No. 13-0251

In the

Supreme Court of the United States

REGINA GEORGE, a minor, by and through her mother AMY GEORGE,

Plaintiff-Appellant,

v.

EVANSTON BOARD OF EDUCATION, TIM DUVALL, AND MARGE GUNDERSON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT
CASE NO. 12-1795

RESPONDENT'S BRIEF

QUESTIONS PRESENTED

I. Under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, police may conduct a reasonable search of items found on a person incident to arrest. Officer Gunderson discovered harassing emails during a limited search of George's cell phone found on her person at the time of her lawful arrest. Was the warrantless search of emails on George's cell phone an unreasonable search under the Fourth Amendment?

II. A school has the constitutional authority to discipline a student for speech that causes a substantial disruption at school or infringes on the rights of other students. George sent bullying emails to another student that caused her to miss classes and to seek counseling at school. Was the school constitutionally permitted to suspend George for cyberbullying another student?

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The decision and order of the United States Court of Appeals for the Thirteenth Circuit is set out in *George v. Evanston Board of Education*, No. 12-1795 (13th Cir. 2013).

CONSTITUTIONAL PROVISIONS

The First Amendment and the Fourth Amendment to the United States Constitution are relevant to this case and are reprinted in Appendix A.

STATUTES

Title 42 United States Code Section 1983 is relevant to this case and reprinted in Appendix B.

RULES PROVISIONS

The following provisions are relevant to this case: Craven's anti-bullying statute, Crav. Gen. Stat. § 11-1111 (2011), available in the court of appeal's opinion, *George v. Evanston Board of Education*, No. 12-1795, *3-4 (13th Cir. 2013); North Shore High School's Safe School Climate Plan, available in the court of appeal's opinion. *Id.* at 4.

STATEMENT OF THE CASE

Regina George ("George"), a minor with her mother acting as guardian, filed suit against the Evanston Board of Education ("Board of Education"), Principal Tim Duvall ("Duvall"), and Deputy Marge Gunderson ("Gunderson") for violations of her Fourth and First Amendment rights. George asserts her claims, pursuant to 43 U.S.C. § 1983, against Duvall for violation of her First Amendment rights, against Gunderson for violation of her Fourth Amendment rights, and against the Board of Education for violations of both her First and Fourth Amendment rights. The Board of Education, Duvall, and Gunderson filed a motion for summary judgment in the United States District Court for the Western District of Craven. The district court granted summary judgment in favor of Appellees. George appealed the summary judgment order, and on May 23, 2013, the United States Court of Appeals for the Thirteenth Circuit affirmed the district court's summary judgment order. *George*, No. 12-1795. This Court granted George's petition for certiorari.

STATEMENT OF THE FACTS

The facts are set forth as the court of appeal's found them in its order affirming the district court's grant of summary judgment to Defendant-Appellees, the Evanston Board of Education, Duvall, and Gunderson. *George v. Evanston Board of Education*, No. 12-1795, p. 2-4 (13th Cir. 2013), *cert. granted,* No. 13-0251.

At approximately 10:40 a.m. on a weekday, School Resource Officer, Deputy Gunderson, was patrolling the North Shore High School ("North Shore") campus. She saw a vehicle, driven by fifteen-year-old Regina George, quickly departing the campus and speeding across a speed bump. Gunderson decided to stop the vehicle and issue a warning to the driver for failing to slow down for a speed bump. Gunderson pulled the vehicle over, ran its license through the DMV database, and determined it was registered to Will and Amy George. Gunderson was aware that the George's daughter was a tenth grader at North Shore. When Gunderson approached the vehicle, she realized that the daughter, Regina George, was driving. Gunderson explained to George that she was being stopped for speeding over a speed bump. She asked George why she was leaving campus so quickly during the school day, and George defensively responded that it was none of Gunderson's business and refused to provide an explanation. Gunderson asked for George's license and registration. *Id.* George protested but eventually admitted she did not have a driver's license. Gunderson arrested George for driving without a license. *Id.*

Gunderson asked George to get out of the vehicle and then asked her to empty the contents of her pockets. *Id.* George removed a lip gloss container, a twenty-dollar bill, and a cell phone from her pockets. Gunderson placed George in the police car and performed a cursory investigation of the materials found on George's person at the time of the arrest. The

cell phone was not password protected, and Gunderson inspected the phone to determine why George was hastily leaving North Shore during school hours and without an explanation. *Id.* Gunderson promptly discovered a text message sent the previous night from another student at North Shore, which read: "Please stop sending me THOSE emails." *Id.* Gunderson quickly located the referenced emails between George and the other student on the cell phone's memory. The emails contained harassing comments from George regarding the other student's sexual orientation. In one email, George referred to a pool party, stating: "no girl would want to be in a bathing suit around a lesbian." *Id.* In another email, George threated to tell other students that the recipient was a lesbian and stated that the student would have a difficult time making friends because "none of the cool people at North Shore would want to waste time hanging out with you if I told them you were a lesbian." *Id.* The emails Gunderson viewed were sent within three weeks prior to the time of George's arrest.

Disturbed by the contents of the emails, Gunderson copied the emails and reported them to Principal Duvall. While the emails appeared to have been sent after school hours and off school grounds, Duvall contacted the recipient student to investigate. The student was another fifteen-year-old girl that had recently sought counseling at North Shore due to the harassing emails she received from George. The counseling sessions required the student to leave her classes early, and the student admitted to asking her mother to homeschool her because she "felt personally victimized" by George. *Id.* George's harassing comments and conduct impacted the recipient student and her ability to function in her high school environment.

