# 34TH ANNUAL METROPOLITAN MENTOR MOOT COURT COMPETITION

2018



Justice Resource Center
122 Amsterdam Avenue
New York, NY 10023

Fordham University School of Law
Moot Court Board
150 West 62nd Street
New York, NY 10023

RULES
and
PROBLEM

# I. INTRODUCTION

This packet contains all the materials necessary to participate in the Thirty-Fourth Annual New York Metropolitan MENTOR Moot Court Competition. Participants may not utilize any materials not contained in this packet or referenced in Appendix I in preparing for and presenting their arguments.

The MENTOR Program focuses on student advocates' abilities to organize and present their arguments persuasively. Judges will question advocates as they normally would in appellate court proceedings. Participants should refrain from memorizing prepared texts. Rather, they should focus on understanding the legal issues, structuring coherent arguments, effectively responding to judges' questions, thinking extemporaneously, and being persuasive. Some participants may be called upon to advance unpopular positions with which they disagree. This is often a characteristic of the legal process and should not diminish the student's enthusiasm or the quality of presentation.

This year's fictional lawsuit is entitled Trey Manning v. Fordhamville High School. The issues are: (1) whether, under the framework set forth in Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988), Fordhamville High School ("FHS") violated Appellee Trey Manning's right to free speech when it blocked his article from publication to the school's student newspaper; and (2) whether FHS violated Manning's right to be free from unreasonable searches and seizures when it searched his backpack at school as part of broader search of certain FHS basketball teammates.

This packet contains: (1) the Statement of Facts; (2) the fictitious majority opinion of Judge Lewis and two dissenting opinions, one from Judge Margolis and one from Judge McDonnell; and

(3) the Order granting the Petition for a Writ of Certiorari to the United States Supreme Court, which includes the two questions certified for review.

## II. RULES OF THE COMPETITION

Preliminary rounds are scheduled for **Thursday, November 8; Friday, November 9; Tuesday, November 13; Thursday, November 15; and Friday, November 16, 2018.** Each participating school will compete on one day of the preliminary rounds, which will be held at Fordham University School of Law, 150 West 62nd Street, New York, NY 10023. All teams must check-in by **8:30 a.m.** on the morning of their round. Rounds will begin promptly at **9:00 a.m.** and **11:00 a.m.** Failure to check-in on time may result in disqualification. After the 9:00 a.m. rounds, **teams should remain in the competition room and await instruction** from a clerk as to the location of their 11:00 a.m. round.

Upon completion of the preliminary rounds, the two top-scoring teams from each of the first five days will advance to the quarterfinals. The next eight overall top-scoring teams from all the preliminary rounds will compete in the "Wild Card" round on **Monday, November 19, 2018**. During the Wild Card round, these eight teams will compete again and the two top-scoring teams will advance to the quarterfinals.

The twelve quarterfinalist teams will compete in the quarterfinal rounds on **Tuesday, November 20, 2018**. The four top-scoring teams will then advance to the semifinal rounds on **Monday, December 3, 2018**, to be held at the Thurgood Marshall United States Courthouse. The two top-scoring teams will advance to the final round on **Thursday, December 6, 2018**, also to be held at the Thurgood Marshall United States Courthouse. The winning team will qualify for a further round against the winning team from Long Island, to be held on **Thursday, December 13, 2018**, at the Thurgood Marshall United States Courthouse. Scores will not be disclosed during the

competition, but will be available for review after the competition ends. Schools will be notified of advancement by telephone. Advancement results will be available at the end of each day after all rounds are completed.

Competition conflicts must be submitted in writing by **Friday, October 19, 2018**. The last day to withdraw from the competition is **Thursday, October 25, 2018**. Untimely withdrawals may result in disqualification from the 2019 MENTOR Moot Court Competition.

## III. TEAMS

Each school will field two teams, and each team will have two students. Team I will represent Appellant Fordhamville High School on both issues. Team II will represent Appellee Trey Manning on both issues. Only two students from each team may participate in each round of oral argument.

The two finalist schools will be announced after the semifinal rounds at the closing luncheon to be held at **Thurgood Marshall United States Courthouse on December 3, 2018**. The two finalist teams will reach a mutual agreement as to which team will represent Appellant and Appellee, respectively. If no agreement can be reached, assignment of representation will be determined by a coin toss.

## IV. PREPARATION

Teachers and attorneys from sponsor law firms may coach the teams. Teams should arrange practice rounds alone, with teachers, and with attorneys from sponsor law firms. Visits to the appellate courts to observe the nature of appellate oral advocacy are also encouraged.

Teams **may not** utilize any legal precedent or research aids **not listed in Appendix I**. Moreover, participating attorneys may not use any outside materials in coaching student advocates. The facts contained in the record are inclusive; students may not invent facts or present data that

conflict with these materials. However, in drawing inferences about the strength of given arguments, students may draw upon personal knowledge, as well as general knowledge about crime and crime prevention.

A list of sources used in the problem is set forth in Appendix I. **PDF versions can be found on the JRC website, at http://jrcnyc.org/site/moot-court**. Many of the sources have been partially redacted for the students' convenience. Redacted sources are denoted with an asterisk in Appendix I. If a source has been redacted, students are **not permitted to use any complete, non-redacted versions of that source**. If a team has trouble accessing the cases, please contact the Mentor Editor, Andrew Spears, at (203) 947-6072 or email aspears2@law.fordham.edu for assistance.

