

## STATEMENT OF JURISDICTION

The matter before the Court arose under 42 U.S.C. § 1983 (2004), which was enacted as part of the Civil Rights Act of 1871. Subsequent to the findings of the Badger County District Court and the State of Grace Court of Appeals, the Petitioners filed a writ of certiorari. This Court granted certiorari and has jurisdiction to hear the matter conferred by 28 U.S.C. § 1254 (2004)

## STANDARD OF REVIEW

In addressing cases concerning the First Amendment, this Court “has an obligation ‘to make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038 (1991) (citing *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 499 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284–86 (1964)). This Court reviews a lower court’s decision “de novo.” *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466 N.10 (1992). An appellate court can review a lower court’s decision “without relying on the lower courts’ understanding.” *Id.* Thus, a de novo standard “means an independent determination of controversy that accords no deference to any prior resolution of the same controversy.” *United States v. Raddatz*, 447 U.S. 667, 690 (1980).

The party moving for summary judgment must demonstrate “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c) (2006). The moving party must demonstrate they are “entitled to a judgment as a matter of law.” *Beard v. Banks*, 548 U.S. 521, 553 (2006). Granting a motion for summary judgment is inappropriate “[i]f reasonable minds could differ.” *Id.* When a party moves for summary judgment, “courts are required to view the facts and draw reasonable inferences ‘in the

light most favorable to the party opposing the [summary judgment] motion.” *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007); citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

### STATEMENT OF THE CASE

The present action began when Petitioners Kit Politte and Cory Towles filed a complaint against Horton Hopkins School District (hereinafter “HHSD”) and Principal Keena Smalls (hereinafter “Principal Smalls”) on October 15, 2008. *Politte v. Horton Hopkins School Dist.*, NO. 521 AT 4 (Badger County Dist. Ct. Oct. 2008). Petitioners filed an action under 42 U.S.C. § 1983 claiming the Respondents, HHSD and Principal Smalls, violated their constitutional rights. *Id.* Petitioners Politte and Towles argued that Principal Smalls and HHSD violated their constitutional rights to free speech when Principal Smalls suspended them from school for failing to take down websites they had created and administered off-campus. *Id.* Petitioner Towles also claimed that Principal Smalls and HHSD violated his Fourth Amendment rights against unreasonable searches and seizures when school officials conducted a search of his person to look for illegal narcotics. *Id.*

At the trial court level, HHSD and Principal Smalls moved for summary judgment. *Id.* The Badger County District Court granted their Motion for Summary Judgment on both the First and Fourth Amendment claims. *Id.* at 8. The trial court found HHSD and Principal Smalls had not violated either of the Petitioners’ First Amendment rights and that Petitioner Towles had not been the victim of an unreasonable search under the Fourth Amendment. *Id.*

Petitioners appealed the District Court’s ruling to the State of Grace Court of Appeals. *Politte v. Horton Hopkins School Dist.*, No. 254 (Grace Ct. App. 2009). Petitioners contended that HHSD and Principal Smalls violated their constitutional rights under 42 U.S.C. § 1983. *Id.* The State of Grace Court of Appeals disagreed with the Petitioners and affirmed the Badger

Count District Court's granting of Respondents' Motion for Summary Judgment. *Id.* at 12. The appellate court held there was no unconstitutional search and seizure nor was there any violation of the Petitioners' freedom of speech rights. *Id.*

Petitioners then appealed to the Supreme Court of the State of Grace. *Politte v. Horton Hopkins School Dist.*, No. 05-1338, *cert. granted*, (Supreme Ct. of Grace 2009). This Court granted the Petitioners' writ of certiorari in the matter now before the Court. *Id.*

### **STATEMENT OF FACTS**

Horton Hopkins High School ("HHHS") is a public school in the Horton Hopkins School District ("HHSD") in Hopkinsville, Grace. *Politte v. Horton Hopkins School Dist.*, No. 521 P.1 (Badger County District Court Oct. 2008). Kit Politte and Cory Towles ("Petitioners") are students at HHHS. *Id.* Keena Smalls has been the principal at HHHS for nearly twenty years. *Id.* Over the last five years HHHS has been in the midst of a drug epidemic. In 2007, HHHS and Principal Smalls responded to the dilemma by enacting a zero-tolerance drug policy. *Id.*

In September 2008, Kit Politte (hereinafter "Petitioner Politte") started a school-sponsored student organization called Drug Use Damages Schools ("DUDS"). *Id.* at 2. DUDS promotes a drug-free lifestyle and hopes to curb drug usage at HHHS. *Id.* Over one hundred and thirty HHHS students have joined DUDS. *Id.* On September 10, 2008, from her home, Petitioner Politte created a webpage on a social networking website called Friendkepeida. *Id.* The webpage was called Fighting All Dealers ("FAD") and was aimed at identifying drug dealers and users in the community of Hopkinsville. *Id.* FAD allowed people to submit anonymous tips which would hopefully lead to arrests. *Id.* FAD became popular and boasted nearly two hundred HHHS students as members of the Friendkepedia webpage. *Id.*

