

No. 05-1138

IN THE
SUPREME COURT OF THE STATE OF GRACE

SPRING TERM 2008

KIT POLITTE and COREY TOWLES,
Petitioners,

v.

HORTON HOPKINS SCHOOL DISTRICT and KEENA SMALLS,
Respondents.

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

BRIEF FOR PETITIONERS

March 2, 2009

Team No. 25
Counsel for Petitioners

QUESTIONS PRESENTED

- I. Did Respondents violate Ms. Politte's and Mr. Towles's First Amendment rights when they forced the students to remove their off-campus, non-school-sponsored webpages from the Internet even though the webpages did not fall within any of the well-drawn categories of independent student communications that school authorities may regulate?

- II. Did Respondents' warrantless search of Mr. Towles, which was neither reasonable at its inception nor reasonable in scope, violate the Fourth Amendment as applied to the States by the Fourteenth Amendment?

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CONSTITUTIONAL PROVISIONS INVOLVED

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

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

U.S. Const. amend. I.

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

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

U.S. Const. amend. IV.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

No state shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Statement of the Facts

In September 2008 Kit Politte was an eighteen-year-old senior at Horton Hopkins High School (hereinafter “HHHS” or “Horton Hopkins”) in the town of Hopkinsville in the State of Grace. (R. 2.) Concerned about student drug abuse, Ms. Politte founded a school-sponsored club, Drug Use Damages Schools (hereinafter “DUDS”). (R. 2.) The 130-member organization’s activities included posting flyers at school and organizing school assemblies to help curtail drug use. (R. 2.) Ms. Politte also created a webpage on the social networking website Friendkipedia. (R. 2.) Her network consisted of all of the DUDS members, some other students, and additional Friendkipedia users. (R. 2.) Ms. Politte created her webpage at home using her personal computer. (R. 2.) She never updated or accessed her webpage on school property or during school hours. (R. 2.) The webpage was called Fighting All Dealers (hereinafter “FAD”) and solicited information about potential drug dealers from Hopkinsville residents on the Friendkipedia network. (R. 2.) FAD contained a link to allow users to email anonymous tips to Ms. Politte, who designated herself as the page’s administrator and posted what she deemed the strongest tips. (R. 2.) On September 15, Ms. Politte informed DUDS members about FAD at a meeting that took place after school hours in a classroom. (R. 2.)

Corey Towles was a sixteen-year-old Horton Hopkins sophomore who transferred there for the 2008-2009 school year. (R. 2.) Mr. Towles was an honor student and baseball player at his previous school, and he had only a minor disciplinary record, including two detentions for tardiness. (R. 2.) On October 3, Mr. Towles attended a party at the home of Jeff Tweegs, the HHHS baseball team captain. (R. 2.) He arrived at Tweegs’s home at 9:00 p.m. and departed at 11:00 p.m., and he spent most of his time there tossing a football with other students. (R. 3.) He

witnessed no drug use at the party. (R. 3.) Thirty minutes after Mr. Towles left the party, the police broke it up. (R. 3.) They cited five students for underage drinking and cited HHHS sophomore Frank Conrad for possession of marijuana. (R. 3.)

The following day, an anonymous Horton Hopkins student emailed Ms. Politte a photograph of Mr. Towles, Conrad, and sophomore John Thompson sitting outside Tweegs's home during the party. (R. 3.) Conrad was smoking in the photo. (R. 3.) Ms. Politte posted the photo on FAD with the caption "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (R. 3.) The webpage did not include Mr. Towles's name, but his face was visible in the photo. (R. 3.)

On October 5, some parents who had seen the photo on FAD called Principal Keena Smalls. (R. 3.) The Hopkinsville police also called Smalls to inform her about the students they cited. (R. 3.) Smalls had been principal of HHHS for twenty years and had witnessed increased drug use on campus in the last five years. (R. 1.) In 2007, Smalls suspended twenty-five students for using drugs at school, and one student died of an overdose at an off-campus party. (R. 1.) That year, the Horton Hopkins School District enacted a new drug policy that allowed for drug testing and searches by school officials. (R. 1.)

Smalls looked at FAD and the photo then individually questioned Mr. Towles, Conrad, Thompson, and Tweegs. (R. 3.) All of the boys denied having drugs, so Smalls searched their lockers and backpacks pursuant to the drug policy. (R. 3.) After finding a small bag of marijuana in Conrad's locker, Smalls required all four boys to submit to strip searches. (R. 3.) Mr. Towles and the others refused to be searched, but gym teacher Jim Waters strip searched them anyway. (R. 3.) Waters took each boy to a private room, instructed each one to strip to his

undergarments in front of him, and rifled through the pockets of each boy's clothing. (R. 3.)
Waters did not find any drugs in his strip search of Mr. Towles. (R. 3.)

Following the strip search, Mr. Towles created a Friendkipedia page called Students Against Defamatory Statements (hereinafter "SADS"). (R. 3.) Like Ms. Politte, Mr. Towles designed and edited his webpage completely off-campus on his personal computer and did not view it on school property or during school hours. (R. 3, 12.) Mr. Towles wrote on SADS that Ms. Politte's FAD posting invaded his privacy and defamed him. (R. 3-4.) He also wrote, "Horton Hopkins school officials committed a far worse injustice when they subjected my friends and me not only to an unreasonable search of our lockers, but also to strip searches." (R. 4.) He asked classmates to "let our school administrators know that we will not tolerate this kind of treatment." (R. 4.)

Horton Hopkins students discovered Mr. Towles's webpage and started viewing it and Ms. Politte's page from home and school computers. (R. 4.) Smalls was angry about Mr. Towles's censure of personal officials and demanded that both he and Ms. Politte remove their webpages. (R. 4.) When they refused, Smalls suspended them in order to force them to comply. (R. 4.) Smalls later alleged that she coerced Mr. Towles and Ms. Politte to take down their webpages because she was concerned about "keeping discipline and order at school, and preventing what she saw as a potential for student protest." (R. 4.)

Procedural History

On October 15, 2008, Mr. Towles, with his parents, and Ms. Politte sued Horton Hopkins School District and Smalls (hereinafter "Respondents") pursuant to 42 U.S.C. § 1983, alleging that Respondents violated their First and Fourteenth Amendment rights to free speech when they ordered Petitioners to remove their personal webpages from the Internet. (R. 4.) In addition, Mr.

