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Docket No. 05-1338

**IN THE SUPREME COURT OF THE STATE OF GRACE**  
March Term 2009

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**Kit Politte and Cory Towles**  
Plaintiffs-Petitioners

-vs-

**Horton Hopkins High School and Keena Smalls,**  
Defendants-Respondents

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

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BRIEF FOR PETITIONER

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Team #37

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## **STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW**

- I. Were the Petitioners' rights under the First Amendment to the United States Constitution violated when Principal Smalls ordered the Petitioners to shut down their respective websites?
  - A. Do the Petitioners websites qualify as on-campus speech when they were created from their homes, using their own individual computers, and were only accessed by other Horton Hopkins students during their free time at school?
  - B. Did Principal Smalls possess sufficient evidence to forecast a material or substantial disruption with school activities when the only evidence promulgated by school officials was the personal feelings of Principal Smalls towards the Petitioners websites?
- II. Whether Respondents' warrantless search of Corey Towles on school premises violated his Fourth Amendment protection against unreasonable searches and seizures despite Towles' failure to violate any school rules?
  - A. Whether Respondents' are immune from suite when students' Fourth Amendment rights are protected under the Constitution, and those rights were violated by Respondents' actions?

## STATEMENT OF FACTS

Petitioners Kit Politte and Corey Towles are both students at Horton Hopkins High School. *Politte and Towles v. Horton Hopkins Schl. Dist. and Keena Smalls*, Badger County Dist. Ct. No. 521, 1 (Oct. Term, 2008) Petitioners' have both filed claims under 42 U.S.C. §1983, alleging that the taking down of their network webpages violated their rights to free speech under the First and Fourteenth Amendments of the U.S. Constitution. (R. at 4). The Badger County District Court ruled in favor of Respondents on both issues, granting their motion for summary judgment on the First Amendment issue, and finding that the search of Petitioner Towles was reasonable under the Fourth Amendment. (R. at 6-8). While the State of Grace Court of Appeals agreed with the District Court, finding no violation of the Petitioners First Amendment rights, the Justices reversed in part, finding the search of Petitioner Towles to be unreasonable, thus violating his Fourth Amendment rights. *Politte and Towles v. Horton Hopkins Schl. Dist. and Keena Smalls*, State of Grace Ct. of Appeals No. 254 (Jan. Term, 2009). However, despite ruling in favor of Petitioner Towles regarding the search, the Court held that the Respondents were entitled to qualified immunity because the constitutionality of the strip search was not clearly established at the time school officials searched Petitioner Towles. (R. at 11).

In September 2008 Kit Politte, a senior at Horton Hopkins High School, started a school-sponsored club called "Drug Use Damages Schools" which advocated against student drug. (R. at 2). DUDS has approximately 130 members who post flyers around the school and organize school assemblies. (R. at 2). During a DUDS organized assembly on Sept. 10<sup>th</sup> Jeff Zarling, the guest speaker, told Politte the only way to stop the school's drug problem was to point out and expose drug dealers and users in the community. (R. at 2). Later that night, Politte created a

network webpage on the internet site Friendkepedia<sup>1</sup>. (R. at 2). The webpage, named “Fighting All Dealers” (FAD), was directed at residents of the Hopkinsville community and asked community members to post information on potential drug activity in the area. (R. at 2).

Although Politte did mention FAD once during a DUDS meeting after school hours, she created her webpage from her own home, using her personal computer. (R. at 2). Politte believed tips posted on the site would lead police to arrest local drug dealers and users. (R. at 2). In addition to collecting these tips, Politte reviewed the information she received, taking care to post only information she believed to be helpful from users whose profiles she kept anonymous. (R. at 2).

Petitioner Towles is a 16 year-old sophomore who recently transferred to Horton Hopkins High School. (R. at 2). At his former school, Towles was an honor student, played on the Junior Varsity baseball team, and had no serious disciplinary problems his entire freshman year, receiving only two detentions for tardiness. (R. at 2).

On October 3<sup>rd</sup>, Towles attended a house party at the home of Jeffrey Tweegs, a junior at Horton Hopkins and captain of the varsity baseball team. (R. at 2). Tweegs was previously suspended after Principal Smalls caught him smoking a marijuana joint during lunch on school grounds. (R. at 2). Towles, hoping that meeting some baseball players at the party might improve his chance of making the team later in the year arrived at Tweeg’s home around 9p.m. and left by 11p.m, spending his time throwing a football with classmates. (R. at 2-3). At the party, Towles stated he saw some students drinking beer and smoking cigarettes, although he observed no drug use. (R. at 3). After Towles left, around 11:30pm, neighbors called police

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<sup>1</sup> Friendkepedia is a social networking site that allows users to create personal networks. The website is oriented towards high school and college students. The site allows users to set up networks or groups, which are hosted by Friendkepedia, and that other Friendkepedia users with similar interests may join. (R. at 2).

complaining about the noise. (R. at 3). When police arrived, officers cited five students for underage drinking, and ticketed sophomore Frank Conrad for marijuana possession. (R. at 3).

The next day Politte received an email containing a photo depicting Towles sitting with Conrad outside of the house during the party while Conrad was smoking. (R. at 3). Politte posted the photo on her website with the caption, "Police find drug use at local high school party. Are students becoming drug dealers?" (R. at 3). Although Towles' name was never used, his face was visible in the photo. (R. at 3).

On Oct. 5<sup>th</sup>, Principal Smalls received calls from the police, as well as several concerned parents who saw the photo on the FAD webpage. (R. at 3). The Principal called Towles, Conrad, Thomson, and Tweegs into her office to question the students individually. Although all the students denied possessing any drugs, Principal Smalls had their lockers and bags searched. (R. at 3). During the search, a small baggie of marijuana was found in Conrad's locker, upon which time Principal Smalls asked each student to submit to a personal search. (R. at 3). In spite of refusing, each student was taken into a private room and searched by the gym teacher, Jim Waters. (R. at 3). The students were told to strip to their underwear while Waters searched their clothes. (R. at 3). He eventually found a small amount of marijuana in Thomson's jeans, but found nothing on Towles. (R. at 3).