Cory Towles (hereinafter “Petitioner Towles”) transferred to HHHS for the 2008-2009 school year. *Id.* Petitioner Towles was sixteen years old and was a model student at his previous school. *Id.* On October 3, 2008, Petitioner Towles attended a party at the house of Jeff Tweegs who was a known drug user and had violated HHHS’s zero-tolerance policy in early September 2008. *Id.* Alcohol was present at the party, and after it was broken up by Hopkinsville police, an HHHS student, Frank Conrad, was cited for marijuana possession. *Id.* at 3. Petitioner Towles did not partake in any illegal activity at the party. *Id.* Before leaving the party, however, Petitioner Towles was photographed with Frank Conrad and John Thomson, who was also a known drug user. *Id.* Conrad was smoking an unknown object at the time the picture was taken. *Id.* This photograph was emailed to Petitioner Politte who uploaded the picture to her FAD webpage. *Id.* Petitioner Politte never mentioned Petitioner Towles’ name, but his face was clearly visible in the picture. *Id.*

On the morning of October 5, 2008, Principal Keena Smalls received calls from concerned parents regarding the picture on FAD. *Id.* Principal Smalls was also contacted by Hopkinsville police and advised her of the presence of marijuana and alcohol at the party. *Id.* Principal Smalls viewed the photo and conducted a further investigation by questioning Petitioner Towles, Conrad, Thomson, and Tweegs. *Id.* Each of the boys denied possessing marijuana. *Id.* Principal Smalls then conducted a lawful search of the school lockers of each student.<sup>1</sup> *Id.* She found marijuana in the locker of Frank Conrad. *Id.* Principal Smalls then searched the students’ backpacks, which yielded no contraband. *Id.* Finally, after the students refused to consent to a search of their persons, Principal Smalls required each student to submit to a partial strip search. *Id.* The students were taken into a private room by a male teacher and stripped down to their

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<sup>1</sup> In this Court, Petitioner Towles does not contest Principal Smalls’ search of his locker, rather, Petitioner Towles challenges the searches of his person, including his backpack and wallet.

underwear. *Id.* The boys were never touched by the teacher, rather the teacher simply searched the clothing of the students. *Id.* The teacher found more marijuana in Thomson's clothes. *Id.*

In response to the ordeal, as well as to Petitioner Politte's webpage, Petitioner Towles created from his home a Friendkepedia webpage entitled Students Against Defamatory Statements ("SADS"). Petitioner Towles posted a comment on the webpage that accused FAD and DUDS of defaming him. *Id.* at 4. Further, Petitioner Towles' comment explained that Principal Smalls had subjected him and his friends to an unreasonable search and urged students to fight that injustice. *Id.* Petitioner Towles called for HHHS students to not tolerate these kinds of searches and to speak out against Principal Smalls. *Id.*

Petitioner Towles' comments on SADS became the source of controversy. *Id.* HHHS students began to access both the FAD and SADS webpages from school computer labs and the library. *Id.* Principal Smalls realized that the situation had gotten out of control and, as a result, demanded the Petitioners shut down their Friendkepedia webpages. *Id.* The Petitioners refused to comply with Principal Smalls' request so Principal Smalls suspended the Petitioners from school until they took down the webpages. *Id.* Principal Smalls admitted being upset by the criticism of her on SADS but maintained that she ordered the webpages shut down to keep discipline and order at HHHS and to prevent a student protest. *Id.*

As a result of the suspensions of the Petitioners and the search of Petitioner Towles, the Petitioners filed a suit under 42 U.S.C. § 1983. *Id.* The suit alleged that Principal Smalls violated the Petitioners' First Amendment rights by ordering them to shut down their Friendkepedia webpages. *Id.* Also, Petitioner Towles alleged that the search conducted on him was unreasonable under the Fourth Amendment. *Id.*

## SUMMARY OF THE ARGUMENT

This Court should grant judgment as a matter of law to Horton Hopkins School District (“HHSD”) and Principal Keena Smalls (“Principal Smalls”) because their suspension of Kit Politte and Cory Towles for failing to shut down personal websites created off-campus is not a violation of the First Amendment. First, the Supreme Court has never directly answered the question of school administrative authority over off-campus exercise of First Amendment rights. There is, however, authority to suggest that school officials can punish students for their off-campus speech if such action could foreseeably materially disrupt the school’s discipline and work environment. Second, given the facts of current case, Petitioners Politte and Towles acted in a manner that could reasonably create a disturbance in Horton Hopkins High School’s (“HHHS”) working environment and foster an atmosphere devoid of discipline. Because both websites possessed the potential for severe and substantial disruption at HHHS, Principal Smalls did not violate the First Amendment rights of the Petitioners by suspending them from HHHS for refusing to shut down their web pages. Hence, HHSD and Principal Smalls are entitled to judgment as a matter of law.

