

No. 05-1338

IN THE

Supreme Court of the State of Grace

KIT POLITTE and CORY TOWLES,
Petitioners,

v.

**HORTON HOPKINS SCHOOL DISTRICT
and KEENA SMALLS,**
Respondents.

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

BRIEF FOR RESPONDENTS

March 2, 2009

*Team No. 26
Counsel for Respondents*

QUESTIONS PRESENTED

- I. May school officials regulate student speech that reaches the school campus when they reasonably forecast that such speech would cause a substantial disruption to the school environment?

- II. Did Respondents' search of Petitioner Towles that was based on a reasonable suspicion he had drugs on the school premises violate the Fourth Amendment, as applied to school officials by the Fourteenth Amendment?

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CONSTITUTIONAL PROVISIONS AND STATUTES 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:

Nor shall any State deprive any person of life, liberty, or property, without due process of the law.

U.S. Const. amend. XIV, §1

STATEMENT OF THE CASE

The City of Hopkinsville and the public high school, Horton Hopkins High School (“Horton Hopkins”), have experienced a troubling surge of drug abuse among teenagers in the past five years. (R. at 1.) Respondent, Principal Keena Smalls (“Principal Smalls”), who has been the principal at Horton Hopkins for twenty-years, suspended twenty-five students for using illegal drugs on school grounds in 2007. (Id.) In December of 2007, the captain of the volleyball team, Kelly Smith, overdosed on cocaine at a party. (Id.)

To combat this increase in drug use, in January 2007 Principal Smalls requested that Respondent Horton Hopkins School District (“School District”) enact a strict, zero-tolerance drug policy. (Id.) See Appendix A. The policy reserves Horton Hopkins School Officials (“School Officials”) the right to “conduct personal searches of students, as well as searches of lockers, desk, other school property, and book bags and other personal containers” upon suspicion of drug use or possession on school property. (R. at 15.)

In September 2008, Petitioner and high school senior Kit Politte (“Politte”), formed a school-sponsored club, Drug Use Damages Schools (“DUDS”) to help curb drug use on campus. (R. at 2.) DUDS contains approximately 130 student members. (Id.) On the evening of September 10, Politte created the webpage Fighting All Dealers (“FAD”) on the social networking website Friendkepeidea requesting that anonymous tipsters point out suspected drug dealers. (Id.) Politte serves as a moderator and posts the “strongest” tips on the webpage. (Id.) Politte promoted her webpage during the September 15th on-campus DUDS meeting, and of the 235 total members, 198 are Horton Hopkins students including all 130 members of DUDS. (Id.)

On Friday October 3, 2008, Jeff Tweegs (“Tweegs”), a junior who is captain of the Horton Hopkins baseball team, threw a party at his house. (R. at 2.) The week before the party,

rumors circulated that there would marijuana brought to the house. (R. at 2.) By 11:30 p.m. neighbors called in a noise complaint to the Hopkinsville police. (R. at 3.) Police officers cited five Horton Hopkins' students for underage drinking, and sophomore Frank Conrad ("Conrad") for marijuana possession after finding him in the backyard holding a marijuana joint. (Id.)

Petitioner Corey Towles ("Towles"), a 16-year-old sophomore and recent transfer student, attended the party. (R. at 2.) Towles was an honor-student who played baseball at his former high school. (Id.) At the party, a picture was taken of Towles sitting outside with two other students, Conrad and John Thomson ("Thomson"), displaying Conrad smoking. (R. at 3.)

Politte, who did not attend the party, received an email with the photograph attached the next day. (Id.) She posted this photograph on her Friendkapedia FAD network with the caption: "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (Id.) The photograph was attributed to "an anonymous Horton Hopkins student." (Id.) Although Towles was not named in the photograph, his face was clearly visible. (Id.)

The next morning, the Hopkinsville police contacted Principal Smalls to alert her about the drinking and drug citations from the party. (Id.) Several parents viewed the photograph of Conrad, Thompson and Towels on the FAD webpage, and contacted Principal Smalls expressing their concern about the drug use. (Id.) Principal Smalls called Conrad, Thompson and Towels into her office individually for questioning. (Id.) All three denied possessing drugs. (Id.) Pursuant to the school's drug policy, Principal Smalls conducted searches of each of their lockers and book bags. (Id.) In Conrad's locker she found a small baggie of marijuana. (Id.)

She then asked each of the boys to submit to a search of their persons, to which they refused. (R. at 3.) Per the personal search provision of the drug-policy, each boy was searched individually and in private by the gym teacher, Mr. Jim Walters. (Id.) The search took place in a

private room, and each was told to strip to their undergarments. (R at 3.) Mr. Walters searched all of the clothing pockets, but did not touch the boys at any time. (Id.) During this search, Mr. Walters found marijuana in Thomson's jean pocket, but found no drugs on Towles. (Id.)

In response to Politte's posting, Towles created his own network page from his home computer on Friendkepedia called Students Against Defamatory Statements. (Id.) On this page, he recounted his experience of being searched and called for Horton Hopkins' students to "speak out against Smalls and the rest of these Hopkins idiots." (R. at 4.) Shortly thereafter, Horton Hopkins' students began accessing both Politte and Towles' webpages from their homes and from the school computer labs throughout the school day and after school hours. (Id.)

Principal Smalls was concerned about keeping discipline and order and saw a strong potential for student protest. (Id.) She realized the situation had gotten out of control, and demanded that both Politte and Towels shut down the Friendkepedia network pages. (Id.) When both students refused, she suspended them both until they agreed to take the pages down. (Id.) Although angry about Towles' criticism of the school administration's actions in dealing with drug problems on school grounds, she said her main concern was the disturbance and interruption in the students' education the websites were causing. (Id.)