## V. FORMAT OF THE COMPETITION

The order of arguments at each round will be as follows: (1) counsel for the Petitioner on Issue I; (2) counsel for the Petitioner on Issue II; (3) counsel for the Respondent on Issue I; and (4) counsel for the Respondent on Issue II. Each student advocate will have ten minutes to argue his or her client's position. Time periods will be strictly enforced. No rebuttal time will be permitted.

During the competition, only two team members may argue for each side—*i.e.*, one student advocate per issue. All four team members may, however, be seated at the counsel table in the courtroom. **Students may not pass notes once the oral arguments begin.**

All teams, coaches, teachers, and guests are invited to attend their school's rounds. Unfortunately, some rooms may not be large enough to accommodate all spectators. Therefore, we will contact each school to determine the number of spectators expected to attend the competition. If we are unable to accommodate your school's request, the teacher-coach will be

informed as such, and the number of spectators will be limited. **While MENTOR attorneys and teachers may be present during oral arguments, they may not coach the students while the round is in progress.** Additionally, all persons affiliated with a school participating in the competition are prohibited from previewing the arguments of other participants.

## VI. SCORING

All rounds will be scored by a panel of judges. No attorney may judge his or her MENTOR high school in any round. Judges will evaluate students on the following criteria: (1) overall persuasiveness; (2) ability to respond effectively to questions; (3) knowledge of the case law; (4) clarity of arguments; and (5) poise and appearance. Scoring in each category will range from one to ten, with ten being the highest score. After both teams have presented their arguments, the bench will give comments to the individual oralists. The bench will not announce a ruling on the merits of the case nor will the bench reveal the specific scores of the teams. The bench may, however, provide group or individual feedback to the oralists as time permits.

## VII. AWARDS

All team members will receive a "Certificate of Participation." The finalists will receive a gift commemorating their participation in the competition. The name of the overall winner will be engraved on the MENTOR trophy.

## VIII. CONTACT INFORMATION

Please address all inquiries regarding the New York Metropolitan MENTOR Moot Court Competition to:

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**Fordham University School of Law**
Moot Court Board, Room 1-103
150 West 62nd Street
New York, NY 10023

# United States Court of Appeals for the Thirteenth Circuit

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FORDHAMVILLE HIGH SCHOOL,
Appellant,

v.

TREY MANNING,
Appellee.

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On Appeal from the United States District Court for the District of Fordham

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Before the Thirteenth Circuit, sitting *en banc*.

Opinion for the Court by *Chief Judge* LEWIS;
Concurrence and Dissent by *Circuit Judge* MARGOLIS;
Concurrence and Dissent by *Circuit Judge* MCDONNELL.

**Lewis, *Chief Judge***

This case comes before the court on appeal from the United States District Court for the District of Fordham's grant of Appellee's motion for summary judgment. Appellant Fordhamville High School ("FHS") timely filed this appeal, asserting that the lower court incorrectly held that FHS had violated Appellee Trey Manning's First Amendment right to free speech, as well as his Fourth and Fourteenth Amendment rights against unreasonable searches and seizures.

This appeal involves two distinct questions, both of which touch upon fundamental constitutional rights. This Court must first determine whether, under the framework set forth in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), FHS violated Appellee's right to free speech when it blocked his article from publication to the school's student-run newspaper. This Court must also address whether FHS violated Manning's right to be free from unreasonable searches and seizures when police officers searched his backpack at school as part of a broader search of certain FHS basketball teammates.

## I.
## STANDARD OF REVIEW

On appeal of a district court's grant of summary judgment, an appellate court reviews the district court's conclusions of law *de novo*. See Pierce v. Underwood, 487 U.S. 552, 558 (1988).

## II.
## FACTUAL BACKGROUND

The material facts on summary judgment are undisputed and are set forth by this court herein.

Trey Manning is a seventeen-year-old junior at FHS in Fordhamville, Fordham. FHS is a public school with 3,127 students and 199 faculty members.

In early March 2017, Manning and his then-sophomore class were tirelessly studying for

their approaching midterm examinations. Manning was particularly anxious about his Chemistry I exam, as were many of his classmates. Their teacher, Helen Kompany, had been teaching Chemistry I for 40 years at FHS and was known for her incredibly difficult and unforgiving multiple-choice examinations. Unbeknownst to her, Mrs. Kompany was also developing a reputation for being increasingly forgetful in her old age. In fact, as Manning pored through pages of class notes and worksheets in preparation for Mrs. Kompany's exam, one of his classmates had other ideas. Jon Barkley, an FHS basketball teammate of Manning's, detested Chemistry I and had taken note of Mrs. Kompany's decline in carefulness around the classroom. More specifically, Barkley noticed that at the end of each lesson, as the class broke for lunch, Mrs. Kompany would neatly place her lesson plans in a file cabinet next to her desk and rarely, if ever, secured the contents of the drawer.

Eager for a high score on the exam, but equally desperate to avoid studying, Barkley hatched a plan: as the lunch bell rang and his classmates shuffled out of Mrs. Kompany's room, Barkley would slink up to the file cabinet and grab a few folders from inside, hoping that one might contain some useful documents, like an answer sheet to the upcoming midterm. During lunch, Barkley would photocopy the useful papers and return them to their place in the open file cabinet before Mrs. Kompany returned. On Monday, March 6, 2017, just three days before the Chemistry I exam, Barkley put his plan into action. To his delight, Barkley discovered not just the answers to the midterm exam, but also a draft of Mrs. Kompany's Chemistry I final exam, which accounted for 50% of the overall course grade.

