Case No. 07-0412

In The

# Supreme Court of the United States

October Term, 2017

**REGINA GEORGE,**

*Petitioner,*

v.

**EVANSTON BOARD OF EDUCATION and TIM DUVALL.**

*Respondents.*

On Petition for Writ of Certiorari
to the Supreme Court

## RECORD

## QUESTIONS PRESENTED

1. Whether a police officer's action of opening and viewing all files stored in a file folder after a private party reviewed only some of these files constitutes an unreasonable search and seizure under the Fourth Amendment?

2. Whether a public school violates a student's First Amendment right to free speech when they punish her for speech that was communicated outside of a school setting, but nevertheless deemed by the school to be bullying?

**Regina GEORGE**, Plaintiff-Appellant

v.

**EVANSTON BOARD OF EDUCATION, Tim Duvall, and Damian Carr**,
Defendants-Appellees

No. 12-1795

United States Court of Appeals for the
Fourteenth Circuit

Argued: March 25, 2016

Decided: May 23, 2016

KAREN, Judge.

In this case, we consider whether the police's subsequent warrantless search of Regina George's computer violated her Fourth Amendment right against unreasonable searches and whether a school suspension issued pursuant to the state of Evanston's anti-bullying statute based upon information in e-mails found on that computer violates George's First Amendment rights.

Because the police's search did not exceed the scope of the previous private search conducted, we hold that George's Fourth Amendment rights were not violated. We further hold that, because schools may limit student speech that substantially interferes with the rights of another student at school, George's First Amendment rights were not violated. Accordingly, we affirm the judgment of the United States District Court for the Western District of Lonestar granting summary judgment in favor of the Appellees.

## I. Facts

Regina George, then an eighteen-year-old student at North Shore High School in Evanston, Lonestar, was using her MacBook Air computer in class to work on a presentation. After warning George several times to stop "Facebooking" in class against school policy, her teacher, Ms. Norbury, confiscated her computer, and placed

it in her desk drawer. Ms. Norbury informed George that she could pick it up at the end of the day. George, a notorious "mean girl" at school was furious, but her classmates were glad to finally see her disciplined for her blatant lack of respect towards their favorite teacher.

At lunchtime, one of George's classmates, Kady Heron, decided she would teach George an additional lesson. Heron had long suspected George of bullying her best friend, Janice Ian. Janice had been acting very upset at school, and although Heron could not be sure, she assumed George was behind it. So, Heron decided she would browse through George's computer during lunchtime when the classroom would be empty to try and confirm her suspicions. Once the classroom emptied, Heron retrieved the computer out from Ms. Norbury's desk, and proceeded to search the computer. The computer was not password protected.

First, Heron reviewed George's e-mails. Heron saw one e-mail that George had sent to Janice at 10:58 PM the previous night informing Janice that she was not welcome at George's pool party because "no girl would want to be in a bathing suit around a lesbian." Heron also saw several other e-mails George had sent to Janice in the weeks prior which indicated that Janice would have trouble making friends due to her sexual orientation 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." All of the e-mails that Heron reviewed were sent between 10:00 PM and 11:00 PM. Disgusted and upset at what she found, Heron grabbed her USB thumb drive from her backpack, and saved these e-mails to this device

As she was about to log out of George's computer, Heron noticed another folder labeled "Mary Jane." She did not know anyone at the school by this name, but she knew that George also worked at a popular cosmetics company ("Mary Jane Cosmetics") that was modeled after the famous Mary Kay brand. Heron also knew this term to be a common nickname for marijuana. Heron curiously opened the "Mary Jane" folder and discovered six files in the folder: "inventory_1," "sales_1," "inventory_2," "sales_2," "inventory_3," "sales_3." They appeared to be spreadsheets. Kady attempted to open each of these files, but most of them were password protected.

She was, however, able to open the "inventory_1" and "sales_1" files because they were not password-protected. Those two spreadsheets seemed to show her attempts at accounting for the various marijuana sales she had made to unnamed individuals, not her cosmetics sales. Heron quickly saved the entire "Mary Jane" folder to the USB.

Heron immediately contacted Principal Tim Duvall, and the school resource officer, Officer Coach Carr, who is an Evanston police officer. Principal Duvall immediately began reviewing the e-mails Heron had provided, and he decided to contact Janice to investigate the matter further. In response to these inquiries, Principal Duvall learned that Janice, sixteen-years-old at the time, had been seeking counseling from North Shore's guidance counselor due to the e-mails she received from George. She was leaving class early once a week to attend these meetings. She had also repeatedly asked her mother to remove her from North Shore and homeschool her because she "felt personally victimized" by George and was having difficulty emotionally processing her interactions with George. Her friends, including Heron, indicated to Principal Duvall that Janice had been acing "weird" at school.