In light of the email evidence against George and in the interest of preventing disruptive bullying at North Shore, Duvall and the Board of Education charged George with violations of the Evanston Board of Education Safe School Climate Plan. George received written notice of

the charges against her and the damaging email evidence. She was also given the opportunity to dispute the charges, which she did. The school administrators decided to suspend George for ten days for her violations of the Safe School Climate Plan. *Id.*

Under Craven's anti-bullying statute, Crav. Gen. Stat. § 11-1111 (2011), the Board of Education was required to "develop and implement a safe school climate plan to address the existence of bullying in schools." *Id.* Bullying is specifically defined in the statute as including cyberbullying and communications "based on any actual or perceived differentiating characteristic, such as . . . sexual orientation." *Id.* The statute is designed to prevent bullying both on and off school grounds and extends to student actions outside of school that create a hostile environment at school for the victim, infringe on the victim's rights at school, or substantially disrupt the education process or operation of the school. The North Shore administrators determined that George violated the Safe School Climate Plan because her harassing emails created a hostile environment and infringed on the victim's rights at school. *Id.*

George brought charges against the Board of Education and Duvall for violations of her First Amendment rights because of her suspension. George also brought charges against the Board of Education and Gunderson for violations of her Fourth Amendment rights due to the search of her cell phone. George sought $200,000 for harm to her reputation. *Id.* The district court found no violation of George's constitutional rights and granted the Appellees' motion for summary judgment. The court of appeals affirmed the district court's findings, and George filed this appeal.

SUMMARY OF THE ARGUMENT

The district court correctly determined there was no violation of George's First and Fourth Amendment rights and properly granted summary judgment in favor of Appellees. Supreme Court precedent permits a thorough search of a person and items immediately associated with a person incident to a lawful arrest. George did not password protect her cell phone and it was in her pocket at the time of her arrest. Objects found on a person, such as cigarette packages, wallets, pagers, or address books, fall within the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. A cell phone is indistinguishable from these other types of personal possessions. All can be carried on the person and may contain private information, and the Supreme Court has determined all may be searched under the search-incident-to-arrest exception without additional justification beyond a lawful arrest. Because George's cell phone was on her immediate person at the time of her lawful arrest, Gunderson was authorized to conduct a warrantless search of the cell phone and its contents.

To the extent a cell phone contains more private information than conventional containers, the reasonableness requirement under the Fourth Amendment protects against theoretical, unlimited invasions of privacy. Gunderson conducted a minimally invasive, cursory search of the cell phone that she reasonably believed would lead to evidence regarding George's suspicious departure from school grounds. The search was restricted to a text message and specifically referenced emails. Gunderson's search satisfied the Fourth Amendment's reasonableness requirement because it was targeted and limited in scope.

Even if Gunderson's search requires some justification based on officer safety or preservation of evidence, the search was still constitutionally proper. Information contained on a cell phone is inherently destructible because it can be remotely accessed and destroyed, unlike

most physical evidence. Moreover, danger to a police officer flows from the fact of the arrest itself and not from the crime for which the arrest was made. The search of George's cell phone was proper because it was found on her person, and a cell phone is indistinguishable from other containers the Supreme Court has held can be searched when found on a person without additional justification. But even if additional justification for the search is necessary, it is present in this case.

Finally, in disciplining George for the harassing emails she sent to another student outside of the school setting, the Board of Education and Duvall also did not violate George's First Amendment rights. A school has the authority to discipline a student for speech that causes, or is likely to cause, a substantial disruption at school or infringes on the rights of other students. George's victim sought counseling, missed classes, and asked to be removed from school. George's emails disrupted the victim's day-to-day activities and infringed upon her right to feel secure in the public school environment. While George's emails may have been sent outside the school setting, it was foreseeable that its impact would reach the victim within the school environment, and it clearly did. George's suspension for her harassing comments was a valid exercise of North Shore's protective power, and it did not violate her First Amendment rights.

Cyberbullying has no geographical boundaries and poses an immediate threat to the modern educational environment. The significant safety concerns associated with cyberbullying in schools is analogous to the dangers of drug-related or lewd speech that the Supreme Court has held does not require the school to prove an actual or likely disruption. Cyberbullying's disruptive impact may not be felt until it gives rise to irreparable injury, and schools should be able to deal with this crisis without strict constitutional limitations.

Because the search of George's cell phone was a reasonable search within the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement and George's suspension for bullying speech did not violate her First Amendment right to freedom of expression, the district court's properly granted summary judgment in favor of the Appellees.

ARGUMENT

I. The Warrantless Search of George's Cell Phone Incident to Her Lawful Arrest did not Violate Her Fourth Amendment Rights.

The District Court properly recognized that the limited search of George's cell phone is indistinguishable from the search of other items found on a person incident to arrest and was permissible under established case law. George's claim that cell phones should be treated differently under the Fourth Amendment due to the scope of information they may contain is not supported by precedent and must be rejected.

A. The search-incident-to-arrest exception to the Fourth Amendment warrant requirement authorizes police to search items found on an arrestee incident to a lawful arrest, including cell phones.