On October 15, 2008, Petitioners filed suit in the Badger County District Court pursuant to 42 U.S.C. §1983 alleging that the School District's requirement that they remove their websites violated their First Amendment rights. (R. at 4.) Additionally, Petitioner Towles alleged that the School Officials' search of his person was an unreasonable search in violation of his Fourth Amendment rights. (R. at 4.) Respondents School District and Keena Smalls moved for summary judgment on both counts. (Id.) The district court granted both of Respondents' motions. (R. at 5.) First, applying the Tinker "substantial disruption" test, the district court

concluded that Petitioners' speech clearly called for a protest and therefore Respondents' act of compelling removal of the websites was justified when they reasonably forecasted future disruption to the school environment. (R. at 6.) The district court also held that Respondents' search of Petitioner Towles was reasonable because it was motivated by the compelling government interest in preventing drug use and was not excessive in scope. (R. at 7-8.) The State of Grace Court of Appeals affirmed the district court's grant of summary judgment on both counts. (R. at 12.) As to the first count, the court of appeals agreed with the district court's findings that Petitioners' webpages created a risk of substantial disruption and that their regulation was therefore unprotected by the First Amendment. (R. at 10.) Furthermore, the court of appeals affirmed the grant of summary judgment as to the Fourth Amendment claim, albeit under the reasoning that Respondents are entitled to qualified immunity despite conducting an unreasonable search. (R. at 12.) Petitioners filed for a writ of certiorari which was granted by the Supreme Court of the State of Grace on January 26, 2009. (R. at 14.)

SUMMARY OF ARGUMENT

Petitioners' speech is on-campus speech for purposes of judicial scrutiny and is therefore subject to the Supreme Court's student speech precedents. The overwhelming weight of authority has analyzed student speech that originates off campus but is later brought onto campus under a Tinker substantial disruption analysis. **(Part I.A)** Additionally, student speech regulation is appropriate because it was reasonably foreseeable that Petitioners' speech would reach school grounds and Petitioners' speech was connected to the Horton Hopkins school campus by a direct causal nexus. **(Parts I.A.1-2)** Furthermore, regulation of online student speech that reaches the school campus is consistent with Supreme Court precedent. **(Part I.B)** Therefore, Petitioners' speech is properly analyzed under the Tinker substantial disruption test.

Applying Tinker, Petitioners' speech may be regulated by school authorities because it is reasonable to conclude that such speech would substantially disrupt the school environment.

(Part I.C) First, Petitioners' speech had already created a disturbance that had gotten out of control and was interrupting other students' rights to a disruption-free educational environment.

(Part I.C.1) Additionally, Respondents reasonably forecasted that Petitioners' speech created a potential for student protest. **(Part I.C.2)** This court should grant great deference to

Respondents' reasonable forecast anticipating disruption to the school environment. **(Part I.C.3)**

Respondents' personal search of Towles was reasonable, and therefore not a violation of the Fourth Amendment, because it satisfies the T.L.O. standard. **(Part II.A)** First, the search was justified in its inception based on the School Officials' finding of a "reasonable suspicion" that Towles possessed drugs on campus. **(Part II.A.1)** Second, the scope of the search was reasonably related to finding marijuana on Towles' person and was not excessively intrusive in scope. **(Part II.A.2)** Drugs can easily be hidden in ones' pockets and possessing drugs on campus is a serious infraction that required quick action on behalf of the School Officials. **(Part II.A.2)** The fact that drugs were found on Conrad and Thomson, but not Petitioner, does not after-the-fact undercut the School Officials reasonable suspicion for the search. **(Part II.A.3)**

Even if this court finds the search unreasonable, the court of appeals' decision to grant summary judgment based on qualified immunity should be affirmed. **(Part II.B.1)** The legal ambiguities in the T.L.O. standard, and circuit court decisions favorable to the School Officials preclude a finding that the law was sufficiently "clearly established" to put the School Officials on notice that the search was unlawful. **(Part II.B.2)** Further, the District's search policy was consistent with Supreme Court precedent. **(Part II.C)** Therefore, Respondents should be granted summary judgment on both the First and Fourth Amendment causes of action.

ARGUMENT

I. THE SCHOOL OFFICIALS APPROPRIATELY REGULATED PETITIONERS' WEBSITES BECAUSE THE SPEECH REACHED THE SCHOOL CAMPUS AND THEY REASONABLY FORECASTED A POTENTIAL FOR SUBSTANTIAL DISRUPTION TO THE SCHOOL ENVIRONMENT.

The constitutional rights of students in public school “are not automatically coextensive with the rights of adults in other settings.” Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). Additionally, the proper operation of public school systems is one of the highest and most fundamental responsibilities of the state. Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966); see also Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973) (interest of a state in maintenance of its education system is a compelling one). With these inferences in mind, the Supreme Court noted in the seminal student speech case of Tinker v. Des Moines Indep. Community Sch. Dist. that student conduct “which for any reason . . . materially disrupts classwork or involves substantial . . . invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” 393 U.S. 503, 513 (1969).

Since Tinker, a line of Supreme Court cases has “effectively shifted the focus of student expression from the rights of the students to the needs of educators and administrators” while showing “judicial deference to the schools to pursue a safe and educational environment.” Tracy L. Adamovich, Note, Return To Sender: Off-Campus Student Speech Brought On-Campus By Another Student, 82 St. John’s L. Rev. 1087, 1092-93 (2008); see, e.g., Bethel, 478 U.S. at 675 (holding that student speech that is vulgar, lewd, or plainly offensive is not protected by the First Amendment); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1986) (holding that school officials may exercise editorial control over the style and content of student speech that is school sponsored); Morse v. Frederick, 127 S.Ct. 2618, 2618 (2007) (holding that schools may regulate student speech reasonably regarded as encouraging illegal drug use). This broad

administrative authority is derived from some variation of the premise that a “school need not tolerate student speech . . . even though the government could not censor similar speech outside the school.” Hazelwood, 484 U.S. at 266. Therefore, as a threshold matter, a court must first decide whether student speech is properly characterized as on or off-campus speech so as to determine whether the Supreme Court’s student speech precedents apply. See J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864-65 (Pa. 2002). The most relevant of these precedents is Tinker, wherein the Court held that school officials may regulate student speech that they reasonably predict will create a substantial disruption of or material interference with the school environment. 393 U.S. at 514. Petitioners’ speech is on-campus speech and is therefore subject to a Tinker analysis. Because it was reasonable to forecast that such speech would substantially disrupt the school environment, Respondents had the authority to regulate such speech.

A. Petitioners’ Speech Is On-Campus Speech Even Though It Originated Off Campus, Because It Was Brought onto and Accessed at the School Campus.

Although “[t]he Supreme Court has yet to speak on the scope of a school's authority to regulate expression that . . . does not occur on school grounds,” regulation of student speech that originates off-campus but is brought onto or accessed on campus is consistent with Supreme Court precedent. Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008). Since Tinker, significant technological advances have developed communicative media capable of transmitting speech onto school premises and effecting the school environment from off-campus locales in ways unforeseen by the Court at that time. Further, in Morse v. Frederick, the Court rejected application of a strict territoriality requirement to limit school administrators’ authority when it held that a student’s speech was properly regulated despite originating outside the physical schoolhouse boundaries. 127 S.Ct. at 2618. The lower courts have overwhelmingly agreed.