Towles alleged that school officials' search of his person was unreasonable under the Fourth and Fourteenth Amendments. (R. 4.) Both Respondents moved for summary judgment on both claims. (R. 4.) Respondents argued that they permissibly regulated Petitioners' webpages, their search of Mr. Towles was reasonable, and even if the search were unreasonable, they would nevertheless prevail under the doctrine of qualified immunity. (R. 4-5.) The Badger County District Court granted Respondents' motion for summary judgment on both claims, finding that they did not violate Petitioners' constitutional rights. (R. 5.)

Petitioners appealed to the State of Grace Court of Appeals, which affirmed. (R. 9.) It held that Horton Hopkins School District did not violate Petitioners' First Amendment rights because Petitioners' websites created a risk of substantial disruption of the school. (R. 10.) The court further held that though Respondents' search of Mr. Towles was unreasonable, they were entitled to qualified immunity. (R. 11-12.) Petitioners filed a petition for writ of certiorari to the Court of Appeals of the State of Grace, which this Court granted. (R. 14.)

SUMMARY OF THE ARGUMENT

Respondents violated Ms. Politte's and Mr. Towles's First Amendment rights when they forced the students to take down their webpages. Respondents impermissibly regulated the students' speech because it occurred entirely off-campus and in no way bore the imprimatur of Horton Hopkins High School. Moreover, even if it is permissible for school authorities to regulate students' off-campus Internet speech, Petitioners' speech did not fall within any of the well-drawn categories of speech that school authorities may regulate. Respondents could not have reasonably forecast that the students' webpages would materially and substantially interfere with school discipline or impinge on the rights of their classmates. Finally, the students' Internet speech was not lewd and offensive, nor did it advocate illegal activity. Thus, the Court of

Appeals of the State of Grace incorrectly held that Respondents' actions did not violate Petitioners' First Amendment Rights when it required them to remove their webpages.

Respondents also violated Mr. Towles's Fourth Amendment rights when they performed a series of increasingly invasive searches that were not justified at their inception and excessive in scope. The search was not justified at its inception because Respondents lacked the required "particularized and objective basis" for suspecting Mr. Towles of wrongdoing at the time the search began. The information was entirely uncorroborated, did not indicate a present or ongoing violation, and was impermissibly based on Mr. Towles's mere association with individuals who had previously engaged in wrongdoing. Furthermore, the scope of the search was excessive. Given Mr. Towles's age, the potential for psychological harm stemming from a search of his person was substantial. Given the potential for psychological harm, tenuous information regarding the nature of the infraction, and the availability of less intrusive means, the search was excessive in scope.

ARGUMENT

I. RESPONDENTS' ATTEMPT TO REGULATE MS. POLITTE'S AND MR. TOWLES'S INTERNET SPEECH CREATED OFF-CAMPUS VIOLATED THE STUDENTS' FIRST AMENDMENT RIGHTS.

The First Amendment provides that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I. Though the text of the First Amendment clearly addresses Congress, the Supreme Court held that the Fourteenth Amendment's Due Process Clause protected freedom of expression against state infringement. Gitlow v. New York, 268 U.S. 652, 666 (1925). It is well-established that the Free Speech Clause of the First Amendment, applied in the context of public schools, is available to teachers and students alike. E.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); West Virginia v. Barnette, 319 U.S.

624, 637 (1943). Though this Court has never squarely addressed students' First Amendment rights in the context of off-campus Internet speech, it has held that Internet speech deserves the same First Amendment protections as print media. Reno v. ACLU, 521 U.S. 844, 897 (1997).

A. Respondents Impermissibly Regulated Ms. Politte's and Mr. Towles's Internet Speech Because the Speech Was Not School-Sponsored.

1. Ms. Politte's and Mr. Towles's webpages did not bear the imprimatur of Horton Hopkins High School.

In two important school speech cases, this Court focused on schools' interest in removing their imprimatur of approval from lewd or controversial speech. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (holding that schools may exercise editorial control over the content of student speech in school-sponsored publications); Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (upholding suspension of student who unfurled a "BONG HiTS 4 JESUS" banner at an off-campus but school-supervised event). In both cases, this Court was concerned with "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Kuhlmeier, 484 U.S. at 271. The Court distinguished between a school tolerating particular student speech and a school affirmatively promoting or "lending its name and resources" to particular student speech. Id. at 270-72.

Unlike the newspaper in Kuhlmeier and the banner in Morse, Ms. Politte's website, Fighting All Dealers, did not bear the school's imprimatur through its association with the student group Drug Use Damages Schools. FAD and DUDS are distinguishable. DUDS was undoubtedly a school-sponsored club. (R. 2.) It was comprised of only Horton Hopkins students who met in classrooms, posted flyers throughout the school, and organized assemblies. (R. 2.) FAD, on the other hand, was clearly not school-sponsored, despite Mr. Towles's contention to

the contrary on his webpage. (R. 2-3.) Ms. Politte created the webpage at her home using her personal computer without any school resources. (R. 2.) Though she aimed her page at curbing student drug use, Ms. Politte directed the page toward all Hopkinsville residents, not only HHHS students. (R. 2.) FAD's only connection to the school was Ms. Politte's isolated endorsement at one DUDS meeting, and students often discuss non-school-related and non-school-sponsored topics at school. (R. 2.) The mere fact that Ms. Politte discussed her personal website at school is not enough to transform her off-campus speech into school-sponsored speech.

Mr. Towles's webpage is an even weaker case of school-sponsored activity. Like Ms. Politte, he created his webpage at home using only his personal computer. (R. 3.) And like Ms. Politte, Mr. Towles did not present his webpage as being associated with Horton Hopkins. (R. 3-4.) While it is clear that students heard about Mr. Towles's webpage, the record is absent of any evidence that he promoted his webpage at school. (R. 2-4.) Accordingly, members of the public could not reasonably perceive Mr. Towles's webpage as bearing the school's imprimatur.

2. Ms. Politte and Mr. Towles conducted their online expression entirely off-campus.

“When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends.” Thomas v. Granville Sch. Dist., 607 F.2d 1043, 1052 (2d Cir. 1979). School administrators may not “seek approval of the community-at-large by punishing students for expression that took place off school property.” Id. at 1051. In Thomas, students were suspended for publishing and distributing “Hard Times,” a vulgar and sexually explicit newspaper, which they deliberately designed to remain off-campus. Id. at 1050. At most, any activity on school grounds was *de minimis* because the students typed a few articles on school typewriters and temporarily stored copies of the newspaper in a teacher's locked closet. Id. Because “‘Hard Times’ was conceived, executed,

and distributed outside the school,” authorities impermissibly infringed on the students’ First Amendment rights. Thomas, 607 F.2d at 1051.

