

No. 05-1338

IN THE
SUPREME COURT OF THE STATE OF GRACE

OCTOBER TERM, 2008

Kit Politte and Cory Towles,

Petitioners,

v.

Horton Hopkins School District and Keena Smalls,

Respondents.

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

BRIEF FOR PETITIONER

Team 11
Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether public school officials violate a student's First Amendment rights by punishing her for creating an Internet web page at home, when the only on-campus effect of that speech is that fellow students view the web page during their free time.
2. Whether public school officials violate a student's clearly established Fourth Amendment rights by strip searching him at school without a warrant based merely on uncorroborated, speculative evidence.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
OPINIONS AND ORDER.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	1
Politte’s “Fighting All Dealers” Web Site.....	1
Politte Receives an Anonymous Photograph of Horton Hopkins Students.....	2
Towles’ History and the Fateful Party.....	2
The Posting of the Ambiguous Photograph and the Strip Searches That Followed.....	3
Towles Creates His Own Web Site To Address the Strip Search.....	3
Principal Smalls Suspends Politte and Towles for Their Web Pages.....	4
Proceedings Below.....	4
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	8
I. THE SCHOOL OFFICIALS VIOLATED THE STUDENTS’ FUNDAMENTAL FIRST AMENDMENT PROTECTIONS BY PUNISHING THEM FOR OFF- CAMPUS SPEECH THAT NEITHER DISRUPTED SCHOOL ACTIVITIES NOR INTERFERED WITH THE SCHOOL’S SPECIAL INTEREST IN SAFETY.....	8
A. School Officials May Not Regulate Off-Campus Internet Speech That Is Not Directed Toward the School Grounds.....	8
1. Purely Off-Campus Internet Speech Is Protected by the First Amendment.....	9

2.	Politte and Towles Did Not Direct Their Off-Campus Speech Toward the School Grounds Merely by Publishing Content on the Internet or Informing Fellow Students About Their Web Pages.....	10
B.	School Officials May Not Police Off-Campus Speech That Does Not Substantially Disrupt School Activities or Affect the Safety of the School.....	13
1.	The Web Pages Did Not Materially Disrupt School Operations When Students Viewed Them During Their Free Time and When a Few Concerned Parents Contacted the School.....	14
2.	Politte’s and Towles’ Web Pages Did Not Interfere with the School’s Interest in Maintaining the Safety of Its Students.....	18
II.	THE SCHOOL OFFICIALS’ STRIP SEARCH OF TOWLES WAS UNREASONABLE UNDER THE FOURTH AMENDMENT AND THE OFFICIALS ARE NOT ENTITLED TO QUALIFIED IMMUNITY WITH RESPECT TO THAT CONSTITUTIONAL VIOLATION.....	19
A.	The School Officials Lacked Reasonable Suspicion to Conduct Their Strip Search of Towles Because The Search Was Neither Justified at Its Inception nor Reasonable in Its Scope.....	20
1.	The Strip Search Was Not Justified at Its Inception Because School Officials Did Not Further Investigate or Corroborate The Anonymous Internet Tip Prior to Their Search.....	20
2.	The Strip Search Was Not Reasonable in Its Scope Because It Was Overly Intrusive and Traumatic.....	24
B.	The School Officials May Not Invoke Qualified Immunity with Respect to Towles' Fourth Amendment Claim Because They Should Have Reasonably Known That the Strip Search Was Unconstitutional at the Time They Conducted Their Search.....	26
	CONCLUSION.....	29

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

<u>Anderson v. Creighton</u> , 483 U.S. 635 (1987).....	27
<u>Ashcroft v. ACLU</u> , 542 U.S. 656 (2004).....	9
<u>Bethel Sch. Dist. No. 403 v. Fraser</u> , 478 U.S. 675 (1986).....	8, 9, 12
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982).....	25
<u>Harlow v. Fitzgerald</u> , 457 U.S. 800 (1982).....	19
<u>Hazelwood Sch. Dist. v. Kuhlmeier</u> , 484 U.S. 260 (1988).....	9, 12
<u>Morse v. Frederick</u> , 127 S. Ct. 2618 (2007).....	8, 12, 13
<u>New Jersey v. T.L.O.</u> , 469 U.S. 325 (1985).....	19, 20, 21, 22, 27, 28
<u>Pearson v. Callahan</u> , No. 07-751, 2009 U.S. LEXIS 591 (U.S. Jan. 21, 2009).....	19, 20
<u>Reno v. ACLU</u> , 521 U.S. 844 (1997).....	9, 11, 12
<u>Saucier v. Katz</u> , 533 U.S. 194 (2001).....	19
<u>Terry v. Ohio</u> , 392 U.S. 1 (1967).....	19
<u>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</u> , 393 U.S. 503 (1969).....	8, 9, 12, 13, 14

UNITED STATES COURTS OF APPEALS CASES

<u>Boucher v. Sch. Bd.</u> , 134 F.3d 821 (7th Cir. 1998).....	10
<u>Brannum v. Overton County Sch. Bd.</u> , 516 F.3d 489 (6th Cir. 2008).....	20, 26, 27, 28, 29
<u>Burnside v. Byars</u> , 363 F.2d 744 (5th Cir. 1966).....	13
<u>Cornfield v. Consol. High Sch. Dist.</u> , 991 F.2d 1316 (7th Cir. 1993).....	20, 24, 25, 26
<u>Doninger v. Niehoff</u> , 527 F.3d 41 (2d Cir. 2008).....	12, 13, 14, 16, 17
<u>Lavine v. Blaine Sch. Dist.</u> , 257 F.3d 981 (9th Cir. 2001).....	18
<u>Phaneuf v. Fraikin</u> , 448 F.3d 591 (2d Cir. 2006).....	20, 23, 24, 27
<u>Ponce v. Socorro Indep. Sch. Dist.</u> , 508 F.3d 765 (5th Cir. 2007).....	14, 18
<u>Porter v. Ascension Parish Sch. Bd.</u> , 393 F.3d 608 (5th Cir. 2004).....	10
<u>Redding v. Safford United Sch. Dist. #1</u> , 531 F.3d 1071 (9th Cir. 2008).....	20, 21, 22, 23, 24, 25, 27, 28
<u>Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.</u> , 607 F.2d 1043 (2d Cir. 1979).....	10, 11
<u>Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.</u> , 494 F.3d 34 (2d Cir. 2007).....	12, 18

UNITED STATES DISTRICT COURT CASES

<u>Beussink v. Woodland R-IV Sch. Dist.</u> , 30 F. Supp. 2d 1175 (E.D. Mo. 1998).....	14, 16
<u>Bystrom v. Fridley High Sch.</u> , 686 F. Supp. 1387 (D. Minn. 1987).....	15