Following the search, Towles created his own Friendkepedia network page, called "Students Against Defamatory Statements" (SADS), on his home computer. (R. at 3) On his webpage, Towles accused DUDS of invading his privacy by posting inaccurate statements about him, and also criticized Respondents for conducting the strip search. (R. at 3-4). As a result of these posts, students at the school began accessing Towles and Politte's webpages, both from home and at school during their free time at school. (R. at 4). Principal Smalls, stated she had

become worried about the situation getting out of control, demanded that both Politte and Towles shut down their webpages. (R. at 4). When both students refused, they were suspended until they took down their pages. (R. at 4). Principal Smalls admitted she became angry upon reading Towles comments, but claims the main reason for her decision was keeping order at the school. (R. at 4). In response to Respondents actions, both students filed actions under 42 U.S.C. §1983, alleging that the forced shut-down of their webpages violated their rights to free speech under the First and Fourteenth Amendments of the U.S. Constitution. (R. at 4). In addition, Towles alleged that the strip search Respondent subjected him to, violated his Fourth Amendment protections against unreasonable searches and seizures. (R. at 4).

### **SUMMARY OF THE ARGUMENT**

I. The Court of Appeals for the State of Grace incorrectly decided that the Horton Hopkins School District and Principal Keena Smalls, did not violate the Petitioners, Kit Politte and Cory Towles, First Amendment rights. The United States Supreme Court has held that students rights are not automatically coextensive with that of adults in other settings *Bethel v. Fraser*, 478 U.S. 675, 681 (1986), however it has tempered that statement against the fact that students do not “shed their constitutional rights to freedom of expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969).

The Petitioners websites should be afforded the full protection of the First Amendment because they were created off-campus from Horton Hopkins High School. The Petitioners websites were created at their own individual homes, using their own computers on a public social networking website. (R. at 2, 4). Therefore the Petitioners websites cannot fairly be characterized as on-campus speech and should be protected by the full power of the First Amendment.

Even if this court were to characterize the Petitioners speech as being on-campus, Principal Smalls possessed insufficient evidence to reasonably forecast a material or substantial disruption with school activities. The United States Supreme Court has expressly held that school officials cannot suppress student speech if motivated by “[u]ndifferentiated fear or apprehension of disturbance.” In the present case the only reason Principal Smalls gave for suppressing the Petitioners websites was that she was worried and angry, citing no additional correlative evidence of an imminent disruption. (R. at 4). Therefore, Principal Smalls actions violated the Petitioners rights under the First Amendment.

II. The Court of Appeals for the State of Grace correctly decided that the Respondents search of Petitioner Corey Towles was unreasonable, and violated his Fourth Amendment rights. App.Ct.Opinion at 10. However, the Court was incorrect when it granted the defendant’s qualified immunity as school officials. *Id.* at 11. In *New Jersey v. T.L.O.*, the U.S. Supreme Court ruled that student searches must pass a two-part reasonableness test to pass constitutional muster: the court must consider (1) whether the action was justified at its inception and (2) whether the search as conducted was reasonably related to the circumstances that initially justified suspicion. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). In *Vernonia School Dist. 47J v. Acton*, the Court also applied three factors in addition to *T.L.O.*’s test in determining the reasonableness of a search: (1) the student’s legitimate expectation of privacy; (2) the intrusiveness of the search; and (3) the severity of the school system’s needs that were met by the search. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664-665 (1995).

The Respondents search of Petitioner Towles was unreasonable, as he was neither caught violating any school rules nor engaging in any activity that would raise suspicions as to his potential drug use or possession. The only basis for Respondents search was a picture of

Petitioner Towles sitting next to another student who was smoking a cigarette. The photo was taken at a party, and while other students were cited for drinking, Petitioner Towles was never seen with any alcohol or doing anything that might violate school rules or the law.

While students' constitutional rights are subject to a school's need to maintain authority and educate, they nonetheless enjoy protection under the U.S. Constitution. *T.L.O.*, 469 U.S. at 341; *Vernonia*, 515 U.S. at 654. As such, the Fourth Amendment protection against unreasonable search and seizure applies to students, shielding them from action that falls short of *T.L.O.*'s reasonableness standard. Since Petitioner Towles' Fourth Amendment right has been identified by the Court in *T.L.O.* and *Vernonia*, the defendant's are not protected by immunity for violating that right.

## ARGUMENT

### **I. PETITIONERS' SPEECH IS PROTECTED BY THE FIRST AMENDMENT BECAUSE IT WAS CREATED AND EXECUTED OFF-CAMPUS AND SCHOOL OFFICIALS COULD NOT REASONABLY FORECAST A MATERIAL OR SUBSTANTIAL DISRUPTION WITH SCHOOL ACTIVITIES**

The Court of Appeals for the State of Grace incorrectly decided that the Respondents', Horton Hopkins High School District and Keena Smalls, could suppress Petitioners' non-school sponsored website without violating the Petitioners' rights under the First Amendment. U.S. Const. amend. I. Petitioners Kit Politte and Corey Towel's rights under the First Amendment were violated when Horton Hopkins High School officials, specifically Principal Smalls, ordered the Petitioners to shut down websites created on a public internet forum and promoted off-campus. Petitioners' speech was advanced off-campus, and thus, it is entitled to the full amount of protection guaranteed under the First Amendment. U.S. Const. amend I. (R. at 2, 12). Furthermore, insufficient evidence existed for school officials to reasonably forecast a substantial or material disruption with school activities for the following three reasons; one, the ability to

access Petitioners' websites from the school campus does not, without more, qualify as a material or substantial disruption; and two, the political and social nature of the Petitioners' speech cannot form the basis for its suppression. As this issue concerns matters of law and the First Amendment to the Constitution, the standard of review is *de novo*. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

The First Amendment of the United States Constitution provides that, “[c]ongress shall make no law . . . abridging freedom of speech.” U.S. Const. amend. I. In commenting on the general sphere of protection that the First Amendment provides the United States Supreme Court has stated that the First Amendment “prevents government from proscribing speech . . . because of the disapproval of the ideas expressed.” *R.A.V. v. City of St. Paul*, 505 U.S. 64, 74-75 (1992). Further, the United States Supreme Court has outlined the general rule regarding the limits of student expression, finding that if a school fails to show a student’s conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969) (internal citations omitted).