Petitioners’ speech had even fewer on-campus connections than “Hard Times,” so if this Court were to affirm the decision of the court of appeals, Ms. Politte and Mr. Towles would never be free to speak their minds once the school day ends. Both students conducted their online expression entirely off-campus. (R. 2, 4.) Like the creators of “Hard Times,” Peitioners deliberately designed their speech to remain off-campus. (R. 2, 4.) Both students created and maintained their webpages at home using their own computers. While their classmates accessed the webpages from the school computer labs and library, neither Ms. Politte nor Mr. Towles actually publicized their webpage for on-campus viewing. (R. 2, 4.) At most, Ms. Politte’s page had on-campus connections because she mentioned it at one DUDS meeting; however, she did not advocate on-campus activity through FAD. (R. 2.) Thus, Ms. Politte’s and Mr. Towles’s speech was entirely off-campus and not subject to regulation by Respondents.

3. Respondents had no legitimate pedagogical concern in regulating Ms. Politte’s and Mr. Towles’s webpages.

School authorities may regulate student speech in “school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns.” Kuhlmeier, 484 U.S. at 272-73. However, noncurricular student speech “is less likely to disrupt materially any legitimate pedagogical purpose.” Id. at 283 (Brennan, J., dissenting). In Kuhlmeier, the school’s legitimate concerns were to assure that journalism students learn what the curriculum was designed to teach, expose readers only to age-appropriate material, and properly attribute viewpoints to individual speakers. Id. at 271. Thus, the school principal properly withdrew from the school newspaper articles on teen pregnancy and divorce that did not protect the anonymity

of pregnant students, exposed younger students to “frank talk” about sex and birth control, and failed to provide a divorcing father a chance to defend himself. Kuhlmeier, 448 U.S. at 274-75.

Similarly, the Second Circuit upheld a student’s disqualification from running for class secretary because her blog was at cross purposes with the “school policy providing that student government should teach good citizenship.” Doninger v. Niehoff, 527 F.3d 41, 52 (2d Cir. 2008). The Sixth Circuit determined that a principal did not violate a student’s First Amendment rights when he forbid the student from “selling” candy bearing a religious message at a simulated marketplace. Curry v. Hensinger, 513 F.3d 570, 579-80 (6th Cir. 2008). The school’s valid educational purpose was protecting students from unsolicited proselytizing and potentially offensive religious messages. Id. at 579.

Here, even if the students’ speech were school-sponsored, Respondents have no legitimate pedagogical concerns that would allow them to demand that they take down their webpages. Unlike the students in Kuhlmeier, Doninger, and Curry, Ms. Politte and Mr. Towles did not create their webpages as a part of any curricular activity that had particular educational objectives such as student government. (R. 2, 4.) Moreover, Respondents have not presented any school policy outlining pedagogical interests contrary to the interests of Ms. Politte and Mr. Towles in exercising their First Amendment rights. (R. 4.)

B. Ms. Politte’s and Mr. Towles’s Online Speech Did Not Fall Within Any of the Well-Drawn Categories of Independent Student Communications that School Authorities May Constitutionally Regulate.

1. Ms. Politte’s and Mr. Towles’s webpages did not materially and substantially interfere with the requirements of appropriate discipline in the school or impinge on the rights of other students.

Students do not “shed their constitutional right to freedom of speech or expression at the schoolhouse gate”; however, students’ rights to free speech may be limited when the speech

“materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 513 (1969). In Tinker, school officials impermissibly infringed on students’ First Amendment rights when they suspended them for wearing armbands to protest the Vietnam War. Id. at 504, 514. The school simply wanted to avoid controversy, but “to justify prohibition of a particular expression of opinion, it 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 Court also pointed out that the armbands caused no actual disturbances on school premises, only discussion outside of the classrooms. Id. at 514. Thus, schools may discipline students for independent student speech not sponsored by the school if the speech materially and substantially disrupts the educational process or impinges the rights of others. Id. at 513.

- a. Respondents could not have reasonably forecast that Ms. Politte’s and Mr. Towles’s webpages would be disruptive.

Tinker’s material and substantial disruption test is satisfied where school officials can reasonably forecast or have reason to believe that the students’ expression will be disruptive. Id. at 514. The circuit courts of appeal have interpreted Tinker as requiring “a specific and significant fear of disruption, not just some remote apprehension of disturbance.” E.g., Saxe v. State College Area Sch. Dist., 250 F.3d 200, 211 (3d Cir. 2001). The Seventh Circuit held that a school violated students’ First Amendment rights when it expelled them for distributing a non-school-sponsored newspaper that criticized the school without showing “that the action was taken upon a reasonable forecast of a substantial disruption of school activity.” Scoville v. Bd. of Educ. of Joliet High Sch. Dist., 425 F.2d 10, 13 (7th Cir. 1970). The Ninth Circuit held that a school may not require prior review of student-written, non-school-sponsored materials distributed on school grounds absent evidence that the materials somehow “interfered with the

operation of the high school.” Burch v. Barker, 861 F.2d 1149, 1151 (9th Cir. 1988). Thus, “student distribution of non-school-sponsored material” cannot be prohibited “on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials.” Id. at 1158.

The Second Circuit interpreting Tinker held that a student’s instant message icon created more than just a remote apprehension of disturbance. Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007). That court upheld the suspension of an eighth-grade student who used an instant message icon that depicted his English teacher being shot and bore the caption “Kill Mr. VanderMolen.” Id. The icon crossed “the boundary of protected speech.” Id. It was reasonably foreseeable – if not inevitable – that the “icon would come to the attention of school authorities” because the icon was visible to several of the student’s classmates for three weeks. Id. at 39-40. Thus, some off-campus speech can give rise to a foreseeable risk of substantial disruption in a school. See also Doninger, 527 F.3d at 51 (high school student’s blog post calling school administrators “douchebags” and encouraging classmates to contact the superintendent to “piss her off” created a reasonably foreseeable risk of substantial disruption); Boucher v. Sch. Bd., 134 F.3d 821, 827-28 (7th Cir. 1998) (upholding suspension for an newspaper article describing how to hack school computers); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1089-90 (W.D. Wash. 2000) (enjoining a high school from enforcing a suspension of a student whose webpage contained mock obituaries of classmates without evidence that the obituaries were intended to threaten anyone, actually threatened anyone, or manifested violent tendencies).

In the present case, as in Scoville and Burch, Mr. Towles’s webpage was merely critical of HHHS. (R. 4.) Nothing he wrote gave rise to a reasonable forecast of a substantial disruption of school activity or did, in fact, lead to a disruption. Though students viewed Mr. Towles’s webpage from school and at home there is no evidence that it interfered with school operations.