Thrilled at the success of his scheme, Barkley stashed the photocopied documents inside a folder that he had received just a day before from the FHS basketball coach, Mike Sterling. The folder, which initially contained the team strategy for an upcoming rivalry game against Liverton

High School, was light blue and contained the words "Blue Wolves Basketball" in large block writing. Barkley spent an hour or so committing the exam answers to memory by repeatedly copying the answers down on loose-leaf pieces of paper. He took the exam with his classmates on Thursday, March 9. Needless to say, Barkley received an A on Mrs. Kompany's Chemistry I exam. Manning received a C+ on the exam, and the class as a whole averaged a B-.

Three weeks later, just a few minutes before the team bus left for Liverton, Barkley was running late and still needed to retrieve the uniform and game notes in his locker. Forgetting that the Blue Wolves Basketball folder still contained copies of the stolen Chemistry I papers, Barkley grabbed the folder and haphazardly tossed it in his basketball bag. As Barkley dashed down the hallway to catch the team bus, the Blue Wolves Basketball folder slipped out of his unzipped bag and landed face-up on the hallway floor behind him. Barkley kept running and got to the bus just before it was set to leave.

Manning, who wasn't traveling with the basketball team due to a shoulder injury, stayed at school after the final bell on the day of the Liverton game. Manning was an active member of *The Blue Moon*, the FHS student-run newspaper released on the third week of each month. FHS student-journalists wrote and edited *The Blue Moon* under the supervision of new FHS English teacher Mr. Lundqvist. Manning had yet to write a feature article for *The Blue Moon* and, following his shoulder injury, he was keen on taking advantage of his time away from basketball to work on an article. With the deadline to submit an article idea fast-approaching, Manning struggled to find a suitable idea. Feeling dejected about the article and upset to be missing the Liverton rivalry game, Manning left the newsroom around 6:00 P.M. and headed home.

As Manning walked towards the exit at the end of the sophomore hallway, he spotted a Blue Wolves Basketball folder lying face-up on the floor. Recognizing the folder as the one the

team members received in advance of the Liverton game, Manning picked it up and planned to bring it to practice the following day. As Manning moved to place the folder in his backpack, he noticed that this folder had much more paper in it than the folder he had received. Concerned that Coach Sterling was providing his teammates with more in-depth game plans than he had received, Manning opened the folder and, to his surprise, discovered the stolen Chemistry I papers.

Manning considered who might have dropped the folder. There were four other members of the FHS basketball team in his Chemistry I class. Manning suspected Barkley, who was particularly boastful after the exam, and made no mistake in telling much of the class that he had received an A. Angered that students could so easily find answer keys to an exam, Manning decided that the school's apparent cheating problem would be the story for his feature article in *The Blue Moon*.

The next day, rather than bring the folder to Coach Sterling, Manning brought it to Mr. Lundqvist, who thought the story had the potential to be the lead article in the April edition. Over the next week, Manning worked around the clock. In connection with the article, Manning interviewed a handful of FHS teachers about their policies on how and where they stowed away their test materials. In doing so, Manning realized that many classroom environments at FHS were ripe for cheating. Manning was unaware of how exactly someone might have managed to steal the Chemistry I papers, but, in researching his article, recognized a myriad of ways in which the scheme could have been executed. Manning submitted his draft of the article on April 7, two weeks before *The Blue Moon* would be published to the school community.

On that same day, the newspaper's Editor-in-Chief, Leroy Shephard, proofread the article, selected it as the lead piece for the April edition, and presented it to Mr. Lundqvist for final approval. After noting that the article was critical of Mrs. Kompany, Mr. Lundqvist brought the

article to Principal Tela Beckham for review. As a new teacher at FHS, Mr. Lundqvist did not want to be responsible for stirring up controversy and told Principal Beckham about Manning's suspicions of Barkley. Upon review of the article, Principal Beckham was unimpressed. She ordered Mr. Lundqvist to block Manning's article from publication and to tell Manning that the article was not adequately supported by facts and evidence. Principal Beckham told Mr. Lundqvist privately that she was concerned that the article might harm the reputation of the long-tenured Mrs. Kompany, saying: "Mrs. Kompany has given her heart and soul to this school, and should not have her 40-plus years of dedication diminished by a bored sophomore who is probably just unhappy with his grades." Principal Beckham also voiced her concern that the article would call unnecessary attention to the alleged cheating issues at FHS.

Desperate to find the true culprit, Principal Beckham called Coach Sterling, who informed her that Blue Wolves Basketball folders were only distributed to members of the FHS basketball team. With this knowledge, Principal Beckham determined that the school needed to take quick, decisive action to eliminate the growing threat of cheating at FHS. Principal Beckham phoned Jim Mendy, Chief of the Fordhamville Police Department, and asked if a few officers could come to FHS and search the backpacks of each member of the FHS basketball team enrolled in Mrs. Kompany's Chemistry I class as the students entered school. Chief Mendy was happy to oblige and requested a list of the Chemistry I basketball players and their photographs, which were emailed to him that afternoon.