While Principal Duvall reviewed the e-mails, Officer Carr attempted to open the pass-word protected "Mary Jane" folder that Heron had provided. He lazily typed in "PASSWORD" into the password prompt for "inventory_2" folder, chuckling to himself at his feeble first attempt, when to his surprise, the file opened. He then tried the same password on the rest of the files and found that it opened each of them. Based on the information provided by Heron, Officer Carr worked with Assistant Attorney General ("AAG") Kevin Napoor and applied for a search warrant for the contents of George's e-mails and the entire "Mary Jane" folder. Officer Carr's request for a search warrant was granted.

Officer Carr provided the unlocked "Mary Jane" files obtained from George's computer to AAG Napoor, who submitted them to the grand jury as his principal evidence in favor of indictment. In a deposition, also used as evidence in the indictment, Heron testified as follows:

**Deposition Direct Examination**

AAG Kevin Napoor:
Let me direct your attention to the day you accessed Ms. George's computer. What happened on that day?

Heron: I went to Ms. Norbury's office after I heard several rumors that Regina George was the one bullying my friend.

Napoor: And then what happened?

Heron: I saw a folder named "Mary Jane" in her computer and I remembered hearing some other rumors that Regina was selling marijuana to make extra money for her expensive clothes. I also knew she worked for the cosmetics company, so I was curious and I opened the folder.

Napoor: What did you see in that folder, if anything?

Heron: Six file thumbnails, and they all looked like some sort of spreadsheets.

Napoor: And then what happened?

Heron: I was only able to open two of them, "inventory_1" and "sales_1." I read them over.

Napoor: And what did you gather them to be, if anything?

Heron: Based on the rumors that I had heard about how Regina was selling drugs to people at school, I figured those were her way of accounting for her "business."

Napoor: And what did you do after that?

Heron: I was going to leave the classroom, but I thought the files in "Mary Jane" might become useful to stop her from bullying my best friend. So, I grabbed those folders and saved them on my USB.

Napoor: What did you do after that?

Heron: I contacted Officer Carr and told him everything I had found. I also gave him my USB.

**Deposition continued:**

**Deposition Cross-Examination**

Attorney Aaron Samuels:
Ms. Heron, when you opened my client's folder, "Mary Jane," were you able to open all files in that folder?

Heron: No.

Samuels: You were only able to open two files, "inventory_1" and "sales_1" right?

Heron: That's correct.

Samuels: Were you able to read the text, let's say for example, the item name of each cell by looking at the thumbnails of the ones that you could not open?

Heron: No.

Samuels: Did the name of those files suggest that they are sales of illicit drugs?

Heron: No. After I opened the first one though, all the others were named similarly.

Samuels: But you cannot be certain, not even 80% certain, that those other unopened spreadsheets are similar to "inventory_1" and "sales_1," right? Please just give me a yes or no answer.

Heron: No, but I was pretty sure.

Samuels: They could have been sales figures for her Mary Jane Cosmetics consulting, correct?

Heron: I suppose that's a possibility, but I didn't think so.

George was ultimately convicted of the sale and distribution of marijuana under Lonestar Law. Principal Duvall then decided that disciplinary action was necessary pursuant to the Evanston anti-bullying statute.[1] School administrators

[1] Evanston's anti-bullying statute, Ev. Gen. Stat. § 11-1111 (2012), directs boards of education to "develop and implement a safe school climate plan to address

ultimately suspended George from school for ten days, determining that George violated the Evanston anti-bullying law by engaging in bullying outside of the school setting, which created a hostile environment at school for the Janice.

George sued the Evanston Board of Education, Principal Tim Duvall, and Officer Coach Carr for violations of George's Fourth and First Amendment rights. The lawsuit challenges the constitutionality of the warrantless search of George's computer and the school administrators' discipline of George for speech outside of the school setting.

The District Court granted the Appellees' motion for summary judgment based on a determination that George's constitutional rights were not violated by the Appellees. We review the grant of summary judgment de novo.