As the court in Killion v. Franklin Reg'l Sch. Dist. noted, “[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with Tinker.” 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001). The Fifth Circuit recently summarized the bevy of authority supporting this assertion in Porter v. Ascension Parish School Bd.:

Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in Tinker when analyzing off-campus speech brought onto the school campus. See Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998) (student disciplined for an article printed in an underground newspaper that was distributed on school campus); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075-77 (5th Cir. 1973) (student punished for authoring article printed in underground newspaper distributed off-campus, but near school grounds); Killion, 136 F. Supp. 2d at 455 (student disciplined for composing degrading top-ten list distributed via e-mail to school friends, who then brought it onto campus); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (student disciplined for article posted on personal internet site).

393 F.3d 608, 615 n.22 (5th Cir. 2004).

In the present case, Petitioners’ speech is on-campus speech even though it originated off-campus because it was accessed by Horton Hopkins students from school computers throughout the school day and after school hours. (R. at 4.) The overwhelming weight of authority thus supports the regulation of Petitioners’ webpages. Before applying the Supreme Court’s student speech precedents, however, the Second and Fifth Circuits have additionally looked to (1) whether it was reasonably foreseeable that student speech would reach the school campus, or (2) whether there is a causal nexus connecting student speech to the school campus. See Doninger v. Niehoff, 527 F.3d at 41; Porter v. Ascension Parish School Bd., 393 F.3d at 608. Satisfaction of these additional factors, should this court choose to apply them, will be addressed in turn.

1. Petitioners' speech was properly regulated by School Officials because it was reasonably foreseeable that such speech would reach the Horton Hopkins school campus.

In Doninger v. Niehoff, the Second Circuit upheld a school's punishment of a student for posting a blog that was critical of school administrators even though the message was posted from a personal computer in the student's home and onto a website unaffiliated with the high school. 527 F.3d at 41. The court applied a Tinker analysis in holding that "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct would foreseeably create a risk of substantial disruption within the school environment." 527 F.3d at 48. In choosing to subject the speech to a Tinker analysis, the Second Circuit looked at a number of factors speaking to the issue of whether it was reasonably foreseeable that the speech would reach the school campus. First, the court noted that the web posting, "although created off-campus, was purposely designed by [the student] to come onto the campus." Id. at 50. Furthermore, the "blog posting directly pertained to events at [the high school]," and the student's "intent in writing it was specifically to encourage her fellow students to read and respond." Id. Additionally, the court found that the student "knew other [high school students] were likely to read [her posting]" and that "the posting managed to reach school administrators." Id. The court therefore held that "the record amply supports the district court's conclusion that it was reasonably foreseeable that Avery's posting would reach school property." Id.

It was even more foreseeable that Petitioners' speech would reach the school campus than the student's speech in Doninger. Petitioner Towles' webpage was directed at "all Horton Hopkins students," suggested the students "speak out against Smalls and the rest of these Hopkins idiots," and was in fact accessed "from the school computer labs . . . throughout the school day." (R. at 4.) Likewise, Petitioner Politte's webpage inquired into whether "Horton

Hopkins students [are] becoming drug dealers,” was personally promoted by Politte on school campus, and was in fact accessed “from the school computer labs . . . throughout the school day.” (R. at 2-4.) Not only was it reasonably foreseeable that Petitioners’ speech would reach the Horton Hopkins school campus, but Petitioners’ speech, unlike the speech in Doninger, was in fact accessed by fellow students on the school campus during school hours. As the Second Circuit reasoned just a year before Doninger in Wisniewski ex rel. Wisniewski v. Bd. of Educ., “the undisputed fact that [student speech] did reach the school [may] pretermitt any inquiry as to this aspect of reasonable foreseeability.” 494 F.3d 34, 39 (2d Cir. 2007). Petitioners’ speech therefore satisfies any inquiry into whether it was reasonably foreseeable that such speech would reach the school campus, and is properly subject to student speech regulation.

2. Petitioners’ speech was properly regulated by School Officials because it was connected to the Horton Hopkins campus by a direct nexus.

The direct causal nexus linking Petitioners’ speech to the school campus weighs in favor of student speech regulation. In J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., an eighth grade student created a website on his home computer and on his own time that made derogatory comments about his algebra teacher and his school principal. 807 A.2d 847. The court found “a sufficient nexus between the website and the school campus to consider the speech occurring on-campus.” Id. at 865. Importantly, the court noted that the website: (1) was accessed on a school computer in a school classroom; (2) was aimed not at a random audience but at the specific audience of students and others connected with the school; and (3) included the school principal and a teacher as its primary subjects. Id. The court therefore held that “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus . . . the speech will be considered on-campus speech.” Id.

Petitioners' speech in the present case closely resembles that in J.S.: (1) the speech was accessed on school grounds; (2) the speech was aimed not at a random audience but at the specific audience of Horton Hopkins students and school personnel; and (3) the speech made students and school authorities its principal subjects. (R. at 2-4.) Petitioners' speech therefore has a direct causal nexus to the school campus and should be considered on-campus speech.

B. Internet Speech Is Subject to Student Speech Regulation When It Is Accessed on School Grounds Because, Regardless of Its Location of Origin, It Is Being Physically Transmitted to the School Campus Wherever It Is Accessed.

The technological development of new communicative media affords students avenues of speech that can reach and affect schools in ways not envisioned by the Court when cases such as Tinker were heard. A policy that allows students to enjoy these new avenues of communication in a fashion that is not disruptive of the school environment is wholly consistent with the spirit of traditional Supreme Court student speech precedents.

As Judge Newman noted in his concurring opinion in Thomas v. Bd. of Educ., “territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority.” 607 F.2d 1043, 1058 n.13 (2d Cir. 1979). “True enough in 1979, this observation is even more apt today, when students both on and off campus routinely participate in school affairs . . . via blog postings, instant messaging, and other forms of electronic communication.” Doninger, 527 F.3d at 48-49. These authorities astutely recognize the need for an administrative policy that does not elevate form over substance. Modern digital communication cannot be conveniently pigeonholed as occurring within or outside the “schoolhouse gate[s].” Tinker, 393 U.S. at 506. When a message is posted onto an internet website it is immediately receivable by anyone with internet access. The moment a student accesses the website and receives such a message the speech is physically being communicated

onto the school campus and within the schoolhouse gates. School authorities should not be handcuffed by a policy that prevents them from regulating disruptive on-campus speech that would otherwise be within their ambit merely because of a procedural technicality.