The searches were executed as planned. On the morning of Monday, April 10, police officers Wilson and Zuccarello identified the Chemistry I basketball players as they entered school and thoroughly searched their backpacks for signs of stolen test papers. While searching Barkley's backpack, the officers found a hand-written copy of Mrs. Kompany's answer key to the Chemistry

I midterm exam. Barkley was immediately brought to Principal Beckham's office. Evidently, while Barkley lost his Blue Wolves Basketball folder, he had nevertheless retained his handwritten answer key to the exam, which he had used while studying to commit the answers to memory. Barkley had no choice but to confess. Pursuant to the school's anti-cheating policy, he was suspended for two weeks and assessed a failing grade on his Chemistry I midterm exam.

After Barkley's confession, the officers continued their search of the other Chemistry I basketball players. While searching Manning's backpack, the officers did not find any incriminating papers, but they discovered a bottle of unmarked medicine placed in a smaller pocket within the main compartment of his backpack. When Manning declined to answer the officers' questions as to the contents of the bottle, Manning was sent to Principal Beckham's office, where she and Coach Sterling identified the medication as a supplement called Peptalin. Peptalin is a steroid used to speed up recovery from injury. The school district banned the supplement in 2012. As it turned out, Manning had been taking Peptalin to expedite his recovery from shoulder surgery. Upon their discovery, Principal Beckham and Coach Sterling suspended Manning from the FHS basketball team for the remainder of his high school career.

## III.
## PROCEDURAL HISTORY

Appellee Trey Manning filed a complaint in the United States District Court for the District of Fordham through his mother, pursuant to 42 U.S.C. § 1983 (1996). The complaint requested injunctive relief and damages. Manning argued that his constitutional rights were violated under Hazelwood School District v. Kuhlmeier when Principal Beckham ordered Mr. Lundqvist to deny Manning's article publication in the April edition of *The Blue Moon*. See 484 U.S. 260 (1988). Manning further argued that the subsequent search of the Chemistry I basketball players upon their

arrival to school was conducted in violation of Manning's Fourth and Fourteenth Amendment rights.

FHS filed a motion for summary judgment, arguing that the blocking of Manning's article was appropriate under Hazelwood because it was reasonably related to legitimate pedagogical concerns regarding cheating and harm to the school's reputation. See id. FHS further argued that it possessed individualized suspicion to search the FHS basketball players. Given that the prevalence of cheating can be detrimental to the legitimacy and effectiveness of the school, the search was necessary to stymie a potential cheating problem at FHS. Manning filed a cross-motion for summary judgment.

The district court denied FHS's motion for summary judgment and granted Manning's cross-motion, finding that the school violated both his First and Fourth Amendment rights. The court found a First Amendment violation because Principal Beckham's underlying rationale for the blocking of Manning's article was not reasonably related to a pedagogical concern. The court further ruled that Manning's search was conducted in violation of the Fourth Amendment because it was not made pursuant to individualized suspicion and because the school's interests in conducting the search were outweighed by Manning's privacy interests.

FHS timely appealed to this Court. We now determine that FHS did not violate Manning's constitutional rights and REVERSE the district court's decision.

## IV.
## *THE BLUE MOON* ARTICLE AND THE FIRST AMENDMENT

This Court first addresses whether FHS impermissibly violated Manning's First Amendment rights when it blocked him from publishing his article about the school's struggles combatting a growing threat of cheating within their halls. For the reasons set forth below, we

reverse the district court's decision and hold that FHS acted lawfully, and that Manning's right to free speech was not violated.

## A.
## LEGAL BACKGROUND

The First Amendment to the United States Constitution reads:

> 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. I (emphasis added). At issue here is the Free Speech clause. It is well established that the First Amendment rights of students in public schools "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). Nevertheless "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960).

When analyzing restrictions on student speech in the public-school context, the Supreme Court has distinguished between "pure speech" and school-sponsored speech. "Pure speech" is generally entitled to more comprehensive protection under the First Amendment. See Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 506 (1969). More specifically, school censorship of "pure speech" is unlawful unless school administrators have reason to believe that the speech would "substantially interfere with the work of the school or impinge upon the rights of other students." Id. at 509. On the other hand, school-sponsored student speech is typically afforded less protection. See Hazelwood, 484 U.S. at 271. Accordingly, when speech is considered "school-sponsored," a separate analysis is used. Id. at 273.

In Hazelwood, the Supreme Court laid out the standard for analyzing censorship of school-sponsored student speech. There, the Court struck down a challenge to a public school's decision to delete a student's article from publication to the school's newspaper. Id. at 271. The Court reasoned that because school newspapers "bear the imprimatur of the school," they are essentially a part of the school curriculum, and "a school must be able to set high standards for the student speech that is disseminated under its auspices." Id. at 271–72. Thus, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, as long as their actions are *reasonably related to legitimate pedagogical concerns*." Id. at 273 (emphasis added). Specifically, the Court found that the school had legitimate pedagogical concerns regarding the article's mature subject matter, the privacy of the students implicated by the piece, and a lack of time to alter the article to reflect these concerns. Id. at 274–76. Subsequent courts have also looked to "the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the [article]" to guide their Hazelwood analyses. Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 722–23 (2d Cir. 1994) (quoting Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) (internal quotations omitted)).

**B.**
**DISCUSSION**

Today, we consider the facts before us to determine if the blocking of Manning's article was reasonably related to the legitimate pedagogical interests of FHS. We reverse the decision below, holding that FHS's actions were indeed reasonably related to legitimate pedagogical concerns and the district court erred in finding otherwise.