## II. Fourth Amendment Analysis

The State argues that Officer Carr's search did not violate George's Fourth Amendment rights because: (1) this case is most similar to the most recent "private search doctrine" cases in the Fifth and the Seventh Circuits, and therefore, this court should adopt the "closed container" approach in determining the scope of the private search, *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001); *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012); and (2) even if this court agrees with the Sixth Circuit in abandoning the "closed container" approach and applies the "virtual certainty"

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the existence of bullying in schools." *Id.* 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." *Id.* Specifically, the statute notes that bullying includes such communications "based on any actual or perceived differentiating characteristic, such as . . . sexual orientation." *Id.* The school must 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 a school[.]" *Id.*

standard, Officer Carr's search meets the "virtual certainty" standard, and therefore the State did not unreasonably intrude George's expectation of privacy. *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015).

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. However, long-established precedent holds that the Fourth Amendment does not apply to non-government searches. When a private party provides police with evidence obtained in the course of a private search, the police need not stop that voluntary private search or "avert their eyes." *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971). Rather, the question becomes whether the government agent subsequently exceed the scope of the private search. *See United States v. Jacobsen*, 466 U.S. 109 (1984); *Rann*, 689 F.3d at 836. In *Jacobsen*, the Supreme Court of the United States held that individuals retain a legitimate expectation of privacy even after a private individual conducts a search, and additional invasions of privacy by the government beyond that committed by a private party, must be tested by the degree to which they exceeded the scope of the private search. *Jacobsen*, 466 U.S. at 115.

In *Jacobsen*, the Court explained what it means to "exceed the scope" of a private search as briefly mentioned in *Walter v. United States*, 447 U.S. 649, 662 (1980). In *Jacobsen*, a FedEx employee opened a damaged package and found several plastic bags of white powder inside a closed tube wrapped in crumpled newspaper. That employee put everything he found back in the tube, and the box containing the tube, and then notified the law enforcement authorities. The federal agent who responded to the employee's tip opened the box, unpacked the bags of white powder and performed a chemical field test confirming that the white powder was in fact cocaine and the addressees were subsequently convicted of possession of an illegal substance with intent to distribute. *Jacobsen*, 466 U.S. at 111–12.

Elaborating on Justice Stevens's reasoning in *Walter* that "additional invasions of respondent's privacy by the Government agent must be tested by the degree to which they exceed the scope of the private search," the Court found that the

agent's actions did not violate the Fourth Amendment. *Id.* at 115. The Court noted that the agent's actions in removing the plastic bags from the tube and visually inspecting their content "enabled the agent to learn nothing that had not previously been learned during the private search." *Id.* at 120. The Court therefore ruled that the government's subsequent actions did not infringe "any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct." *Id.* at 126; *see also Runyan*, 275 F.3d at 60. Here, plaintiffs argue that the private search exception is inapplicable in the instant case because the government agent exceeded the scope of the private search. They maintain that Officer Carr's pre-warrant search of the digital folder exceeded the scope of the review conducted by Heron.

We first reject plaintiffs' application of *Riley v. California*, 134 S.Ct. 2473 (2014), to justify adopting the heightened "virtual certainty" standard in this case. In *Riley*, the Court stated that cell phones "hold for many Americans 'the privacies of life'" because of the tremendous storage capacity of cell phones and the broad range of types of information that cell phones generally contain. *Id.* at 2489. The Court suggested that a search warrant for a cell phone must specify what part or parts of the information contained on it may be searched. *Id.* This view then was applied by the Eleventh Circuit in *Sparks*, a case where the government was found to have exceeded the scope of the private search on a smart phone by opening additional images and videos that were not previously viewed by the private party. *United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015). It is undisputed that this case does not involve smart phones, cell phones or portable digital devices of any sort. Therefore, we do not find that the heightened expectation of privacy standard suggested in *Riley* relevant in disposing the private search issue in the instant case.

Here, we are tasked with determining the scope of Officer Carr's private search. In order to follow the proper federal precedent—as the Fourth Amendment issue is a federal constitutional issue—we find it necessary to revisit *Jacobsen*, the seminal case of the "Private Search Doctrine" at issue. There, the Court engaged in a two-step analysis in determining whether the federal agent had exceeded the scope

of the original private search. *Jacobsen*, 466 U.S. at 115. The Court first examined the container(s) that stored the private matter, to see whether the government agent had revealed anything that had not been discovered by the private Fedex employee. Next, the Court examined whether when taking further actions, if any, the government agent was "virtually certain" that the nature of the information to be revealed would not further frustrate the individual's constitutionally protected privacy interest. *Jacobsen*, 466 U.S. at 125.