Next, this Court should grant judgment as a matter of law to HHSD and Principal Smalls because the partial strip search of Cory Towles (“Petitioner Towles”) was not unreasonable under the Fourth Amendment. First, under the totality of the circumstances, Principal Smalls was justified in having a reasonable suspicion that Petitioner Towles and his friends possessed illegal drugs. The independent evidence supplied to Principal Smalls, which was corroborated by her subsequent investigation and searches, justified the search of the Petitioner at its inception. Second, the totality of the circumstances shows that the scope of the partial strip search of Petitioner Towles was reasonably related to the goal of finding drugs on his person and

that the search was not excessively intrusive. The scope and intrusiveness of the search were reasonable because the search was conducted by a teacher of the same sex, Petitioner Towles was sixteen-years-old at the time of the search, Petitioner Towles was not touched by the teacher conducting the search, and Petitioner Towles was allowed to remain partially clothed during the search. Therefore, because Petitioner Towles' Fourth Amendment rights were not violated, HHSD and Principal Smalls are entitled to judgment as a matter of law.

### ARGUMENT

**THIS COURT SHOULD GRANT JUDGMENT AS A MATTER OF LAW TO HORTON HOPKINS SCHOOL DISTRICT (“HHSD”) AND KEENA SMALLS (“PRINCIPAL SMALLS”) BECAUSE THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS WERE NOT VIOLATED, PETITIONER TOWLES WAS NOT THE VICTIM OF AN UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT, AND THE DOCTRINE OF QUALIFIED IMMUNITY APPLIES TO HHSD AND PRINCIPAL SMALLS.**

Federal Rule of Civil Procedure 56 mandates the entry of summary judgment when the evidence, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(C); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Initially, the party seeking summary judgment bears the responsibility of informing the court of the basis for its motion as well as identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. However, once a properly supported motion for summary judgment has been made, the non-moving party cannot resist the motion and withstand summary judgment by merely resting on its pleadings. FED. R. CIV. P. 56(E). Moreover, “[an] adverse party’s response, by affidavits or as otherwise provided [by Rule 56], must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). Thus, to demonstrate a genuine issue of fact, the non-moving party must do more than simply raise some metaphysical doubt as to the material facts;

rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If a genuine issue of material fact is not presented, then the court should grant judgment as a matter of law if there is not a “scintilla of evidence” that would lead “a reasonable juror to conclude that the position more likely than not is true.” *Daubert v. Merrell Dow Pharms*, 509 U.S. 579, 596 (1993).

In the matter before the Court, Horton Hopkins School District and Principal Keena Smalls, the Respondents, submitted a Motion for Summary Judgment to the Badger County District Court. The facts are undisputed and there is no genuine issue as to any material fact, therefore summary judgment is appropriate. The District Court granted summary judgment to the Respondents and the Court of Appeals affirmed in part and reversed in part. Nevertheless, on *de novo* review “no form of appellate deference is acceptable.” *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

I. This Court should affirm the decision of the Court of Appeals and grant judgment as a matter of law to Horton Hopkins School District (“HHSD”) and Principal Keena Smalls (“Principal Smalls”) because the case is governed by *Tinker* and its progeny which allows school administrators to discipline students for off-campus speech that could foreseeably materially disrupt the work and discipline of a public high school.

This court should affirm the decision of the Court of Appeals and grant judgment as a matter of law to HHSD and Principal Smalls because none of the Petitioner’s First Amendment rights were violated. HHSD and Principal Smalls acted in a constitutional manner when the Petitioners were punished because their websites created a foreseeable risk of creating a material and substantial disturbance to Horton Hopkins High School. Further, this Court should review the First Amendment claims of the Petitioners under standard promulgated by the *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969).

In *Tinker*, the Supreme Court held that public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The Court understood the importance of balancing competing claims made by school officials regarding the need to maintain control and authority over student conduct. *Id.* at 507. The Court ultimately concluded that school officials may suppress student expression if such expression “would materially and substantially disrupt the work and discipline of the school.” *Id.* at 513. Nevertheless, teachers and administrators cannot suppress constitutional rights simply because a student harbors an unpopular opinion that other students may strongly disagree with. *Id.* at 508. Thus, *Tinker* means “schools may not be enclaves of totalitarianism.” *Id.* at 511. The Court warned, however, that student conduct “*in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.*” *Id.* at 513 (emphasis added); see *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (teachers cannot suppress student expression “unless school authorities have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students”) (internal quotations omitted).

While the Constitution protects students in the public school setting, the “rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Courts must analyze student rights in light of the “special characteristics of the school environment.” *Tinker*, 393 U.S. at 506. In *Fraser*, a student’s speech at a school assembly was laced with vulgar sexual innuendo. *Fraser*, 478 U.S. at 678. The Court reiterated, “it is a highly appropriate function of public

school education to prohibit the use of vulgar and offensive terms in public discourse.” *Id.* at 683. The Court upheld the school’s right to punish the student even though his acts did not cause any actual disturbance on the school’s premise. *Id.* at 740. Hence, while students do not shed their constitutional rights at school, *Tinker* and its progeny allow teachers to suppress student speech if it would cause a substantial disturbance to the school’s pedagogical mission.