Applying Supreme Court student speech precedents to disruptive speech originating outside the physical school grounds is not an extension of school administrators' traditional authority to regulate student speech. Rather, the technological development of new communicative media has afforded students avenues of speech beyond those they enjoyed when cases such as Tinker were heard. When students choose to use an electronic medium to convey messages onto the school campus, they should do so in accordance with the traditional strictures the Supreme Court has already placed upon them; in this manner, regulation in the present case is wholly consistent with the Supreme Court's long standing student speech precedents.

C. Petitioners' Speech may be Regulated by School Authorities Because It Is Reasonable to Conclude that Such Speech Would Substantially Disrupt the School Environment and Infringe the Rights of Other Students.

As aforementioned, the seminal test for determining whether student speech is subject to school regulation is the Tinker substantial disruption test. 393 U.S. at 514. Under Tinker, school officials have the authority to regulate student speech upon a showing of facts which might reasonably have led school authorities to forecast substantial disruption of school activities or any showing that disturbances or disorders in fact occurred. Id. Importantly, "Tinker does not require school officials to wait until disruption actually occurs before they may act." LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).

Petitioners' speech was properly regulated because it had already created a substantial disruption in fact; however, should this court disagree with that finding, school officials were nonetheless reasonable in forecasting a potential for future disruption. As the Badger County

District Court held, and the State of Grace Court of Appeals affirmed, Petitioners' speech "could reasonably be seen as [a] future disruption at school" and Respondent Smalls "was concerned of a protest breaking out and disrupting classes, and her concern was reasonable." (R. at 6.)

1. Petitioners' speech created a disturbance that had gotten out of control and was interrupting other students' rights to a disruption free educational environment.

Petitioners' speech created a substantial disruption to the Horton Hopkins school environment and is therefore not protected by the First Amendment. Politte's Fighting All Dealers webpage acted as a gossip rumor-mill, displaying photos of Horton Hopkins students and nakedly insinuating that such students are drug dealers. (R. at 3.) Towles' reactionary webpage is proof that Politte's page was stirring a campus controversy and causing a material disruption. Furthermore, Towles' page added to the disruption by openly confronting Politte's school-sponsored student group DUDS and calling for student support in a provocative challenge to DUDS' methods and the FAD webpage. (R. at 3-4.) That Horton Hopkins students were accessing the webpages from school computer labs, the school library, and in their homes both throughout the school day and after school hours is evidence of the pervasiveness with which the controversy had become embedded in the school environment. (R. at 4.) As Principal Smalls rationally realized, "the situation had gotten out of control" and Respondents therefore had a duty to regulate the disruptive speech. (R at 4.)

The material disruption created by Petitioners' speech is even more evident in light of Governor Wentworth Reg'l Sch. Dist. v. Hendrickson, 421 F. Supp. 2d 410 (D.N.H. 2006). In Hendrickson, the court upheld a school's authority to compel a student to remove a patch from his clothing that could reasonably be inferred to "[amount] to a confrontational challenge to, or provocation of, [another] group of students." 421 F. Supp 2d at 423. Although the patch could

be interpreted as passive, political speech, the court stressed the importance of “the overall context of . . . hostility . . . between the two identified groups of students.” Id. at 422-23. This is because student speech “cannot be dissected from reality and observed in a vacuum . . . in addition to consideration of the acts of [the student], all other circumstances confronting the school administrators which might reasonably portend disruption must be evaluated.” Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973).

School Officials’ duty to uphold the compelling and fundamental government interest of a safe and orderly school environment demands that they take heed of confrontations between groups of students. Any speech that may be reasonably inferred to provoke such controversies is not protected by the First Amendment. Importantly, whether an official is reasonable in classifying speech as confrontational needs to be determined in light of the totality of the factual circumstances rather than the vacuum of a judge’s chambers. Thus, Petitioners’ speech is reasonably interpreted as fueling a disruptive and confrontational stand-off between rival student groups which materially interferes with the compelling government interest in an orderly school environment. As such, Petitioners’ speech is not protected by the First Amendment.

2. Even if this court disagrees that a substantial disruption had already occurred, Respondents were reasonable to forecast that Petitioners’ speech would create a potential for student protest.

In addition to the substantial disruption that Petitioners’ speech had already caused Horton Hopkins, Respondent Smalls was reasonable to forecast a potential for student protest. “It is clear that school administrators need not wait until a substantial disruption has already occurred prior to taking action. Rather, school administrators may preempt problems if they have a specific and significant fear of disruption.” Layshock, 496 F. Supp. 2d at 597; see also LaVine v. Blaine Sch. Dist., 257 F.3d at 989 (“Tinker does not require school officials to wait until

disruption actually occurs before they may act.”). Therefore, even if this court questions whether Petitioners’ speech is already sufficiently disruptive to merit regulation, an administrator’s reasonable forecast of future disruption is all that Tinker requires. 393 U.S. at 514.

As the record indicates, “Smalls said her main concern was keeping discipline and order at school, and preventing what she saw as a potential for student protest.” (R. at 4.) This reasonable forecast of potential student protest is surely sufficient to merit regulation. See Karp, 477 F.2d at 175 (court held school officials’ forecast of substantial disruption reasonable where a school assembly was cancelled because officials feared a planned student walkout might provoke violence). Additionally, Principal Smalls’ forecast of disruption was reasonable in light of Doninger v. Niehoff, where the Second Circuit held that a blog message critical of school administrators posted from a student’s home computer “foreseeably create[d] a risk of substantial disruption within the school environment.” 527 F.3d at 50. The Doninger court relied heavily on two facets of the student’s speech in finding a risk of substantial disruption: (1) that the student’s word-choice in calling the school administrators “douchebags” was “offensive,” “incendiary,” and “potentially disruptive of efforts to resolve [the situation];” and (2) that the student’s “efforts to recruit could create a risk of disruption.” Id. at 50-51. Petitioner Politte’s word-choice is likewise “offensive” and “incendiary” as it displays photos of unsuspecting Hopkins students and insinuates their participation in drug dealing. (R. at 3.) Petitioner Towles speech, meanwhile, refers to the Horton Hopkins administration as “Hopkins idiots” in the same vein as the student speech in Doninger which referred to the administration as “douchebags.” Doninger, 527 F.3d at 51. Furthermore, both Politte’s and Towles’ speech displayed “efforts to recruit,” as Politte promoted her webpage at a meeting of her school-sponsored student group

DUDS (successfully recruiting all 130 members) and Towles' webpage "call[ed] for all Horton Hopkins students" to fight back. Doninger, 527 F.3d at 51; (R. at 2, 4.)