Since *Jacobsen*, courts did not encounter the application of the Private Search Doctrine to a subsequent police search of privately searched digital devices until the Fifth Circuit's case of *Runyan* in 2001. *See Runyan*, 275 F.3d at 465. Defendant Runyan was convicted on child pornography charges after his ex-wife and her friends entered his residence and obtained a collection of his digital media storage devices, which they then turned over to the police. *Id.* at 456. There, even though Runyan's ex-wife and her friends had only viewed a random selection of the disks, the police searched each disk and found additional child pornography images. *Id.* at 460. The Fifth Circuit applied *Jacobsen* to these facts and partially upheld the government search, holding that a search of any material on a computer disk is valid if the private party who conducted the initial search *had viewed at least one file* on the disk. *Id.* at 465 (emphasis added).

In so holding, the Fifth Circuit analogized digital media storage devices to containers, and found that "police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searches unless the police are already substantially certain of what is inside that container based on the statements of the private searches, their replication of the private search, and their expertise." *Id.* at 463. The Fifth Circuit further explained, since the police could be substantially certain, based on the information provided by Runyan's ex-wife and her friends, what the privately-searched disks contained, they did not exceed the scope of the private search when they searched those specific disks. *Id.* at 465. More than ten years later, the Seventh Circuit found this approach persuasive and adopted the Fifth Circuit's holding in *Runyan*. *Rann*, 689 F.3d at 837.

In other words, under the closed container approach, the police do not exceed the scope of the prior search if they examine the same container searched by the private individual, even if they do so in greater detail. Rather, under the closed container approach, they violate the individual's Fourth Amendment rights only if they examine an unopened container without substantial certainty of the unopened container's contents.

More recently, the Sixth Circuit came across the question of whether a police search of files on a laptop computer exceeded the scope of a prior private search. *Lichtenberger*, 786 F.3d at 491. In *Lichtenberger*, the defendant's girlfriend opened a folder on defendant's laptop computer labeled "private." *Id.* at 480. Within that folder were several sub-folders labeled with numbers. The girlfriend opened one of these sub-folders, viewed a few images, and discovered that they were child pornography. *Id.* She then notified the police, showed the responding officer several images on that computer, but then she was unsure whether they were the same images that she had originally seen. *Id.* at 481. The Sixth Circuit first suggested that a computer is not a single unit, but rather a combination of multiple containers. Thus, the court focused its analysis on the "virtual certainty" part of the *Jacobsen* test and found that because the private individual was unable to establish that she had showed the officers the exact same images that she had originally seen, the subsequent governmental search exceeded the scope of the private search and infringed upon the defendant's reasonable expectation of privacy in each individual computer folders. *Id.* at 491.

Adopting the closed-container approach, we conclude that Officer Carr's subsequent actions did not exceed Heron's original private search. Here, we do not have the same problem to reconstruct the original search as in *Lichtenberger*. In *Lichtenberger*, the private party was unable to recall exactly what she had originally seen. Ms. Heron, however, was able to testify to a certain accuracy that she recalled exactly what she had seen on George's personal computer—the two files that she was able to open, the thumbnail icons that she had seen of the entire folder, the remaining files that she recognized by their labels, and everything was within one single folder. Therefore, at the moment when Officer Carr viewed those files, he was, to a virtual

certainty, expecting to see nothing but the incriminating files as described by Ms. Heron.

Accordingly, we find that the State's actions subsequent to the private individual's search did not further intrude on George's constitutionally protected expectation of privacy.

## III. First Amendment Analysis

We must next decide whether, consistent with the First Amendment, the defendant school officials could punish George for her speech outside of the school setting under the Evanston anti-bullying statute. Although the Supreme Court has declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), it has also emphasized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). The Court has instructed that students' rights are "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. While the Supreme Court has not explicitly addressed whether its school speech cases apply to speech outside of the school setting, its decisions in *Tinker*; *Fraser*; *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 8 (1988); and *Morse v. Frederick*, 551 U.S. 393 (2007), guide us in determining the appropriate standard with which to analyze George's speech.

In *Tinker*, the Supreme Court emphasized that students' free speech rights must be balanced with "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker*, 393 U.S. at 507. There, the Court analyzed school officials' punishment of students for wearing black armbands to protest the Vietnam War under the First Amendment. *Id.* at 513–14. The Court held that the school policy barring students from wearing the black armbands violated the students' freedom of expression because "[t]here is here no evidence

whatever of Respondents' interference, actual or nascent, with schools' work or collision with the rights of other students to be secure or to be let alone." *Id.* at 508. *Tinker* concluded that school administrators may interfere with students' freedom of expression only if the expression "would substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509.