A. Petitioners Pure Political And Social Speech Occurred Off-Campus And Is Therefore Entitled To The Full Ambit Of Protection Under The First Amendment.

The social and political speech promulgated by Petitioners, via their internet websites, was created and advanced off-campus from Horton Hopkins High School. Therefore, it is guaranteed greater protection under the First Amendment as compared to speech promoted on a school campus. The United States Supreme Court has stated that, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the schoolhouse gate.” *Id.* at 506. Furthermore, the United States Supreme Court has never held that the extent of the government’s authority to suppress student speech reaches beyond the steps

of the schoolhouse,<sup>2</sup> instead, the Court has stated that while, “a school need not tolerate student speech that is inconsistent with its basic educational mission,” it conversely has no authority to “*cancel similar speech outside of the school.*” (emphasis added) *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

The Second Circuit has held “the *First Amendment* forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon.” *Thomas v. Board of Ed. Granville Central School District*, 607 F.2d 1043, 1051-52 (2d Cir. 1979). Additionally, the court found that “[w]hen school officials are authorized only to punish speech on the school property, the student is free to speak his mind when the school day ends.” *Id.* at 1052. In *Thomas*, high school students created and distributed an underground newsletter to their fellow classmates which made satirical references to school teachers and was laced with sexual innuendo. *Id.* at 1045. The newsletter was primarily created off-campus however, certain portions of the paper were prepared on-campus with the aide of a teacher. *Id.* at 1045. Eventually, students who had purchased the newsletter brought copies onto the school’s campus and, when discovered by school officials, were promptly confiscated by the school principal. *Id.* at 1045-6. While school officials initially took no action, they later suspended the students for distributing the newsletter. *Id.* at 1045-6. The court found that the school violated the students’ rights under the First Amendment, reasoning that school officials play a unique role of “both prosecutor and judge when [they] move against student expression.” *Id.* at 1051.

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<sup>2</sup> See Justice Brennan’s concurrence in *Bethel v. Fraser*, noting that, “[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because the government officials considered his language inappropriate.” 478 U.S. 675 (1986). See also Justice Alito’s concurrence in *Morse v. Frederick*, commenting generally on the rights of students outside of the school setting and stating “I join the opinion of the Court on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on a political or social issue.” 127 S.Ct. 2618, 2636 (2007).

Furthermore, the court emphasized that when “school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.”

*Id.* at 1055

Likewise, in *Emmett v. Kent School Dist. No. 415*, a Pennsylvania District court held that school officials lacked the power to regulate a student’s off-campus website despite the fact that it was directed at the high school itself. 92 F. Supp. 2d 1088, 1090 (W.D. PA 2000). In *Emmett*, a high school student created a website from his home using no school equipment. *Id.* at 1089. The website contained mock obituaries of other students in the school and eventually became a popular topic of discussion among the school community. *Id.* at 1089. The court held the First Amendment protected the students’ speech due to the “out-of-school nature of the speech” and because the school administrators had no authority to regulate the student’s speech “on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials.” *Id.* at 1089.

Like the students in both *Thomas* and *Emmett*, the First Amendment protects the Petitioners’ websites because they were created and promoted and advocated off-campus from Horton Hopkins High School. (R. at 2, 4). The Petitioners websites were created off-campus at their own individual homes, using their own computers. (R. at 2, 3). The websites were displayed on a social networking site called Friendklopedia, which the lower court described as “open to anyone” and “allows users to set up networks or groups . . . that other Friendklopedia users with similar interests may join.” (R. at 2). While a majority of the users who belonged to Petitioner Politte’s website were Horton Hopkins students, the page was specifically directed towards the Hopkinsville *community* in an effort to stamp out illegal drug activity. (R. at 2).

Also, while Petitioner Politte did promote her website one time at Horton Hopkins after schools hours it had been posted. for approximately one month before the school forced her to shut it down. (R. at 2, 4) Petitioner Towles' website however, while being directed towards Horton Hopkins students, merely contained a description of the search he and his friends were subjected to by school officials and called for students to voice their concerns about any unlawful treatment they may experience at the hands of school administrators. (R. at 3, 4) Finally, although Petitioners' webpages were accessed on-campus during school hours, they were not accessed personally by either Petitioner. (R. at 12). The record indicates rather that the websites were viewed on campus by other students during their free time or after the school day had commenced. (R. at 4)

In *Thomas* and *Emmett*, a student newsletter and webpage were afforded protection under the First Amendment because they originated and were promoted off-campus. Likewise, in the present case, the Petitioners speech is similarly protected by the First Amendment because it too originated and was promoted off-campus from Horton Hopkins.

#### 1. *Petitioner Towles' Speech Primarily Occurred Off-Campus*

Petitioner Towles' website was created solely from his own home using his personal computer, and although it was directed at Horton Hopkins students, this fact alone cannot form the basis for its suppression. As both courts in *Thomas* and *Emmett* correctly recognized, school officials cannot transform student speech created and promoted off-campus into on-campus speech simply because other students possess or access that speech on school grounds. Allowing otherwise, the courts reasoned, would grant schools a dangerous amount of power they do not otherwise possess. The courts holding instead that the speech should instead be evaluated as it would be in a normal public setting. Similarly in the present case, students merely accessing

Petitioner Towles' off-campus website from Horton Hopkins, during their free time, fails to transform Petitioner Towles' website into on-campus speech. Moreover, allowing Principal Smalls to reclassify and shutdown Petitioner Towles' off-campus website affords her the czar like authority over student speech both the courts in *Thomas* and *Emmett* were concerned with. Therefore, because Principal Smalls should not be granted this extreme power, Petitioner Towles' website, as the speech was in *Thomas* and *Emmett*, should be evaluated as it would be in a normal public setting.

## 2. *Petitioner Polittes' Speech Primarily Occurred Off-Campus*

Like Petitioner Towles' website, Petitioner Politte's website was created from her own home using her own personal computer. (R. at 2). Students' merely accessing Petitioner Pollites' website on-campus fails to transform her website into on-campus speech, just as directing speech at fellow classmates and brining underground newsletters onto campus similarly failed to transform the off-campus speech at issue in *Thomas* and *Emmett* into on-campus speech. Moreover, as in *Thomas*, Petitioner Politte's actions in promoting her website on-campus after school hours were *de minimus* because it did not change the fact that her website was conceived and executed outside of the school. Finally, unlike the newsletter in *Thomas*, which contained racy sexual innuendo, Petitioner Polittes' website promoted abstention of illegal drug use. Such an important social message, one the Supreme Court has affirmatively recognized,<sup>3</sup> should not be silenced, especially coming from the mouth of a fellow student.