Furthermore, the Second Circuit’s recent decision in *Doninger v. Niehoff*, 527 F.3d 41 (2008) is also instructive. In *Doninger*, a reprimanded student tried to argue a violation of 42 U.S.C. § 1983 because a school administrator punished her after she emailed critical comments regarding the administration from an off-campus location. *Doninger* at 48. The *Doninger* court decided in favor of the school administrator and held “a student may be disciplined for expressive conduct, even conduct occurring off school ground, when [the] conduct ‘would foreseeably create a risk of substantial disruption within the school environment.’” *Id.* (citations omitted). The court admitted it was unclear whether *Tinker* or *Fraser* should apply to off-campus expression, yet the court applied *Tinker*’s substantial disruption test to case. *Id.* at 50. The court emphasized that it was concerned about the potential for severe disruption of the pedagogical goals of the school because of the punished student’s off-campus remarks. *Id.* (“[w]e recognized that off-campus conduct of this sort can create a foreseeable risk of substantial disruption within the a school”) (internal quotations omitted).

Similarly, in *Wisniewski v. Bd. of Ed. Of the Weedsport Central School Dist.*, the Second Circuit concluded the mere fact of making comments off-campus insulated students from administrative repercussions. 494 F.3d 34, 38–40 (2d Cir. 2007). If a student’s speech creates the real potential to severely and materially disrupt a school’s pedagogical aspirations, the “off-campus character [of the speech] does not necessarily insulate the student from school

discipline.” *Id.* The *Wisniewski* court believed that off-campus expression “can create a foreseeable risk of substantial disruption within a school.” *Id.* at 39. In *Doninger*, the court appropriately discussed that actual disturbance is not needed, “but whether school officials ‘might reasonably portend disruption’ from the student expression at issue.” *Doninger*, 527 F.3d 41, 51 (citing *LaVine v. Blaine School Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)).

Therefore, when a student makes an off-campus form of expression the question of whether the student’s speech would have to physically reach the school is not the proper inquiry. *Id.* Rather, the court determined the pertinent inquiry is whether it was reasonably foreseeable that the expression “would come to the attention of school authorities.” *Id.* Additionally, in *Morse v. Frederick*, the Supreme Court upheld a student’s punishment for unfurling a banner during a school-sanctioned that occurred off-campus. 127 S. Ct. 2618, 2624 (2007). The court concluded the school and its principal acted appropriately in disciplining the student, even though the student was not technically on-campus during the conduct called into question. *Id.* Thus, the substantial disturbance test developed by *Tinker* and its progeny should extend to student speech that occurs off school grounds as long as there is a foreseeable risk that the student speech will have a material disruption on the pedagogical goals of the school.

To apply, the Friendkikipedia webpages of Petitioners Politte and Towles, Fighting All Dealers (“FAD”) and Students Against Defamatory Statements (“SADS”), created a foreseeable risk of substantial and material disturbance to the discipline and work of the school. Even though both students voiced their expression off-campus, punishment from HHSD and Keena Smalls did not violate either of the Petitioners’ First Amendment rights under *Tinker* and its progeny. First, with respect to Petitioner Politte’s webpage, FAD, had a noble goal in trying to identify drug dealers, it created a very foreseeable risk of materially disturbing the work and discipline of

HHHS. FAD created a reasonably foreseeable chance for disruption because HHHS students will potentially be accused of drug abuse in front of all other students. Hence, the website had the possibility for abuse whereby innocent students may be labeled a drug user or dealer.

Moreover, FAD allowed Petitioner Politte to receive information about suspected drug deals through anonymous messages on her website. Petitioner Politte also used any picture that accompanied a message to further her cause of identifying drug dealers and users. The FAD webpage, however, possessed the potential to cause a material disturbance at HHHS. Students who were labeled drug users or dealers, whether true or not, will have their reputations destroyed at the hands of Politte's website. Even though this website is maintained at an off-campus location its ramifications on HHHS's pedagogical interests is readily apparent. FAD's reach onto the campus of HHHS is exemplified by Petitioner Towles' reaction to FAD's role in his being searched for narcotics and suspension. Petitioner Towles became irate when an anonymous email reached Politte's website. The picture contained Petitioner Towles and two other HHHS students, one of which was smoking. Petitioner Towles' critical response through his Friendkipedia webpage, SADS, created vast student interest in the controversy and convinced others to become embroiled in the debate.

Also, subsequent to the search conducted on Petitioner Towles, both FAD and SADS were accessed by many students at the HHHS library and computer lab. This means Petitioner Politte's off-campus speech actually reached the confines of HHHS. Thus, because of the nature of the Internet, HHHS students were able to read Politte's website at school, even though Politte created the entire website at an off-campus location. Even though Petitioner Politte created the FAD webpage off-campus, the ramifications were felt at HHHS. Students became engrossed with the controversy surrounding Petitioner Politte's website. Beyond Petitioner Towles, the

potential for abuse on the website created a flurry of student activity. Pursuant to *Tinker* and its progeny, school administrators properly demanded Petitioner Politte take down the FAD webpage in order to maintain discipline and an orderly school environment. The potential for the situation to spiral even further out of control left the school administration little choice but to demand the site to be shut down. When Petitioner Politte refused, Principal Smalls acted properly in suspending the student.