George contends that the search of her cell phone, seized from her person incident to her lawful arrest, requires different treatment under the Fourth Amendment than other items carried on her person. But this Court has held that a search of items immediately associated with arrestees at the time of their arrest requires no additional justification beyond the lawful custodial arrest. *See United States v. Robinson*, 414 U.S. 218, 224 (1973). The fact of the lawful arrest results in a lowered expectation of privacy in items found on the arrestee's person. "[T]he Supreme Court has made it increasingly clear that a lawful arrest justifies a special latitude of both search and seizure of things found on the arrestee's person." *United States v. Sheehan*, 583 F.2d 30, 32 (1st Cir. 1978).

Regardless of the broad latitude Gunderson had to conduct the search in this case, the search was still proper under the justifications required by other types of searches incident to arrest as articulated in *Chimel v. California*, 395 U.S. 752 (1969). A cell phone on an arrestee contains destructible evidence and could potentially be used to jeopardize the safety of an officer. *Id.*

1. Because the cell phone was found on George's immediate person at the time of her arrest, a strict Chimel *justification is not necessary here.*

The Supreme Court has distinguished between searches of an arrestee and searches of areas within the arrestee's control. *Robinson*, 414 U.S. at 224-225. While the constitutional authority to conduct a search incident to arrest is loosely based upon "the need to disarm and to discover evidence," this rationale is softened in the case of a reasonable search of items found on an arrestee's immediate person at the time of a lawful arrest. *Id.* at 235. In *Chimel*, the Court established limitations on searches of areas within an arrestee's control by requiring a demonstration that the search was based on either a need to preserve evidence or a concern for officer safety. 395 U.S. at 763 (1969). More recently, in *Arizona v. Gant*, the Court reaffirmed the *Chimel* boundaries in the context of a vehicle search incident to arrest. 556 U.S. 332 (2009). On these two occasions, neither of which involved the search of items on the arrestee's person, the Supreme Court defined certain searches that require a warrant because they lack a *Chimel* justification. But the Supreme Court has never extended a general rule from these two cases that requires all categories of searches incident to arrest to be justified by either the possible destruction of evidence or an officer's fear for safety. *Chimel* and *Gant* limit the scope of the lawful search of items within the arrestee's control, but these limitations do not emphatically extend to searches of items found on the arrestee's person.

In *Robinson*, this Court rejected an all-inclusive rule requiring application of *Chimel's* justification in every search incident to arrest. The *Robinson* Court stated: "[A] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." 414 U.S at 235. In *Robinson*, the officer admitted that he did not believe the cigarette package he found in Robinson's coat was a weapon and he gave no thought to the destruction of evidence.

Id. at 251 (Marshall J., dissenting) (quoting the officer's testimony: "I didn't think about what I was looking for. I just searched him."). In holding that the officer's search was lawful and the heroin pills found in the cigarette package were admissible, the Court did not require the officer to demonstrate any fear of the arrestee or that he suspected the arrestee was armed or possessed contraband. *Id*. at 236. In so doing, the Court drew a distinction between a search of items found *on* a person and searches of items found *around* a person incident to a lawful arrest. While courts have differing interpretations as to the extent of the area around a person that may be searched, there is "unqualified authority of the arresting authority to search the person of the arrestee." *Id.* at 224-25. By not applying *Chimel* in the context of searches of an arrestee's person, the *Robinson* Court established that such searches differ from other searches incident to arrest and are not fully subject to the *Chimel* analysis.

The Supreme Court continued to recognize this distinction in *United States v. Edwards*, and upheld the search of an arrestee's clothing ten hours after he was arrested. 415 U.S. 800 (1974). While the Court focused on the lapse of time before the search, the decision implicitly endorsed the search of an arrestee's person irrespective of any *Chimel* justification. *Id*. at 811 n.3 (noting that "[n]o claim is made that the police feared that Edwards either possessed a weapon or was planning to destroy the paint chips on his clothing"). In *United States v. Chadwick*, the Supreme Court recognized that searches of an arrestee and items immediately associated with him are justified by "reduced expectations of privacy caused by the arrest." 433 U.S. 1, 15 (1977). The Court in *Chadwick* found that a warrant was required to search a footlocker found in the arrestee's trunk. But that holding was limited to cases of "luggage or other personal property not immediately associated with the person of the arrestee." *Id*. By explicitly limiting their holding to items not immediately associated with the arrestee, *Chadwick*

reaffirmed the distinction between items immediately associated and those not immediately associated with the person of the arrestee. "[U]nlike searches of the person, [citing *Robinson* and *Edwards*] . . . searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." *Id*. at 16, n. 10 (internal citations omitted).

While it may be argued that the recent decision in *Gant* supports a categorical, *Chimel*-based approach to searches incident to arrest, the Supreme Court was unconcerned with the nonexistence of *Chimel* rationales in both *Robinson* and *Edwards*. Both of those cases also involved items on an arrestee as opposed to items in their immediate surroundings, as was the situation in *Chimel* and *Gant.* A number of courts have found that the strict *Chimel* rationale established in *Gant* does not apply to searches of items found on the arrestee. *See California v. Diaz*, 244 P.3d 501, 507 n.9 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (U.S. 2011) (finding *Gant* inapplicable because it involved a search of an area within the immediate control of an arrestee, not a search of the arrestee's person); *Smallwood v. Florida*, 61 So. 3d 448, 452-54 (Fla. Dist. Ct. App. 2011) (finding Gant did not apply to a search of appellant's person, though the court noted it shared the same privacy concerns as Gant). In a district court case with comparable facts, the court held that *Robinson* applied to a warrantless search of the arrestee's iPhone and *Gant* did not apply because the phone was discovered in the defendant's pocket. *United States v. Hill*, No. CR 10-00261 JSW, 2011 WL 90130, at *8 (N.D. Cal. Jan. 10, 2011); *see also Fawdry v. Florida*, 70 So. 3d 626, 630 (Fla. Dist. Ct. App. 2011) (holding that *Gant* was not relevant because the search took place in a home, not a vehicle, and the defendant was carrying the cell phone on his person).