**1.**
**SCHOOL-SPONSORED STUDENT SPEECH**

As an initial matter, it is critical to emphasize that the Supreme Court's decision in Hazelwood unequivocally afforded public schools' greater latitude in restricting *school-sponsored* student speech, and the decisions of school administrators in this regard are entitled to substantial deference. See Hazelwood, 484 U.S. at 272; see also Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) (applying Hazelwood at the university and college level). Hazelwood made clear that "what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts." 484 U.S. at 267 (quoting Fraser, 478 U.S. at 683) (internal quotations omitted); see also Epperson v. State of Ark., 393 U.S. 97, 104 (1968) ("public education in our Nation is committed to the control of state and local authorities."). In blocking Manning's article from publication, Principal Beckham was engaging in curricular decision-making regarding school-sponsored student speech. See Pompeo v. Bd. of Regents of the Univ. of New Mexico, 852 F.3d 973, 982 (10th Cir. 2017). Moreover, it is not the role of the courts to meddle in "conflicts which arise in the daily operation of school systems and which do not 'directly and sharply implicate' basic constitutional values." Epperson, 393 U.S. at 104. Accordingly, the overarching judicial emphasis on deference to school decision-making must guide our analysis herein.

**2.**
**HAZELWOOD ANALYSIS**

We now turn our attention to the Hazelwood analysis and first hold that FHS has legitimate pedagogical interests in protecting its own reputation and academic integrity. In Oyama v. University of Hawaii, the Ninth Circuit acknowledged a school's interest in upholding its own reputation. 813 F.3d 850, 865 (9th Cir. 2015). The court found that a school acted lawfully when

it refused to hire a student-teacher applicant because of certain inappropriate speech that the applicant had made. Oyama, 813 F.3d at 855. Here, Manning's article would expose Mrs. Kompany's carelessness in failing to appropriately safeguard her exam materials, harming the reputation of FHS and one of its longest-tenured faculty members. Furthermore, it is undisputed that a school has a pedagogical interest in upholding its academic integrity. Manning's article would essentially give FHS students a detailed road map on how to cheat and get away with it. Specifically, the article would disseminate information from FHS faculty on how and where test materials are stored. In this sense, Manning's article may actually encourage cheating by detailing the ease in which students can do so. Moreover, the spread of this information could cause students and parents to question the merits of a strong work ethic. Therefore, FHS had legitimate pedagogical interests in ensuring that the school's reputation and academic integrity were not impaired.

We next determine that FHS's decision to block the publication of Manning's article was reasonably related to both of these legitimate pedagogical concerns. Under Hazelwood, a restriction on school-sponsored student speech must be reasonably related to legitimate pedagogical concerns. 484 U.S. at 273. Hazelwood "does not require that [restrictions] be the most reasonable or the only reasonable limitations, only that they be reasonable." Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 630 (2d Cir. 2005).

First, as to the school's interest in its reputation, publication of Manning's article would damage that reputation by broadcasting FHS's shortcomings to the entire school community and calling unnecessary attention to an issue which might be better resolved behind-the-scenes. See id. Second, regarding the school's interest in academic integrity, blocking the article's publication would ensure that FHS could take action to thwart its cheating problem before students were

exposed to the various ways that they could cheat. See id. Unfortunately, FHS had clearly permitted the existence of a school environment that allowed students to cheat. In recognition of this growing issue, Principal Beckham decided that action should be taken to counter the threat to the school's academic integrity and censored Manning's article which, if published, would have provided students with a roadmap on how to cheat. Accordingly, because publication would have damaged the school's reputation and inspired additional cheating, the school's actions were reasonably related to its legitimate pedagogical interests in protecting its reputation and academic integrity.

Ultimately, the district court erred in finding that FHS violated Manning's First Amendment rights. Today's holding emphasizes the substantial deference that should be afforded to school administrators in curricular decision-making and recognizes the school's action as reasonably related to its legitimate pedagogical interests.

## V.
## THE SEARCH

This Court next addresses whether Manning's search upon his entrance to school was lawful under the Fourth and Fourteenth Amendments. For the reasons set forth below, we reverse the district court and hold that FHS acted lawfully, and that Manning's Fourth and Fourteenth Amendment rights were not violated.

### A.
### LEGAL BACKGROUND

The Fourth Amendment to the United States Constitution ensures that the federal government shall not violate:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . 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.

U.S. CONST. amend. IV. The Fourteenth Amendment extends the Fourth Amendment's protections to searches conducted by state officers, including public school officials. U.S. CONST. amend. XIV; see Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995). Students have Fourth Amendment rights, "but those rights are different in public schools than elsewhere . . . because schools have a legitimate need to maintain an environment in which learning can take place." Burlison v. Springfield Pub. Sch., 708 F.3d 1034, 1039 (8th Cir. 2013) (internal quotations and citations omitted). Accordingly, the Fourth Amendment's probable cause requirements are not implicated in the public school setting, as it mandates "some easing of the restrictions to which searches by public authorities are ordinarily subject." New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). Nevertheless, "[a] search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." Id. at 337. Courts must balance a school's need to "maintain an environment in which learning can take place" against schoolchildren's equally legitimate expectations of privacy. Id. at 340.

School searches conducted with individualized suspicion are controlled by the standard laid out in T.L.O. See T.L.O., 469 U.S. at 341–42; see also DesRoches v. Caprio, 156 F.3d 571, 575 (4th Cir. 1998). T.L.O. set forth a reasonableness requirement that a school search be both: (1) "justified at its inception;" and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." T.L.O., 469 U.S. at 341–42; see also Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146, 1149 (7th Cir. 1997).