Killion v. Franklin Reg'l Sch. Dist.,
136 F. Supp. 2d 446 (W.D. Pa. 2001).....14, 15, 16

Klein v. Smith,
635 F. Supp. 1440 (D. Me. 1986).....15

Latour v. Riverside Beaver Sch. Dist.,
No. 05-1076, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. Aug. 24, 2005).....11, 15, 16

Layshock v. Hermitage Sch. Dist.,
496 F. Supp. 2d 587 (W.D. Pa. 2007).....15, 16

STATE COURT CASES

J.S. v. Bethlehem Area Sch. Dist.,
807 A.2d 847 (Pa. 2002).....11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.....1

U.S. Const. amend. IV.....1

OPINIONS AND ORDER

The opinion of the Court of Appeals of the State of Grace is reproduced at R. 9-13. The opinion and order of the Badger County District Court granting Horton Hopkins School District's motion for summary judgment is reproduced at R. 1-8.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves questions relating to the First Amendment guarantee that Congress shall make no law "abridging the freedom of speech." U.S. Const. amend. I. This case also presents issues pertaining to the Fourth Amendment's protection "against unreasonable searches and seizures." U.S. Const. amend. IV. The full text of these amendments is set forth at Pet. App. A-B.

STATEMENT OF THE CASE

Politte's "Fighting All Dealers" Web Site

Kit Politte is a twelfth-grade student at Horton Hopkins High School ("Horton Hopkins") in Hopkinsville, Grace. (R. 1, 2.) On her home computer, outside of school, Politte created a web page on the social networking site Friendkepedia directed at the larger community of Hopkinsville. (R. 2.) Friendkepedia is a social networking web site geared toward high school and college students, but open to anyone. (R. 2 n.1.) Politte's page, called Fighting All Dealers (FAD), asked community members to submit information about potential drug dealers. She made herself the administrator of the FAD network and provided a link where individuals could email tips to her. She posted the strongest tips to the FAD web page and kept them anonymous to encourage members of the community to send her information. 235 people on Friendkepedia were members of the FAD network web page. (R. 2.)

Politte is also the founder a school-sponsored club called Drug Use Damages Schools (DUDS) that promotes a drug-free lifestyle within the school by posting flyers and organizing school assemblies. Politte informed the DUDS club about her FAD web page at their September 15, 2008, after-school meeting in a Horton Hopkins school classroom. All 130 DUDS members belong to the FAD network, and a total of 198 network members are Horton Hopkins students. (R. 2.)

Politte Receives an Anonymous Photograph of Horton Hopkins Students

On October 4, 2008, Politte received an email with a photograph attachment showing three Horton Hopkins students outside of a house at a party where the police had cited one student for marijuana possession and five students for underage drinking. In the photograph, one of the students was smoking. Politte posted the photograph on her Friendkepedia FAD network and attributed the photograph to “an anonymous Horton Hopkins student.” Despite the fact that the image did not reveal what the student was smoking, the caption read: “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. 3.)

Towles’ History and the Fateful Party

One of the non-smoking students in the photograph was Corey Towles. (R. 3.) Towles transferred to Horton Hopkins for the 2008-2009 school year. At his former school, he was an honor student with no drug-related disciplinary action who played baseball. Although he had transferred, Towles still wanted to continue playing baseball, so he thought it would be a good idea for him to get to know the players who were already on the team. (R. 2.)

With that in mind, Towles decided to attend a party at one of the player’s houses on October 3, 2008. (R. 2.) During his attendance at this party, an unidentified person took the photograph that Politte posted to her web site the following day. Towles stayed at the party for a

few hours, where he spent most of his time throwing a football around, but he left before the police broke up the party. (R. 3.)

The Posting of the Ambiguous Photograph and the Strip Searches That Followed

Although the photo on the FAD web site was taken at a private residence and it was unclear what the student was actually smoking, several Horton Hopkins parents who saw the photo were concerned about drug use at the high school. On October 5, 2008, those parents called Horton Hopkins' principal Keena Smalls to voice their concerns; the police also called Principal Smalls to inform her about the students they cited at the party. (R. 3.)

In response, Principal Smalls viewed the photo and the FAD web page, and then called each of the pictured students to her office along with the student who hosted the party. When questioned, all four boys denied possessing drugs. However, Principal Smalls decided to conduct searches of their lockers and back-packs anyway, pursuant to the school's drug policy. She found drugs in one of the boy's lockers, which prompted her to ask each of the boys to submit to a strip search. Although each boy refused, Principal Smalls made the male gym teacher, Mr. Waters, conduct the searches anyway. Each boy had to strip to his underwear, and Waters then searched their clothes. Waters did not provide the boys with other clothing to wait in while he searched. When Waters finally completed the strip search, he had only found a small amount of marijuana in one student's jeans. Waters found no drugs on Towles. (R. 3.)

Towles Creates His Own Web Site To Address the Strip Search

After Towles and his friends were strip-searched, he created a web page on Friendkepedia to address what he viewed as the unjust posting of his photograph on the FAD network, and the strip search that it precipitated. Towles wrote on his web page that the FAD network was a guise for the school-sponsored DUDS club, and was responsible for invading his

privacy and defaming him in front of his peers. (R. 3.) He also wrote that the Horton Hopkins school officials committed a far worse injustice by unreasonably searching his and his friends' lockers and then strip-searching their persons. He ended his post by writing: "We need to fight this injustice. I call for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment. Let's speak out against Smalls and the rest of these Hopkins idiots." (R. 4.)

Students who heard about Towles' web page began accessing his page as well as Politte's page from home. Students also viewed the pages during their free time throughout the school day and after school hours from the school's library and computer labs. (R. 4.)

Principal Smalls Suspends Politte and Towles for Their Web Pages

Principal Smalls was angry that Towles had criticized the school's strip search of him and his friends. She stated that she saw his web page as creating a potential for student protest. She was also concerned that Towles' and Politte's web sites were causing a disturbance and interrupting other students' education. Principal Smalls demanded that both Politte and Towles remove their Friendkepedia pages. When they refused, she suspended both students until they complied. (R. 4.)

