd remarks about the administration from her private blog off-campus. *Id.* at 43. She sued seeking a preliminary injunction but both the district and appellate courts denied her request. *Id.* at 54.

The appellate court attempted to analyze the case through the *Fraser* standard but concluded that *Fraser* did not apply because the student Internet speech was created off-campus. *Id.* at 49. Then, the court inappropriately relied on a Ninth Circuit opinion when it applied the *Tinker* substantial disruption test, even though the speech was created entirely off-campus. *Id.* at 51 (citing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)). The facts of *LaVine* were not even remotely similar to the facts in *Doninger*. There, the court was concerned with a student's poem about a school shooting entitled "Last Words." *LaVine*, 257 F.3d at 983. The student showed the poem to a teacher and through a process of conversations with the school counselor, principal, and the police, school officials decided to temporarily expel the student from school. *Id.* at 983-87. There, the student speech was distributed on-campus and school officials were worried that the student would shoot his classmates. *Id.*

In *Doninger*, the court dealt with comments made on an Internet blog created entirely off-campus. *Doninger*, 527 F.3d at 45. The comments merely expressed the student's frustration with the school administration about a school activity – Jamfest. *Id.* While the court was right in concluding that *Tinker* allows school officials to regulate

student speech when it could cause a foreseeable disruption on-campus, the court was wrong in assuming that *Tinker* applies to off-campus student speech. It is clear that the Court chose to limit the *Tinker* test to on-campus student speech because it specifically mentioned that students do not lose their constitutional right to freedom of expression at the schoolhouse gate. *Tinker*, 393 U.S. at 506. This statement implies that outside of the schoolhouse gates students enjoy full protection of the First Amendment. The *Doninger* court committed an error when it applied the *Tinker* test to the comments posted on the student's blog because the speech was created off-campus and, therefore, entitled to the fullest protection afforded by the First Amendment.

J.S. v. Bethlehem Area School District, provides an example of the third approach that applies the substantial disruption test in all situations, even those where the expression was created off-campus. Tuneski, *Online, Not on Grounds*, 89 Va. L. Rev. at 154 (citing *J.S.*, 757 A.2d 412 (Commw. Ct. Pa. 2000)). In *J.S.*, a student created a webpage entitled "Teacher Sux." *Id.* at 415. The webpage was filled with derogatory comments and images of the student's algebra teacher. *Id.* The student made a comment on the webpage about taking donations to hire a hitman to kill the teacher. *Id.* at 416. He even included a diagram with the teacher's head cut-off and blood dripping everywhere. *Id.* His webpage was accessed by other students and staff at the school. *Id.* at 417.

School officials decided to permanently expel the student because they found the webpage to be a threat, harassment, and disrespectful of a teacher and principal. *Id.* These actions resulted in actual harm to the health, safety, and welfare of the school community. *Id.* The commonwealth court analyzed the student expression as if it was created on-campus because it relied on flawed decisions from other courts. See *Donovan*

v. Ritchie, 68 F.3d 14 (1st Cir. 1995) (determining that school officials can punish students for off-premises conduct that makes its way on-campus); *Fenton v. Sear*, 423 F.Supp. 767 (W.D. Pa. 1976) (holding that a student’s First Amendment rights were not violated when he was punished by school officials for making lewd comments to a teacher on a Sunday evening off school grounds).

After reviewing each of the cases noted above, the commonwealth court determined that other courts have “allowed school officials to discipline students for conduct occurring off of school premises where it is established that the conduct materially and substantially interferes with the educational process.” *Id.* at 421. The court went on to explain how the student’s webpage materially and substantially interfered with the educational process because it caused the algebra teacher to suffer an emotional disturbance that kept her from teaching for the rest of the school year. *Id.* Additionally, the court determined that school officials could have properly concluded that viewing the webpage would cause a reasonable person both a physical and emotional disturbance. *Id.*

Emmett v. Kent Sch. Dist., illustrates yet another approach taken by some courts of offering full protection for student expression created off-campus. 92 F. Supp. 2d. 1088 (W.D. Wa. 2000). In *Emmett*, a high school senior created a webpage entitled “Unofficial Kentlake High Home Page.” *Id.* at 1089. A portion of the webpage contained pretend “obituaries” of two of the student’s friends. *Id.* Apparently, the obituaries were supposed to be a joke based upon a creative writing class the student had taken the year before where the students were asked to create their own obituary. *Id.* The mock obituaries became the talk of the school among students and staff. *Id.* Only after a local

TV station aired a story about the webpage calling the mock obituaries a “hit list” did the school decide to expel the student. *Id.*

The court walked through the *Tinker*, *Fraser*, and *Kulmeier* analyses and ultimately determined that none of these cases were applicable because the webpage was created off-campus. *Id.* at 1090. The court found that the speech was “entirely outside of the school’s supervision or control.” *Id.* Because the court concluded that the webpage was created off-campus it did not go through the substantial disruption analysis.