*Fraser* considered "whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly." *Fraser*, 478 U.S. at 677. The Supreme Court applied a different standard to the expression at issue in *Fraser* because of "[t]he marked distinction between the political 'message' of the armbands in Tinker and the sexual content of the respondent's speech" in *Fraser*. *Id.* at 680. The Court held that the punishment imposed upon the student for the lewd speech at the assembly did not violate the student's First Amendment rights because "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . ." *Id.* at 683.

*Hazelwood* addressed "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum." *Hazelwood*, 484 U.S. at 262. Because the newspaper was a school-sponsored forum, the Court noted that "[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Id.* at 270–71. The Court thus applied a different standard to hold that the school's limitation of the student's speech was constitutional. Id. at 272–73.

In *Morse*, the Court addressed whether a student banner displayed at a school-sponsored event which read "BONG HiTS 4 JESUS" was protected speech under the First Amendment. *Morse*, 551 U.S. at 396–97. The Court limited its holding to the context of speech promoting illegal drugs, stating "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded

as encouraging illegal drug use." *Id.* at 397. The Court noted that *Tinker*, *Fraser*, and *Hazelwood* each dealt with different types of student speech and that speech dealing with illegal drugs was also a distinct category of student speech. *Id.* at 403–06.

We must first determine which category of student speech George's e-mails fall under. The e-mails do not refer to drug use and were not school-sponsored, so the standards articulated in *Morse* and in *Hazelwood* do not apply here. We also do not believe that the e-mails could be considered "lewd" so as to fall under *Fraser*. That leaves only *Tinker*. Under the standard articulated in *Tinker*, student speech is not protected by the First Amendment if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. Next, because George's speech occurred outside of the school setting, we must determine whether *Tinker* applies to speech outside of the school setting. This court has not previously dealt with this issue, but other courts of appeals have determined that *Tinker* applies to off-campus speech in some circumstances.

We find their handling of the issue instructive. 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 the off-campus expression might also reach campus." *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008). The Fourth Circuit, in *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), also addressed the applicability of *Tinker* to speech outside of the school setting.

In *Kowalski*, a high school student, on a home computer, made and invited others to view a social media page devoted to allegations that a peer had a sexually transmitted disease. *Id.* at 567–68. The court determined "the language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying." *Id.* at 572. Specifically regarding bullying, the Fourth Circuit stated that, "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school

environment conducive to learning." *Id.* The court determined that there was a sufficient "nexus" between the speech and school activities to apply *Tinker* and render the school punishment constitutional. *Id.* at 577.

We agree with these and other courts that have concluded that schools must be able to limit speech outside of the school in some circumstances, especially because cyberspace has effectively become part of the school environment due to its pervasiveness in school culture and because bullying speech may adversely affect conduct within the school setting. *Tinker* provides a suitable standard to evaluate limitations on speech outside of the school setting because it is targeted at measuring the impact on the school experience by focusing on whether speech materially disrupts, involves substantial disorder, or invades another's rights at school.

Having determined that *Tinker* applies to some off-campus speech, we must now consider whether the off-campus speech here meets the requirements of *Tinker*. Specifically, we must determine whether George's e-mails "materially disrupt[ed] classwork or involve[d] substantial disorder." *Tinker*, 393 U.S. at 513. Although the Supreme Court has not articulated an exact standard for what constitutes material disruption, we are convinced that George conduct sufficed to meet that standard. The e-mails interfered with the recipient's education while she underwent counseling and led her to feel that she could no longer attend school with George due to the emotional toll of the communications.

The Ninth Circuit has held that wearing a shirt expressing disapproval for homosexuality interfered with the rights of other students and so was not protected by the First Amendment under *Tinker*. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178–79 (9th Cir. 2006), cert. granted, judgment vacated sub nom. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) ("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."). The speech here discussing sexual orientation and suggesting that others would wish to avoid the recipient because of her sexual orientation might similarly create tension so as to interfere with the recipient's rights at school. Moreover, as the Fourth Circuit

suggested in *Kowalski*, if school administrators had failed to intervene, the bullying here might "result[] in 'copycat' efforts by other students or . . . retaliation for the initial harassment." *Kowalski*, 652 F.3d at 574.

Bullying is a serious matter that can acutely interfere with a victim's quality of life and even his or her academic performance. *Harper*, 445 F.3d at 1178–79 ("The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development."). Because George's e-mails interfered with the recipient's rights at school, we hold that the school's action in punishing George and limiting her speech was constitutional pursuant to the standard enumerated in *Tinker*.