Therefore, the search of items found on an arrestee is not subject to *Chimel* scrutiny. Gunderson searched an item found on George's person at the time of her arrest and not an item

found merely in the area within her control. Because the arrest was valid and the cell phone was on George's person, no further justification is necessary to find that the warrantless search of the cell phone was a valid search incident to arrest.

2. *Even if the search of George's cell phone requires* Chimel *justifications, the standard is met in this case.*

Even if the duel rationales introduced in *Chimel* and extended in *Gant* apply in this case, the search of George's cell phone was still justified. Cell phones on an arrestee's person implicate issues of both destruction of evidence and officer safety. Gunderson had probable cause to make the arrest and the subsequent authority to protect her own safety and prevent destruction of evidence.

Lower courts have justified the search of digital information based on the destructibility of evidence. *E.g., United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (upholding the warrantless search of a pager incident to arrest because of the risk of destruction of evidence). With the press of a few buttons, a cell phone can be cleared of incriminating data. The digital information on a cell phone is more easily destroyed than physical evidence of criminal activity. From a practical standpoint, information deleted from a phone is unlikely to be discovered by an arresting officer absent unusual circumstances. While it may be possible to discover digitally deleted information in a laboratory setting, placing this burden on an arresting officer would create an impractical burden. Indeed, even physical evidence that is destroyed by an arrestee is still theoretically discoverable by police but inaccessible as a practical matter. Because the information on a cell phone can be deleted at the touch of a button, it is even more likely than physical evidence to be destroyed before the police are able to obtain a warrant. Even if the risk of destruction is reduced when the officer gains control of the cell phone, this is also true of physical containers, which officers are authorized to search incident to arrest.

Taking a cell phone away from an arrestee does not eliminate the danger that evidence on that phone may be destroyed. The data on a cell phone can be accessed from other devices and does not require the arrestee herself to destroy evidence. In holding cell phone searches incident to arrest are constitutional, the Seventh Circuit in *U.S. v. Flores-Lopez*, noted: "[R]emote-wiping capability is available on all major cell-phone platforms; if the phone's manufacturer doesn't offer it, it can be bought from a mobile-security company." 670 F.3d 803, 808 (7th Cir. 2012). Due to the unique properties of a cell phone, destruction of evidence is an overarching concern. Therefore, Gunderson was justified in searching George's cell phone to prevent the destruction of evidence stored on the phone.

Gunderson was also justified in searching the cell phone based on concern for her own safety. The fact that George was arrested for not having a license does not reduce the potential danger to the officer. *Robinson* also involved an arrest based on improper licensing, and the Court refused "to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons then those arrested for other crimes." *Robinson*, 414 U.S. at 234. Indeed, the Court asserted that: "[t]he danger to a police officer flows from the fact of the arrest, and its attendant proximity, stress and uncertainty, and *not from the grounds for arrest*." *Id*. at 259 n. 5 (emphasis added). A cell phone's capacity for instantaneous communication could be used to endanger the arresting officer. A suspect could easily contact accomplices during a traffic stop. These accomplices could arrive on the scene during or after an arrest and threaten the officer's safety. Even after an arrestee was secured, the officer could still be in danger if a text was sent before the phone was confiscated.

Officers can reduce the danger of this type of communication by quickly reviewing any recent calls, text messages, or emails.

Because George's cell phone was on her person at the time of arrest, the duel rationales in *Chimel* are not required. But those justifications are present because messages sent from a cell phone can endanger an arresting officer and information contained on a cell phone is inherently destructible.

B. A cell phone is a container and the search-incident-to-arrest exception authorizes officers to search a container immediately associated with the arrestee.

Some courts have attempted to avoid applying *Robinson* to searches of a cell phone found on an arrestee by distinguishing cell phones from conventional containers that *Robinson* holds can be searched regardless of *Chimel* justifications. *See, e.g., United States v. Wurie*, 728 F.3d 1, 12 (1st. Cir. 2013), *cert. granted*, 2013 WL 4402108 (2014) (establishing a bright-line rule that warrantless searches of cell phones incident to arrest violate the Fourth Amendment); *State v. Smith*, 920 N.E.2d 949, 956 (2009) (finding that warrantless searches of cell phones seized from a person incident to arrest are not justified under *Robinson* because cell phones are not traditional containers). But the majority of courts of appeals that have considered whether a cell phone is analogous to other items historically uncovered in a search incident to arrest have held that cell phone searches are constitutional under the Fourth Amendment. *See Flores-Lopez*, 670 F.3d at 809 (a search of a cell phone may be conducted as a traditional search of a conventional container); *Silvan W. v. Briggs*, 309 Fed. App'x 216, 225 (10th Cir. 2009) (holding "the permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee's person"); *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009) (rejecting the argument that a search of a cell phone with a large storage capacity implicates a heightened expectation of privacy); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007), *cert.*

denied, 549 U.S. 1353 (2007) (rejecting the argument that a cell phone is analogous to a closed container that requires a warrant to be searched).