(R. 4.) Mr. Towles’s Internet posting is distinguishable from the student’s screed in Doninger. There, the student used inflammatory language intended to incite her classmates to “piss off” the school superintendent. Here, while Mr. Towles’s description of administrators as “idiots” was less than complementary, it was not as incendiary as the term “douchebags.” (R. 4.) Furthermore, Mr. Towles only encouraged students to speak out against invasive strip searches, not to barrage school officials with communication intended to draw their ire. (R. 4.)

Though Ms. Politte’s webpage presents a slightly more difficult case, Petitioners nevertheless acted impermissibly in forcing her to remove it. FAD did not cause a substantial disruption of school activity. While Mr. Towles was upset over the content of the webpage he, rather than causing a disruption at school, responded by exercising his First Amendment rights from his home using his personal computer. (R. 3-4.) Moreover, there is no evidence that students viewing FAD from home or from school disrupted school activity. (R. 4.) Both students’ speech is distinguishable from Wisniewski and other cases where students advocated death, bodily harm, and the commission of other crimes. As in Emmett, there is no evidence that Mr. Towles’s Friendkipedia page was intended to threaten or did threaten school officials or students with violence or manifested violent tendencies. (R. 3-4.) All Mr. Towles advocated was that other students let school officials know that they thought the strip searches were unjust. (R. 4.) Likewise, Ms. Politte advocated reporting drug dealers, hardly a violent or criminal activity. Thus, Ms. Politte’s and Mr. Towles’s speech is not the type that has been found to cause material and substantial disturbances of the work of a school.

- b. Petitioner Smalls’s dislike of Mr. Towles’s Internet post is not an acceptable justification for prohibiting the students’ speech.

School authorities may not punish or prohibit student speech merely because they disagree with it. See Tinker, 393 U.S. at 509. In addition to undifferentiated fears of possible

disruptions, “[d]isliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under Tinker.” Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). Beussink extended Tinker’s reasoning to websites created off-campus. Id. In that case, a student created a publicly accessible webpage at home on his own computer and not during school hours. Id. at 1177. The webpage was “highly critical” of the school administration, used vulgarity to convey the student’s opinion about his school, and invited readers to share their opinions about the school with the principal. Id. Though the student did not intend his webpage to be accessed or viewed at the school, one friend saw the webpage and showed it to school officials. Id. at 1177-78. Despite a lack of evidence that any other students even knew about the page, the principal immediately suspended the student for ten days. Id. at 1178. The suspension was unconstitutional because the webpage did not materially and substantially interfere with school discipline and there was no evidence to support a reasonable fear of an interference. Id. at 1181. The student was suspended merely because he expressed an opinion that upset his teacher and the school principal. Id.

Here, as in Beussink, Mr. Towles’s webpage criticized school administration and invited classmates to speak out against the school’s unreasonable strip searches. (R. 4.) Respondent Smalls admitted that the reason why she asked Mr. Towles to remove his webpage was because she was angry about his criticism of school officials. (R. 4.) It was only later that she alleged she was concerned about maintaining order and preventing student protest. (R. 4.) Unlike Mr. Towles, Ms. Politte was not critical of the administration. (R. 2.) In fact, Ms. Politte’s anti-drug stance was consistent with the school’s drug policy in that both aimed to maintain a drug-free school environment. (R. 1-2.) Because Smalls’s cited fear of student protest as her justification for stifling the students’ speech only after she admitted being angry about Mr. Towles’s criticism

of the administrators, it appears that she required Ms. Politte to remove her webpage merely because she associated it with Mr. Towles's webpage. (R. 4.) Thus, this case presents no more than a principal angry about a student's criticism of her school, which is insufficient to justify Respondents' action under Tinker and its progeny.

2. Neither Ms. Politte's nor Mr. Towles's Internet speech invaded the rights of others.

Under Tinker, school officials may regulate student speech if they reasonably predict that it will invade the rights of other students; however, courts have rarely applied this test, and it may not be binding on the courts. Tinker, 393 U.S. at 514; Douglas D. Frederick, Restricting Student Speech that Invades Others' Rights: A Novel Interpretation of Student Speech Jurisprudence in Harper v. Poway Unified School District, 29 Hawaii L. Rev. 479, 480 (2007). The Court based its decision in Tinker on whether the students' armbands were likely to materially and substantially disrupt the school, not on whether they might impinge on the rights of other students. Tinker, 393 U.S. at 514. The Court has never applied the invasion of the rights of others test and has not explained it in subsequent cases. See, e.g., Frederick, supra, at 480. Arguably, this test is dicta. See, e.g., Trachtman v. Anker, 563 F.2d 512, 520-21 (2d Cir. 1977) (Mansfield, J., dissenting) (criticizing the majority opinion for "relying upon dicta" for focusing on the invasion of the rights of others language in Tinker).

The Court derived the "invasion of the rights of others" test from Blackwell v. Issaquena County Board Board of Education, 363 F. 2d 749, 754 (5th Cir. 1966). In that case, students were punished for accosting classmates in the hallways and pinning civil rights buttons on them even though their classmates did not want the buttons. Id. at 751. The court noted that freedom of expression includes the right not to express others' opinions and held that the students could be disciplined, at least in part, for their "collision with the rights of others." Id. at 754. See also

Carr v. Hillsboro, 497 F. Supp. 2d 1197, 1202 (D. Ore. 2007) (student’s claim could not withstand summary judgment where he blocked students’ path to school buses).

Based on the standards set forth in Blackwell and Carr, neither Mr. Towles nor Ms. Politte invaded the rights of others vis-à-vis their webpages. Clearly, neither student engaged in any activity that forced other students to espouse their messages, nor did either student physically hinder classmates from getting an education. (R. 2-4.) Mr. Towles’s Friendkipedia page was completely focused on himself; it was his response to the photograph Ms. Politte posted on FAD and on the school officials’ searches of his person and effects. (R. 3-4.) Ms. Politte’s Friendkipedia page is a somewhat more difficult case in that she posted a captioned photo of Mr. Towles; however, her actions do not rise to the level of physical assaults, and she did not attribute anything on her webpage to Mr. Towles or other students. (R. 3.)