## IV. Conclusion

We hold that the search of George's computer did not violate her Fourth Amendment rights. Additionally, we hold that the school suspension for the content in the e-mails did not violate George's First Amendment free speech rights. As such, we affirm the judgment of the District Court granting summary judgment in favor of the Appellees.

AFFIRMED.

Judge GRETCHEN dissenting.

I respectfully disagree with the majority's conclusion that the search of George's computer did not violate her Fourth Amendment rights and that her punishment based upon the e-mail content does not violate George's First Amendment rights. For the reasons set forth below, I would reverse the decision of the District Court and remand for further proceedings.

## I. Fourth Amendment Analysis

The Fourth Amendment establishes that "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and

seizures." U.S. Const. amend. IV. However, this protection applies only to government action. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment protection is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *Id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

Once an individual's expectation of privacy in particular information has been frustrated by a private individual, the Fourth Amendment does not prohibit law enforcement's subsequent use of that information, even if obtained without a warrant. *Jacobsen*, 466 U.S. at 116. As a result, a warrantless governmental search conducted after a private search violates the Fourth Amendment only to the extent to which it exceeds the scope of the previously occurring private search. *Id.* at 115.

Here, Ms. Geoerge does not contend that she retains an expectation of privacy as to the two spreadsheet files opened by Ms. Heron. However, she argues that the State exceeded the scope of the private search when Officer Carr opened the remaining files in the same digital folder, and used those as the underlying probable cause to apply for a search warrant.

Considering the search and seizure circumstances in front of us here, three recent federal cases are relevant to the issue at hand. First, in 2014, the Supreme Court of the United States decided *Riley v. California*, 134 S.Ct. 2473 (2014). In *Riley*, the Court held that computers, smartphones, and other like devices are different than most other "containers" due to the amount of information they hold so they deserve special Fourth Amendment protection. In holding so, the Supreme Court opined that in cases regarding electronic devices, there is a heightened level of expectation of privacy equivalent to that in closets, drawers and storage containers in a dwelling. *See also People v. Michael*, 178 Cal. Rptr. 3d 467 (Cal App. Dep't Super Ct. 2014). The Supreme Court implied that, because people might store all sorts of private information on their mobile phones (contacts of relatives, medical information, birth dates, banking information and other sensitive personal information), these phones are entitled to the same Fourth Amendment protection as private residences.

Two circuits found that when the government's search revealed more information than the original discovery made by the private individual, the government's search exceeded the scope of the private search, regardless of where the information was stored. *See United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015); *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015); *United States v. Tosti*, 733 F.3d 816 (9th Cir. 2013). In the Sixth Circuit case of *Lichtenberger*, the defendant's girlfriend opened a folder on defendant's computer labeled "private." Within this folder were several other folders labeled with numbers. The girlfriend opened up one of these sub-folders, viewed several images, and discovered child pornography. After she called the police, she showed the responding officer several images, but was unsure whether they were the same images, the images from the same sub-folder that she had originally seen, or if they were even from the same sub-folder.

The Sixth Circuit, relying on *Riley*, ruled that the subsequent governmental search exceeded the scope of girlfriend's original search because girlfriend was unable to establish that she had showed the officers the exact same images that she had originally seen. Because the girlfriend was unable to replicate the exact search she originally performed, the police officer was not "virtually certain" that nothing else of significance will be discovered for the subsequent search of the remainder of Lichtenberger's computer. *Lichtenberger*, 786 F.3d at 488. And the government's search was hence a violation of the Fourth Amendment.

This view was also adopted by the Eleventh Circuit in *Sparks*. In that case, a cellphone was accidentally left at a Wal-Mart. The phone was not password-protected, and a Wal-Mart employee looked through the phone. She found some disturbing images of child pornography and told her fiancé, Widner, about what she had seen. Widner scrolled through all of the thumbnail images in a photo album found in the phone. He also stopped and opened a few images to full size, and he watched one video. Widner then turned over the phone to law enforcement. Widner showed investigators what he had seen. Later on, a police detective went through the folder and opened all of the images to full size and watched both the video Widner had seen

and another video Widner had not seen. *Sparks*, 806 F.3d at 1334. The Eleventh Circuit held that (1) the officer did not exceed the scope of the private search when he looked at the photos and files Widner already viewed, but that (2) the officer did exceed the scope of the private search, and therefore violated the Fourth Amendment, when he watched the video that Widner had not watched. "To the extent that [the police officer] viewed the second video, which was stored within the same album that Widner had scrolled through but which Widner did not view," the Sixth Circuit ruled, "[the police officer] exceeded the scope of Widner's private search." *Sparks*, 806 F.3d at 1336.