In the absence of individualized suspicion, school searches are analyzed under the standard articulated in Vernonia. See Vernonia, 515 U.S. at 661; see also DesRoches, 156 F.3d at 575. In Vernonia, the Supreme Court held that in situations where individualized suspicion is absent,

courts are required to analyze the reasonableness of a school search by balancing the students' legitimate privacy interests against the government's interests in conducting the search. 515 U.S. at 661. Indeed, these searches are reasonable only in a narrow class of cases. Id. at 652.

## B.
## DISCUSSION

Today, we consider the facts before us to determine if FHS's search violated Appellee Trey Manning's Fourth and Fourteenth Amendment rights. We reverse the decision below, holding that Manning's search was conducted pursuant to individualized suspicion and was reasonable under T.L.O. In doing so, we conclude that the district court erred in finding that Manning's Fourth and Fourteenth Amendment rights had been violated.

### 1.
### INDIVIDUALIZED SUSPICION

As an initial matter, we find that FHS possessed individualized suspicion to search Appellee Manning. The Fourth Circuit acknowledged in DesRoches that in some situations, a group of students may be so small that the entire group may be searched without violating the individualized suspicion requirement. 156 F.3d at 576. Indeed, "[s]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." T.L.O., 469 U.S. at 346 (citing Hill v. California, 401 U.S. 797, 804 (1971)). Here, it is undisputed that only five FHS basketball players were enrolled in Mrs. Kompany's Chemistry I class. Moreover, because only FHS basketball players were given Blue Wolves Basketball folders, FHS knew that those five student-athletes were the only possible culprits of the stolen tests. Understanding this, Principal Beckham instructed the Fordhamville police officers to methodically search only these five

students. This is sufficient individualized suspicion to conduct a search of each Chemistry I basketball player, including Manning.[1]

Accordingly, we hold that FHS had individualized suspicion to search Manning and that T.L.O. governs our analysis of the search.

**2.**
**T.L.O. ANALYSIS**

With T.L.O. as our controlling standard, we must next determine whether the search was both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 341–42.

Turning to the first prong in this analysis, we hold that the school's search of Appellee Manning was justified at its inception. A school search is justified at its inception when there are reasonable grounds to suspect 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 342. Here, because FHS knew at least one of the five Chemistry I basketball players was the individual responsible for the stolen tests, it was reasonable for the school to suspect that the search would turn up incriminating evidence. See id. Thus, we hold that the FHS search satisfies the first prong of the T.L.O. analysis.

The second prong of T.L.O. is also met here. A school search is permissible in its scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Id. Here, the school's measures were clearly related to its objective of catching the culprit of the stolen test scheme. As discussed above, the search was narrowed to the five Chemistry I basketball players. Moreover, the officers were instructed to only search the students' backpacks for evidence

[1] Manning argues that the school no longer had individualized suspicion to search him when Barkley confessed, as the true culprit had been found. However, it was reasonable for FHS to believe that the others might also be involved—after all, the five students were teammates.

of cheating. Cf. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375-77 (2009) (upholding search of student's backpack but striking down subsequent strip search as excessively intrusive). Finally, there is no dispute that FHS has a strict anti-cheating policy, and the Supreme Court has emphasized the "substantial need" of public school officials to conduct searches on school grounds to maintain order in schools. See T.L.O., 484 U.S. at 341. Thus, the school search here was reasonably related to its objectives.

As to the intrusiveness of the search, Manning argues that the school's use of law enforcement to conduct the search was excessively intrusive in light of the nature of the infraction. However, the school's search did not become excessively intrusive simply because law enforcement was present. Neither the incriminating papers found in Barkley's backpack, nor the banned supplement found in Manning's backpack were used to initiate criminal proceedings against them. See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 833 (2002) (finding use of law enforcement in conducting a search had a weaker implication on student privacy when the fruits of the search were not actually turned over to law enforcement). Rather, the purpose of the search was to catch the individual who stole the tests and to impose academic consequences upon him. Because the fruits of the search were not used to initiate criminal proceedings against the students, the officers' presence was not excessively intrusive.

We hold that FHS's search of Manning was reasonable under T.L.O. and therefore complied with Fourth Amendment requirements.

## VI.
## CONCLUSION

Accordingly, for the reasons set forth above, the judgment of the district court is hereby REVERSED.

**Margolis, *Circuit Judge*, concurring in part and dissenting in part:**

I concur with the majority that Fordhamville High School did not violate Appellee Manning's Fourth and Fourteenth Amendment rights when it searched him. However, I write separately to dissent from Part IV of the majority's opinion regarding Manning's First Amendment claim. Hazelwood requires that censorship of school-sponsored speech must be *reasonably related* to a legitimate *pedagogical* interest of the school. 484 U.S. at 273. First, FHS's interest in its own reputation is neither a legitimate pedagogical concern, nor is it consistent with the Supreme Court's analysis in Hazelwood. Second, to the extent that quelling a cheating threat is a legitimate pedagogical concern, the school's action in blocking Manning's article was not reasonably related to that concern. Finally, the true pedagogical concern here relates to the lessons inherent in writing for a school newspaper, which, ironically, are actually hindered by FHS's actions. Therefore, I would affirm the district court's holding and find that FHS violated Manning's First Amendment rights.