These contrasting approaches illustrate that without a brightline rule the courts are divided on how to appropriately balance between the need for school officials to maintain order in the public schools and the need for students’ speech to be protected under the First Amendment. Until the Court distinguishes between Internet speech created on-campus and Internet speech created off-campus the lower courts have the capacity to chill students’ freedom of expression, thereby inhibiting the type of creative and robust ideas the Court spoke of in *Tinker*.

B. The Court Should Create a Brightline Rule Clearly Distinguishing Between On-Campus and Off-Campus Speech.

The Court should not apply the *Tinker* substantial disruption test to off-campus student Internet speech because it does not adequately protect students’ First Amendment rights outside the schoolhouse gates. The *Tinker* test should only be applied to off-campus Internet speech if the student intentionally places his expression on-campus. See Tuneski, *Online, Not on Grounds*, 89 Va. L. Rev. at 177. The Court should create a new rule for Internet speech created entirely off-campus that focuses on the “place of origination and dissemination” of the speech. *Id.* (Emphasizing that that by focusing on

the origination and dissemination, courts can clearly distinguish between on-campus and off-campus Internet expression).

Courts should not apply the *Tinker* substantial disruption test to students' Internet speech created off-campus for two reasons. First, school officials can easily manipulate the *Tinker* test. The test states that if school officials reasonably predict that student speech will create a substantial disruption or material interference with school activities, or invade the rights of others, they may regulate the speech. *Tinker*, 393 U.S. at 518. The problem with applying *Tinker* to off-campus Internet speech is that it does not take into consideration the relative ease with which information flows on the Internet. Information is now global. A webpage that a student creates in the privacy of his own home is easily accessible by another student in the aisle of a classroom.

The *Donniger* case provides an excellent illustration of how *Tinker* does not sufficiently protect off-campus student speech. There, a student merely commented about her frustrations with school officials on a blog and the school was allowed to punish her for it. *Doninger*, 527 F.3d at 45. Her blog did not cause a substantial disruption on campus. *Id.* at 45-6. There was no proof that students even accessed her blog on school grounds. Yet, the appellate court allowed the school to punish the student for comments made from the privacy of her own home. *Id.* at 53. Allowing school officials to regulate and/or punish students for off-campus Internet speech creates a slippery slope that can easily be manipulated. This vague standard has the potential to leave students with no way of knowing if their online chatter could be seen as a foreseeable substantial disruption in the eyes of school officials. The fear of punishment could chill student expression.

Second, by allowing school officials to regulate and/or punish students' off-campus Internet speech, school officials essentially become the judge and jury deciding when to afford First Amendment protection to students' speech. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1051 (2nd Cir. 1979). In *Thomas*, the court highlighted four main concerns with extending school officials' reach to off-campus speech. The four reasons include: (1) school officials, in an attempt to "preserve institutional decorum," are more likely to suppress controversial speech; (2) school officials may choose to punish a larger amount of student speech because they have to answer to community pressures; (3) school officials are not trained in how to deal with complex constitutional issues, such as "libel and obscenity;" and (4) school official's typically punish students for a short period of time making the punishment "virtually terminated before judicial review can even begin." *Id.*

Courts should apply the *Tinker* test to off-campus student Internet speech only if the student intentionally places his expression on-campus. Tuneski, *Online, Not on Grounds*, 89 Va. L. Rev. at 177. By requiring intent this creates a clear identifier for students, parents, and school officials. *Id.* For example, school officials could establish intent by showing that the student accessed the webpage from a school computer; emailed the site to students' school accounts; printed off a portion of the webpage and handed it out on campus; or showed a group of students the webpage in class, etc.