In a subsequent case interpreting Tinker, this Court held that, in the context of student association, school officials may prohibit students from interfering “with the opportunity of other students to obtain an education.” Healy v. James, 408 U.S. 169, 189 (1972). Several years later, the Second Circuit took the test a step further, holding that student journalists’ distribution of a questionnaire on sexual attitudes would “invade the rights of other students by subjecting them to psychological pressures which may engender significant emotional harm.” Trachtman v. Anker, 563 F.2d at 516. The Ninth Circuit interpreted Tinker even more broadly, holding that students should be protected from “verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation.” Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) vacated as moot, 127 S. Ct. 1484 (2007). The court described a high school student’s anti-gay shirt as a form of psychological attack that caused gay and lesbian students to “question their self-worth and their rightful place in society” and interfered with their right to

learn. Harper, 445 F.3d at 1178, 1180. Thus, Harper apparently interpreted students' rights to include the rights of some minority students to be free from offensive speech that indirectly causes psychological harm, which, in turn, causes educational harm. Id. at 1178.

Even under Harper's broad reading of Tinker, Ms. Politte's webpage did not impinge on other students' rights, including those of Mr. Towles. Mr. Towles did not allege that he suffered any psychological pressures, nor is there any evidence that what he described as an inaccurately captioned photograph would be sufficient to inflict significant emotional harm upon him. (R. 3-4.) Mr. Towles did not allege that Ms. Politte's posting caused him to question his self-worth or place in society or caused him educational harm. (R. 3-4.) Indeed, if anything interfered with Mr. Towles's right to learn it was Horton Hopkins school officials' inappropriate response to the photograph, not Ms. Politte's website. (R. 4.)

Some suggest Tinker's invasion of the rights of others test must mean a tortious act. See, e.g., Harper, 445 F.3d at 1198 (Kozinski, J., dissenting) (arguing that "rights of others" in Tinker should only include traditional rights, "such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established"); Accord The Michigan Law Review Association, Administrative Regulation of the High School Press, 83 Mich. L. Rev. 625, 640 (1984); Michael Imber and Tyll Van Geel, Education Law 114 (2d ed. 2000). One law review article argues that invasion of the rights of others should be limited to tortious acts:

Tort standards define when an act "invades the rights of another" to such an extent that the person wronged should recover damages. Limiting school action under the invasion-of-rights justification to torts or potential torts means that a school can refer to previously defined legal standards to decide if it may constitutionally restrain student expression.

The Michigan Law Review Association, *supra*, at 640-41.

Though Mr. Towles wrote on his Friendkipedia page that Ms. Politte invaded his privacy and defamed him – both of which would satisfy the “tortious acts” interpretation of an invasion of rights – his mere allegations do not satisfy the second Tinker test. First, the record is silent as to whether Mr. Towles has made any formal allegations against Ms. Politte. (R. 3-4.) His own posting appears to be nothing more than the fulmination of an upset high school boy. (R. 3-4.) Second, it is entirely unclear, and beyond the scope of this case, whether Ms. Politte’s actions were sufficient to support a legal finding of invasion of privacy or defamation. (R. 3.) For instance, invasion of privacy includes highly objectionable publicity containing private information, even if it is true. See William L. Prosser and W. Page Keeton et al., The Law of Torts (5th Ed. 1984). An imprudently captioned photograph – taken at a house party and failing to identify the subjects, much less provide any private information – hardly satisfies the requirement for invasion of privacy. Moreover, a legal finding of defamation requires the presence of six elements: false facts, harm, publication, clear reference, standard of fault, and no privilege. Imber and Van Geel, *supra*, at 440-41. Though Mr. Towles may have a stronger case for defamation, it is unclear whether all of the elements of defamation are present, particularly clear reference. (R. 3.) Thus, even if this Court were to apply Tinker’s unclear invasion of the rights of others test, Ms. Politte’s speech would survive even under the broadest reading.

3. Respondents could not have reasonably regarded Ms. Politte’s and Mr. Towles’s speech as lewd and offensive.

The state cannot presume that provocative or offensive words will lead to disorder. Texas v. Johnson, 491 U.S. 397, 409 (1989). In Fraser, this Court held that a school district did not violate a student’s First Amendment rights when it suspended the student for giving a lewd speech at a high school assembly. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986). The student used “an elaborate, graphic, and explicit sexual metaphor” in a “speech nominating a

fellow student for elective office.” Fraser, 478 U.S. at 677-78. The Court balanced the freedom to “advocate unpopular and controversial views in schools” against “the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” Id. at 681. The Court noted that a school rule prohibited obscene language and recognized that it was appropriate for public schools to ban such language. Id. at 683; see also Donovan v. Ritchie, 68 F.3d 14, 18 (1st Cir. 1995) (upholding suspension for an off-campus “shit list” crudely describing other students’ character, appearance, or behavior). Compare Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 676 (7th Cir. 2008) (First Amendment protects student’s right to wear “Be Happy, Not Gay” t-shirt despite school’s ban on derogatory comments based on personal identity characteristics).

Clearly, neither Ms. Politte’s nor Mr. Towles’s speech rose to the level of lewd and offensive. At most, the language on Mr. Towles’s webpage was critical of the school administration and might be upsetting to school administrators because he referred to them as “idiots.” (R. 4.) However, this is a far cry from explicit sexual metaphors, crude “shit lists,” and vulgar name-calling. Moreover, Mr. Towles’s speech is even less offensive than the “Be Happy, Be Gay” shirt in Nuxoll, which Judge Posner found worthy of First Amendment protection.

Thus, Respondents could not have reasonably regarded the webpages as lewd and offensive.

4. Ms. Politte’s and Mr. Towles’s websites did not encourage illegal activity.

School authorities may prohibit “speech that can reasonably be regarded as encouraging illegal drug use.” Morse, 127 S. Ct. at 2622. Where a high school student unfurled a large banner that read “BONG HiTS 4 JESUS” at a school-supervised event that took place near school grounds, this Court upheld the principal’s suspension of the student. Id. at 2622-23. The principal was justified in restricting the student’s speech because she reasonably viewed the

banner as encouraging drug use in violation of school policy. Morse, 127 S. Ct. at 2623. The Court cited the seriousness of youth drug abuse and the fact that schools educate students about drug abuse, and it noted that the school’s concern “extends well beyond an abstract desire to avoid controversy.” Id. at 2628-29. The suspension was justified because the school had a particularized concern in preventing drug abuse. Id. at 2629. Thus, “the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students.” Id. at 2644 (Stevens, J., dissenting).