Proceedings Below

On October 15, 2008, Politte and Towles filed an action under 42 U.S.C. § 1983 against the Horton Hopkins school district and Principal Smalls (the "School Officials"), alleging that they had violated the students' First Amendment rights by forcing them to take down their web pages, and that the School Officials had further violated Towles' Fourth Amendment rights by subjecting him to an unreasonable search of his person. (R. 4.) The Badger county court granted the School Officials' motion for summary judgment on both the First Amendment and the Fourth

Amendment claims. (R. 5.) As to the First Amendment claim, the court reasoned that the School Officials were entitled to summary judgment because Principal Smalls acted reasonably to quell a foreseeable disruption at school by shutting down both Politte's and Towles' web pages. (R. 6.) Similarly, the court held that the Officials' strip search of Towles was reasonable under the Fourth Amendment since the Officials had reasonable suspicion prior to their search that Towles likely had drugs, and the strip search was not intrusive because it only entailed a male teacher looking through his clothing. (R. 7-8.)

Politte and Towles appealed to the Courts of Appeals of the State of Grace. The court held that the School Officials could limit the students' First Amendment rights by regulating their web pages to prevent disruption during school hours. (R. 9.) The court further held that the Officials' strip search of Towles violated his Fourth Amendment rights because the search was not justified at its inception; the Officials did not have sufficient evidence warranting such an intrusive measure without further investigation. (R. 10-11.) Although the Officials violated Towles' Fourth Amendment rights, the court found that the Officials were entitled to qualified immunity because that violation was not clearly established at the time they acted. (R. 11-12.)

SUMMARY OF ARGUMENT

The School Officials violated Politte's and Towles' First Amendment rights by punishing them for making off-campus speech that did not materially disrupt the operation of the school or interfere with the school's interest in maintaining student safety. The Supreme Court has held that school officials may only restrict a student's freedom of expression when the student makes on-campus speech, and that speech materially disrupts school discipline, is lewd or vulgar, is part of a school-sponsored activity, or promotes illegal drug use. **(Part I.)** The School Officials also violated Towles' Fourth Amendment rights by subjecting him to a strip search based primarily

on an anonymous photograph of him at a party. School officials may only search a student if they have reasonable grounds before their search to believe that the student has violated a law or school regulation, and that the search will uncover evidence of that student's wrong-doing. Officials must limit the scope of their search to ensure it is not excessively intrusive under the circumstances. The School Officials were not entitled to qualified immunity under the circumstances, because Towles' constitutional right against the strip search was clearly established at the time the School Officials conducted their search. **(Part II.)**

Presumptively, school officials may not restrict a student's off-campus speech. School officials may only regulate off-campus speech if the student has taken affirmative steps to direct the speech to the campus. **(Part I.A.)** Since Politte and Towles created web pages at home on their own computers and away from the school grounds, that speech should have been presumptively treated as off-campus speech and afforded the same protection as speech in society outside the school setting. **(Part I.A.1.)** Since Towles did nothing more than create his web page at home, the record contains no evidence that he took any affirmative steps to direct his speech toward the campus. Although Politte mentioned her web page to an after-hours, on-campus gathering of a school-sponsored club, merely informing the students about her page did not rise to the level of bringing her speech to campus. Since neither Towles nor Politte brought their speech to campus, the School Officials were not permitted to punish the students for that speech. **(Part I.A.2.)**

Even if the School Officials were permitted to treat off-campus Internet speech as constructive on-campus speech, they were still not permitted to discipline Towles and Politte for their speech because it neither caused material disruption of school activities nor interfered with the school's interest in maintaining school safety. **(Part I.B.)** It was not a substantial disruption

to the school when Principal Smalls had to field calls from a few concerned parents and investigate drug use in the school because that is part of her routine, daily job. There is no evidence in the record that Politte's and Towles' web pages caused any disruption to classes when students merely viewed them during their free time at home, in the school library, and in the school computer lab. Furthermore, it was not reasonable for Principal Smalls to forecast a disruptive protest from Towles' generalized complaint about Politte's web page and the strip search he experienced at the hands of the School Officials. **(Part I.B.1.)** Finally, neither Politte's nor Towles' web pages contained any content that could be reasonably interpreted as interfering with the school's interest in maintaining school safety. Therefore, the School Officials had no constitutional grounds for restricting the students' First Amendment rights. **(Part I.B.2.)**

The Grace court of appeals correctly determined that Towles' Fourth Amendment rights were violated because the School Officials lacked sufficient reasonable suspicion prior to their search. The School Officials should have conducted further investigation before strip-searching Towles, considering the only evidence they had was an uncorroborated anonymous tip that Towles might be connected to illegal drug possession, and drugs found in another student's locker. **(Part II.A.1.)** The Officials' strip search of Towles was also unreasonable in its scope since Officials lacked evidence connecting Towles to any illegal activity or school violation. Given his status as a minor, and the extremely invasive and traumatic nature of a strip search, the Officials needed to investigate further before resorting to that measure. **(Part II.A.2.)** Finally, the law prohibiting the strip search of Towles under the circumstances was clearly established at the time the Officials' conducted their search. Therefore, the Officials were not entitled to qualified immunity. **(Part II.B.)**

ARGUMENT

I. THE SCHOOL OFFICIALS VIOLATED THE STUDENTS' FUNDAMENTAL FIRST AMENDMENT PROTECTIONS BY PUNISHING THEM FOR OFF-CAMPUS SPEECH THAT NEITHER DISRUPTED SCHOOL ACTIVITIES NOR INTERFERED WITH THE SCHOOL'S SPECIAL INTEREST IN SAFETY.

“In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). There are four exceptions to the general rule of student freedom of expression. First, school officials may prohibit student expression if they reasonably forecast that the expression will materially or substantially interfere with school discipline and operation, or other students’ rights; officials may not restrict student expression merely to avoid the discomfort or unpleasantness that might accompany an unpopular viewpoint. See Tinker, 393 U.S. at 509. Second, school officials may prohibit vulgar and lewd speech on campus if it undermines the basic educational mission. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986). Third, school officials may regulate student speech during school-sponsored activities, or during activities “that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988). Finally, school officials may restrict speech in the school setting “reasonably viewed as promoting illegal drug use.” Morse v. Frederick, 127 S. Ct. 2618, 2625 (2007).

A. School Officials May Not Regulate Off-Campus Internet Speech That Is Not Directed Toward the School Grounds.

The Internet speech that Towles and Politte created at home was off-campus speech, and there was no evidence that either student purposefully directed that speech toward school

grounds. Therefore, the School Officials had no constitutionally valid grounds to regulate either student's speech.

1. Purely Off-Campus Internet Speech Is Protected by the First Amendment.

When Politte and Towles published content to their web pages from their homes, that expression was off-campus speech and merited the full protection of the First Amendment. School officials may only restrict student speech "in light of the special characteristics of the school environment;" however, this restriction does not extend beyond the "schoolhouse gate." Tinker, 393 U.S. at 506. On campus, officials are still limited and may only regulate school-sponsored activities bearing "the imprimatur of the school." Kuhlmeier, 484 U.S. at 271. This regulatory power does not extend to lewd and vulgar speech outside the school environment. Fraser, 478 U.S. at 688 (Brennan, J., concurring). Generally, the First Amendment protects Internet expression to an even greater extent than media such as radio and television, and has shielded even indecent Internet speech from overbroad government regulation. See Ashcroft v. ACLU, 542 U.S. 656, 673 (2004); Reno v. ACLU, 521 U.S. 844, 869 (1997).