Courts should create a new rule specific to off-campus student Internet speech that focuses on the "origination and dissemination" of the speech. *Id.* at 164. Tuneski indicates, "the line between on- and off-campus speech should be based on where the expression originated and how it was disseminated." *Id.* In other words, on what

computer the expression was created, and from what server it was sent from. Tuneski illustrates that when a student creates a webpage or email account off-campus, he is not acting in his capacity as a student. *Id.* Therefore, his speech should not be within the grasp of school officials. *Id.* This rule clearly distinguishes between on-campus and off-campus student Internet speech because school officials, students, and parents can easily identify the computer, server, and accounts where the speech originated and was disseminated from.

The Court should adopt Tuneski's brightline rule because it stringently protects students' First Amendment rights in speech created entirely off-campus. The lower courts are confused and divided on whether to allow school officials to be a judge and jury over students' First Amendment rights, or whether to fully protect student speech that is outside the schoolhouse gates. A brightline rule would be easier for school officials and courts to administer, and easier for students to follow.

C. A Brightline Rule Would be Easy to Administer and Would not Inhibit the Schools from Maintaining Order.

The Court should focus on the origination and dissemination of students' Internet speech created off-campus because this brightline rule would help school officials know what types of student speech they can regulate. Establishing a brightline rule will not affect the school's ability to maintain order for three reasons. Tuneski, *Online, Not on Grounds*, 89 Va. L. Rev. at 183.

First, school officials will still be able to punish students who cause a substantial disruption on campus. *Id.* This rule will not affect the schools ability to maintain order, it will merely affect which student might be punished. If a different student, other than the one who created the off-campus Internet speech, causes a disruption in class by choosing

to access Internet speech, causing a scene, then the school can still punish that student for his immaturity. *Id.* at 181. Additionally, if the student who created the speech intentionally places his expression on campus by viewing it there, or emailing students on school accounts, etc., then school officials may apply the *Tinker* analysis and regulate the speech. *Id.* at 177.

Second, school officials will still be able to maintain order, because they can rely on parents to keep an eye on what their children are doing on the Internet. *Id.* at 183. Parents can make their child either modify or take down any offensive or controversial speech. *Id.* This rule places responsibility and discipline back in the hands of parents where it rightfully belongs. If a student is acting inappropriately in the privacy of his parent's home it is his parent's responsibility to punish him accordingly, not school officials.

Lastly, school officials will still be able to maintain order because in the most egregious of situations they can rely on the criminal and civil justice system to penalize student speech that is truly offensive and dangerous. *Id.* at 184. *J.S.*, provides an excellent example of how the civil justice system can be used to deter inappropriate student Internet speech. The algebra teacher sued the student in civil court for defamation, interference with contractual relations, invasion of privacy, and loss of consortium and recovered \$500,000 in damages. Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U.J. Sci. & Tech. L. 243, 247 (2001).

The Court should adopt Tuneski's brightline rule focusing on the origination and dissemination of off-campus student Internet speech because the new rule will assist

school officials, parents, and students in identifying the difference between on-campus and off-campus expression. The Court indicated in *Tinker* that students share the same First Amendment rights as adults outside the schoolhouse gates. *Tinker*, 393 U.S. at 511. Now the Court has an opportunity to clearly defend and protect students' freedom of expression.

In this instance, the Court should reverse the appellate court's decision because it relied on flawed analyses from other courts when it applied the *Tinker* substantial disruption test to Politte's and Towles' off-campus Internet speech. (R. at 9.) If the Court applies the proposed off-campus Internet speech rule to the present situation, it would find that both Politte's and Towles' First Amendment rights were violated because their speech originated and was disseminated entirely off-campus.

II. The Court Should Reverse the Appellate Court's Decision Because the Illegal Searches of Towles, and Horton Hopkins School Policy Upholding the Searches Violated Towles' Fourth Amendment Right to be Free from Unreasonable Search and Seizure.

When the Horton Hopkins School District created the policy that allowed school officials to search Towles' personal belongings and his person, they violated his constitutional right to be free from unreasonable search and seizure. The Fourth Amendment protects individuals against unreasonable searches and seizures by government agents. *Camara v. Mun. Ct. of City and Co. of S.F.*, 387 U.S. 523, 528 (1967) (citing U.S. Const. amend IV). Through the Fourteenth Amendment, the Fourth Amendment protection against arbitrary searches and seizures applies to state officials. *Mapp v. Ohio*, 367 U.S. 643, 654 (1961). Among the state officials to whom the Fourth Amendment applies are school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

The remedy for violation of an individual's rights by a state actor can be established in an action of law as provided under 42 U.S.C. § 1983 (2006).