The Supreme Court continually emphasizes the importance of establishing bright-line rules in dealing with Fourth Amendment issues. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). With this objective in mind, the Court established the broad rule that officers can categorically search containers on a person discovered during a valid search incident to arrest. *Robinson*, 414 U.S. at 477. This clear standard allows police to make quick decisions without having to break down every step of the search with a Fourth Amendment analysis.

The Fifth Circuit, in *Finley*, upheld the denial of a motion to suppress text messages retrieved from an arrestee's cell phone found on his person incident to arrest. 477 F.3d at 260. The court concluded that Finley's cell phone was akin to a closed container found on an arrestee's person. *Id.* at 259-60. In arguing that a cell phone is somehow distinguishable from a traditional container, a few courts have emphasized the expansive scope of information that is accessible through a modern cell phone. These cases focus on a cell phones' capacity to access vast, remotely-stored information as opposed to its function as a traditionally-defined container. *See, e.g., United States v. Park*, CR 05-375SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007); *Smith*, 920 N.E.2d at 956. This Court defines "containers" expansively as "any object capable of holding another object." *New York v. Belton*, 453 U.S. 454, 460 (1981). This broad definition purposely avoids complicated distinctions based on the sophistication of the container in question. "[The] traveler who carries a toothpaste and a few articles of clothing in a paper bag . .

. [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case." *United States v. Ross*, 456 U.S. 798, 822 (1982). A person with the latest smart phone should not be entitled to more protection than someone who is arrested while carrying an address book or paper correspondence.

As long as the search of a cell phone is generally restricted to its function as a container, albeit a large container, there is no need to dismantle established precedent. Courts have allowed searches of a wide variety of containers. *See, e.g., United States v. Ortiz,* 84 F.3d 977, 984 (7th Cir.1996) (telephone numbers from a pager); *United States v. Rodriguez,* 995 F.2d 776, 778 (7th Cir.1993) (address book kept inside a wallet); *United States v. Molinaro,* 877 F.2d 1341, 1346–47 (7th Cir.1989) (phone numbers on slips of paper found in a wallet); *United States v. Holzman,* 871 F.2d 1496, 1504–05 (9th Cir.1989) (address book), *abrogated on other grounds by Horton v. California,* 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Cell phones have merely replaced such personal effects.

While people may store very personal information on their phones this is the result of a personal choice and does not change the nature of the container itself. "[A] constitutional distinction between 'worthy and unworthy' containers would not be proper." *Ross*, 456 U.S at 822. As the California Supreme Court stated in *California v. Diaz*, "[Supreme Court] decisions do not support the view that whether the police must get a warrant before searching an item properly seized from an arrestee's person . . . depends on the item's character, including its capacity for storing personal information." 244 P.3d at 506 (Cal. 2011). While George's cell phone could store large amounts of data, it was still a discrete, portable container that is legally indistinguishable from a conventional container.

C. The search of George's cell phone was limited in scope and justified by her reduced expectation of privacy resulting from her lawful arrest.

Even if cell phones possess attributes that distinguish them from more conventional physical containers, none of these attributes were implicated by the search in this case. The scope of Gunderson's search was limited to information contained in text messages and emails. This same type of information could have been present on George's person in the form of written notes. Whether the information obtained during a search is written in ink or displayed electronically should make no constitutional difference.

The constitutionality of a search often depends on the extent of the intrusion into the arrestee's privacy interest. For example, while a search of an arrestee's clothing is permissible, cavity searches are off limits incident to an arrest without reasonable suspicion. *See Swain v. Spinney*, 117 F.3d 1, 5–9 (1st Cir. 1997). Permitting the limited search of text messages and locally-stored emails in this case does not automatically permit a general search into the full extent of a cell phone's capacity – any more than allowing a search of the outer clothing leads to a cavity search. While a cell phone can contain vast amounts of information, the simple electronic messages viewed in this case are not representative of that capacity. The types of information that would warrant consideration of new limits to search of a cell phone are simply not present in this case. Absent a justification that would distinguish the type of information obtained during a cell phone search from what could be found in a wallet or address book, this Court should decline to overthrow established precedent.

Here, the Gunderson viewed a text message on the phone that she recognized as being sent from another student. There is no justifiable rationale to distinguish this message from the ink and paper messages that students have always passed between each other. Once Gunderson viewed the text that said "Please stop sending me THOSE emails," she then accessed emails

stored on the phone's memory. Since the emails themselves were stored on the phone's internal memory, they are conceptually indistinguishable from notes written with pen and ink. Gunderson did not use the internet function to access externally stored messages. Nothing that Gunderson viewed was different, in either scope or type, from information that courts have always permitted to be searched incident to arrest. *See, e.g., Rodriguez*, 995 F.2d at 984 (allowing the search of an address book incident to arrest).

To find a violation of the Fourth Amendment on these facts, this Court would endorse the principle that mere digitization of information results in heightened constitutional protection. Evidence of drug deals, child pornography, and information implicating countless other crimes would be unsearchable incident to arrest merely because it was stored in a phone rather than a wallet or backpack. This would contradict past precedent and severely limit the ability of police to investigate crime.

Appellant voices the concern that officers will have unfettered access to everything accessible through a person's cell phone incident to arrest. However, the facts of this case in no way resemble the type of police fishing expeditions that Appellant fears. To invalidate this search would erode police ability to discover evidence that criminals store digitally. Law enforcement would be powerless against technologically-proficient criminals. This cannot be what the Fourth Amendment requires and should not be the outcome of this case. The facts in this instance fall well within decades of precedent upholding the constitutionality of police searches incident to an arrest.