Therefore, because Petitioners' websites advocated a social and political message, remained off-campus in nature, and were not transformed into on-campus speech through the

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<sup>3</sup> See generally; *Morse v. Frederick*, where the United States Supreme Court expressly noted the affirmative duty placed on public schools to spread the message that illegal drug use is harmful and dangerous. *Id.* at 2628.

acts of their fellow classmates, they are protected by the First Amendment and cannot be suppressed by the Respondent.

3. *Petitioner Polittes' Website Was Not Sponsored By Horton Hopkins High School.*

In addition, the present case also does not fall under the authority given to school officials. (See e.g. *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)). In *Hazelwood* the Supreme Court held that schools could censor student speech which “the public might reasonably perceive to bear the imprimatur of the school. *Id.* at 271. In *Kuhlmeier*, a teacher exercised near complete control of a high school newspaper, which was funded and distributed through the school. However, in the present case, Petitioner Politte’s website was solely managed and created by her. (R. at 2). Therefore, because the record does not reveal any control or decision making by school officials in the creation or management of Petitioner Politte’s website, it would be unreasonable for the public to view her website as bearing Horton Hopkins imprimatur.

B. Insufficient Evidence Existed For School Officials To Properly Forecast Any Material Or Substantial Disruption With School Activities

Even if this Court were to find the Petitioners’ speech as occurring on-campus, Respondent still does not possess sufficient evidence to reasonably forecast a substantial or material disruption with school activities. In order to validly suppress student speech, school officials must be able to demonstrate facts that would reasonably lead them to, “forecast substantial disruption of or material interference with school activities.” *Tinker*, 393 U.S. at 514. However, a school official’s desire to suppress student speech is not valid if motivated by an “[u]ndifferentiated fear or apprehension of disturbance.” *Id.* at 508. This alone, “is not enough to overcome the right to freedom of expression.” *Id.* at 508. Elaborating on the importance of valid evidence of a disruption, the United States Supreme Court further noted that school officials “must be able to show that its action was caused by something more than a mere desire

to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 509.

The Seventh Circuit has held that a student newsletter, although highly critical of school officials and school procedures, was protected by the First Amendment because the school failed to produce sufficient evidence to show that a substantial or material disruption of school activities could be forecasted. *Scoville v. Board of Ed.*, 425 F.2d 10, 14 (7th Cir. 1970). In *Scoville*, two students were expelled for distributing a newsletter entitled “Grass High” to fellow classmates on their high school campus. *Id.* at 11. The publication was sharply critical of school policies and officials, using words like “utterly idiotic” and “asinine” in referring to the schools attendance policy. *Id.* at 16. The article also instructed students to disregard any “propaganda” that was distributed by the school’s principal, David Ross. *Id.* at 16. The court found the student’s First Amendment rights had been violated, noting that school officials did not possess sufficient evidence to forecast a disruption. Moreover, the court stated that even if the students had “intended their criticism to substantially disrupt or materially interfere with the enforcement of school policies,” more would be needed to satisfy the standard under *Tinker*. *Id.* at 14. The court then described the evidence school officials had failed to produce, specifically, the article’s overall impact on the school, the ages of the students reading the article, and the kinds of materials already available at the school. *Id.* at 14. The court then reasoned “mere expressions of the [students] feelings with which [school officials] do not wish to contend, is not the showing required by the *Tinker* test to justify expulsion.” (internal citations omitted) *Id.* at 14.<sup>4</sup>

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<sup>4</sup>*See also; Pinard v. Clatskanie School Dist.*, 467 F.3d 755 (9th Cir. 2006) (student petition calling for resignation of high school basketball coach was held to be protected political speech as it did not cause a material or substantial disruption with school activities) And *see, Beussink v. Woodland*, 30 F.Supp. 2d 1175 (E.D. Mo. 1998) (student website highly critical of school principal could not be suppressed simply because the

Similar to *Scoville*, Respondents in the present case have similarly failed to demonstrate any evidence of a potential disruption emanating from the Petitioners' websites. Petitioner Politte's website merely asked community members for information regarding illegal drug use in the Hopkinsville community and had been posted for approximately one month before school officials ordered her to take it down. (R. at 2-4). School officials forced Politte to take down her page only after a photograph of Petitioner Towles standing near a student smoking surfaced, ultimately prompting school officials to search Towles. (R. at 2-4). After being searched by school officials, Petitioner Towles created his own website where he urged his fellow classmates to speak out against, what he felt, were unlawful school policies. (R. at 4). Upon hearing about Petitioner Towles webpage, students at Horton Hopkins began accessing both Politte and Towles websites during their free time at school and after school hours. (R. at 4). The exact number of students who accessed the sites is unknown. (R. at 4). It was at this time in which Principal Smalls ordered Petitioners to shut down their public webpages, stating she was worried about a potential disruption with school activities. (R. at 4). Although angry with Petitioner Towles for criticizing her on his website, Principal Smalls claimed this was not the "main" reason for her decision. (R. at 4).

*1. Students Accessing Petitioners Websites During Their Free Time And After School Hours Was Insufficient Evidence To Forecast A Material Or Substantial Disruption*

Similar to *Scoville*, Horton Hopkins students merely accessing Petitioners' websites during their free time and after school hours does not, without more, allow for an inference that a material or substantial disruption with school activities was likely to occur. Like *Scoville*, Respondent has also failed to elaborate on what activities, if any, are restricted during a student's

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principal was angry with the student for making the comments; nor because of a disruption that occurred when the boy was handed a disciplinary notice, as it was a common occurrence whenever students were disciplined).

free time at Horton Hopkins. Moreover, Respondent has failed to mention, as school officials failed to do in *Scoville*, what types of reading material were already available to students at the school. For example, Respondent has not stated that students were forbidden from reading about the harmful effects of drug use or readings promoting advocacy of ones own civil liberties, which were the topics of Petitioners’ websites. Likewise, evidence of a disruption cannot solely be based upon Principal Smalls feeling of becoming “worried” about a possible disruption. Principal Smalls feelings do not shed light on the websites overall impact on the mood of the school, which, as the court in *Scoville* noted, should be central to the inquiry. Instead, Principal Smalls stated she felt worried and angry about the content of the website, not that *students* had become worried or angry. (R. at 4).