This case is most analogous to *Lichtenberger*. More importantly, here we have Ms. Heron testifying precisely that she had not looked at any files but the "inventory_1" and "sales_1" files. She then provided this information to Officer Carr. Therefore, by opening the other files in the same folder without any more information, Officer Carr could not have been "virtually certain" that he would not further intrude the defendant's privacy beyond the private search. We hold that the scope of Heron's "private search" was limited to the two files that Heron had actually viewed, and the State violated the Fourth Amendment in its subsequent search.

Moreover, in *Sparks*, the private party had the opportunity to browse through a few images and videos, whereas here, Ms. Heron had not opened every file that was submitted as evidence of the marijuana sales and distribution prior to the governmental search. Thus, we find that Officer Carr undoubtedly exceeded the scope of the private search when he opened every file in that same folder.

We are unconvinced by the State's argument that this court should take the "closed container" approach adopted by the Fifth and the Seventh Circuits. The Fifth Circuit first visited the issue of computer files in *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), which was decided more than ten years prior to the Supreme Court's decision in *Riley*. In *Runyan*, the defendant's soon-to-be-ex-wife discovered several computer disks in his barn and upon further examination, found that some of the computer disks contained child pornography. She turned the disks over to law enforcement, and the agents subsequently performed a warrantless search of every

single disk. The Fifth Circuit held that when a private party views even a single file on a computer disk, the police may subsequently inspect all content on the disk without a warrant. The Fifth Circuit drew comparisons between *Jacobsen*, and reasoned that because the defendant's expectation of privacy has already been compromised when a "container" was broken into by a private party, further governmental search within that "container" does not further intrude that expectation of privacy. This view was later adopted by the Seventh Circuit in *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012).

We reject this line of reasoning based on the "Private Search Doctrine" established by *Jacobsen* and *Walter*. Both were decided more than 30 years ago, before the proliferation of electronic devices which allow access to a great portion of an individual's personal information. Moreover, these two cases predate the Supreme Court's seminal opinion in *Riley* on the exact issue of electronic devices versus an individual's expectation of privacy. We therefore, respectfully disagree with the majority and hold that Officer Carr's search exceeded the scope of Heron's private search and violated Ms. George's Fourth Amendment right.

## II. First Amendment Analysis

I also dissent from the majority's holding that the punishment for her speech outside of school does not violate George's First Amendment rights. I disagree with the majority on two grounds. First, I believe that *Tinker* should not be applied to speech outside of a school setting. Second, even if *Tinker* were applicable to speech outside of school, I do not believe that the limitation on the speech here satisfies the requirements enunciated by the Supreme Court in *Tinker*.

First, I would not apply *Tinker* to speech outside of the school setting. The Supreme Court in *Tinker* noted that it was developing a special rule for school speech because of the "special characteristics of the school environment." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Moreover, Tinker limits its inquiry to the area within the "schoolhouse gate;" it states that "[a] student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or

on the playing field, or on the campus during the authorized hours, he may express his opinions [in accordance with *Tinker*'s requirements of student speech]." *Id.* at 506, 512–13. Why, if Tinker contemplated that its rule might apply outside of the school setting, did it limit its list to locations on school grounds?

In later school speech cases, the Supreme Court emphasized that the differing rules for student speech were grounded in the need to create a public education that teaches civility to prepare students for political and social discourse. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). Thus, freedom of speech "in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* In *Fraser*, the Supreme Court determined that speech that would be permitted for adults outside of school was not allowed in school and around children who view their instructors as role models to help them discern appropriateness. *Id.* at 683–85.

This reasoning reveals that the Supreme Court intended its school speech standards to apply where teaching and education are involved. Once students are no longer engaging with school subject matter—including coursework, athletics, other extracurricular activities, and even socialization on school grounds—such educational considerations no longer exist. Indeed, in *Morse v. Frederick*, 551 U.S. 393 (2007), the Supreme Court explicitly stated that "[h]ad Fraser delivered the same speech [which contained lewd and vulgar language] in a public forum outside the school context, it would have been protected." *Id.* at 405.

I interpret *Tinker* then as mandating that any increased restrictions on student speech as compared to adult speech be justified based upon the "special characteristics of the school environment" and not just based upon the fact that the speakers are students. *Tinker*, 393 U.S. at 506. The Fifth Circuit has been similarly reluctant to apply *Tinker* "in cases such as this involving off-campus speech brought on-campus without the knowledge or permission of the speaker." *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004). *Porter* declined to apply *Tinker* to a punishment for drawing a picture of an attack on the student's high school that was accidentally brought to the school years later by the student's brother. *Id.* at 611.