Politte and Towles were not in the school environment when they published speech to the Internet from their home computers. Neither Politte nor Towles published their speech while engaged in school-sponsored activities. Towles wrote, as an individual, about an episode he experienced at school; the record contains no evidence that Politte represented her FAD web page as having any association with the school-sponsored DUDS group or Horton Hopkins. Rather, Politte's page was available to all Hopkinsville residents and addressed itself to community members. The large membership overlap between the members of Politte's web page, Horton Hopkins students, and the DUDS group merely illustrates the common interest of all three groups in promoting a drug-free community. The membership composition of the FAD

network alone does not communicate the “imprimatur of the school,” and no reasonable person could believe that, when Politte recommended her FAD page to a meeting of the DUDS group, she was endorsing it on behalf of the school. Nor could any reasonable person believe that Politte’s page was an alter-ego of the school-sponsored DUDS group merely because of Towles’ one-time accusation on his web page.

The web pages that Politte and Towles created at home may have contained topics of interest to the school, but they remained off-campus speech. In the absence of any affirmative acts by Towles and Politte to bring their speech to school grounds, those pages were presumptively protected from school regulation.

2. Politte and Towles Did Not Direct Their Off-Campus Speech Toward the School Grounds Merely by Publishing Content on the Internet or Informing Fellow Students About Their Web Pages.

The fact that Towles’ web page criticized school policy and Politte’s web page raised the specter of drug-dealing among Horton Hopkins students did not give the School Officials sufficient cause to punish them for their speech when the students took no significant steps to bring that speech onto school grounds. Since Politte only promoted her web page in a limited fashion on campus and Towles did not promote his web page at all, they did not direct their speech toward school grounds in a manner that allowed school officials to discipline them.

Even when the off-campus speech relates to the school, school officials may only police that speech when a student has directed it toward the campus. See Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) (drawing depicting the school building under attack was off-campus speech because someone other than the creator brought it to school); Boucher v. Sch. Bd., 134 F.3d 821, 829 (7th Cir. 1998) (school could treat underground newspaper as a on-campus speech because students distributed it on campus); Thomas v. Bd. of Educ., Granville

Cent. Sch. Dist., 607 F.2d 1043, 1050 (2d Cir. 1979) (school could not punish student publishers of underground newspaper featuring sexual content and school satire when students produced and distributed copies off-campus and only minimal production occurred in the school).

The Internet is different from media like radio and television because “the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.” Reno, 521 U.S at 887. Even when speech is published on the Internet, school officials may not regulate it unless the student has taken affirmative steps to bring the speech to school grounds. See Latour v. Riverside Beaver Sch. Dist., No. 05-1076, 2005 U.S. Dist. LEXIS 35919, at *4 (W.D. Pa. Aug. 24, 2005) (school could not punish student for publishing offensive rap lyrics to the Internet when he did not communicate them directly to fellow students who were the subjects, or to the school); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (student’s “Teacher Sux” web site was on-campus speech because he brought the speech to school by personally accessing the site from a classroom, aimed the speech at the specific audience of students, showed the site to a fellow student at school, and informed other students about the site’s existence).

Towles did not direct his speech toward the school in any manner when he simply published it to a web site marketed toward high school and college students. There is nothing in the record to indicate that he accessed the page at school or showed it to any of his fellow students. His speech is akin to that of the drawing created at home or the underground newspaper created and distributed off campus, and retains the full protections of off-campus speech. That the content of his speech was of interest to the specific audience of Horton Hopkins students was not a sufficient reason for school officials to discipline him when he did nothing to bring that speech to school grounds.

Politte did not affirmatively bring her speech to school grounds or to the specific audience of Horton Hopkins students. She created a web page of interest to the entire Hopkinsville community; it was not a web site tailored specifically to students. Politte did not expose Horton Hopkins students to her speech. She recommended to the DUDS group a web page available to the entire community. Politte did not show the students her web page, instruct them to view it during school hours, or ask them to show the web page to other students during school hours. At most, Politte informed the DUDS members about the existence of her speech, and under Reno, the School Officials may not regulate Politte's Internet speech simply because she made other students aware of its existence.

A rule that would permit school officials to police a student's off-campus Internet speech merely because she informed her fellow students that she had a blog or a Friendkepedia account would ignore the on-campus/off-campus distinction established by Tinker and reaffirmed by Fraser, Kuhlmeier and Frederick. A rule that treated a student's off-campus Internet speech as *per se* on-campus speech would be contrary to the Court's opinion in Reno that a viewer must take affirmative steps to view Internet content, and that the Internet, as a medium, does not have the same "invasive nature" as radio or television. Reno, 521 U.S. at 868-69, 887.¹

Under an analysis that correctly preserves the Tinker distinction between on-campus and off-campus speech, Towles' and Politte's web pages should be treated as off-campus speech. The students did not take affirmative steps to bring their speech to school grounds when they

¹ Some lower courts treat off-campus Internet speech as on-campus speech because it could foreseeably reach the campus. See Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007); Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008). Given the "viral" nature of Internet content, the ubiquity of networked computers in the classroom, and the propensity for gossip to travel through a school community, any student-created Internet speech of sensational interest to the student body could foreseeably reach school grounds. Thus, under this approach there is virtually no Internet speech that would escape the authority of school officials.

merely published their web pages to the Internet, or in Politte's case, informed fellow students of the existence of one of the pages. Therefore, the School Officials did not have the authority to restrict their off-campus speech.

B. School Officials May Not Police Off-Campus Speech That Does Not Substantially Disrupt School Activities or Affect the Safety of the School.

Even if this court decided to treat all speech created on a social networking site like Friendkedia as expression that could foreseeably reach the campus, the School Officials were not permitted to discipline Politte and Towles for their web pages. The Grace court of appeals misquoted the "foreseeable material disruption" test in its opinion. It incorrectly suggested that this test was disjunctive, and that school officials may police any speech that reached campus without considering whether it caused a material disruption.² For a school to justify a prohibition on speech it is not merely sufficient to show that the speech could foreseeably reach the campus. The school must still show that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Tinker, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

Alternatively, in the absence of a substantial or material disruption, school officials may police off-campus Internet speech that foreseeably and indirectly reaches the campus, if that speech were "reasonably viewed as promoting illegal drug use." Frederick, 127 S. Ct. at 2625. School officials may also restrict speech "advocating a harm that is demonstrably grave and that

² The court stated, "a student may be disciplined for expressive conduct, even occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' *or* at least when it was similarly foreseeable that the off-campus expression might also reach campus." (R. 9 emphasis added.) Here, the court attempted to quote Doninger; however, the court added an "or." Doninger, 527 F.3d at 48. This addition materially misstated the law and altered the test.

derives that gravity from the ‘special danger’ to the physical safety of students arising from the school environment.” See Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 770 (5th Cir. 2007).