*2. The Nature Of The Statements Made On Petitioner Towles Website Cannot Serve As The Basis For A Potential Disruption*

As in *Scoville*, Respondent similarly cannot limit Petitioner Towles speech simply because it was critical of school policies, and specifically, Principal Smalls. Petitioner Towles criticized school officials and policies in a similar, yet more mature manner than the student in *Scoville*, calling for students to “fight injustice” and asking students to “speak out” against Principal Smalls. Like the school officials in *Scoville*, Respondent is barred from silencing Petitioner Towles website which advocates principally dissention and protest. Furthermore, the United States Supreme Court has always sought to protect speech that invites protest and disagreement, as failing to do so would eliminate the central purpose of the First Amendment.<sup>5</sup>

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<sup>5</sup> See; *Terminello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“One of the core functions of free speech is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.”).

Respondent has failed to demonstrate the correlative evidence necessary to sufficiently justify its decision to silence the Petitioners' speech. It cannot rest its decision merely on the fact that the Petitioners' websites were accessed by students during their free time or on the nature of Petitioner Towles speech. Therefore, because Respondent has failed to cite any concrete evidence that would have allowed school officials to forecast a material or substantial disruption, Petitioner speech is protected under the First Amendment.

To the contrary, the court in *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008), found that school officials could reasonably forecast a material and substantial disruption stemming from the student's speech, and therefore, school officials possessed the authority to suppress it without offending the student's First Amendment Rights. *Id.* at 52 In *Doninger*, a student posted a false message on her personal internet website, stating that an upcoming school event had been canceled by school officials. *Id.* at 45. The website also described the school officials accused of canceling the event with vulgar terminology, calling them "douche bags" and specifically asked students to contact the district superintendent to "piss her off more." *Id.* at 45. The student also produced and distributed an email to parents, asking them to contact the district superintendent and school principal about the events cancellation. *Id.* at 44. As a result of the student's actions, both the superintendent and principal were inundated with calls and emails concerning their purported decision to cancel the school event, which in fact had never been made. *Id.* at 44-6. The court, in its analysis, focused on two main issues in deciding that the student's speech reasonably lead school officials to forecast a disruption. *Id.* at 51. First, the language the student used was not conducive to resolving the conflict between herself and the school administrators. *Id.* at 51. Second, the false information the student posted lead to empirical evidence suggesting the students had become very angry, even planning a student sit-in

in protest of the perceived school decision. *Id.* at 51. As a corollary, the false information also lead to the school officials' offices becoming flooded with messages concerning the rumor of the cancellation, forcing them to take time away from their other official school duties. *Id.* at 51-2. The court reasoned that the student's webpage did create a foreseeable risk of disruption, and the school's actions in forcing the student to shut the page down did not violate her First Amendment rights. *Id.* at 53.

Unlike the vast amount of empirical evidence produced by school officials in *Doninger*, Respondents in the present case have only produced evidence that Principal Smalls was worried about a possible disruption. *Id.* at 4. Moreover, unlike the student in *Doninger*, neither Petitioner in the present case used vulgar language to describe Principal Smalls. Petitioner Towles merely referred to school officials as "idiots." The record does not suggest, nor do school officials claim, that Petitioner Towles meant to use this term in a vulgar way, as such the term cannot properly be considered vulgar in this context. Also, Petitioner Towles did not lie about school officials forcing him to submit to a strip search, unlike the student in *Doninger*. Furthermore, there was no evidence of immense student disruption stemming from either Petitioners websites. In *Doninger*, students had planned a sit-in to protest what they believed to be the school's decision to cancel a school event. In the case at case, the record does not reveal any planned demonstration by school students as in *Doninger*, and merely reveals that students accessed the Petitioners' websites during their free time at school.

Finally, here the dispute between Petitioner Towles and Principal Smalls concerned much more than a mere extracurricular student activity. Instead, Petitioner Towles was advocating for the preservation of his civil rights. Unlike the situation in *Doninger*, where it could be argued that the student reacted in an immature manner to a scheduling conflict between herself and the

school, Petitioner Towles on the other hand was subjected, not only to a search of his personal belongings, but forced to strip down and submit to a search of his person. (R. at 3). This highly intrusive incident, which did not bear any incriminating paraphernalia, pales in comparison to the situation in *Doninger*, and surely warrants the tolerance of an un-obscene off-campus statement asking students to stand up for their rights.

In sum, Respondent cannot validly suppress either Petitioner Politte nor Petitioner Towles speech because it was conducted off-campus and insufficient evidence existed for school officials to forecast a substantial disruption with school activities. The Petitioners' created their websites from their homes, on a public networking website, and did not access or encourage others to access their websites on the campus of Horton Hopkins High School. Furthermore, other students merely viewing the social and political language displayed on the Petitioners websites during their free time cannot transform the Petitioners off-campus websites into on-campus speech. The United States Supreme Court has never held, nor does the United States Constitution give school officials the power to re-characterize student speech that occurs off-campus into on-campus speech simply for the purpose of its regulation. The Petitioners speech therefore should be afforded the full protection of the First Amendment. In addition, school officials have failed to cite sufficient evidence upon which a material or substantial disruption with school activities could have been forecasted. Neither the nature of the Petitioners words nor student conduct in passively viewing the Petitioners websites is a sufficient basis for school officials to claim disruption was imminent. Moreover, Principal Smalls cited only her personal feelings of a possible disturbance as her basis for forcing the Petitioners to shut-down their websites. A school officials personal feeling of worry is exactly the type "fear or apprehension of disturbance" that was explicitly rejected by the United States Supreme Court as a basis to

regulate student speech. *Tinker* 393 U.S. at 508. Finally, teaching our youth to become responsible and informed citizens is the chief function of our public education system. Important social and political messages, such as abstention of illegal drug use and the protection of ones own civil liberties, are messages that should not causally be silenced due to the personal feelings of a school principal. As such, Petitioners assert that they have demonstrated a genuine issue of material fact existing between the parties. Therefore, Petitioner respectfully this Honorable Court reverse the State of Grace Court of Appeals decision and deny summary judgment to Respondents.