Regarding Petitioner Towles, a similar result follows from the application of *Tinker* and its progeny. Petitioner Towles' Friendkipedia webpage created a foreseeable risk of substantial disturbance to HHHS work and discipline. Petitioner Towles, through SUDS, promoted student insubordination geared towards HHHS's administration. *Tinker* allows school administrators to discipline students if their actions create a foreseeable risk to cause a disturbance to the school's work or discipline. Towles' message invites and encourages students to "fight this injustice" and "let school administrators know we will not tolerate this kind of treatment." *Politte v. Horton Hopkins School Dist.*, No. 521 at 4 (Badger County Dist. Ct. 2008). Viewed objectively, Principal Smalls could reasonably believe Petitioner Towles' was encouraging students to revolt against school officials. This type of behavior, in whatever manner the students intended to fight the school administration, could very well lead to a material disruption of the pedagogic interests of HHHS. Principal Smalls acted in an appropriate and proportional manner in requesting Towles' remove the message from his website. If Smalls had not taken action, school officials may have been overwhelmed by student protest. *Tinker* and its progeny allow school officials to quell a disturbance before it occurs, as long as it was reasonably foreseeable. In the situation at hand, Principal Smalls acted in a reasonable manner because the controversy between Petitioner

Towles and Petitioner Politte was spiraling out of control. Failure to take remedial action could have led to a loss of discipline at the school and a hostile work environment for other students.

In addition, many students accessed both of the Petitioners' Friendkipedia webpages at HHHS. No longer could school officials ignore the potential calamitous effects of students reading Towles' website on HHHS computers. Therefore, Petitioner Towles' response to Petitioner Politte's website created a foreseeable risk of material disruption to HHHS's work and discipline. The call to challenge the school administration created a foreseeable risk to HHHS's pedagogic interests, and Principal Smalls acted appropriately to try and maintain order at her school. Hence, *Tinker* and its progeny allow this type of discipline to protect the efficient working environments of public schools and HHSD and Principal Smalls are entitled to judgment as a matter of law.

II. This Horton Hopkins School District ("HHSD") and Principal Keena Smalls ("Principal Smalls") are entitled to judgment as a matter of law because the search conducted on Cory Towles ("Petitioner Towles") did not violate the Fourth Amendment because, under the totality of the circumstances, Principal Smalls had independent and corroborative evidence that gave her a reasonable suspicion Petitioner Towles possessed narcotics, the scope of the search was limited in nature, and the search was not excessively intrusive.

The constitutionality of searches and seizures performed upon students by public school officials while on school grounds is governed by the United States Supreme Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 325, 335–36 (1985). The Fourth Amendment's protection against unreasonable searches and seizures insulates citizens from the arbitrary or illegal conduct of government officials. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990). The Fourth Amendment, as applied to the states through the Fourteenth Amendment, prohibits state government officials from conducting unreasonable searches and seizures. *Wolf v. Colorado*, 338 U.S. 25 (1949); *Elkins v. United States*, 364 U.S. 206, 213 (1960). For the purposes of

Fourth Amendment analysis, the term “state government officials” encompasses public school officials. *T.L.O.*, 469 U.S. at 336.

Typically, a search or seizure cannot be lawfully performed in the absence of a warrant and a finding of probable cause by a magistrate. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). The strong preference for obtaining search warrants is based on the rationale that “even a limited search of the person is a substantial invasion of privacy.” *Terry v. Ohio*, 392 U.S. 1, 24–25 (1985). In *Griffin v. Wisconsin*, however, the Supreme Court created a “special needs” exception to the warrant requirement that allowed police to conduct warrantless searches and seizures in certain situations. 438 U.S. 868, 873 (1987). The special needs exception allows a law enforcement officer to conduct a search of an individual if he has a “reasonable suspicion” that the individual is involved in criminal activity. *Id.* In *T.L.O.*, the Supreme Court declared the special needs exception and its reasonable suspicion standard applied to searches and seizures that were performed by public school officials on school grounds. 469 U.S. 325, 341–42 (1985).

As the law stands, for a public school official’s search of a student to be constitutional, the totality of the circumstances must show the school official had a reasonable suspicion to search the student. *Id.* at 341. Two inquiries are taken into consideration in making this determination: 1) was the search justified at its inception and 2) was the scope of the search reasonably related to the objectives of the search and not excessively intrusive. *T.L.O.*, at 341–42. With respect to the intrusiveness of the search, the age and sex of the student being searched are taken into account as well as the nature of the infraction. *Id.* at 342.

A. The judgment of the Court of Appeals should be reversed and judgment as a matter of law granted to the HHSD and Principal Smalls because the totality of the circumstances show that at the inception of the search Principal Smalls had sufficient evidence that gave her a reasonable suspicion Petitioner Towles possessed illegal drugs on school property.