The record therefore indicates that Petitioners' speech used incendiary language and displayed efforts to recruit other students in the factual context of a disruptive and confrontational stand-off between rival student groups. In light of these facts, Principal Smalls' "concern [for] keeping discipline and order at school, and preventing what she saw as a potential for student protest" cannot be said to be unreasonable. (R. at 4.)

3. The School Officials' reasonable determination forecasting a substantial disruption should be afforded a great deal of judicial deference.

This court should afford "great deference" to the determinations of the Horton Hopkins administration in finding that Petitioners' speech not only created a situation that had gotten out of control, but that also had the potential to spark student protest, as "courts must not become embroiled in micromanaging school officials' administration of the institution's daily affairs." J.S. v. Bethlehem, 807 A.2d at 868 n. 13. "An important part of the Tinker test is the recognition that courts must defer to school administrators' determinations regarding whether student behavior within their supervision merits punishment." Layshock, 496 F. Supp. 2d at 597. Additionally, courts "should avoid too quickly second-guessing, from the quiet confines of a judge's chambers, the complex and difficult decisions made . . . by teachers and school administrators" as "[s]chool authorities are generally in a far better position to understand their students and the students' likely response to various modes of intervention." Hendrickson, 421 F. Supp. 2d at 425. It is not the province of this court to determine whether it, if in the same position as Respondents, would have acted accordingly. Rather, this court is merely required to determine whether the judgments of the Horton Hopkins administrators were patently

unreasonable under the circumstances—the result of “undifferentiated fear or apprehension.” Tinker, 393 U.S. at 509.

In light of: the evidence presented of a material disruption to the school campus in the form of a confrontational student stand-off, the potential for Petitioners’ incendiary language to fuel such a stand-off into student protest, and the great deference that should be afforded to the Horton Hopkins administrators’ determinations, this court cannot chalk Respondents’ judgments up to an unreasonable fear or apprehension. As such, the school’s reasonable regulation of Petitioners’ speech must stand.

II. THE SCHOOL OFFICIALS’ SEARCH OF TOWLES’ PERSON FOR DRUGS WAS CONSISTENT WITH THE STANDARD SET-FORTH IN T.L.O. AND WAS NOT A VIOLATION OF THE FOURTH AMENDMENT.

The role of a school official is as a “guardian and tutor” and “Fourth Amendment rights . . . are different in public schools than elsewhere.” Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995). The Fourth Amendment does not protect against all searches, only those that are unreasonable. Terry v. Ohio, 392 U.S. 1, 9 (1968). Reasonableness is not a static inquiry, as what is reasonable depends on the “context within which a search takes place.” Camara v. Municipal Court, 387 U.S. 523, 536 (1967). In public schools, “[a] students privacy interest is limited” as the “State is responsible for maintaining discipline, health and safety” Bd. of Educ. Of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 825 (2002), and school officials have a substantial interest in maintaining order and discipline on school grounds. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985). Often securing order “requires students to be subject to greater controls than those that would be appropriate for adults.” Earls, 536 U.S. at 831.

Drug use and violence has proliferated on school campuses and the “war against drugs [is] a pressing concern in every school.” Earls, 536 U.S. at 834. Recognizing the flexibility and

deference due to school officials in maintaining safety and order, the Court in T.L.O. held that a search is lawful under the Fourth Amendment when school officials have a “reasonable suspicion” that the subject of the search has violated or is violating the law. 469 U.S. at 343, 339-40. Even if a court finds a search to be unreasonable, as long as school officials are not “plainly incompetent” or “knowingly violate the law” they are protected from civil liability under the doctrine of qualified immunity. Malley v. Briggs, 475 U.S. 335, 341 (1986). If the law at the time of the alleged constitutional violation was not clearly established sufficient to put a school official on notice that they were violating a constitutional right, they are entitled to qualified immunity. Pearson v. Callahan, No. 07-751, U.S. 2009 WL 128768, at *9 (2009).

Here, the relevant facts do not make out a constitutional violation, as the search was lawful in light of the reasonableness standard set forth in T.L.O. Further, the court should affirm the court of appeals’ grant of qualified immunity on the basis that there was no clearly established law that would have put the School Officials on notice that their personal search of Towles was unlawful. The forgoing analysis demonstrates that the School Officials reasonably conducted the search consistent with the Supreme Court’s precedent and the law that existed in other circuits at the time of the search.

A. The School Officials Had a Reasonable Suspicion Towles Possessed Drugs on Campus and the Scope of the Search Was Reasonably Related to Finding Such Drugs.

The substantial need for teachers and school administrators to maintain order and safety in the schools led the Court in T.L.O. to adopt a reasonableness standard to govern all school searches. T.L.O., 469 U.S. at 341. The reasonableness standard is aimed at “spar[ing] . . . school administrators the necessity of schooling themselves in the niceties of probable cause and permits them to regulate their conduct according to the dictates of reason and common sense.”

T.L.O., 469 U.S. at 343. To determine the lawfulness of a search under the T.L.O. standard the court engages in a two-part inquiry. First, the court looks to whether there was reasonable suspicion and the search “was justified in its inception.” Id. at 342 (citing Terry, 392 U.S. at 20). Second, whether the search was conducted in a manner that is “reasonably related in scope to the circumstances which justified the interference in the first place.” Id. The legality of the search in question should also be evaluated in light of the strong deference due to school administrators when they are effectuating policies to combat drug abuse on school campuses. See, e.g., T.L.O., 469 U.S. at 339; Acton, 515 U.S. at 661; Earls, 536 U.S. at 834; Morse, 127 S.Ct. at 2623.

1. The search was justified in its inception based on the facts known to the School Officials and reasonable inferences drawn from those facts.