1. The Web Pages Did Not Materially Disrupt School Operations When Students Viewed Them During Their Free Time and When a Few Concerned Parents Contacted the School.

Principal Smalls could not reasonably characterize the phone calls she received from the Hopkinsville police and the handful of parents who viewed Politte’s page as a material disruption. Nor could she reasonably characterize the student body’s reaction as a material disruption when the students merely viewed Politte’s and Towles’ web pages from the computer lab and school library after school hours. Based solely on these events, Principal Smalls’ recital that she had a concern that protests would break out does not actually make her concern reasonable. Nor was it reasonable to base that concern on Towles’ generalized Internet complaint about the strip search.

An “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” Tinker, 393 U.S. at 508, 514 (a few “hostile remarks” by students and “discussion outside of the classrooms” was not sufficient to forecast substantial disruption of or material interference with school activities). For school officials to regulate student speech, they must show that the speech actually interfered with class or the functioning of the school, or that such a disruption was reasonably foreseeable. See Doninger, 527 F.3d at 50-52; see also Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (vulgar “Top Ten” list did not cause material disruption when there was no evidence teachers were incapable of teaching or controlling their classes); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1179, 1181 (E.D. Mo. 1998) (no evidence to support a particularized reasonable fear that a student’s vulgar web site criticizing the administration interfered with

school discipline when a class in which the teacher permitted the site to be viewed was not disrupted); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1392 (D. Minn. 1987) (material disruption when students distributed an underground paper on campus and other students passed around, read, and reacted to the paper in class).

Mere criticism or offensive remarks about teachers or administrators do not rise to the level of material disruption. See Killion, 136 F. Supp. 2d at 456 (court could not find, without more, that “the childish and boorish antics of a minor could impair the administrators' abilities to discipline students and maintain control”); Klein v. Smith, 635 F. Supp. 1440, 1441 n.4 (D. Me. 1986) (court doubted that teachers’ “professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly” in the face of a student giving a teacher the finger off-campus).

Nor does student “buzz” about off-campus speech constitute a disruption when it is unclear whether the buzz was caused by the speech itself, or the administration’s punishment of the speech. See Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (school did not demonstrate that on-campus “buzz” about a student-created Internet parody of the principal was caused by the profile itself or discipline the student received); Latour, No. 05-1076, at *6 (school could not contend that students wearing t-shirts with another student’s Internet-published rap lyrics was a disruption caused by that student or by the school, which had previously expelled him for those lyrics).

There can hardly be a better example of an “undifferentiated fear or apprehension of disturbance” than the reasons that Principal Smalls offered for her suspension of Politte and Towles. There is no objective evidence that Politte and Towles’ web pages substantially disrupted either the educational or administrative functions of the school. Like the web page in

Beussink and the “Top Ten” list in Killion, neither Politte’s nor Towles’ web pages caused disruption of class time. Principal Smalls could not reasonably forecast a disruption merely because there was student “buzz” about the pages and students were viewing the pages at home and on their free time in the school.

Any connection between Politte’s page and the subsequent buzz on campus is simply too attenuated. As in the Latour and Layshock cases, Principal Smalls failed to demonstrate that the student interest in Politte’s web page was based on the speech itself, rather than Principal Smalls’ strip search of Towles and his friends. Nor can Principal Smalls label the action she took in searching Towles and his friends as a material disruption caused by Politte’s posting. Principal Smalls’ performance of her job in administering the school’s anti-drug policy can hardly qualify as a disruption to school operations.

In Doninger, a high school junior who served on the school’s student council was angered by the cancellation of a school concert. Doninger, 527 F.3d at 43-44. The student body was already upset about the alleged cancellation when the student, along with other student leaders, wrote a mass email to students that included the school superintendent’s phone number. Id. at 44, 51. She also urged them to contact the superintendent and principal to protest the cancellation and to forward the email “to as many people” as possible. Id. The student then wrote a post on her blog that reproduced the previous email, called school system administrators “douchebags,” stated that the superintendent “is getting a TON of phone calls and emails,” and urged students to “write something or call [the superintendent] to piss her off more.” Id. at 45. The court applied the Tinker standard and found three reasons that the blog post caused a risk of substantial disruption: (1) The language “douchebags” and “piss off” with which the student urged others to contact the administration was incendiary and could create a risk of disruption;

(2) the student misled the student body by telling them the concert had been permanently cancelled, when in fact, the administration was considering rescheduling it; and (3) she was a student leader who was frustrating the operation of the student government and undermining its values. Id. at 50-52.

Towles' page is distinguishable from the plaintiff's blog post in Doninger. The plaintiff in Doninger used her influence as a student leader to communicate a specific set of instructions to flood the school administration with phone calls and emails to disrupt their operations. She fanned the flames of discontent that were already present among the student body about the concert's cancellation by using incendiary language. No reasonable person could confuse Doninger's vulgarly-worded disruptive plan with Towles' well-articulated complaint, or consider Towles' calls to "fight this injustice," "let our school administrators know," or "speak out against Smalls" to be anything more than a generalized rant. Towles' weak crescendo of "idiot" is not comparable to the vulgar and inflammatory language that the Doninger plaintiff used. Additionally, the Doninger plaintiff misrepresented facts about the cancellation of a school concert. Towles' posting recounted the true facts of a disturbing personal experience he had at the hands of the School Officials. For Principal Smalls to cause Towles to have this experience, then forbid him from either mentioning this event or encouraging other students to express their opinions to administrators about what happened, is pure censorship.

In the absence of any actual or forecasted disruption, Principal Smalls was not permitted to discipline Towles based merely on her anger about his web page's criticism of the school administration, or discipline Politte for her web page's attenuated connection to Towles' strip search.

2. Politte's and Towles' Web Pages Did Not Interfere with the School's Interest in Maintaining the Safety of Its Students.