II. The Board of Education and Duvall Did Not Violate George's First Amendment Rights When They Disciplined Her for Cyberbulling that Caused a Substantial Disruption and Infringed Upon the Rights of Another Student.

The nature of bullying creates a severe and palpable danger and schools need broad discretion to regulate student discipline in this context. A school has the constitutional authority to discipline a student for speech that caused or is likely to cause a substantial disruption at school or infringes on the rights of other students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969). George's harassing emails caused a substantial disruption to the recipient student's education and right to be secure in a public school environment. The school's forecast of future disruption was reasonable based on the threatening language within the email.

A. North Shore Administrators Acted Within Their Authority When They Punished George Because Tinker Applies to Off-Campus Speech.

Because this Court has never implemented a geographical limitation on *Tinker*, the administrators acted within their authority when they punished George for her bullying emails that originated off-campus. In *Tinker*, the Court held that disruptive student speech or behavior is not protected by the First Amendment and granted public schools the authority to restrict student speech under these circumstances. 393 U.S. at 512. The Court stated: "[c]onduct by the student, *in class or out of it*, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* (emphasis added). Based upon this language, circuit courts have applied *Tinker* to off-campus speech cases. *See Boim v. Fulton County Sch. Dist.,* 494 F.3d 978, 980 (11th Cir. 2007)(applied *Tinker* to statements written in a personal journal at home); *D.J.M v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 765-66 (8th Cir. 2011)(instant message sent from students home computer

threatening to shoot other students); *J.S. v. Blue Mt. Sch. Dist.,* 650 F.3d 915, 920 (3rd Cir. 2011)(comments made on a MySpace profile created after school hours from a home computer); *Kowalski v. Berkeley County Sch.,* 652 F.3d 565,567 (4th Cir. 2011)(web comments made after school from a home computer).

In *Morse,* the Supreme Court, after analyzing a litany of contextual factors connecting the speech to the school, expressly upheld broad school authority over speech that was displayed off school grounds. 551 U.S. at 396. Building on *Morse,* some lower courts have acknowledged that school authority should not be limitless. These courts have required a sufficient connection between the speech and the school before applying *Tinker* to off-campus speech. This Court should adopt the analysis implemented by the Fourth Circuit that considers (1) whether the off-campus speech could reasonably be expected to reach the school; and (2) whether the content of the speech concerned school students, faculty, or property sufficient to create a nexus between the student's off-campus speech and the school's pedagogical interests. *Kowalski*, 652 F.3d at 573 (4th Cir. 2011). Under this test, the school properly disciplined George for sending bullying emails because she specifically targeted a classmate and they directly interfered with the recipient's regular class attendance.

1. This Court Has Never Drawn a Geographical Boundary Limiting the Reach of School Authority Under Tinker.

This Court has never placed a geographical boundary on *Tinker*. *Tinker* suggested that the substantial disruption test was applicable outside of the classroom when it noted that disruptive student speech, whether "inside the class *or out of it*," is not immunized by the constitutional guarantee of free speech. 393 U.S. at 513 (emphasis added). Three years later, the Supreme Court applied *Tinker* to off-campus speech when it upheld an ordinance limiting disruptive speech by any citizen, whether adult or student, in the "immediate environs" of a

school. *Grayned v. City of Rockford,* 408 U.S. 104, 118 (1972). The speech at issue in Grayned occurred on a public sidewalk adjacent to the school. *Id.* This Court chose to focus on the disruption caused by the speech, rather than the location from which the speech originated. Recently the Supreme Court has denied certiorari to a Fourth Circuit case applying *Tinker* to speech originating off campus. *See e.g. Kowalski* 652 F.3d 565, *cert. denied,* 132 U.S. 1095 (2012). Thus, geographical boundaries are not dispositive for the application of *Tinker*.

2. North Shore Could Reasonably Expect George's Off-Campus Speech to Reach the School.

The rule in *Tinker* should be applied to this off-campus speech because North Shore could reasonably expect George's emails to reach the school. Nearly every circuit has utilized this foreseeability test to determine if the School can constitutionally punish a student for speech originating off campus. The Second Circuit has held 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, at least when it was similarly foreseeable that off-campus expression might also reach campus." Doninger 527 F.3d at 48. *See also; Kowalski* 652 F.3d at 574 (focusing on foreseeability).

In *Doninger*, a student created a blog at home that utilized vulgar language and erroneously asserted that a band contest had been cancelled. 527 F.3d at 50. The court concluded that it was foreseeable that the blog post would reach school because the student knew that other students would read it. *Id*. Likewise, the Fourth Circuit utilized the same test and concluded that it was reasonably foreseeable that a bullying Myspace page, created at home, could reach campus because the student intended for other students to see the harassing speech. *Kowalski* 652 F.3d at 573.

Here, George took steps to ensure that her harassing emails would reach the school by directly emailing them to her victim, who was a North Shore student. Although no other students had seen the emails, George threatened disclosure by telling the recipient, "none of the cool people at North Shore would want to waste time hanging out with you if I told them you were a lesbian." *George*, No. 12-1793 at 3. The Eighth Circuit addressed the issue of online threats and concluded that the First Amendment does not require the school to wait and see if a threat is carried out. *D.J.M.,* 647 F.3d at 764. Courts have held that directing speech toward a student, teacher, or faculty member creates with reasonable certainty the foreseeability that the speech will reach the school. *Kowalski* at 573. Because the victim was a student at North Shore, and George emailed her directly, she ensured with all virtual certainty that her speech would reach school.