## I.
## PEDAGOGICAL INTERESTS

FHS's interest in upholding its reputation is not a legitimate pedagogical concern. The majority overreads an inconsequential observation in Oyama as support for the notion that a school's interest in its own reputation is legitimately pedagogical. 813 F.3d at 855. Merriam-Webster's Dictionary defines pedagogical as "of or relating to teachers or education." Pedagogical, MERRIAM-WEBSTER DICTIONARY (2018). Therefore, FHS's self-serving attempt to protect its own reputation under the guise of pedagogical concerns is unavailing here.

In addition, FHS's alleged pedagogical interest in its own reputation is not consistent with the interests that the Supreme Court found convincing in Hazelwood. Indeed, the factual similarities between Hazelwood and this case begin and end with the existence of a school

newspaper article. 484 U.S. at 262. Hazelwood emphasized student maturity levels and privacy issues as legitimate pedagogical concerns supporting the school's restriction on a student's speech. Id. at 276. The Court also noted a lack of time for the school to edit the student's article to better align with school concerns.[2] Id. at 271–72. Here, there can be no legitimate allegation that the subject matter of Manning's article is unduly mature for a high school audience. See id. Moreover, there is no suggestion that Manning's article was poorly written and researched, or vulgar and profane. Cf. Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533, 539 (2d Cir. 2011) (finding that a school's refusal to publish a sexually explicit cartoon was reasonable). The majority errs in finding that, simply because the restricted speech here emanated from a student newspaper, FHS has satisfied the Hazelwood requirement.

Furthermore, the majority errs in accepting the school's supposed interests in academic integrity and ignores the evidence that the school's *only* interest was to ensure its own reputation. Principal Beckham told Mr. Lundqvist, in no uncertain terms, that she disapproved of Manning's article because Mrs. Kompany "should not have her 40-plus years of dedication diminished by a bored sophomore who is probably just unhappy with his grades." Therefore, the facts before us make clear that Principal Beckham's *only* concern in blocking Manning's article was not to protect the school's academic integrity but to uphold the school's reputation, cover for the carelessness of a long-tenured faculty member and, frankly, to discredit Manning's intentions as a student-journalist. See Hazelwood, 484 U.S. at 288 (Brennan, J., dissenting) (noting how "readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of

[2] In discussing the factual differences between Hazelwood and this case, it is critical to note that, when Principal Beckham blocked Manning's article, there were two weeks left before *The Blue Moon* was set for publication to the student body. In other words, unlike Hazelwood, Manning had ample time to edit his article to soften his critique of FHS and Mrs. Kompany. Rather than give Manning this opportunity, FHS blocked the article entirely.

students"). Thus, the majority should not have considered academic integrity as a legitimate pedagogical concern here.

## II.
## THE SCHOOL'S ACTION

Even if we accept that FHS had a legitimate pedagogical interest in protecting its academic integrity, the actions taken by the school were not *reasonably related* to that concern. In Hazelwood, the school's actions in blocking the student's article were directly related to its legitimate pedagogical concern of preserving the privacy interests of those implicated in the article. Id. at 276. Here, the school censorship of Manning's article has no impact whatsoever on the school's ability to combat cheating. The action reasonably related to the school's supposed pedagogical interest would be to take steps that make it harder for students to cheat. Instead, the school's action simply keeps the FHS community from understanding the school's own shortcomings and suppresses a student's ability to speak on the difficult issues facing FHS. Therefore, the school's action was not reasonably related to this pedagogical concern.

## III.
## THE TRUE PEDAGOGICAL CONCERN

The majority has also misunderstood the true pedagogical interest at issue here and improperly reads the Hazelwood opinion as affording school administrators with *carte blanche* to effectively curate the school newspaper. FHS's latitude in regulating school-sponsored student speech should be "to assure that participants learn whatever lessons the activity is designed to teach." Id. at 271. As a school newspaper, *The Blue Moon*'s purpose is to teach students that journalism sometimes requires an author to report on topics that might be unpopular, unsettling, or controversial. See Sheldon H. Nahmod, Beyond Tinker: The High School as an Educational Public Forum, 5 HARV. C.R.-C.L. L. REV. 278, 281–88 (1970) (recognizing that schools can

benefit from student criticism of educational policy, school rules, and school faculty). Thus, by blocking Manning's article from publication, FHS effectively restrained the *actual* pedagogical interest of *The Blue Moon* – the interest which truly relates to the educational purpose of a student-run newspaper. Accordingly, today's holding does not accurately reflect the spirit of the First Amendment and its critical importance in the public school context. See Tucker, 364 U.S. at 487 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

For the foregoing reasons, I respectfully dissent.

**McDonnell, *Circuit Judge*, concurring in part and dissenting in part:**

I concur with the majority that FHS did not violate Appellee Trey Manning's First Amendment rights when the school blocked his article from publication to *The Blue Moon*. However, I write separately to dissent from Part V of the majority's opinion regarding Manning's Fourth and Fourteenth Amendment claims. Manning's search was not conducted on the basis of individualized suspicion and accordingly, the majority should have analyzed this case under the standard set forth in Vernonia. 515 U.S. at 652–53. Regardless, the search still fails to satisfy the requirements laid out in T.L.O. 469 U.S. at 342. The search was not likely to turn up evidence that a student had violated school rules, and the use of law enforcement personnel in conducting the search was excessively intrusive considering the nature of the infraction. Therefore, I would affirm the district court's holding and find that FHS violated Manning's Fourth and Fourteenth Amendment rights.