Although *Porter* did not explicitly state that *Tinker* is not applicable to speech outside of school, it did not engage in analysis regarding whether the drawing created a material disruption or substantial disorder or interfered with another's rights as required by *Tinker*. Nevertheless, the court determined that the speech was entitled to First Amendment protection. *Id.* at 620. Hence, it appears that the Fifth Circuit, at least in that circumstance, did not find *Tinker* applicable to speech outside of the school context. See also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (en banc) (Smith, J., concurring) ("Applying Tinker to off-campus speech would . . . empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.").

Because the e-mails here do not involve any of the "special characteristics of the school environment," I would not apply *Tinker*. The e-mails do not involve the educational or extra-curricular activities of the school. They are merely communications, albeit mean-spirited communications, between two students. Although unpleasant, adults have similar conversations wholly unrestricted by the government and protected by the First Amendment. As George's speech also does not fall under any of the other categories for student speech established by the Supreme Court (lewd speech, school-sponsored speech, and drug-related speech), I would hold that George's speech is entitled to protection under the First Amendment and that her punishment for the speech was unconstitutional.

Moreover, even if I were to apply *Tinker*, I also would not hold that it was foreseeable that George's e-mails would create a material disruption or substantial disorder at school. The other circuits that have identified such substantial disruption or disorder have done so in cases where the speech has been designed to solicit engagement with other students regarding a school-related issue, or is likely to disrupt school affairs based on the fear of a shooting. See generally *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011) (threat of school shooting); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011) (website where friends were invited to disparage another student); *Doninger v. Niehoff*, 527

F.3d 41 (2d Cir. 2008) (blog post inviting students to contact school officials regarding a grievance).

Here, the record does not reveal any communications between George and the recipient at school or that any school personnel or students knew about the e-mails before Heron discovered them. This situation simply does not seem analogous to the disruption and disorder created in the cases the majority mentions. It seems more similar to, and even less disruptive than, the situation in *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d at 915, where the Third Circuit found that speech was not reasonably likely to cause material disruption or substantial disorder at school. In *Blue Mountain*, a student, on a home computer, created a parody social media profile of her principal. *Id.* at 920. The court determined material disruption and substantial disorder could not reasonably be forecast because (1) the social media site was blocked on school computers, (2) other students who had found the profile only briefly discussed the profile in class, (3) the guidance counselor who filled in supervising testing while the principal was dealing with the matter only had to fill in briefly and likely was able to reschedule all appointments that she missed to do so, and (4) the student who created the profile attempted to make the profile private and to limit access only to a few of her friends. *Id.* at 921–23.

The Third Circuit determined that the communication in the case before it involved no greater a disruption than the students' expression via wearing the armbands in *Tinker*, so it held that the punishment for creating the profile was unconstitutional. *Id.* at 929–30. Here, before the officer brought the e-mails to the school's attention, nothing in the record demonstrates that George's communications with the recipient had ever caused disruption or disorder at school. No students talked about George's speech. No teachers had to fill in for others. No other students viewed the e-mails. Although the recipient did seek counseling, this is not a disruption of the type required by *Tinker* because a school guidance counselor routinely engages in such activity and the recipient may have sought counseling for reasons other than the e-mails. *See Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (en banc).

Because George's e-mails did not cause disruption or disorder at North Shore, I would reverse the decision of the District Court and remand for further proceedings.

## III. Conclusion

For the reasons set forth above, I disagree with the majority's holding. I would hold that the challenged actions by the law-enforcement officer and by school administrators violate George's Fourth and First Amendment rights and are unconstitutional.

**Fourth Amendment Cases**

*Coolidge v. New Hampshire*, 403 U.S. 443 (1971)

*People v. Michael*, 178 Cal. Rptr. 3d 467 (Cal App. Dep't Super Ct. 2014)

*Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012)

*Riley v. California*, 134 S. Ct. 2473 (2014)

*United States v. Jacobsen*, 466 U.S. 109 (1984)

*United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015)

*United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001)

*United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015)

*United States v. Tosti*, 733 F.3d 816 (9th Cir. 2013)

*Walter v. United States*, 447 U.S. 649 (1980)

**First Amendment Cases**

*Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015)

*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)

*D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011)

*Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008)

*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)

*J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011)

*Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011)

*Morse v. Frederick*, 551 U.S. 393 (2007)

*Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004)

*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)