Unlike Morse, Respondents could not have reasonably viewed the students’ webpages as promoting illegal activity. All Respondents had was an abstract desire to avoid controversy, as evidenced by Smalls’s statement that she coerced the students to take down their webpages because she was angry about Mr. Towles’s criticism. (R. 4.) Moreover, unlike the school principal in Morse, who had to make an on-the-spot judgment when the student unfurled the banner, Smalls had to make no such snap judgment. (R. 4.) Instead of immediately asking the students to remove their webpages, she could have first ascertained whether they advocated breaking any laws or school rules. If she had paused to do so, Smalls would have determined that Ms. Politte’s page espoused anti-drug views consistent with the school’s and that Mr. Towles was merely advocating that classmates express their unhappiness with the school’s strip searches. (R. 2-4.) Respondents could not reasonably regard either student’s speech as threatening violence or encouraging illegal activity.

II. RESPONDENTS SUBJECTED MR. TOWLES TO AN UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AMENDMENT BECAUSE THE SEARCH WAS NOT JUSTIFIED AT ITS INCEPTION AND WAS EXCESSIVE IN SCOPE.

The Court of Appeals correctly held that Respondents’ search of Mr. Towles was not justified at its inception because the school officials did not possess sufficient information to

warrant a reasonable suspicion that Mr. Towles was violating a school rule. (R. 11.) In addition, the search was unreasonable in scope because it was excessively intrusive given the nature of the infraction, the age and sex of the student, and the objectives of the search.

The Fourth Amendment grants the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” U.S. Const. amend. IV. The Fourteenth Amendment extends this protection to searches by state actors, including public school officials. New Jersey v. T.L.O., 469 U.S. 325, 334-37 (1985). The core purpose of the Amendment “is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” Camara v. Municipal Court, 387 U.S. 523, 528 (1967). The touchstone of the Fourth Amendment, and therefore the constitutionality of any government search, is reasonableness. United States v. Knights, 534 U.S. 112, 118 (2001). Typically, the reasonableness of a particular search is satisfied by showing the state actor had probable cause to conduct the search. See Horton v. California, 496 U.S. 128, 133 (1990). However, the requirement that searches be based on probable cause is inapplicable in the school setting. T.L.O., 469 U.S. at 341. The legality of student searches depends “simply on the reasonableness, under all the circumstances, of the search.” Id. Determining the legality of a school search involves a dual inquiry. Id. First, the search must be “justified at its inception.” Id. (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)). Second, the search must be “reasonably related in scope to the circumstances which justified the interference in the first place.” Id.

A. The Search Was Not Justified at Its Inception Because Respondents Lacked a Particularized and Objective Basis to Suspect Mr. Towles of Wrongdoing.

Respondents’ information was entirely lacking in “a particularized and objective basis” for suspecting Mr. Towles of wrongdoing at the time the search began because their information was entirely uncorroborated, did not indicate a present or ongoing violation and was

impermissibly based on Mr. Towles's mere association with individuals who had previously engaged in wrongdoing.

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." T.L.O., 469 U.S. at 341-42. When assessing whether reasonable grounds exist, the court must consider the totality of the circumstances. United States v. Cortez, 449 U.S. 411, 418 (1981). "An inchoate suspicion or hunch" will not pass constitutional muster. Terry, 392 U.S. at 27. Based on the totality of the circumstances, a school official must possess "a particularized and objective basis for suspecting the particular person" of wrongdoing. Cortez, 449 U.S. at 417. A reasonableness inquiry must only consider facts the school officials know prior to the start of the search. Florida v. J.L., 529 U.S. 266, 271 (2000). Accord Phaneuf v. Fraikin, 448 F.3d 591, 597 (2d Cir. 2007); DesRoches v. Caprio, 156 F.3d 571, 577 (4th Cir. 1998).

At the time of the search, the facts known to the school officials were insufficient to justify any search of Mr. Towles. At the time of the search, school officials were aware that there had been an increase in drug use on the high school campus over the last five years. (R. 1.) More recently, twenty-five students were suspended for using illegal drugs on school grounds and one student died from a drug overdose in 2007, and in the first two months of the fall semester of 2008, fifteen students were caught smoking marijuana on school grounds. (R. 1.) Then, in early October 2008, school officials viewed a photograph, posted on a student's personal webpage and taken days prior, of Mr. Towles and two other sophomores sitting at a party at which one of the individuals in the photograph (Frank Conrad) had been cited for possession of marijuana and five other students were cited for underage drinking. (R. 1-3.)

The record does not reflect any prior knowledge or information on the part of Respondent Smalls relating Mr. Towles to the possession, use, or sale of illegal drugs or other contraband.

(R. 1-3.) The record does not reflect that Smalls knew of any relationship between Mr. Towles and the other two individuals in the photograph. (R. 1-3.) Moreover, the record is absent of any evidence that Mr. Towles, an honor-student and athlete, was suspected by school officials of any wrongdoing, at any time whatsoever, prior to the viewing of this photograph. (R. 1-3.)

1. Respondents' information was uncorroborated and therefore insufficient to justify a search.

The photograph is, at best, analogous to an anonymous tip and even then fails to present any recognized indicia of reliability supporting a reasonable suspicion to search. "An anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."

Alabama v. White, 496 U.S. 325, 329 (1990); see also J.L., 529 U.S. at 271-72. Because the credibility of the source cannot be assessed, there is no way to hold the source responsible if the information turns out to be fabricated. J.L., 529 U.S. at 271-72. In order to rely on an anonymous tip there must normally be indicia of reliability contained in the tip such that the informant's knowledge or credibility can be tested. Id. at 271. An anonymous tip must be corroborated by more than readily observable facts to rise to the level of reasonable suspicion: the tip must "be reliable in its assertion of illegality." Id. at 272. Both the quantity and quality of the information are considered in determining if there is reasonable suspicion based upon the totality of the circumstances. Cortez, 449 U.S. at 417.

The photograph utterly fails in both the quantity and quality of information provided therein to the school officials regarding any present wrongdoing on the part of Mr. Towles. The website on which the photograph appeared maintains the anonymity of those supplying it with "tips." (R. 2.) Accordingly, there was no way to assess the credibility of the informant, or that

of the individual who posted the photograph. There is absolutely no assertion of illegal conduct on the part of Mr. Towles, either occurring contemporaneously with the photograph, at another time during the party, or most importantly, while present at school that every morning. (R. 3.) The information known to the school officials could only have justified the inception of a search if it was corroborated by additional investigation. See White, 496 U.S. at 332. No additional investigation was performed. (R. 3.)