Neither Towles' nor Politte's speech interfered with the school's interest in maintaining safety, and thus the School Officials could not rely on this ground for restricting their speech. Absent a material disruption, school officials may only discipline a student for speech that can foreseeably reach campus if the speech interferes with the school's interest in keeping its students safe. See Ponce, 508 F.3d at 770 (applying Justice Alito's concurring opinion in Frederick to find that schools have authority to restrict speech because of the heightened vulnerability of students in the school setting); Wisniewski, 494 F.3d at 38-39 (applying Tinker to find that student's instant messaging icon depicting and calling for the killing of his teacher could foreseeably reach the campus and materially disrupt the work and discipline of the school); Lavine v. Blaine Sch. Dist., 257 F.3d 981, 989-90 (9th Cir. 2001) (applying Tinker to find that student was properly disciplined for showing teacher poem filled with imagery of violent death and the shooting of his fellow students). Neither Towles' nor Politte's web pages fall under this category of speech. A web page promoting a drug-free community and a page complaining about a search conducted under the school's drug policy cannot reasonably be seen as interfering with the school's interest in keeping its students safe.

The School Officials failed to show that Politte and Towles engaged in on-campus speech when the students created their Internet web pages at home and did not direct their speech toward school grounds. Having also failed to show that either student's speech either materially disrupted school activities or interfered with the school's ability to maintain a safe environment, the School Officials had no constitutional basis for punishing Politte and Towles for their speech.

II. THE SCHOOL OFFICIALS' STRIP SEARCH OF TOWLES WAS UNREASONABLE UNDER THE FOURTH AMENDMENT AND THE OFFICIALS ARE NOT ENTITLED TO QUALIFIED IMMUNITY WITH RESPECT TO THAT CONSTITUTIONAL VIOLATION.

The Fourth Amendment provides that students have the constitutional right to be free from unreasonable searches and seizures conducted by public school officials. New Jersey v. T.L.O., 469 U.S. 325, 333-34 (1985). The Supreme Court has held that the Fourteenth Amendment protects this right by incorporating the Fourth Amendment against the States. Id. “Even a limited search of [a] person is a substantial invasion of privacy,” Terry v. Ohio, 392 U.S. 1, 24-25 (1967), and “the difficulty of maintaining discipline in the public schools today . . . is not so dire that students in the schools may claim no legitimate expectations of privacy.” T.L.O., 469 U.S. at 337-39 (holding that only prisoners lack legitimate expectations in privacy).

Under the Fourth Amendment, school officials must have reasonable suspicion based on the totality of the circumstances when searching a high school student who is on campus and under their supervision. T.L.O., 469 U.S. at 340-41. A twofold inquiry exists to determine whether the officials had reasonable suspicion: (1) was the search justified at its inception; and (2) was the scope of the actual search “‘reasonably related . . . to the circumstances which justified the interference in the first place.’” Id. (quoting Terry, 392 U.S. at 20).

Even if school officials have violated a student’s Fourth Amendment rights, they still might escape civil liability under the qualified immunity doctrine.³ Harlow v. Fitzgerald, 457

³ In Saucier v. Katz, the Supreme Court ruled that a determination of qualified immunity required a mandatory, sequential analysis of two questions: (1) did the official invoking qualified immunity violate a constitutional right on the facts alleged in the light most favorable to the injured party; and (2) was the constitutional right “clearly established” such that “it would have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” Saucier v. Katz, 533 U.S. 194, 197, 201-02 (2001). In a recent decision, Pearson v. Callahan, the Supreme Court decided that lower federal courts no longer had to apply this rigid two-part test, at least in any particular order. Pearson v. Callahan, No. 07-751, 2009 U.S. LEXIS 591, at 9

U.S. 800, 818 (1982). However, public school officials only qualify for this protection if the constitutional right they violated was not “clearly established” at the time the violation occurred.

Brannum v. Overton County Sch. Bd., 516 F.3d 489, 498-99 (6th Cir. 2008).

A. The School Officials Lacked Reasonable Suspicion to Conduct Their Strip Search of Towles Because The Search Was Neither Justified at Its Inception nor Reasonable in Its Scope.

Generally, a search is justified if reasonable grounds exist at the outset for suspecting the search will turn up evidence that the student has violated or is currently violating a particular law or school regulation. Cornfield v. Consol. High Sch. Dist., 991 F.2d 1316, 1320 (7th Cir. 1993); see also T.L.O., 469 U.S. at 342. However, the scope of that search is only valid when the “measures adopted are reasonably related to the search’s objectives and are *not excessively intrusive* in light of the age and sex of the student and the nature of the infraction.” T.L.O., 469 U.S. at 342 (emphasis added).

1. The Strip Search Was Not Justified at Its Inception Because School Officials Did Not Further Investigate or Corroborate The Anonymous Internet Tip Prior to Their Search.

The School Officials were not justified at the outset in conducting their warrantless, nonconsensual strip search of Towles and his wallet at school, because the Officials based their search solely on an uncorroborated anonymous Internet tip and marijuana found in another student’s locker. School officials must have more evidence than an uncorroborated anonymous tip to support a warrantless strip search of a student on school grounds. T.L.O., 469 U.S. at 343-44; Redding v. Safford United Sch. Dist. #1, 531 F.3d 1071, 1074 (9th Cir. 2008) (en banc); Phaneuf v. Fraikin, 448 F.3d 591, 598-99 (2d Cir. 2006). Under the Fourth Amendment, “guilt

(U.S. Jan. 21, 2009). However, the Court recognized that analyzing both steps would “often [be] beneficial” and in its own analysis, the Court began its qualified inquiry with the second prong. Id. at 9, 14. Petitioners also begin with the second prong, in part, because the immediately preceding section answers the first prong already.

by association [is] certainly too thin of a reed for such a substantial intrusion into [a student's] expectations of privacy.” Redding, 531 F.3d at 1084.

In T.L.O., the vice principal's search of a fourteen year old student's purse at school was justified at its inception because the vice principal had reliable information suggesting the student had cigarettes in her purse. T.L.O., 469 U.S. at 345-46. Right before the student was brought to the vice principal's office, a teacher caught the student smoking in the girl's bathroom against school rules. Id. Given this behavior, reported by a credible teacher, it was likely that if the student “had cigarettes . . . her purse was the obvious place in which to find them.” Id. at 346. Thus, under the circumstances, the vice principal was permitted to search the purse, because he had reasonable grounds for suspecting the search would turn up evidence of the student's violation of the school rules, and his suspicion was based on more than an “inchoate and unparticularized . . . hunch.” Id. at 342, 346.

Unlike in T.L.O., the School Officials in the instant case did not have any specific evidence linking Towles to illegal drug use or drug possession before strip-searching him. The Officials questioned Towles to determine if he had drugs on campus based solely on a photograph posted on the Internet. The picture provided no evidence of Towles personally violating a law or a school violation; instead, it merely showed him sitting next to another student, who was smoking at a friend's house. Whether the photo depicted illegal activity is unclear. This ambiguity did not change merely because Politte added a caption to the photo suggesting otherwise.