The first prong of the *T.L.O.* standard requires the court to determine whether the search that was performed on a particular student was justified at its inception. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985). *T.L.O.* instructs that the privacy interests of students must yield to the freedom needed by teachers and administrators to maintain order in the school. *Id.* at 341. Thus, there is no need for “strict adherence to the requirement that searches be based on probable cause . . . [r]ather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.” *Id.* Generally, 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. *Id.* at 341–42 (emphasis added); *see Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1108 (9th Cir. 2008) (noting that this reasonableness inquiry is based on the context of the search). The reasonable suspicion standard is a relatively low burden to carry. *See Illinois v. Wardlow*, 528 U.S. 119, 126 (2000) (stating that a reasonable suspicion is not only beneath the preponderance of the evidence standard, it is “obviously less demanding than that for probable cause”); *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968) (explaining that the reasonable suspicion standard is lower than that required for probable cause because it is based on in-the-moment experience). For the purposes of a strip search, however, a heightened level of suspicion is required for the search to pass constitutional muster. *See Phaneuf v. Fraikin*, 448 F.3d 591, 596–97 (2d Cir. 2006) (stating that a strip search of a student must be justified by a high level of suspicion).

As to the first inquiry under *T.L.O.*, the partial strip search performed on Petitioner Towles by school officials was justified at its inception because Principal Smalls had independent evidence—which was corroborated after further investigation—that supported a reasonable suspicion that Petitioner Towles possessed illegal drugs. Unfortunately, the Supreme Court has failed to give adequate guidance as to how *T.L.O.*'s reasonable suspicion test applies, *see Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 825 (11th Cir. 1997), which has left the law on strip searches quite unsettled. *See Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1108 (9th Cir. 2008) (Hawkins, J., dissenting). In light of *T.L.O.*'s uncertainty, the third, sixth, seventh, and eleventh federal circuits have found strip searches to be reasonable, whereas the second and ninth federal circuits have held them to be unconstitutional in certain circumstances.

The cases interpreting *T.L.O.* yield three principles for applying the reasonable suspicion standard to strip search cases. First, a strip search is more likely to be justified at the inception of the search if a school official has a reasonable suspicion that the student has secreted narcotics somewhere on his person. *See Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1322–23 (7th Cir. 1993) (stating that the government has a vested interest in providing a safe and drug-free learning environment for children); *see also Politte v. Horton Hopkins School Dist.*, No. 521 p.7 (Badger County Dist. Ct. 2008) (underscoring that “there is a strong government interest in preventing student drug use”). For example, in upholding the validity of a strip search of a high school student, the Seventh Circuit concluded in *Cornfield* that the strip search was justified from its inception because several faculty and staff had noticed a conspicuous bulge in a student's pants. *Cornfield*, 991 F.2d at 1319. The court reasoned that numerous personal observations yielded a reasonable suspicion the student was concealing

contraband and thus the search was constitutional. *Id.* at 1323; *see Hedges v. Musco*, 204 F.3d 109, 117–18 (3d Cir. 2000) (same); *contra Beard v. Whitmore Lake School Dist.*, 402 F.3d 598, 605 (6th Cir. 2005) (invalidating a strip search of over thirty high school students because the search could not be justified at its inception when the objective of the search was the recovery of a nominal sum of money).

A second principle that flows from the cases interpreting *T.L.O.* is that in justifying a strip search school officials must thoroughly investigate any and all circumstances prior to performing a strip search of a student. *See Cornfield* at 1321–22 (stressing that a strip search should be a last resort and school officials have an obligation to further investigate an allegation before searching a student); *see also Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1108 (9th Cir. 2008) (noting that the context of the search is also germane to analysis under *T.L.O.*). Such an investigation is necessary in order to substantiate the search due to the significant privacy interest public school students, who are often minors, have in their unclothed bodies. *See Beard*, 402 F.3d at 605. Further, when anonymous tips or student allegations provide the basis for a school official’s reasonable suspicion, the school administrator is compelled to seek independent and corroborating evidence to justify a strip search. *See Phaneuf v. Fraikin*, 488 F.3d 591, 598–99 (2d Cir. 2006); *Alabama v. White*, 496 U.S. 325, 329 (1990) (stating that the reliability of a tip from an informant can be considered as a factor under the totality of the circumstances analysis).

The final principle stemming from *T.L.O.* is the requirement of reasonable suspicion, in the context of student search cases, is not a requirement of absolute certainty on the part of the school official. *New Jersey v. T.L.O.*, 469 U.S. 325, 345–46 (1985). Although the federal circuits are clear that more is demanded of a school official’s reasonable suspicion in justifying a strip search of a student, a strip search can yield no contraband and still satisfy the Fourth

Amendment. *See Id.* at 345–46 (noting that the touchstone of the Fourth Amendment reasonableness inquiry is that there exists sufficient probability, not complete certainty). Moreover, other facets of the Supreme Court’s Fourth Amendment jurisprudence are instructive, notably the Court’s decision in *Illinois v. Gates*, 462 U.S 213 (1983). *Gates* established that under the totality of the circumstances analysis of probable cause, a deficiency in one piece of evidence can be cured by the strength of another. *Id.* at 238–39. In essence, under the totality of the circumstances inquiry, probable cause, and reasonable suspicion, is a fluid concept and should not be approached in a rigid, part and parcel manner. *Id.* at 232. Therefore, despite the fact that a greater amount of care is required in order to justify a strip search of a student, *T.L.O.* and other aspects of the Court’s jurisprudence indicate that the reasonable suspicion standard is a minimal burden to satisfy.