Under most circumstances, a warrantless search violates the Fourth Amendment because it is considered unreasonable. *See Almeida-Sanchez v. U.S.*, 413 U.S. 266, 277 (1973). However, the Court made an exception for circumstances where “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Griffin v. Wis.*, 483 U.S. 868, 873 (1987). The Court has held that the school environment is an area in which circumstances require the special needs exception to the warrant requirement. *T.L.O.*, 469 U.S. at 333 n.2.

In special needs cases, the standard for a valid search is one that is based on “reasonable suspicion”. *Griffin*, 483 U.S. at 882. Whether there was reasonable suspicion is determined by the totality of the circumstances. *U.S. v. Cortez*, 449 U.S. 411, 417 (1981). The search of a student by school officials meets this requirement if the search is: (1) “justified at its inception,” and (2) “reasonably related in scope to the circumstances which justified the interference in the first place.” *T.L.O.*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

A. The Searches of Towles Were not Justified at Their Inception Because the Student Tip and Guilt-by-Association Evidence Were Enough to Justify a Search.

The Court has held that a search of a student by a school official 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 341-42. A school has a legitimate interest in preventing drug use by its students. *See Bd. of Educ. of I.S.D. 92 v. Earls*, 536 U.S. 822 (2002).

There is no question that the Horton Hopkins School District has had a significant problem with student drug use. (R. at 1.) Therefore, the school had a legitimate interest in reducing drug use by students.

While the school had an interest in reducing drug use this did not give Principal Smalls, nor the school officials, the authority to violate Towles' right to privacy in his person and his personal belongings. It is necessary for students to bring some personal items with them to school, and the Court has previously determined that students do not necessarily waive all "rights to privacy" in their personal items "merely by bringing them onto school grounds." *T.L.O.*, 469 U.S. at 326. Such rights ought to be taken seriously, because if the judicial system treats students' constitutional rights with less respect than adults', it is likely to "strangle the young mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Students have a strong privacy interest in their personal belongings, thus the Court must make an assessment of whether the grounds for the search were reasonable, taking into account the delicate balance of interests between school officials and the student. *See T.L.O.*, 469 U.S. 325.

In determining whether the intrusive searches of Towles' book bag, wallet, and person were justified at their inception, it is important to look at the evidence the school relied on. School officials claim that Towles possessed drugs at the time the searches took place. (See R. at 3) The only evidence the school could have used in determining whether they were justified in searching Towles was: a photograph of Towles sitting next to Conrad who was "smoking," an allegation by Politte that the students in the photo may be drug dealers, and past incidents of drug possession and use by Towles' friends. (R. at

2-3.) Both this Court and federal courts have deemed this type of evidence unreliable. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (holding that guilt is personal and by finding a person guilty for the acts of his associates, that person is not given a fair trial), *Phaneuf v. Fraikin*, 448 F.3d 591 (2nd Cir. 2006) (holding that a student tip alone is not sufficient evidence to conduct a strip search of a student, it must be corroborated by other evidence), and *Redding v. Safford U.S.D. 1*, 531 F.3d 1071 (9th Cir. 2008) (holding that a student tip must be corroborated by other evidence in order to justify a strip search of a student).

The school officials cannot validly claim that the photograph itself proved that Towles possessed drugs on the day of the searches. The school officials were unable to determine what Towles' friend Conrad was smoking. For all the school officials knew, Conrad was smoking a cigarette. Stretching this fact to prove that Towles possessed drugs would be far too tenuous to be legitimate, and would constitute "guilt-by-association" evidence which is invalid for reasons discussed below.

The Horton Hopkins school officials relied on evidence of drug possession and drug use by Conrad and Tweegs to justify the search of Towles' property and person. (R. at 2-3.) Because Tweegs had been disciplined by the school for using drugs in the past, and marijuana had been found in Conrad's locker during the searches, somehow the school found it had enough evidence against Towles to strip search him and search his personal belongings. (R. at 2-3.) The problem with the school's reliance on such evidence is that Towles cannot be held accountable for the possession of drugs by his friends. Guilt in the American judicial system is personal, and no one should be found guilty for the acts of others. *McGrath*, 341 U.S. at 178-79.