Subsequent searches of Towles' back-pack and locker also revealed no wrong-doing. Nevertheless, the Officials subjected Towles to a strip search and search of his wallet even though those searches were completely contrary to the minimally intrusive standard articulated in

T.L.O. In T.L.O., the vice principal confined his search to the student's purse based on substantiated evidence that the student likely had cigarettes somewhere at school. Here, the Officials did not limit their search based on the fact that they had no particularized suspicion suggesting Towles had drugs anywhere with him or on him at school.

In Redding, school officials conducted a strip search of a student based solely on another student's tip. Redding, 531 F.3d at 1075. Prior to their strip search, officials found ibuprofen pills on another student at school, who claimed she got them from the searched student. Id. at 1076. The searched student denied these allegations twice, had no disciplinary record or any pills in her back-pack, yet officials strip-searched her anyway. Id. at 1075. Under those circumstances, the officials should have conducted further investigation before resorting to an invasive strip search, especially since the "initial tip provided no [concrete] information as to whether [the searched student] currently possessed ibuprofen pills, or was hiding them in a place where a strip search would reveal them." Id. at 1083. Officials had other avenues of investigation available to them, including first talking to the student's teachers or calling her parents. Id. at 1083. Generally, guilt by association is insufficient to warrant a strip search; here, just because the other student had pills did not mean the searched student did as well. Id. at 1084.

As in Redding, the School Officials in our case conducted no further investigation before forcing Towles to participate in a strip search against his will. Towles had no disciplinary history, he denied possessing any drugs when questioned, and the previous search of his locker and back-pack revealed no drugs. The Internet photo also failed to provide sufficient corroborative evidence that Towles had violated any laws or school regulations, just as the student's tip in Redding had failed to provide any evidence of any past or current infraction of

the law or school rules. Even though the School Officials found marijuana in another student's locker on the day they strip-searched Towles, there was no link between that student's drugs and Towles. Since the Officials had no evidence connecting Towles specifically to any legal or school rule violation, the Officials should have conducted further investigation; by searching Towles merely because they found drugs in the locker of his acquaintance, the School Officials engaged in impermissible "guilt by association" under the Supreme Court's clear precedent in Redding.

Similarly, in Phaneuf, school officials lacked sufficient justification at the inception of a strip search of one of their high school students, even though they had a specific tip from a disinterested student that the searched student was hiding drugs in her pants. Phaneuf, 448 F.3d at 598. The strip search was unreasonable under the Fourth Amendment despite the fact that a disinterested student made the tip, the searched student had a history of non-drug related disciplinary problems, and on the day in question, she had cigarettes in her purse against school rules. Id. at 600. Although "face-to-face informant[s] must, as a general matter, be thought more reliable than an anonymous tipster," there was no evidence that the identified student, who reported the tip, was a reliable source of information. Id. at 598. The tipster did not actually see the searched student put marijuana down her pants or handle marijuana at any time, including on the day officials conducted their strip search. Id.

Unlike in Phaneuf, where an identified, disinterested student reported a timely tip about another student's alleged current drug possession in an area only viewable during a strip search, in the instant case the School Officials only had an innocent photograph of Towles posted on a webpage by an anonymous student. In that photo, Towles was pictured at a friend's house sitting next to another student, who was smoking. The photo had been taken a few days before the

search and it did not clearly depict any illegal activity. No other evidence existed that anyone had seen Towles with drugs on the day of the search or that he had any hidden drugs somewhere on his body. Instead of investigating further, however, Officials relied on this “anonymous tipster’s” photo and ignored Towles’ clean record, his insistence that he had no drugs, and the fact that the searches of his back-pack and locker revealed nothing. Given this overwhelming lack of evidence, under Phaneuf the Officials clearly needed to conduct further investigation to have the reasonable suspicion required for their strip search of the student. It is far-fetched to believe that a photograph of Towles sitting innocently at a party automatically supported the inference that he was hiding drugs down his pants.

Since Towles had a clean history and the Officials lacked evidence suggesting he had violated any specific law or school rule, they should have pursued other investigatory avenues before conducting a strip search. By failing to do so, the Officials subjected Towles to an unreasonable search in clear violation of his Fourth Amendment rights.

2. The Strip Search Was Not Reasonable in Its Scope Because It Was Overly Intrusive and Traumatic.⁴

The School Officials strip search of Towles was not reasonable in its scope because no evidence existed suggesting Towles hid drugs in a place where only a strip search could reveal them. A strip search is unreasonable in its scope unless school officials have a high level of suspicion that the student actually has drugs on his person. Redding, 531 F.3d at 1085; Cornfield, 991 F.2d at 1322-23. Common sense dictates that strip searches of teenagers are excessively intrusive under most situations, and the trauma experienced by the searched teenager

⁴ If this Court agrees with our position that the strip search was unjustified at its inception, there is no need to address whether the search was unreasonable in its scope. However, if this Court disagrees with that position, but finds the search was unreasonable in its scope, the Officials still violated Towles’ Fourth Amendment rights.

is no less real even if he was only viewed rather than touched during the search. Redding, 531 F.3d at 1086.

In Redding, the strip search of a young girl for ibuprofen was unreasonable in its scope because no information existed prior to the search suggesting that the girl's naked body was one of "the most logical places where the pills might have been found." Redding, 531 F.3d at 1085. Given this baseless connection, the public school authorities "adopted a disproportionately extreme measure" and "the sting" of such an invasive procedure was not excused just because two females conducted the search in the nurse's office. Id. at 1085-86. Even if officials conducted the search professionally and courteously, a strip search is still an embarrassing, humiliating, and even "traumatic" experience, especially in light of the girl's young age. Id. at 1086 (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)). Clinical evaluations of young victims of strip searches indicate they suffer serious emotional damage even if the student is viewed rather than touched. Id.

As in Redding, the Officials in the instant case had no information to suggest that Towles had drugs anywhere on campus, let alone on his person. The School Officials merely had a photograph of Towles next to another student at a party a few days before; however, Towles was doing nothing illegal in that picture. Additionally, on the day of the search, Officials found nothing in their searches of Towles' back-pack and locker. Given this lack of evidence leading up to the strip search, it was irrelevant that a male gym teacher conducted the search in the boys' locker room and that he did not touch Towles during the procedure. Under Redding, the strip search was no less traumatic or disproportional simply because there was no physical contact between the adult administrator and Towles.