To apply, HHSD and Principal Smalls are entitled to judgment as a matter of law because the totality of the circumstances indicates the search of Petitioner Towles’ person was justified at its inception. The search was justified at its inception due to independent and corroborated evidence that Petitioner Towles possessed drugs. The independent evidence showed that Horton Hopkins High School was in the midst of a drug epidemic; Petitioner Towles attended a party that was broken up by police and at which a student was cited for marijuana possession; at the party Petitioner Towles was photographed with known drug users who had previous violations of Hopkins High’s drug policy; finally, parents and the police informed Principal Smalls about the photograph and the fact that a student was cited at the party for possession of marijuana. *Politte v. Horton Hopkins School Dist.*, No. 521 p.1–3 (Badger County Dist. Ct. 2008). To apply these principles of student searches, the case involved narcotics which implicate strong governmental interests; but these interests without further investigation might not give way to a reasonable

suspicion that the Petitioner and the other students possessed drugs. *See Cornfield* at 1322–23; *Phaneuf* at 598–99. If this were all of the evidence upon which the Principal found reasonable suspicion to conduct a search of Petitioner Towles’ person, including the partial strip search, it is likely that it might not have been justified at its inception. Indeed, under the independent evidence the Petitioner is only guilty by association. *See Redding* at 1084.

However, the totality of the circumstances show that this independent evidence was corroborated after Principal Smalls conducted a further investigation of the Petitioner and the known drug users with whom he was photographed. *Politte v. Horton Hopkins School Dist.*, No. 521 P.3 (Badger County Dist. Ct. 2008). Principal Smalls’ inquiry involved questioning the students and a search of their school lockers and backpacks which yielded marijuana. *Id.* When coupled with the independent evidence, Principal Smalls’ questioning and search created a reasonable suspicion that the students, including Petitioner Towles, could possess illegal drugs on their persons. *See T.L.O.* at 345–46 (stating that a search does not have to yield contraband for it to be reasonable under the circumstances). Thus, the search of Petitioner Towles’ person and the partial strip search was justified at its inception and this Court should grant judgment as a matter of law to HHDS and Principal Smalls.

Furthermore, where the Court of Appeals erred was that it premised its reasoning on a birds-eye-view of the factual basis underlying the Petitioner’s claim. The Court of Appeals failed to account for the sequential events that culminated in the partial strip search of the Petitioner. The essential flaw in the Court of Appeals’ reasoning is that it viewed Principal Smalls’ search of the students’ lockers, backpacks, personal effects, and the partial strip search as one large transaction. As *T.L.O.* mandates, each search must be viewed and analyzed independently, which requires the analysis of each search be bifurcated into the correct sequence of events.

Obviously, the strip search would not have been justified at its inception if it had occurred without any further investigation or even without the search of the student's lockers and book bags. Nevertheless, because Principal Smalls gave more scrutiny to the matter and discovered the presence of drugs on school grounds, the totality of the circumstances demonstrated that Principal Smalls had a reasonable suspicion to conduct a partial strip search of the Petitioner, and hence, the partial strip search was justified at its inception.

Taken as a whole, because Principal Smalls conducted a further inquiry into the independent evidence that the Petitioner possibly possessed illegal drugs, including a search which yielded narcotics, Principal Smalls had a reasonable suspicion under the totality of the circumstances that the Petitioner possessed drugs. Therefore, the partial strip search of the Petitioner was justified at its inception and HHDS and Principal Smalls are entitled to judgment as a matter of law.

B. The judgment of the Court of Appeals should be reversed and judgment as a matter of law granted to HHSD and Principal Smalls because, under the totality of the circumstances, the scope of the search of the Petitioner was reasonably related to the objectives of the search and the search was not excessively intrusive.

This Court should grant judgment as a matter of law to HHSD and Principal Smalls because the search of Petitioner Towles was reasonably related to the goal of discovering illegal drugs and the partial strip search was not excessively intrusive. The second prong of the *T.L.O.* analysis requires this Court to make two inquiries: 1) was the scope of the search reasonably related to the objectives of the search, and 2) was the search excessively intrusive. *T.L.O.*, at 341–42. In addressing the intrusiveness of the search, this Court can take into consideration the age and sex of the student being searched and the nature of the infraction. *Id.* at 342. If the Court finds the measures employed were reasonably related to the purpose of the search and that the search was not excessively intrusive to the student, then the requirements of the Fourth Amendment have been satisfied.