Even if considered as a tip from a student-informant (Ms. Politte), the photograph nevertheless failed to provide a sufficient quantum of information for the school officials to have reasonable grounds for suspecting Mr. Towles of wrongdoing. Like an anonymous tip, a student-informant tip is evaluated based on the totality of the circumstances. White, 496 U.S. at 329. The informant's veracity, reliability, and basis of knowledge, as well as corroboration of the information provided through independent investigation should be considered. See Illinois v. Gates, 462 U.S. 213, 238 (1983).

While it is true that Respondent knew that Ms. Politte had organized a club with the goal of curbing drug use within the student body, the record is devoid of any indication that any school official was aware of the existence Ms. Politte's website or its stated goals prior to viewing it on the morning the search. (R. 2-3.) There is also no indication whatsoever that any school administrator had ever relied on information provided by Ms. Politte regarding whether other students were engaged in wrongdoing of any kind. (R. 1-3.) As such, the school officials had not previously had the opportunity to assess Ms. Politte's reliability for providing accurate information of this nature. Because Ms. Politte conceals the identity of those who provide her with "tips" and Respondents did not question her regarding the photograph prior to the search, the school officials had no way of assessing the basis of her knowledge. Importantly, Ms.

Politte's language can in no way be considered a positive assertion of wrongdoing. (R. 3.) Her contribution to the photograph is merely an inquiry as to whether "Horton Hopkins students [are] becoming drug dealers[.]" (R. 3.) Taken as a whole, the photograph and its caption cannot be considered "reliable in its assertion of illegality," because there was no basis from which to conclude its reliability nor was there even an assertion of illegality. J.L., 529 U.S. at 272.

The only way the photograph may have provided reasonable grounds to suspect Mr. Towles of present wrongdoing was through independent investigation. See, e.g., Williams by Williams v. Ellington, 936 F.2d 881, 888-89 (6th Cir. 1991) ("Because the tip lacks reliability, school officials would be required to further investigate the matter before a search or seizure would be warranted."). Given that Respondents attempted no additional investigation, they could not have formed a "particularized and objective basis" for suspecting Mr. Towles of wrongdoing.

2. The information was too stale to contribute to a reasonable suspicion of present wrongdoing.

The underlying facts upon which a search is based must accurately reflect circumstances as they are at the time the search is conducted. See United States v. Snow, 919 F.2d 1458, 1459 (10th Cir. 1990). Stale information "no longer suggests that the items sought will be found in the place to be searched." Id. Staleness does not merely depend on a fixed matter of time. United States v. Stevens, 439 F.3d 983, 988 (8th Cir.2006). Rather, nature of the suspected wrongdoing and the nature of the suspected items to be seized should be examined in the specific context of each case. Id.

Here, the information provided no indication that Mr. Towles was currently violating one or more school rules or that a search would turn up evidence of a past violation. The photograph showed his presence at an off-campus event, days before, where a small group of individuals had

been cited for violating the law. (R. 3.) While drug-dealing may generally be considered an ongoing act of wrongdoing, Ms. Politte's caption did not positively assert that such wrongdoing was actually taking place, let alone occurring at HHHS. (R. 3.) Consequently, the information did not provide a sufficient basis to conclude that the nature of the infraction was a continuous or long-term violation. Moreover, the photograph and phone call from the police conveyed a message that the infraction had already been dealt with by the police at the party itself. (R. 3.) The information did not reasonably suggest Mr. Towels presently possessed marijuana or was involved in a continuing violation of school rules; therefore, Respondents' search was impermissible.

3. Respondents based their search on impermissible guilt-by-association.

The standard of reasonableness required to search an individual must be supported by a suspicion particularized to that individual. Ybarra v. Illinois, 444 U.S. 85, 91 (1979). As such, guilt-by-association does not justify the search of an individual. See id. Mere proximity to, as well as association with, someone suspected of criminal activity does not raise a reasonable suspicion to search. See id. See also United States v. Coggins, 986 F.2d 651, 655 (3d Cir. 1993) (association with known criminals is not a basis for a reasonable suspicion) (citing Ybarra, 444 U.S. at 91.) In Ybarra, police officers went to serve a valid warrant on a bartender suspected of possessing heroin while at work. Ybarra, 444 U.S. at 88. Upon entering the tavern, one of the officers searched Ybarra, revealing that he possessed heroin. Id. at 89. The Court held that the officers had no reason to suspect anyone besides the bartender would be violating the law, and that a person's "mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Id. at 90-91 (citing Sibron v. New York, 392 U.S. 40, 62-63 (1968)). While the Court considered the probable cause standard

in the criminal context, the analysis is equally applicable to school searches and the reasonable suspicion standard. See, e.g., Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1081 (9th Cir. 2008), cert. granted, 129 S. Ct. 987 (Jan. 16, 2009) (No. 08-479); C.A. v. State, 977 So. 2d 684, 686 (Fla. Dist. Ct. App. 3d Dist. 2008) (search of a student based on his association with another student who smelled of marijuana not justified at inception).

Respondents' search of Mr. Towles presents an even weaker case than the search in Ybarra. The only association of Mr. Towles with those who were cited for possession of marijuana known to the school officials was that Mr. Towles had attended a party hosted by one and was photographed at that party with the other. (R. 3.) Mr. Towles was not ever suspected of wrongdoing before Respondent Smalls viewed the photograph. (R. 1-3.) Given the neutral activity occurring in the photograph on the part of Mr. Towles and the equivocal nature of the caption, the school officials had no basis to suspect Mr. Towles was engaged in wrongdoing either at the party, any time beforehand, or on the morning of the search. As such, suspecting that Mr. Towles possessed contraband merely because of his association with others who had previously cited for possession of marijuana is inadequate to support a reasonable suspicion.

By requiring that school officials have reasonable grounds for suspecting a student of wrongdoing, this Court balanced the school's need to sustain an environment conducive to learning and students' right to privacy. T.L.O., 469 U.S. at 341. The search of Mr. Towles was not supported by reasonable suspicion and therefore not justified at its inception. The photograph and information Respondents had did not indicate any present wrongdoing. The information was uncorroborated, unverified, and amounted to little more than a rumor – an insufficient justification for an action as intrusive as a search. The search was impermissibly based on an

association with individuals who had previously been cited for possession of marijuana.

Respondents' search of Mr. Towles was unreasonable, impermissible, and unconstitutional.

B. Respondents' Search Was Impermissible in Scope Because It Was Excessively Intrusive in Light of the Age and Sex of Mr. Towles and the Nature of the Suspected Infraction.

While potentially justifying some form of intrusion, the measures Respondents took were excessive in light of Mr. Towles's age and sex and the tenuous information regarding the nature of the infraction. Given Mr. Towles's age, the potential for harm stemming from a search of his person was substantial. Importantly, the nature of the infraction was relatively unknown as it was based on information amounting to little more than an unsubstantiated rumor. The uncorroborated information linking Mr. Towles to any kind of infraction was too insufficient to support the severe intrusion he suffered.