In *Redding*, a student was faced with a situation similar to Towles'. There, the plaintiff had friendly ties with another student who possessed ibuprofen. 531 F.3d at 1074. The plaintiff had lent the student a planner, and ibuprofen had been found on that student. *Id.* at 1077. The student claimed the plaintiff gave her the ibuprofen. *Id.* The court held that searching the plaintiff based on this tie was "nothing more than 'guilt-by-association,' certainly too thin of a reed for such a substantial intrusion into [the plaintiff's] expectations of privacy." *Id.* at 1099-1100. Because the "guilt-by-association" evidence was inadequate to justify the intrusive searches of Towles, the school officials were left with only the student tip from Politte on which to base the justification for the searches.

According to the Second Circuit Court of Appeals, a student tip, without sufficient corroborating evidence, is not enough to justify a strip search of another student. *See Phaneuf*, 448 F.3d 591. In that case, the school received a tip from a student that Phaneuf possessed marijuana. *Id.* at 593. The student tip in *Phaneuf* was far more specific than the tip from Politte that the Horton Hopkins school officials relied on. In *Phaneuf*, the student tipster told the school officials that Phaneuf had told the student that Phaneuf would be hiding marijuana down her pants so that school officials could not find it. *Id.* In this instance, Politte gave no basis for the veracity of her tip and there was no indication to the school officials that the caption she wrote under the photograph on the FAD webpage was anything more than a suspicion or wild accusation.

Even though the student tip in *Phaneuf* was far more credible than the tip in Towles' case, the court still found the tip wasn't enough to justify the search because the school "did not investigate, corroborate, or otherwise substantiate [the tip] prior to the

strip search.” *Id.* at 598. The court held that although the student tip justified further inquiry into whether Phaneuf possessed drugs, it was not enough to justify a strip search. *Id.* at 598-99. The Second Circuit opinion runs parallel to previous findings by the Court. *See generally Alabama v. White*, 496 U.S. 325 (1990); *Terry*, 392 U.S. 1.

The Court has held that just to make a simple *Terry* stop, where no clothes are removed and no bags are searched, the official “must be able to articulate something more than an ‘inchoate and unparticularized suspicion or hunch.’” *Alabama v. White*, 496 U.S. 325, 329 (1990) (quoting *Terry*, 392 U.S. at 27). A vague student tip and “guilt-by-association” evidence are not enough to constitute reasonable suspicion that Towles possessed drugs. Such evidence could not have constituted more than an “unparticularized hunch.” There was not enough evidence to justify the searches of Towles at their inception, and certainly not enough evidence to subject him to a strip search.

B. The Searches of Towles Were not Reasonably Related in Scope to the Circumstances Because There was not Enough Evidence that Towles Possessed Drugs to Justify any Search, Let Alone Searches as Intrusive as Those Performed.

“Even a limited search of the person is a substantial invasion of privacy.” *See T.L.O.*, 469 U.S. at 337 (citing *Terry*, 392 U.S. 1). Strip searches are, by their very nature, incredibly intrusive and potentially embarrassing. *Phaneuf*, 448 F.3d at 597. This embarrassment and intrusiveness is magnified by the sensitive state that many teenagers are in during this transitional phase in their lives. Towles was 16-years-old at the time the searches were performed and was a sophomore in high school, still a few years away from adulthood. (R. at 2.) The scope of the strip search and search of his book bag

required far more evidence of wrongdoing than the Horton Hopkins school officials were able to come up with at the searches' inception.

The Court has previously stated that it is not necessary for one in a position of authority to use the least intrusive means when performing a search. *Earls*, 536 U.S. at 837. A restriction like this would make it too difficult for the authority to determine how intrusive the search should be. *Id.* However, although authorities are not required to use the least intrusive means, the scope of the search must still meet the threshold of reasonableness in relation to the circumstances justifying the search. *See T.L.O.*, 469 U.S. 325. It therefore would logically follow, as the Seventh Circuit has held, that “as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness.” *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993).

A search is “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 nature of the infraction.” *T.L.O.*, 469 U.S. at 342. In *Williams by Williams v. Ellington*, the Sixth Circuit held that the strip search of a teenage girl was not unreasonable because the school officials were searching for a small vial of drugs. 936 F.2d 881, 887 (6th Cir. 1991). However, *Williams* can be distinguished from *Towles*’ case as the court found the *Williams* search was reasonable only because there was a great deal of corroborating evidence to support the probability that Williams possessed drugs. *Id.* There, the court relied on eyewitness statements that Williams had been sniffing a white substance from a clear vial at school, and a letter found in Williams’ desk written by her regarding the “rich man’s drug”. *Id.* at 887. In this instance, far more

evidence would have been needed to justify the searches performed of Towles' person and belongings.