First, HHSD and Principal Smalls are entitled to judgment as a matter of law because the scope of the partial strip search was reasonably related to the objective of discovering illegal drugs. As explained in *T.L.O.*, the permissible scope of the search conducted by school officials is driven by the interests at stake. *T.L.O.* at 342–43 (requiring that the privacy and security interests of the student be weighed against the government’s interest in conducting a search of the student). Unquestionably, a full strip search of a student in which the student is required to stand fully nude in front of a school official or expose the intimate parts of his body to a school official implicates significant privacy interests. Nonetheless, where a strip search is aimed at discovering narcotics the government has a compelling interest in preventing student drug use and providing a safe learning environment for children. *See Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1322–23 (7th Cir. 1993). In contrast, the government does not have a strong enough interest to justify a strip search of a student when the object of the search is something less compelling, such as recovering stolen money, *see Beard v. Whitmore Lake School Dist.*, 402 F.3d 598, 605 (6th Cir. 2005), or where there is no corroborating evidence of possession of narcotics. *See Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1085–86 (9th Cir. 2008) (emphasizing that what justifies a search of a student’s locker or book bag for narcotics may fall short of what is necessary to justify a full strip search). In the Petitioner’s case, the scope of the search was reasonably related to finding illegal drugs not only because Principal Smalls had a reasonable suspicion that the Petitioner possessed marijuana, but because of the extremely compelling government interests of preventing student drug use and providing safe and drug-free school zones. Moreover, the search of the Petitioner’s person was not unreasonable because it was only a partial strip search during which he was allowed to remain partially clothed, was searched by a gym teacher of the same sex, and was not touched—

the Petitioner was not required to stand nude or even expose the intimate parts of his body to a school official. Therefore, under the totality of the circumstances, HHSD and Principal Smalls are entitled to judgment as a matter of law because the limited nature and duration of the partial strip search, as well as the government's compelling interest in preventing student drug use, allowed the scope of the search of the Petitioner to be reasonably related to its objective.

With respect to the intrusiveness of the search, HHSD and Principal Smalls are entitled to judgment as a matter of law because the partial strip search of the Petitioner was not excessively intrusive. As already stated, the Petitioner was never required to expose intimate parts of his body during the search, he was never touched, and the school official searching the Petitioner was the same sex as the Petitioner. In essence, the Petitioner took off his outer clothing and stood there as his clothes were searched rather than his person. Similarly, in *Beard* the Sixth Circuit invalidated a partial strip search of students because the search was not justified at its inception and the scope was unreasonable in light of the objective of recovering money. *See Beard*, 402 F.3d at 605–06. The court opined, however, that the partial strip search of twenty high school boys in the privacy of the boys locker room probably was not excessively intrusive, particularly when they were not required to expose themselves to school officials and were not physically touched during the search. *Id.* In comparison, the partial strip search of the Petitioner neatly fits under the estimation that the court made in *Beard*. Thus, the partial strip search was not excessively intrusive due to the limited nature of the partial strip search, the fact that the Petitioner was sixteen years old at the time of the search, and the search was conducted by a male teacher. Hence, HHSD and Principal Smalls are entitled to judgment as a matter of law.

In sum, the first prong of the *T.L.O.* analysis is satisfied because the independent evidence that was corroborated by Principal Smalls' further investigation, which gave Principal Smalls a

reasonable suspicion the Petitioner possessed drugs and made the search of the Petitioner justified at its inception. The second prong of *T.L.O.* is met because the scope of the search was reasonably related to the compelling objective of preventing student drug use and because the limited nature of the partial strip search of the Petitioner was not excessively intrusive. Therefore, the partial strip search of the Petitioner was reasonable in all respects under the Fourth Amendment and HHSD and Principal Smalls are entitled to judgment as a matter of law.

II. Even if the Court determines that HHSD and Principal Smalls committed violations of the First and Fourth Amendments, HHSD and Principal Smalls are still entitled to judgment as a matter of law because the doctrine of qualified immunity applies because the legal framework surrounding the issues was not clearly established at the time of the alleged violations.

In order for the doctrine of qualified immunity to apply, two requirements must be met. First, this Court must determine whether there has been a constitutional violation and, second, if at the time of the violation the constitutional right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In order for a constitutional right to be clearly established, a reasonable government official must know that the conduct in question was unlawful. *Id.* at 202.

The District Court and the Court of Appeals never reached the issue of whether the doctrine of qualified immunity applied to the alleged First Amendment violation suffered by the Petitioners. Nevertheless, the inconsistencies in how the law applies to the administrative regulation of off-campus student speech merit the application of the doctrine of qualified immunity on the First Amendment issue. Moreover, even though the Court of Appeals erroneously concluded Petitioner Towles' Fourth Amendment rights had been violated, it correctly determined that qualified immunity insulated HHSD and Principal Smalls from liability due to the inconsistency in the analytical framework in student search law. Therefore, even if HHSD and Principal

Smalls violation the various constitutional rights of the Petitioners they are nevertheless shielded by qualified immunity and are entitled to judgment as a matter of law.

### **CONCLUSION**

For the foregoing reasons, Respondents pray this Court AFFIRM the Appellate Court for the State of Grace because Principal Smalls and HHSD did not violate Petitioners' First Amendment right to free speech. Respondents also pray this court REVERSE the Appellate Court for the State of Grace because HHSD and Principal Smalls did not violate Petitioner Towles' Fourth Amendment rights against illegal search and seizure. Finally, HHSD and Principal Smalls pray this Court AFFIRM the Court of Appeals' conclusion that the doctrine of qualified immunity applies to HHSD and Principal Smalls.

Respectfully Submitted,

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Attorneys for Respondents  
Competition #36