Not only must a search be supported by reasonable suspicion, the search itself must be reasonable. T.L.O., 469 U.S. at 341-42. Even assuming that the search of Mr. Towles was permissible at its inception, the search was in no way "reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 341 (citing Terry, 392 U.S. at 20 (1968)). Generally, a search is "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction." Id. at 342. Reasonableness depends on context: Personally intrusive searches require a higher level of suspicion in order for the search to be considered reasonable. See, e.g., Cornfield by Lewis v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1321 (7th Cir. 1993) ("[A]s the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness."). Accord Phaneuf, 448 F.3d at 596; Redding, 531 F.3d at 1084 (student's friendly relationship with classmate who

was found to possess contraband is impermissible basis for a search). See also United States v. McMurray, 747 F.2d 1417, 1420 (11th Cir. 1984) (In the customs context, as the intrusiveness of a search increases, the suspicion required to justify the search must also increase.). The school district adopted this standard in its Drug and Alcohol Use Policy. (R. 15.) (“The District will balance the likelihood the student possesses drugs against the risk of infringing the student’s individual rights.”).

Respondents’ search of Mr. Towles was highly intrusive. A search of a closed bag carried on a student, “no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.” T.L.O., 469 U.S. at 337-38. Furthermore, “even a limited search of the person is a substantial invasion of privacy.” Id. at 337 (citing Terry, 392 U.S. at 24-25). In this case, Respondents’ search went much further than the “limited search” the Terry Court referenced: Mr. Towles was strip searched. (R. 3.) Total nudity is not required. Redding, 531 F.3d at 1080. Accord Justice v. City of Peachtree, 961 F.2d 188, 190 (11th Cir. 1992); Amaechi v. West, 237 F.3d 356, 363 (4th Cir. 2001).

A strip search is not only highly intrusive, it is highly traumatic. Justice, 961 F.2d at 192-93. The psychological trauma associated with strip searches is widely recognized. See, e.g., id. at 192 (describing strip searches as “degrading and frightening”); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (describing strip searches as “humiliating, terrifying, unpleasant, [and] embarrassing”). The psychological trauma is exacerbated if the target of the search is an adolescent child. Redding, 531 F.3d at 1086. See also Edding v. Oklahoma, 455 U.S. 104, 115 (1982) (“youth . . . is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). Adolescent children, such as Mr. Towles, are likely to suffer even more psychological trauma stemming from a strip search

than that of a very young child. Cornfield, 991 F.2d at 1321 n.1 (“As children go through puberty, they become more conscious of their bodies and self-conscious about them.

Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older.”).

Strip searches are serious intrusions upon personal rights and expectations of privacy. See, e.g., Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993) (“a strip search represents a serious intrusion upon personal rights”); M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979) (calling a strip search a “highly intrusive invasion” of privacy). The intrusion is so great that at least seven states never permit strip searches of school children for any reason. See Redding, 531 F.3d at 1081 n.8 (collecting statutes). In light of the psychological trauma and intrusiveness associated with the strip search of a student, particularly compelling information would be required in order for such a search to be considered reasonable in scope. See, e.g., Phaneuf, 448 F.3d at 598-99 (search of pockets may have been reasonable but strip search was unreasonable).

In many cases where strip searches have been held reasonable in scope, the school officials had reason to believe the student was actually hiding the object on his person or that the sought-after item was small enough to be concealed on the student’s person. See, e.g., Cornfield, 991 F.2d at 1323 (strip search permissible in scope where school officials reasonably believed the student was “crotching” drugs); Williams, 936 F.2d at 887 (strip search reasonable in scope where officials were searching for a small glass vial).

In contrast to Cornfield, Respondents had no reason to believe that Mr. Towles had contraband hidden on his person necessitating a strip search, nor could they have reasonably believed that the sought-after item was small enough to conceal on his person. Nothing in the information suggested that Mr. Towles currently possessed any drugs on his person or had given

any indication that they might be concealed in a manner necessitating a strip search. (R. 3.) And while it is clear that the school officials were looking for drugs, it is unclear as to what the size of the sought-after item actually was. (R. 3.) This makes it impossible to determine whether the sought-after item was actually capable of being hidden on Mr. Towles. Respondents' mere speculation was inadequate to support a reasonable suspicion that Mr. Towles had contraband hidden on his person.

Further indicating the unreasonableness of the search is the availability of other, less intrusive, ways in which the search of Mr. Towles's person could have been conducted. While the availability of less intrusive means is not dispositive of the reasonableness of a search, it is certainly probative. Hedges v. Musco, 204 F.3d 109, 120 (3rd Cir. 2000). See also Redding, 531 F.3d at 1085. Respondents did not notify Mr. Towles's parents of their suspicions or intent to search even though district policy permitted doing so. (R. 3.) Moreover, Respondents did not require Mr. Towles to turn out his pockets, shake out his clothing, or submit to a "pat down" before removing his clothing. (R. 3.) Once Mr. Towles removed his clothing was removed, Respondents forced him to stand in a private room, underdressed, in front of a school official while the official searched his clothing pockets. (R. 3.) Each of these less intrusive options was available when Respondents strip searched Mr. Towles. These options, in light of the tenuous nature of the information at hand, support a finding that the strip search was excessively intrusive. See, e.g., Cornfield, 991 F.2d at 1323 (providing student with gym uniform while searching clothing supported reasonableness of search's scope). See also Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 605 (6th Cir. 2005) (recognizing that a child searched within a locker room would not be as deprived of a privacy interest as a child searched within an office).

Even though the initial search of Mr. Towles's locker supported his statement that he did not possess any drugs and notwithstanding a discipline-free history at the school, the school officials persisted on performing a series of increasingly intrusive searches, culminating in a strip search. Respondents failed to correctly "balance the likelihood the student possesses drugs against the risk of infringing the student's individual rights." (R. 15.) In light of the intrusive nature of the search, the harmful and lasting effects to those subjected to them, particularly adolescents, the less intrusive means available, and the quantity and quality of information possessed by Respondents, the invasion of privacy was excessively intrusive and unreasonable.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this court REVERSE the holding of the Court of Appeals of the State of Grace that Respondents did not violate Petitioners' First Amendment rights and AFFIRM the holding of the Court of Appeals that Respondents violated Petitioner Towles's Fourth Amendment rights.

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Respectfully submitted,

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