## **II. THE SEARCH OF RESPONDENT TOWLES BY SCHOOL OFFICIALS VIOLATED THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONALBE SEARCHES AND SEIZURES.**

The Court of Appeals for the State of Grace, per the Honorable P.J. Harding, overturned the trial court's decision and found that the Horton Hopkins School District and Principal Smalls violated Petitioner Cory Towles' Fourth Amendment protection against unreasonable searches and seizures. In so doing, the Court found that the search of Petitioner Towles was unreasonable under the U.S. Supreme Court's standard for searches of students as announced in *New Jersey v. T.L.O.* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). However, despite this holding, the Court further held that the school district was entitled to qualified immunity with respect to Petitioner Towles' Fourth Amendment claim. Since this appeal involves questions of law under the United States Constitution, the standard of review is *de novo*. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

While students may not "shed their constitutional rights" at the schoolhouse gate, they experience them differently from adults. *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969). In *T.L.O.*, Justice White wrote that students have to accommodate their privacy interests to the needs of administrators in maintaining order in the schools. *New Jersey v. T.L.O.*, 469 U.S. 325,

341 (1985). In *Vernonia School Dist. 47J v. Acton*, Justice Scalia wrote that “the nature of [these] rights is what is appropriate for children in school.” *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). Such a standard takes into account the “serious” need to deter drug use and possession by students. *Id.* at 661. However, despite these deficiencies in constitutional protection, searches of students must be reasonable in all respects. *Supra*, fn. 43 at 341. As the Court cautioned in *West Virginia State Bd. of Ed. v. Barnette*, there is no discretionary function of a Board of Education important enough “that they may not perform within the limits of the Bill of Rights.” *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943). In other words, while school officials are still constitutionally required to adhere to Fourth Amendment provisions for search *and* seizure, that requirement operates under the reasonableness of the circumstances standard.

Determining the reasonableness involves a two-fold inquiry: the court must consider (1) whether the action was justified at its inception and (2) whether the search as conducted was reasonably “related in scope to the circumstances which justified the interference in the first place.” *Supra*, fn. 38 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Under normal circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* at 341-342. In other words, the search of a student must be reasonable under the totality of circumstances surrounding the search itself.

In *T.L.O.*, the student was caught with a classmate smoking in a school bathroom, a violation of school rules. *Id.* at 325. The principal searched the student’s purse and found cigarettes, rolling papers, and a small amount of marijuana. *Id.* She notified the student’s parents

and the police, who later took the student's confession for selling marijuana at school. *Id.* The majority held that the principal's initial search of the purse was reasonable given that the student had been caught smoking in the bathroom and denied it. *Id.* In terms of relevance, the discovery of the cigarettes made the likelihood of the student's smoking in the bathroom more probable than not. The relevance of the student's possession of cigarettes to the question of her smoking them, and to the credibility of her denial, supplied the "nexus" between the item searched for and the infraction being investigated. *Id.* at 345 (quoting *Warden v. Hayden*, 387 U.S. 294, 306-307 (1967)). Since the search was justified at its inception and reasonably related in scope, the Court held that the school had not violated any Fourth Amendment rights. *T.L.O.*, 469 U.S. at 334. In finding no violation, the majority stated that the Federal Constitution still prohibits unreasonable searches and seizures by state officers --including school officials— by virtue of the Fourteenth Amendment. *Id.* (quoting *Elkins v. U.S.*, 364 U.S. 206, 213 (1960)). Public school officials act in furtherance of publicly mandated educational and disciplinary policies, and as such are not only required to adhere to Federal Constitutional standards, but may be held liable for their violations. *Id.* at 336.

The issue of student searches came before the Court ten years later in *Vernonia School Dist. 47J v. Acton*, albeit in the context of suspicion-less drug testing of high school athletes. *Vernonia*, 515 U.S. at 650. Justice Scalia interpreted *T.L.O.* as rejecting the proposition that school officials act *in loco parentis* (SP), with the same authority over schoolchildren as parents have with their own children. *Id.* at 652. The Justice noted that the case "emphasized, that the nature of that power is custodial and tutelary, permitting ...supervision and control that could not be exercised over adults." *Id.* (See *T.L.O.*, 469 U.S. at 339). Although a public school athletic drug policy did not violate a student's constitutional right to be free from unreasonable searches,

the majority noted that such a student-athlete has an even lesser expectation of privacy than a student who didn't participate. *Supra*, fn. 33 at 657. This was especially true given the voluntary nature of their participation. *Id* at 654-655.

Applying the *T.L.O.* reasonableness standard, the majority found the drug testing policy constitutional, due in large part to this decreased expectation of privacy. The Court pointed out that the program was directed more narrowly to student-athletes, and cautioned against assuming a similar suspicion-less drug test would pass "constitutional muster" in other contexts. *Id.* at 662-665. This included student testing based on "suspicion" of drug use. *Id.* at 664. To determine whether the search violated the Fourth Amendment, the Court looked to three factors in addition to *T.L.O.*'s reasonableness test: (1) the student's legitimate expectation of privacy, (2) the intrusiveness of the search, and (3) the severity of the school system's needs that were met by the search. *Id* at 664-665.

A. Respondents Search Of Petitioner Towles Was Unreasonable, And Violated The Standards Set Forth In *New Jersey v. T.L.O.* And *Vernonia School Dist. v. Action.*

Under the U.S. Supreme Court's approach in *T.L.O.* and *Vernonia*, the Horton Hopkins school district, through Principal Smalls, violated Corey Towles' Fourth Amendment protection against unreasonable searches and seizures. The school's search fails under *T.L.O.*'s two-part reasonableness test, as it was neither (1) justified at its inception, nor was it (2) conducted in a manner reasonably related in scope to the circumstances that justified the interference in the first place. *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 20). Principal Smalls based her search on a picture of Towles she found posted on a social networking site. Dist. Ct. opinion at 3. The site was developed by Petitioner Towles co-petitioner, Kit Politte, and was viewed by many students at the school. *Id.* at 2. The picture shows nothing more than Petitioner Towles sitting next to two fellow classmates, John Thomson and Frank Conrad. *Id.* at 3. Although

Conrad was later cited for marijuana possession at the party, Petitioner Towles had left the party by that time, and nothing in the picture shows him doing anything that might be construed as illegal. *Id.* Despite the lack of any illegal activity by Petitioner Towles, Principal Smalls lumped him in with the other students she suspected of wrongdoing, and took the unreasonable step of subjecting Petitioner Towles to a highly intrusive strip search. *Id.* at 3-4.