A search is “justified in the inception” when based on a totality of circumstances, officials have reasonable suspicion 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. The reasonable suspicion standard makes sure officials are acting on the basis of “the sort of common-sense conclusions about human behavior upon which practical people—including government officials are entitled to rely.” T.L.O., 469 U.S. at 346 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). A school official must be able to “point to articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion.” Terry, 392 U.S. at 22. “To justify a reasonable suspicion, the officers’ factual determinations were not required to be correct, but only reasonable given the facts known to them.” Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071, 1099 (9th Cir. 2008) (Hawkings, J., dissenting).

Here, it was reasonable for the School Officials to suspect Towles may have had drugs on campus based on: (1) Towles’ attendance at a known drug party thrown by a student, Tweegs, who was suspended for possession of marijuana on campus the week before; (2) a call from the

police the day after the party apprising Principal Smalls that Conrad was found in Tweegs' backyard holding a marijuana joint and was given a citation; (3) a photograph taken in Tweegs' backyard during the party that showed Towles and Thompson sitting next to Conrad while he was smoking; (4) an anonymous tip posted with the photograph on a Friendkepedia website created by a Horton Hopkins student reporting both drug use and potential drug dealing; and (5) after Petitioner, Conrad, Tweegs, and Thompson were each called into the principal's office and denied drug use or possession, drugs were found in Conrad's locker. (R. at 2-3.)

In addition to these facts, Principal Smalls drew reasonable inferences based on her more than twenty-years experience as principal. (R. at 1.) In the past five years, drug use on campus has dramatically increased. (R. at 1.) Last year, twenty-five students were suspended for using illegal drugs on school grounds. (R. at 1.) In the first two months of the fall semester preceding the search, fifteen students were caught smoking marijuana on school grounds. (R. at 1) Therefore, based on the facts and the reasonable inferences drawn from these facts, the School Officials had reasonable suspicion to search Towles for drugs.

a. The School Officials reasonably considered a photograph showing potential drug use and an anonymous student tip in finding a reasonable suspicion.

Although the tip and photograph were submitted by an anonymous source, the Supreme Court has recognized that anonymous tips can help provide the reasonable suspicion necessary for searches. See Alabama v. White, 496 U.S. 324, 331 (1990). Many courts have approved reliance on tips from fellow students and school officials. See, e.g., T.L.O., 469 U.S. at 337-48 (search justified at inception based on informant indicating student was smoking in the girls lavatory); C.B. ex rel. Breeding v. Driscoll, 82 F.3d 383, 388 (11th Cir. 1996) (search justified solely off the tip of a student who lacked personal knowledge and was simply relaying

information received from an anonymous third party). Further, photographs posted on social networking sites, like friendkapedia, are increasingly being recognized as legitimate evidence to establish wrongdoing by both police officers and school administrators. See Daniel Findlay, Note, Tag! Now You're Really It What Photographs on Social Networking Sites Mean For the Fourth Amendment, 10 N.C. J.L. & Tech. 171, 171 (2008).

Towles is not disputing that the photograph is of him, nor does he allege the photograph was altered in any way. The photograph shows Towles, Thomson, and Conrad sitting in the backyard and Conrad smoking. Conrad's drug citation that evening for smoking a marijuana joint increases the likelihood that Conrad was smoking marijuana in that photograph. The caption proposed that these students were dealing drugs, and before conducting the personal searches a bag of marijuana was found in Conrad's locker. Indeed, after conducting the searches, two of the three students in that picture were found to have drugs on campus. Accordingly, even though the School Officials were wrong in their assessment that Towles had drugs on his person, given the facts known to them, it was reasonable to suspect that he did.

b. The Court in T.L.O. rejected the premise that the standard of proof should increase with the intrusiveness of the search.

A determination that a greater degree of reasonable suspicion, or outright probable cause is required for searches involving the removal of clothing, would be inconsistent with the Courts' holding in T.L.O. The majority in T.L.O. specifically rejected Justice Stevens's approach which would have "varie[d] the extent of the permissible intrusion with the gravity of the suspected offense." T.L.O., 469 U.S. at 379 (Stevens, J., dissenting). The Court discussed that this heightened standard would intrude too much upon the school officials' "comprehensive authority . . . to prescribe and control the conduct . . . in schools." T.L.O., 469 U.S. at 342. "[D]rug use . . . [has] become increasingly common among young people and an immediate response frequently

is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.” T.L.O., 469 U.S. at 352 (Blackmun, J., concurring). Quick response would not “be possible if a teacher could not conduct a necessary search until the teacher thought there was probable cause for the search.” Id.

Here, there was a reasonable likelihood that several students possessed drugs on school grounds. The School Officials needed to act quickly to resolve this danger, and in doing so found drugs on two individuals. Had probable cause been necessary, the School Officials would likely not have been able to respond this swiftly, which could have resulted in injury or harm to the students searched or to others. Accordingly, the School Officials had sufficient reasonable suspicion to justify the inception of the search and met the first prong of the T.L.O. standard.

2. The scope of the search was not excessively intrusive and was reasonably aimed at uncovering the serious infraction of on-campus drug possession.

A search is “permissible in its scope” when “the measures adopted are *reasonably related* to the objectives of the search and are not *excessively intrusive* in light of the age and sex of the student and the *nature of the infraction.*” T.L.O., 469 U.S. at 342 (emphasis added). The relevant facts of this search are as follows: (1) the School Officials were specifically looking for marijuana, a small object that can easily be hidden in clothing; (2) possession of marijuana is illegal and expressly prohibited on Horton Hopkins’ school grounds; (3) drugs are physically dangerous and interfere with the order and safety in schools; (4) the search was conducted by a teacher of the same sex; (5) in a private room; (6) Towles was not required to remove his undergarments; (6) Towles was not touched at anytime during the search; and (7) the focus of the search was a thorough search of the clothing pockets. (R. at 3.)

First, in determining whether measures taken are *reasonably related* to the objectives, courts consider the probability of success based on the nature of the evidence sought. In

Williams ex rel. Williams v. Ellington, the Sixth Circuit upheld a “strip search” of a student for an unknown drug which was believed to be in a small vial, even though there was no evidence the vial was actually under her clothing. 936 F.2d 881, 887 (6th Cir. 1991). On the other hand, a search for a large object, like a baseball bat, would not justify the search of a students’ person. See e.g., T.J. v. State, 538 So. 2d 1320, 1320 (Fla. Dist. Ct. App. 1989) (a search for a knife did not justify searching a small zippered side pocket inside a purse). Like the vial in Williams, marijuana can easily be concealed under ones’ clothing or in ones’ pockets. The tendency of Horton Hopkins students to hide drugs on their persons is illustrated by the fact that during the search in question, marijuana was found in Thomson’s pockets. As such, the personal search was reasonably related to finding drugs.