## I.
## INDIVIDUALIZED SUSPICION AND VERNONIA ANALYSIS

The majority incorrectly finds that FHS possessed individualized suspicion to search Manning. While the school may have narrowed its search down to a small group, the majority errs in ignoring the specific evidence which pointed to Manning's innocence. After all, Manning found the initial evidence of a cheating problem at FHS and turned that evidence over to school officials. Moreover, his aim was to write an article that would expose the very cheating in question here. While searches of small groups do not necessarily violate the individualized suspicion requirement, see DesRoches, 156 F.3d at 576, when there is evidence which tends to exculpate a member of the group, it cannot be said that suspicion exists as to that individual.

Furthermore, to the extent the school ever possessed individualized suspicion to search Manning, they certainly lost it when Jon Barkley confessed to the cheating scheme. See DesRoches, 156 F.3d at 577–78 (noting that the existence of individualized suspicion can change as a search develops). FHS should have halted the search as soon as Barkley confessed; they did not. Therefore, no individualized suspicion existed at the time the school searched Manning, and the appropriate analysis governing this case is that which the Supreme Court laid out in Vernonia.

Vernonia set forth a more student-friendly standard which requires a balancing of the students' legitimate privacy interests against the government's interests in conducting the search. 515 U.S. at 652 –53. While cheating is undoubtedly harmful to schools and their ability to function effectively, it does not rise to the level of the government interests which Vernonia and others have found to be sufficient in tipping the scale away from an individual's privacy rights. See, e.g., id. at 661 (suspicionless search to deter student drug use); Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (suspicionless automobile checkpoints seeking drunk drivers); United States v.

Martinez–Fuerte, 428 U.S. 543 (1976) (suspicionless automobile searches for illegal immigrants at the border).

In dissenting today, I would hold that Manning's search failed to pass Vernonia review and therefore was conducted in violation of his Fourth and Fourteenth Amendment rights.

## II.
## T.L.O. ANALYSIS

Even if the majority is correct in finding that FHS did not violate the individualized suspicion requirement, they nevertheless improperly find that the search satisfies T.L.O. First, Manning's search fails the justification prong because the search was not likely to turn up evidence of cheating. The majority seemingly neglects the obvious fact that the incriminating evidence which FHS sought had already been found. Indeed, the Blue Wolves Basketball folder, and all the incriminating evidence therein, was already in the school's possession. Furthermore, not only did Manning intend to expose the cheating issues at FHS, he also correctly attributed the stolen tests to Barkley. Despite Principal Beckham's knowledge of Manning's suspicion that Barkley was the culprit, the school still searched Manning, even after confirming that those suspicions were correct. Therefore, it can hardly be said that Principal Beckham had reasonable grounds to believe that the ensuing search of the remaining Chemistry I basketball players would turn up any evidence of the stolen tests. See Redding, 557 U.S. at 368 (finding a constitutional violation where school officials had no reasons to suspect that student was concealing drugs in her underwear).

Moreover, while the search of the five Chemistry I basketball players *did* turn up evidence of cheating, this does not allow us to retroactively conclude that the search was *per se* "likely to turn up evidence." See United States v. Jacobsen, 466 U.S. 109, 115 (1984) ("The reasonableness of an official invasion of [a] citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred."). In fact, that evidence was found can best be attributed

to sheer luck. While we recognize that students' Fourth Amendment rights are diminished in the public-school context, this does not afford schools the ability to conduct baseless searches that would elsewhere demonstrate egregious constitutional violations.

The majority also errs in finding that the FHS search met T.L.O.'s intrusiveness prong. More specifically, the majority improperly reads Earls as finding that the school's use of law enforcement has less impact on the intrusiveness of a student search when the fruits of the search are not actually turned over to law enforcement. To the contrary, Earls emphasizes that students have a strong expectation that they be free from intrusion by law enforcement, despite a more limited expectation that they will be free from intrusion by school officials. 536 U.S. 822, 833 (2002); see Policing Students, 128 HARV. L. REV. 1747 (2015) ("[w]here students are searched by police, or where the results of the search must be turned over to law enforcement, the students' privacy interest should therefore weigh more heavily."). Accordingly, because Principal Beckham enlisted the aid of multiple law enforcement officials, the administration of the search was excessively intrusive. See T.L.O., 469 U.S. at 342. The majority plainly errs in discounting the effect that the use of law enforcement personnel has on this analysis. FHS's underlying interest in ending its cheating problems is serious, but not criminal. It is simply unreasonable to expect that the nature of the infraction at issue here would warrant a law enforcement response. See id.

For the foregoing reasons, I respectfully dissent.

(U.S. SUPREME COURT ORDER LIST: 578 U.S.)

Wednesday, October 3, 2018

CERTIORARI GRANTED

No. 16-1420

TREY MANNING
v.
FORDHAMVILLE HIGH SCHOOL

The petition for a writ of certiorari is granted. This Court may consider the following questions raised by the parties:

1. Whether, under the framework set forth in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), Fordhamville High School violated Appellee's right to free speech when it blocked an article from publication to the school's student-run newspaper.

2. Whether FHS violated Manning's right to be free from unreasonable searches and seizures when police officers searched his backpack at school as part of broader search of certain FHS basketball teammates.

## APPENDIX I – Table of Authorities

**Cases**

**Statutes**



**Articles**

*** denotes source with redactions for student convenience**