To be justified at its inception under *T.L.O.*'s standard, Principal Smalls would have to reasonably believe a subsequent search of Petitioner Towles would produce evidence of the wrongdoing she suspected, which in this case was possession of drugs. *Id.* at 3-4. It is difficult to believe that Smalls would suspect Petitioner Towles of having drugs in school simply because he attended a party and was seen in a picture with another student. Prior to transferring to Horton Hopkins, Petitioner Towles was an honor student, had no disciplinary action taken against him, and was a member of the junior varsity baseball team. Dist. Ct. opinion at 2. He had gone to the party hoping to meet some of his new school's baseball players, believing it might improve his chances of making the team. *Id.* at 2. Although a small amount of marijuana was found in Conrad's locker, nothing was found in Petitioner Towles bag or locker. *Id.* at 3. With nothing more than a picture, and against his refusal, Petitioner Towles was made to strip to his undergarments and submit to a highly intrusive search. *Id.* at 3.

While the lower courts have generally adopted the approach taken in *T.L.O.* and *Vernonia*, some circuits have come to different conclusions regarding student searches. In *Cornfield by Lewis v. Consolidated High School Dist No. 230*, the Seventh Circuit applied a sliding scale to its reasonableness analysis, maintaining a more rigid Fourth Amendment reasonableness standard as the intrusiveness of the student search intensifies. *Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2 1316, 1321 (7<sup>th</sup> Cir. 1993). In *Cornfield*,

teachers caught a student outside the building in violation of school rules. *Id.* at 1319. They noticed a small bulge in the student's pants and believing he might be hiding drugs, searched the student the following day. *Id.* Teachers brought him to the boy's locker room, told him to take his clothes off, and visually inspected his naked body. *Id.* All of this was done despite a lack of consent by the student's mother and with no evidence of suspected drug use beyond the bulge in his pants. *Id.* The court found that the search was reasonable under *T.L.O.*'s analysis because the student was caught violating school rules, and "crotching" is a common way to smuggle drugs into school. *Id.* at 1320-1321. However, the justices were particularly disturbed by the use of a strip search on the student. The court wrote that the use of a strip search on a teenage student is an "invasion of constitutional rights of some magnitude." *Id.* (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7<sup>th</sup> Cir. 1980)). Elaborating on the sliding scale of its reasonableness test, the justices emphasized that "what may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search." *Id.* at 1321.

In *Beard v. Whitmore Lake Sch. Dist.*, the Sixth Circuit rejected the strip search of students following the reported theft of money. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 601 (6<sup>th</sup> Cir. 2005). Relying on *T.L.O.* and *Vernonia*, the court held that the search violated the Fourth Amendment because it was unreasonable at its inception. *Id.* at 604-605. Unlike the searches in the two prior cases, the students in *Beard* were not suspected of selling, using, or hiding drugs. Rather, the school officials were looking for money that a student had recently reported missing. *Id.* at 601. The court held that while some search of a student's person and effects of students may be warranted when substantial property has been reported recently stolen,

the use of strip searches for large groups of students not directly suspected of stealing the money was unreasonable. *Id* at 604-605.

In *Redding v. Safford Unified Sch. Dist. No. 1*, the Ninth Circuit Court of Appeals rejected a principal's strip search of a student after finding ibuprofen pills, knives, cigarettes, and lighters in a binder the student had lent to a friend. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1074-1078 (9<sup>th</sup> Cir. 2008). The student denied owning any of the items and claimed that they were not in the binder when she lent it. *Id.* After a search of the student's purse revealed nothing, the principal ordered a strip search of the female student in the presence of himself and the school's female nurse. *Id.* Although the student was eventually stripped to her bra and panties, with her bra being removed at one point in the search, nothing was found. *Id.* In holding that school officials violated the student's Fourth Amendment protections, the court noted that "nowhere does the *T.L.O.* Court tell us to accord school officials' judgments unblinking deference." *Supra*, fn. 84 at 1080 (quoting *T.L.O.*, 469 U.S. at 343). The court added that *T.L.O.* "made it clear that while it did not require school officials to apply a probable cause standard to a purse search, it plainly required them to act 'according to the dictates of reason and common sense.'" *Redding*, 531 F.3d at 1080. Echoing the Seventh Circuit's decision in *Cornfield*, the court agreed that as the intrusiveness of the search intensifies, so too does the standard of Fourth Amendment reasonableness. *Id* at 1081 (quoting *Cornfield by Lewis*, 991 F.2d at 1321). Looking at the totality of circumstances, the court ruled that while the principal was justified in searching the student's backpack and emptying her pockets, it was unreasonable for him to proceed from this to a strip search. *Supra*, fn. 94 at 1074-1078. At a minimum, the court noted, the principal should have at least conducted an investigation to corroborate the

accusations of the student found with the binder against the student that was searched. *Id.* at 1083.