3. There are Significant Connections Between George's Speech and the School.

Circuit courts and the Pennsylvania Supreme Court have created contextual tests limiting schools' authority off-campus by requiring sufficient connections between the speech and the school. *See Layshock v. Hermitage Sch. Dist.,* 496 F. Supp. 2d 587 (W.D. Pa. 2007); *Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 620 (5th Cir. 2004)(finding a violent drawing accidently taken to school by another student establishes a sufficient connection); *J.S. ex rel H.S. v. Bethlehem Area Sch. Dist.,* 807 A.2d 847 (Pa. 2002)(finding an off campus created website with threats against particular administrators was sufficiently connected to the school). The "litany of contextual factors" used to establish school speech in Morse provide support for a multi-factor analysis. *Layshock,* 496 F. Supp. 2d at 599.

This Court in *Morse* set the stage for a contextual analysis when reviewing school authority over off-campus student speech. In *Morse,* a student unfurled a banner across the street

from the school, at a school-sanctioned event, attended by students, teachers, and administrators. *Morse,* 551 U.S. at 400. The student "directed his banner toward the school, making it plainly visible to most students." *Id.* The Court in *Morse* declined to apply *Tinker*, and instead extended school authority to speech that advocated illegal drug use, even absent disruption. *Id.* at 410.

The Fourth Circuit in *Kowalski* drew from *Morse's* contextual analysis and determined that significant connections between the speech and the school exist when the speech can be linked to the school's pedagogical interests. 652 F.3d at 573. Craven's anti-bullying statute directs boards of education to develop and implement a safe school climate plan to address the existence of bullying in schools. Crav. Gen. Stat. § 11-1111 (2011). The statute defines "bullying" as "the repeated use by one or more students of a written, oral, or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district . . . that causes physical or emotional harm to such student." The anti-bullying statute requires that the safe school climate plan prohibit bullying both "on school grounds" and "outside of the school setting if such bullying (i) creates a hostile environment at school for the student against whom such bullying was directed, (ii) infringes on the rights of the student against whom such bullying was directed at school, or (iii) substantially disrupts the education process or the orderly operation of the school." *Id.*

By enacting a statute authorizing the school district to address cyberbullying, the State of Craven has recognized that North Shore has a pedagogical interest in preventing all forms of bullying, whether on or off campus. Because George sent multiple emails directly to another student at North Shore that stated, "no girl would want to be in a bathing suit around a lesbian," and "none of the cool people at North Shore would want to waste time hanging out with you if I told them you were a lesbian," it is clear that her actions fall within the meaning of the anti-

bullying statute. *George*, No. 12-1795 at 3. As a result of George's abusive emails, the recipient requested that her mother remove her from school because she "felt personally victimized" by George. Because George's behavior was in direct conflict with North Shore's pedagogical interests and caused the exact result that the anti-bullying statute was designed to prevent, it is clear that there are significant connections between George's speech and the school.

B. George's Harassing Emails Caused and Were Likely to Cause a Material and Substantial Disruption.

Special characteristics of the school environment allow authorities to circumscribe disruptive school speech when they can demonstrate that the speech caused or was likely to cause a substantial disruption at school. *Tinker*, 393 U.S. at 514. Although students do not "shed their constitutional rights . . . at the schoolhouse gate," *Id.* at 506, this Court has repeatedly emphasized that students' rights are not coextensive with those of adults outside the school context. *Morse,* 551 U.S. at 396-397; *See also Fraser,* 478 U.S. at 682 (giving more latitude to speech restrictions aimed at children in the public school setting). North Shore High School acted within its authority when it punished George for sending cyberbullying emails to a classmate. These facts demonstrate that the school authorities acted based on evidence of an actual disruption and a reasonable forecast of future disruption.

1. George's Email's Caused an Actual Disruption.

The school was justified in punishing George because the totality of the circumstances surrounding her emails constituted a sufficient disruption. The Ninth Circuit held that to determine whether a disruption was substantial, courts should analyze "the totality of the relevant facts." *Karp v. Becken,* 477 F.2d 171, 174 (9th Cir. 1973). *See also, LaVine v. Blaine Sch. Dist.,* 257 F.3d 981, 989 (9th Cir. 2001) (holding that all relevant facts should be considered when assessing the level of disruption).

In *Karp*, the Ninth Circuit analyzed how *Tinker* applied to a series of disruptions that fell between the "two extremes" of substantial and minimal disruption. *Karp,* 477 F.2d at 174. The court found that schools could discipline speech that caused a series of smaller disruptions because "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner." *Id.* The court found it "obvious" that individual events cannot be "observed in a vacuum." *Id.*

In this case, there are ongoing events resulting from George's emails that, when taken together, constitute a substantial disruption at school. First, the victim felt "personally victimized" and repeatedly asked her mom to remove her from North Shore High School. Additionally, as a result of these emails, this student was forced to leave class early every week to seek counseling from North Shore's guidance counselor. *Id.* These facts, when taken together, indicate a constant and repeated disruption of the recipient's education.

2. North Shore's Forecast of Future Disruption was Reasonable in Light of the Language Within the Emails.

Principal Duvall had the authority to punish George because bullying is a major concern in public schools and the emails themselves led Duvall to reasonably forecast future disruption. Under *Tinker*, school authorities may justify the punishment of student speech by showing "facts which might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities." 393 U.S. at 514.