The school officials relied on a photograph of Towles standing by another student who was smoking, Politte's tip written in the caption of the photograph, and evidence of drug use and possession by Towles' friends to justify the searches. (R. at 2-3.) Because the evidence the school relied upon was of such little consequence, the scope of the searches as performed were not reasonably related to the circumstances that justified the search in the first place. Such insignificant evidence cannot justify a search of Towles' personal belongings and strip search of his person.

C. The Defendants are not Entitled to Qualified Immunity Because the Law Clearly Established that Such Intrusive Searches Cannot be Justified with Such Little Evidence.

Qualified Immunity is an affirmative defense that is available to state officials. *See generally Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). The defense of qualified immunity relies on two things: (1) whether it would be unjust to hold the official liable, when the official must exercise discretion as a requirement of his or her job, and the official has not acted in bad faith, and (2) whether the threat of liability would cause the officer to be hesitant to make decisions necessary for the public good. *Scheuer*, 416 U.S. at 240. “[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court should determine whether the law regarding searches of students' personal property and strip searches was clearly established. If the law is clearly established, then finding the school liable would

not cause injustice nor would it cause the school officials to be hesitant in making decisions in the future.

The Sixth and Eleventh circuits have held that *T.L.O* is not specific enough to offer adequate guidance to school officials as to what constitutes “reasonable suspicion” to justify a strip search. See *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997), and *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005). However, according to *Wilson v. Layne*, a person’s constitutional right must only be “defined at the *appropriate level of specificity* before a court can determine if it was clearly established.” 526 U.S. 603, 615 (1999) (emphasis added.).

When a court creates a general rule, it might not be specific enough to apply to a certain situation, in which case, a “very high degree of factual particularity may be necessary.” *U.S. v. Lanier* 520 U.S. 259, 271 (1997). However, the *Lanier* court also noted that although the law may be generally applicable and does not apply specifically to the facts in the current situation, it does not necessarily follow that the rule is not clearly established. *Id.* at 271. For example, “[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.’ ” *Id.* (quoting *U.S. v. Lanier*, 73 F.3d 1380 (6th Cir. 1996)).

In a situation where reasonable persons could differ as to whether there is enough suspicion to justify a search of one’s person and personal items, *T.L.O.* may or may not offer an “appropriate level of specificity.” However, in a case like this one, where there is so little evidence of drug possession, and the searches performed were so intrusive, the justification for the searches does not come anywhere near the “reasonable suspicion”

threshold in *T.L.O.* This means, that for the purposes of Towles' case, the rule in *T.L.O.* was amply specific for the school officials to determine that their actions were illegal.

There are federal district court decisions in which there was more substantial evidence provided than the evidence provided in Towles' case. *See e.g. Phaneuf*, 448 F.3d 591; *Redding*, 531 F.3d 1071. Yet, those courts still found a violation of the Fourth Amendment because even there was more evidence, they were unable to meet the reasonable suspicion threshold. *Id.* With this knowledge, a reasonable person in the school officials' position would have known that Towles' Fourth Amendment rights could not justifiably be infringed in such an intrusive way with so little evidence.

The affirmative defense of qualified immunity is ineffective when the school official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if [the school official] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). In Towles' case, there was so little evidence that Towles possessed drugs that the school officials had to have known that it was completely unreasonable for them to search his personal belongings and perform a strip search.

There should have been no doubt in the school officials' minds that the searches of Towles were unconstitutional. Therefore, no injustice would be caused in holding them liable, and liability would not stop the school officials from making decisions necessary for the public good in the future. Alternatively, liability would help guide the Horton Hopkins school officials in making decisions that respect the constitutional rights of its students in the future. This can only benefit the public good.

Conclusion

The Court should reverse the incorrect holding of the State of Grace Court of Appeals because Principal Smalls and the Horton Hopkins school officials violated Politte's and Towles' First Amendment and Towles' Fourth Amendment rights. The appellate court incorrectly relied on the *Tinker* substantial disruption test. In order to fully protect the students' First Amendment rights the Court should create a brightline rule focusing on the origination and dissemination of students' Internet speech.

Additionally, the school officials' searches of Cory Towles were not justified at their inception or reasonably related in scope to the circumstances that justified the interference in the first place. Furthermore, the school is not entitled to qualified immunity from liability for their actions because the law was established clearly enough to put a reasonable school official on notice that the searches of Towles were unconstitutional.