Unlike the student in *T.L.O.*, Petitioner Towles was not caught violating any school rules. The party he attended took place off school grounds, and while police observed underage drinking and marijuana possession, Petitioner Towles had left before they arrived. Dist.Ct. Opinion at 2-3. While Conrad was seen smoking in the picture, Petitioner Towles had nothing in his hands and did not appear inebriated in the photo. *Id.* at 3. Even after a search of Petitioner Towles' bags and locker, the principal was unable to find anything in his possession that might give rise to a reasonable suspicion of wrong-doing on his part. In *T.L.O.*, as well as the lower court cases such as *Cornfield*, *Beard*, and *Redding*, the conduct giving rise to school official's suspicion occurred on-campus. *T.L.O.*, 469 U.S. at 325; *Cornfield by Lewis*, 991 F.2d at 1319; *Beard*, 402 F.3d at 601; *Redding*, 531 F.3d at 1074-1078. Moreover, the student's conduct in each of these cases reasonably gave rise to a suspicion of further concealment of contraband. In *T.L.O.* the student caught smoking in the bathroom denied that she had even engaged in the observed conduct, and the Court found it reasonable to believe that a student caught violating school rules, and than lying about it, might be hiding contraband in her purse or on her person. *T.L.O.*, 469 U.S. at 333. In *Cornfield*, a student was again caught violating school rules. *Cornfield*, 991 F.2d at 1319. The search that followed was based on an observation that the student had a bulge in his pants. *Id.* However, unlike that case, there was nothing to provide Smalls with a reasonable suspicion of wrongdoing on Petitioner Towles' part.

Even if the principal was justified in ordering the search of Petitioner Towles' locker and bags, the subsequent strip search was not reasonably related in scope to the circumstances that initially brought about her suspicion. In *Vernonia*, the Court set forth the relevant criteria for

evaluating searches performed in the absence of individual suspicion: (1) the student's legitimate expectation of privacy, (2) the intrusiveness of the search, and (3) the severity of the school system's needs that were met by the search. *Vernonia*, 515 U.S. at 664-665. Furthermore, it warned against conducting suspicionless searches on students in the general school population. As Towles was not a member of any school-sponsored athletic team or club, he did not experience the lowered expectation of privacy the *Vernonia* Court stated is inherent in such involvement. *Id.*

Despite the lowered standard of suspicion on the part of school officials, students still enjoy protection against unreasonable searches and seizures under the Fourth Amendment. The intrusiveness of the search is without question, as a strip search requires the student to strip down to near nakedness in front adults. The fact that Petitioner Towles was strip searched merely for being photographed with a student cited for marijuana possession makes the intrusion even more disturbing. Although the Court ruled in favor of strip searches without probable cause in *Bell v. Wolfish*, that case was decided in the context of inmate searches conducted in prison, an environment the Court characterized as a "unique place fraught with serious security dangers." *Bell v. Wolfish*, 441 U.S. 520, 560 (1979). While drug abuse in schools is a real concern, it does not rise to the level of security risk found in adult prisons, where smuggled contraband such as knives pose a severe risk to prisoners and guards alike. Warning against such a comparison, the *Vernonia* Court stated, "there is no basis for...insinuation that in upholding [this] policy we are equating the Fourth Amendment status of schoolchildren and prisoners." *Vernonia*, 515 U.S. at 664.

B. Respondents Are Not Protected By Qualified Immunity.

Government officials have long enjoyed immunity from suits seeking damages from alleged constitutional violations. Such immunity is designed to prevent officials from feeling constrained in the performance of their duties by fear of suits seeking damages. As Judge Learned Hand once noted, “the burden of a trial and...the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” *Gregoire v. Biddle*, 177 F.2d 579, 581 (2<sup>nd</sup> Cir.1949). In *Wood v. Strickland*, the U.S. Supreme Court held that school board members could enjoy qualified immunity from §1983 claims. *Wood v. Strickland*, 420 U.S. 308, 321(1975). However, such officials would not be shielded from liability if they “knew or reasonably should have known that the action [they] took...would violate the constitutional rights of the student affected.” *Id.* at 320.

In *Harlow v. Fitzgerald*, the Court rejected the subjective elements of the *Wood* test, and instead crafted an entirely objective test. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-816 (1982). Under this objective test, government officials performing discretionary functions were to be “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.” *Id.* at 818.

In *Pearson v. Callahan*, the Court overruled the approach taken in *Saucier v. Katz*, which created a two-step test it deemed as mandatory. *Pearson v. Callahan*, 129 S.Ct. 808, 817-818 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194 (2001)). However, the Court noted that while the *Saucier* approach is no longer mandatory, it may be quite beneficial. *Id.* at 818. Under the *Saucier* test, the Court must determine: (1) whether the defendant’s conduct violated the

Constitution, and (2) whether that right has been clearly established. The *Pearson* Court preferred a simpler approach, looking at the objective legal reasonableness of the action in light of the immunity cases decided before it. *Id* at 822 (quoting *Wilson v. Layne*, 526 U.S. 603 (1999)).

Under either the *Saucier* or the *Pearson* approach, the defendant's lack qualified immunity in this case. Applying *Saucier*, the defendant's search violated Petitioner Towles constitutional protection against unreasonable searches and seizures. Although students enjoy a lowered standard of constitutional protection, *T.L.O.* and *Vernonia* both affirm the Fourth Amendment's application to student's, albeit under a lesser standard of reasonableness. *T.L.O.*, 469 U.S. at 341; *Vernonia*, 515 U.S. at 654. Despite this lowered standard, the Supreme Court has established that students are still protected by the U.S. Constitution, and has never ruled otherwise. *T.L.O.*, *supra*, fn. 111 at 334 (quoting *Barnette*, 319 U.S. 624 (1943)). Furthermore, the defendant's fail under *Pearson*'s "objective legal reasonableness of the action." *Pearson*, 129 S.Ct. at 822. Looking at the facts objectively, all Petitioner Towles is guilty of is attending an off-school party where he saw a few students drinking and smoking cigarettes. Dist. Ct. opinion at 2-3 The picture Principal Smalls based her search on only showed Petitioner Towles next to two students, one of which was holding a cigarette. *Id*. Even under a more diminished standard of admissible evidence, there is nothing remotely linking Petitioner Towles to drug use or possession beyond the mere attendance of a party. In the vast majority of cases dealing with student searches, those students searched were at a minimum caught violating school rules. *Redding*, 531 F.3d at 1074-1083. While a bag or locker search might be expected under these circumstances, a strip search goes beyond

the bounds of reasonableness. Therefore, Petitioner Towles respectfully requests that this Honorable Court uphold the Court of Appeals decision, finding that the Respondents search violated his Fourth Amendment protection against unreasonable search and seizure and reverse the Court's decision as Respondent failed to demonstrate the existence of qualified immunity.

### **CONCLUSION**

For the reasons stated above, the decision of the lower court should be reversed in full.

March 2, 2009

Respectfully Submitted,

Team #37