Second, in examining whether a search is *excessively intrusive*, T.L.O. provides that two specific attributes should be considered: age and sex. T.L.O., 469 U.S. at 342. A students’ participation in extracurricular activities can also be analyzed when determining intrusiveness. Acton, 515 U.S. 646. In Acton, the Court upheld a school’s policy of administering random drug urinalysis of student athletes in part because “[s]chool sports are not for the bashful” and “there is an element of communal undress inherent in athletic participation.” Id. at 646. In addition to age, sex, and extracurricular activities, lower courts have found other factors to be significant such as: (1) the privacy of the environment where the search is conducted; Cornfield, 991 F.2d 1323 (search conducted in the privacy of boys’ locker room), Singleton, 894 F. Supp. at 391 (search conducted in the privacy of administrator’s office); (2) whether the student was required to remove their underwear; Singleton, 894 F. Supp. at 391 (student not required to remove underwear), Widener v. Frye, 12 F.3d 215 (6th Cir. 1993) (where school officials were allowed to remove the jeans but not undergarments); (3) whether the student was touched

inappropriately; Cornfield, 991 F.2d at 1316 (requiring student to take off clothing was less intrusive than a pat-down); and (4) whether the person conducting the search was of the same sex. Williams, 936 F.2d at 883 (search of female student conducted by female administrator).

Here, Towles is a sophomore in high school and this age is not too young for administrators to rationally suspect drug possession. Before transferring to Horton Hopkins, Towles played on the baseball team, and as discussed by the Court in Acton, individuals who participate in team sports are more accustomed to communal undress. The search was conducted in the boys' locker room like the search in Cornfield, and was similarly conducted by a gym teacher of the same sex. At no time was Towles' touched and his undergarments remained on. Further, the point of the search was to thoroughly search through Towles' pockets. As discussed in Cornfield, administrators could reasonably conclude that requesting Towles to remove some of his clothing would be less intrusive than thoroughly searching his pockets while he was wearing his clothing. Accordingly, requesting a male sophomore to disrobe to his undergarments in front of the male school gym teacher in a private room was not excessively intrusive.

Lastly, the *nature of the infraction* falls within the scope analysis and here the School Officials were faced with the possibility that Towles had drugs on his person. Illegal drugs present an immediate danger and thus require prompt action on the part of school officials. T.L.O., 469 U.S. at 352 (Blackmun, J., concurring). The Court has repeatedly held that school administrators have an important if not compelling interest to safeguard those entrusted to their care from drug use. See Acton, 515 U.S. at 661; Earls, 536 U.S. at 834; Morse, 127 S.Ct. at 2623. Of the three individuals in the picture posted on Politte's website two carrying drugs on campus. If not for this search, it is probable that these drugs would have been either personally

consumed or distributed to other students.

Further, there is no requirement that schools use the least intrusive means. Acton, 515 U.S. at 663 (“we have repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.”) Therefore, the nature of the infraction was serious, and requiring Towles to remove his clothing other than his undergarments in order to search for drugs was reasonable in scope and not excessively intrusive.

3. The Supreme Court has repeatedly instructed that great deference be given to school officials in ferreting out drug use on high school campuses.

In T.L.O., the Court first discussed the deference and flexibility that was due to school officials in combating drug abuse on school campuses. T.L.O., 469 U.S. at 339. In Acton, the Court reiterated the deference that should be given to school officials when conducting searches aimed at combating drug abuse. Acton, 515 U.S. at 661. “[D]etering drug use by our Nation’s school children,” the Court opined that “the nature of the concern is important-indeed, perhaps compelling [which] can hardly be doubted.” Id. In Morse, the Court stated that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.” Morse, 127 S.Ct. at 2623. It is good policy to give teachers great deference in effectuating drug policies and searches because “[s]tudents will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges.” Id. at 2640 (Breyer, J., concurring). Further, “no one wishes to substitute courts for school boards or to turn the judges chambers into the principal’s office.” Id.

In effectuating drug policies, administrators should be given deference in order to stay one step ahead of tragedy when drugs become a significant problem at their schools. See Redding, 531 F.3d at 1106 (Hawkings, J., dissenting). In Hopkinsville, like many towns across

the country, drugs are an invidious and growing problem. In 2007, Kelly Smith, a 17-year-old student who was captain of the volleyball team, overdosed on cocaine at a party. (R. at 1.) In the last five years, a significant number of students at Horton Hopkins have been apprehended with drugs on campus. In light of the serious threat drugs pose to students and the tragedy this school has already faced, this court should be deferential to the reasonable means chosen by the District and the School Officials to combat this threat.

B. Even if This Court Determines the Search was Unreasonable, The School Officials Should Be Granted Qualified Immunity Because a Reasonable School Official Would Not Have Been on Notice Such a Search Violated Clearly Established Law.

Assuming arguendo, that this court determines the search was unreasonable, the legal ambiguities described above should preclude a finding that the law was sufficiently clearly established to deny the School Officials qualified immunity. “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation.” Saucier v. Katz, 533 U.S. 194, 201 (2001) overruled by Pearson, 2009 WL 128786 (held two-step inquiry no longer mandatory). Once the School Officials’ asserted a qualified immunity defense, the burden shifted to Petitioner to demonstrate that the alleged right was clearly established. Saucier, 533 U.S. at 201. The court examines the legal right under the “specific context of the case, and not as a broad general proposition.” Id. The general T.L.O. framework, that searches must be supported by reasonable suspicion, is not sufficient to put the officials on notice, as qualified immunity requires a higher degree of specificity in describing the right. Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 607 (6th Cir. 2005). “Accordingly, T.L.O. is useful in guiding us in determining the law in many different kinds of circumstances; but is not the kind of clear law necessary to have clearly established the unlawfulness of the defendants' actions in this case.” Beard, 402 F.3d at 607.

Therefore the inquiry is whether the School Officials, in light of the facts and circumstances confronting them, could have reasonably believed conducting a personal search of Towles based on a reasonable suspicion that he had drugs on campus was lawful.

1. The reasonable suspicion justifying the inception and scope of Towles' search was consistent with searches deemed lawful in other circuits.