In Cornfield, the teachers' strip search of the student was reasonable in its

scope because it was the least intrusive measure available for them to corroborate their suspicion that the student was carrying drugs on his person. Cornfield, 991 F.2d at 1323. Before their search, various teacher's aides and instructors had noticed that the student had an "unusual bulge" in his pants. Id. at 1319. Given this evidence, the teachers had two male school officials escort the student to the boy's locker room, where they watched from a distance as he changed, to ensure he could not conceal any drugs. Id. at 1323. They gave the student a gym uniform to put on while they searched his clothing, and they never touched him during the search. Id.

Unlike in Cornfield, no teacher or aide on campus saw or reported that Towles had drugs concealed anywhere on his body before the Officials conducted their strip search. During the Officials' search, Towles was not given any clothing to change into; rather, he was forced to stand in his undergarments and wait as his clothes were searched. Under Cornfield, the School Officials did not use the least intrusive measures possible when deciding to conduct their search, especially since they did not take basic steps such as providing Towles with other clothing to change into, despite the fact that they had no reason to suspect he had drugs concealed on his person.

Given that the Officials failed to find any evidence suggesting Towles committed any school violation or conducted any illegal activity, and the severe nature of a strip search in general, the Officials' search of Towles was overly intrusive.

B. The School Officials May Not Invoke Qualified Immunity with Respect to Towles' Fourth Amendment Claim Because They Should Have Reasonably Known That the Strip Search Was Unconstitutional at the Time They Conducted Their Search.

Under the qualified immunity doctrine, a violation is "clearly established" if a reasonable official would understand that his actions violated a constitutional right at the time he acted. Brannum, 516 F.3d at 499. This standard only requires that the "unlawfulness [of the violation] .

. . . be apparent” from preexisting law. Id. (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)). Although courts look at Supreme Court decisions and circuit opinions to decide if a violation was clearly established, “the Supreme Court has left it to the federal lower courts to decide [on a] case by case [basis] what ‘clearly established’ means when applied to factual situations not previously confronted by the Supreme Court.”⁵ Id.

The Officials’ strip search of Towles violated his Fourth Amendment right under preexisting law because the Officials lacked any reliable information before their search to corroborate their suspicion that Towles had drugs hidden on his body. The legal standard prohibiting the Officials’ actions was clearly established in 1985. Redding, 531 F.3d at 1088; see also T.L.O., 469 U.S. at 341; Phaneuf, 448 F.3d at 596 (concluding T.L.O.’s “flexible reasonableness standard” governs review of student strip search). Regardless, “some personal liberties are so fundamental to human dignity [that they] . . . need no specific explication in our Constitution . . . to ensure their protection.” Brannum, 516 F.3d at 499.

In Redding, the court relied on the sliding scale established in T.L.O. when it found that public school officials should have reasonably known their strip search of a minor student was not a reasonable measure under the circumstances.⁶ Redding, 531 F.3d 1071 at 1087-88. The Court decided T.L.O. in 1985 and in that case, the Court provided school officials with a tool for deciding whether, under the specific circumstances of an individual case, they could reasonably conduct a student search; officials received a twofold inquiry that mandated the use of the *most*

⁵ The Supreme Court has not addressed a factual scenario dealing with a student strip search for illegal drugs.

⁶ The court found no case law directly on point and it attributed this to the fact that no other officials would take such outlandish measures, especially given no reason to suspect the girl hid drugs anywhere on her body. Redding, 531 F.3d at 1088. Such a “patent[] . . . defiance of the considered approach in T.L.O.” not only disregarded the Supreme Court, but also common sense and reason. Id.

minimally intrusive search possible given the evidence available prior to their search. Id. In Redding, school officials only had evidence from “an unreliable student informant,” that the young student searched had ibuprofen on her at school. Id. The previous search of the girl’s back-pack had revealed nothing, and she had denied having any pills with her. Id. Yet despite T.L.O.’s guidance, the school officials subjected the young girl to a strip search although such extreme measures were unreasonable. Id.

As in Redding, the Officials in the instant case had the same instructions under T.L.O., dictating that they not act in an excessively intrusive manner when deciding whether to conduct a search of a student in their charge. Like the officials in Redding, the School Officials in this case had no evidence suggesting that Towles had any drugs hidden on his body, yet the Officials conducted an invasive strip search anyway. Given T.L.O.’s mandate that public school officials should “ensure that the interests of students will be invaded no more than necessary,” the Officials’ strip search of Towles was clearly established as violative at the time they acted. T.L.O., 469 U.S. at 343.

In Brannum, middle school officials had video cameras installed in the boys’ and girls’ locker rooms for the stated purpose of providing better security. Brannum, 516 F.3d at 492. However, the cameras were being used for more than security; they were recording the students dressing for various athletic activities. Id. Although neither the Supreme Court, nor the Sixth Circuit had explicitly addressed the Fourth Amendment’s applicability to a video surveillance search in schools prior to the officials’ search in that case, the Supreme Court had expressly provided that the Fourth Amendment generally protects students from unreasonable searches conducted by school officials. Id. at 494. Therefore, students were protected from the administrators’ actions if they unreasonably invaded their legitimate privacy expectations. Id. A

“person of common sense, to say nothing of professional school administrators, would know without specific instruction from a federal court, that teenagers have an inherent personal dignity, . . . a sensitivity about their bodily respect” such that they would not want to be videotaped while undressing. Id. at 499. Given this “clearly established” notion that “inhere[s] in all of us,” videotaping teenagers, especially based on no reasonable suspicion, was a violation of clearly established Fourth Amendment law.

Although the instant case does not involve video surveillance, the School Officials subjected Towles to a similarly invasive search based on no reasonable suspicion. Under Brannum, the Fourth Amendment protects a teenager against an intrusive search conducted by a public school official. Both videotaping a student while undressing and forcing a student to strip off his clothing, offend “fundamental human dignity” and “common sense.” Although no case law explicitly addresses the officials’ conduct in either Brannum or the instant case, the Fourth Amendment’s reasonableness standard (along with the T.L.O. test) clearly established that both officials acted unreasonably when they conducted excessive searches of their teenage students, considering the lack of evidence each had prior to those searches.

Since under preexisting law, Towles’ constitutional right against an unreasonable strip search was “clearly established” at the time the Officials conducted their search, they are not entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, this court should reverse the judgment of the Grace court of appeals on the finding that there was no First Amendment violation, affirm the judgment on the finding that there was a Fourth Amendment violation, and reverse the judgment on the finding

that the School Officials were entitled to qualified immunity for their Fourth Amendment violation.

Respectfully submitted,

Counsel for Petitioners, Team 11

Dated: March 2, 2009

APPENDIX A

First Amendment

“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.”

APPENDIX B

Fourth Amendment

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