This Court has not specifically defined a "reasonable forecast" standard, but several circuit courts have used this analysis relying on threatening messages that would create a reasonable fear of future disturbance. *See D.J.M v. Hannibal Pub. Sch. Dist.,* 647 F.3d 754 (8th Cir. 2011). In *D.J.M.*, a student sent instant messages from his home to a classmate, in which he discussed attacking other students at school. 647 F.3d at 756. The Eighth Circuit created a test

in *Doe v. Pulaski County Special School District,* which established that a school district does not have to wait for a threat to materialize, provided that a reasonable recipient would view the statement as an actual threat. 306 F.3d 616, 622 (8th Cir. 2002). The recipient's reaction to George's emails indicate that she viewed the statements as an actual threat. The recipient had already sought counseling and asked to be removed from school. It was foreseeable that if the recipient's sexuality became a topic of ridicule it would cause greater disruption. If the school's ability to immediately respond to bullying threats became frustrated, it would give rise to a greater risk of retaliation or copycat harassment. The school did not need to wait for George to take any additional affirmative steps, as the threat alone was enough for the school to reasonably forecast a disruption.

C. George's Emails Interfered With the Victim's Rights at School.

Duvall appropriately punished George for her bullying emails because they created a hostile environment that interfered with the recipient's right to be secure and let alone at school. While this Court has not articulated a standard to determine what constitutes an invasion of this right to be secure and let alone, several circuits have addressed the issue.

The Ninth Circuit held that wearing a shirt to school expressing disapproval for homosexuality interfered with the rights of other students and was not protected under the First Amendment. *See Harper v. Poway,* 445 F.3d 1166 (9th Cir. 2006). The court in *Harper* reasoned that "being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." *Id.* at 1178. Additionally, the Third Circuit has held that, "students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243, 264 (3rd Cir. 2002).

Under this analysis, George's bullying emails interfered with the recipient's right to be secure and let alone. The bullying emails that George sent were nothing short of a psychological attack directed at the recipient. Upon receiving these emails the recipient repeatedly asked her mother to have her removed from school and sought counseling. These facts indicate that the recipient actually suffered from emotional harm following these psychological attacks. This Court should articulate a rule in line with that of the Third and Ninth circuits to protect students from this type of bullying. This Court should provide schools with a meaningful tool to ensure that students are afforded a safe and adequate learning environment.

D. Cyberbullying Presents a Serious Threat to the Public School System and School Administrators Should Not Be Subject to Strict Limitations.

Public schools should be permitted to enforce strict policies against cyberbullying. This Court has acknowledged on multiple occasions that the substantial disruption mode of analysis set forth in *Tinker* is not absolute. *See* e.g. *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (stating "the rule of *Tinker* is not the only basis for restricting student speech"). In *Bethel Sch. Dist. No. 403 v. Fraser*, this Court permitted school authorities to punish lewd speech without applying the disruption analysis set forth in *Tinker* 478 U.S. at 680 (1986). Similarly in *Morse,* this Court granted school officials the authority to restrict all speech relating to the promotion of illegal drug use due to the serious and palpable danger this speech creates.

Cyberbullying is analogous to lewd speech and speech promoting illegal drugs. It is inherently offensive and creates a serious and palpable danger to students. According to the United States Department of Health and Human Services, bullying is a "major concern" in schools. Twenty-eight percent of high school students have fallen victim to bullying and over seventy percent of students report to have witnessed incidents of bullying. *See* StopBullying.gov, *available at* www.stopbullying.gov/news/media/facts/#listing. Victims of bullying are more

likely to suffer from depression, anxiety, fear of going to school and thoughts of suicide. *Id*. Due to these inherently dangerous effects, cyberbullying is analogous to lewd speech and speech promoting drug use. Similarly, administrators should not be constrained to a strict *Tinker* disruption analysis. However, even if this Court applies *Tinker*, George's emails caused a substantial disruption and interfered with the rights of another student.

CONCLUSION

Respondents respectfully request this Court uphold the decision of the United States Court of Appeals for the Thirteenth Circuit and uphold the search of George's cell phone and school suspension. The Constitution allows police to enforce the law and schools to protect their students and the learning environment.

Evidence of crime is increasingly stored on digital devices and police need the ability to search for it. Nothing about the facts in this case support overthrowing established Supreme Court precedent that allows officers to reasonably search any item found on a person at the time of a lawful arrest. Gunderson did not use George's cell phone to access limitless personal information, but conducted a reasonable search that was limited in scope. To effectively perform their duties, officers need the authority to examine cell phones found on an arrestee. The Fourth Amendment should not be read to dismantle police investigatory tools in the face of constantly evolving technology.

Public schools have an obligation to foster a school environment that is conducive to learning. Online communication has a pervasive impact on the lives of students both at home and in school. Recognizing this, the Craven legislature has directed schools to create policies that deter cyberbullying and protect students and the school environment. George's emails directly targeted another student and substantially interfered with her school attendance and ability to focus on her education. As students increasingly communicate and interact on the internet, schools need broad discretion to identify and prevent this type of bullying that undermines the school's pedagogical interests.

Respectfully submitted,

/s/

/s/

Counsel for Respondent

(Names omitted pursuant to Craven Rule B(3))

APPENDIX A

Constitutional Provisions

U.S. Const. amend. I

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

U.S. Const. amend. IV

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

APPENDIX B

Code Provisions

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.