Absent a declaration from the Supreme Court, or the clear weight of authority from other circuits, there is no real argument that the contours of the right were sufficiently clear to put the School Officials on notice that their search was unlawful. The case law applying the T.L.O. standard has consistently upheld strip searches. In Williams, the Sixth Circuit upheld the “strip search” of a high school student for an unknown drug even though she denied possession of any drugs and prior searches of purse and locker did not turn up evidence of drug use. 936 F.2d at 887. Similarly, the Seventh Circuit upheld a strip search of a 16-year old student who officials had reason to believe was “crotching” drugs. Cornfield, 991 F.2d at 1322-23. In Singleton, a district court upheld the search of a 13-year old boy where school officials “patted” the boy’s crotch and “searched inside the waistband of his boxer shorts.” 894 F. Supp at 386.

Even in cases where the privacy intrusion was greater than the School Officials’ search of Towles, courts have regularly granted qualified immunity. In Jenkins by Hall v. Talladega City Bd. of Educ., an en banc Eleventh Circuit panel was presented with strip searches of 8-year-olds to find seven dollars that had been taken from a classmate’s purse and granted qualified immunity. 115 F.3d 821, 825 (11th Cir. 1997). Similarly in Thomas ex rel. Thomas v. Roberts, a police officer and teacher were granted qualified immunity for conducting a mass strip search of a fifth grade classroom following the reported disappearance of an envelope containing twenty-six dollars. 323 F.3d 950, 950 (11th Cir. 2003). In Beard, the Sixth Circuit granted qualified immunity to school officials, who while conducting a search for several hundred dollars,

required fifteen male and five female students to remove their underwear. 402 F.3d at 598.

Compared to Jenkins, Thomas, and Beard, the need for the School Officials' to search Towles was far more urgent. The search was not for evidence of a past crime, stealing money, but was for evidence of an ongoing crime, possessing marijuana. In light of the more serious nature of the crime presented and the more reasonable scope of the search, qualified immunity should be granted even if this court finds Towles' search was unlawful.

2. Holding school officials liable in situations where reasonable judicial minds differ will deter teachers from conducting necessary searches.

This matter is before the court because the district court determined there was no Fourth Amendment violation, and the court of appeals determined there was a violation, but nonetheless granted the School Officials qualified immunity. In Pearson, the Court faced a similar situation regarding a circuit split and reiterated the standard set forth in Wilson that “[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.” Pearson, 2009 WL 128768, at *14 (quoting Wilson v. Layne, 526 U.S. 603, 618 (1999)). We do not want the threat of lawsuits to deter teachers from taking action when they feel a student may be a threat to themselves or to others. The denial of qualified immunity could have a chilling effect on the degree to which teachers are willing to protect student's safety from perceived threats. Therefore, a grant of qualified immunity is consistent with the Supreme Court's precedent and the substantial policy reasons behind enabling teachers to respond to threats to their pupils' safety with great speed and flexibility.

C. Even if this Court Determines the Search was Unreasonable, the School District Should Be Granted Summary Judgment Because Their Search Policy is Consistent with T.L.O.

Even though the District cannot raise the qualified immunity defense, they are still entitled to summary judgment because their search policy is consistent with T.L.O. See, e.g.,

Skehan v. Village of Mamaroneck, 465 F.3d 96, 109 (2nd Cir. 2006). As discussed in Cornfield:

[M]unicipalities, including school boards, may not be held liable under section 1983 simply because they employed the tortfeasor acting within the scope of his or her employment. Rather, municipal liability attaches only “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

Cornfield, 991 F.2d at 1324 (quoting Monell v. Dept. of Social Services of New York, 436 U.S.

658, 694 (1978)). Furthermore, plaintiffs cannot claim municipal liability unless they can

demonstrate that the enforcement of its policy was the “moving force” behind the constitutional

violation. Cornfield, 991 F.2d at 1324 Here, the District’s drug policy is consistent with the

standard set-forth in T.L.O. It allows for personal searches only when the serious offense of

drug possession is suspected on campus. Before conducting such searches, school officials must

balance the likelihood of drug possession with the risk of infringing on students’ individual

rights. As such, the District’s policy is not unlawful and Summary Judgment should be granted.¹

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this court: 1) AFFIRM the State of Grace Court of Appeals’ decision that Respondents’ actions did not violate the First Amendment; 2) REVERSE the finding that Respondents’ search was unreasonable; and 3) AFFIRM the decision that Respondents are entitled to qualified immunity.

Dated: March 2, 2009

Respectfully submitted,

Team No. 26
Counsel for Respondents

¹ The District Court found no Fourth Amendment violation and granted Summary Judgment on behalf of the District and Principal Smalls and therefore had no need to discuss the municipal liability of the School District, or qualified immunity for Smalls. The Court of Appeals found qualified immunity for Smalls but did not discuss the municipal liability of the District. Both Smalls and the District are parties to this appeal.

APPENDIX A

Horton Hopkins School District DRUG AND ALCOHOL USE POLICY

Horton Hopkins School District recognizes that the illegal use of alcohol and drugs is unacceptable and that the problems associated with it pose a significant threat to our school community and to society in general. The District further understands that the use of chemical substances can have a profound impact on the student's own education, as well as other students' educational opportunities. The District therefore takes the following steps to maintain a drug-free school system.

Suspicion of Drug Use or Drug Possession

When drug use or possession is suspected on school property, the District reserves the right to conduct personal searches of students, as well as searches of lockers, desks, other school property, and book bags and other personal containers. The District will request consent before beginning a search, however, the school may continue with a search even if the student refuses to give consent. The District may also conduct drug testing by urinalysis on an as-needed basis. The District will balance the likelihood the student possesses drugs against the risk of infringing the student's individual rights.

a) Personal Search

The District may contact a student's parent or legal guardian before commencing a personal search, but this is not mandatory. The District may judge if parental involvement is necessary on a case-by-case basis. A faculty member of the same gender as the student will conduct the personal search.

b) Consequences

1. Illegal drugs

In cases where students are found in possession or under the influence of illegal drugs, the school may contact police, and must contact the student's parent or legal guardian. Discipline will be decided on a case-by-case basis, but the offending student will receive a suspension of no less than three days.

2. Alcohol or tobacco

A parent or guardian will be notified in cases where a student is found in possession or under the influence of alcohol or tobacco. The District will dispose of all alcohol or tobacco, and notify the parent or guardian of the disposal.

3. Extra-curricular activities

Students in violation of this policy will be banned from all athletic and other extra-curricular activities for the remainder of the school year.