

NO. 05-1338

IN THE
SUPREME COURT OF THE STATE OF GRACE

KIT POLITTE and CORY TOWLES,

Petitioners,

v.

HORTON HOPKINS SCHOOL DISTRICT and KEENA SMALLS,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Grace

BRIEF FOR PETITIONER

March 2, 2009
Team No. 17
Counsel for Petitioners

QUESTIONS PRESENTED

- I. Whether the Respondents' act of forcing Politte and Towles to shut down their private webpages, both of which were created and edited off of school grounds, was an unconstitutional violation of their free speech rights under the First and Fourteenth Amendments.

- II. Whether the Respondents' strip search of Towles was an unconstitutional violation of his search rights under the Fourth and Fourteenth Amendments, considering that the Respondents commenced their invasive search of Towles after receiving just a single, uncorroborated tip.

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The opinion of the Badger County District Court is unpublished but is reported at R. 1-13.

The opinion of the State of Grace Court of Appeals is unpublished but is reported at R. 14-16.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions are set forth in Appendix A: U.S. CONST. amend. I., U.S. CONST. amend. IV., and U.S. CONST. amend. XIV. The following relevant statutory provisions are set forth in Appendix B: Horton Hopkins School District Drug and Alcohol Use Policy.

STATEMENT OF THE CASE

A. Statement of the Facts

In January 2007, Horton Hopkins School District (“HHSD”), at the request of Horton Hopkins High School (“HHHS”) Principal Keena Smalls, enacted a zero-tolerance drug policy that gives school officials the authority to test students for drugs and conduct searches of students’ lockers, desks, and personal property, including but not limited to book bags and clothing. (R. at 1.) According to the policy, any student who is caught possessing illegal drugs will be suspended for no less than three days. (R. at 1-2.)

In September 2008, Kit Politte, an 18-year-old senior at HHHS, started Drug Use Damages Schools (“DUDS”), a school-sponsored club designed to discourage drug use among HHHS students and promote a drug-free lifestyle. (R. at 2.) Approximately 130 HHHS students are affiliated with DUDS. In addition to posting flyers throughout the school, DUDS members have also organized school assemblies to discuss the dangers of drug addiction. *Id.*

At the advice of assembly speaker Jeffie Zarling, who told Politte that the only way to stop the drug problem is to point out drug dealers and users to the entire community, Politte created

an online network webpage using Friendkepedia, a social networking website open to the general public that allows online users to create personal networks. (R. at 2.) The webpage, titled “Fighting All Dealers,” is directed at all residents of Hopkinsville who are members of Friendkepedia. Politte built the webpage not at school, but at home on her personal computer. *Id.* On the webpage, Politte asked for community members to submit information about potential drug dealers, hoping that tips would lead to their arrest. *Id.* Users can e-mail such information anonymously to Politte through a link on the network webpage. *Id.* Of the 235 members of Politte’s network, only 198 members are HHHS students, including all 130 DUDS members. *Id.*

Corey Towles, a 16-year-old sophomore at HHHS, transferred to the school for the 2008-09 school year. (R. at 2.) At his former high school in the State of Disarray, Towles was an honor student who played on the junior varsity baseball team and had no disciplinary action taken against him, except for two detentions due to tardiness during his freshman year. *Id.* On October 3, 2008, Towles attended a house party at the home of Jeff Tweegs, a HHHS junior. *Id.* Towles arrived at the party around 9 p.m. and left by 11 p.m. (R. at 3.) Although Towles saw several students drinking beer and smoking cigarettes, he noticed no illegal drug use. *Id.* He spent most of his time at the party playing football outside. *Id.* Around 11:30 p.m. that night, the police arrived at Tweegs’ home and cited five HHHS students for underage drinking and HHHS sophomore Frank Conrad for marijuana possession. *Id.*

On October 4, 2008, Politte, who did not attend Tweegs’ party, received an e-mail with an attached photo of Towles sitting with Frank Conrad and HHHS sophomore John Thomson outside of Tweegs’ house during the party. *Id.* The photo showed Conrad smoking. *Id.* In response, Politte posted the photo on her webpage, attributing it to “an anonymous Horton Hopkins student” with the following caption: “Police find drug use at local high school party.

Are Horton Hopkins students becoming drug dealers?" *Id.* Although Politte did not use Towles name, his face was visible in the photo. *Id.*

On October 5, 2008, Principal Smalls received phone calls from several parents who had viewed the photo on Politte's webpage. *Id.* The Hopkinsville police also contacted Smalls to alert her about the students they cited at Tweegs' party. *Id.* Upon viewing the webpage herself, Smalls called Towles, Conrad, Thomson and Tweegs individually into her office for questioning. *Id.* When all four students denied possessing illegal drugs, Smalls conducted a search of each of their lockers and book bags, as permitted by the HHSD drug policy. *Id.* Smalls only found a small bag containing marijuana in Conrad's locker. *Id.*

Smalls also asked each student to consent to a search of their persons individually and in private. *Id.* Though each student refused to be searched, HHHS gym teacher Jim Waters still conducted a body search of each boy in a private room. *Id.* Each student was asked to strip to his undergarments, and Waters then searched all clothing pockets. *Id.* Waters did not actually touch any of the boys' bodies. *Id.* During the search, Waters found a small amount of marijuana in Thompson's jeans pocket. *Id.* Waters found no drugs in Towles' possession. *Id.*

Towles, in response to Politte's posting on her webpage, created his own Friendklopedia network page titled "Students Against Defamatory Statements" ("SADS"). *Id.* Just like Politte, Towles edited his webpage at home from his personal computer. *Id.* Towles wrote the following message on his webpage:

By taking unauthorized photographs of me during a Friday night out with my friends, and then posting inaccurate captions, DUDS, a school organization under the guise of its website FAD, committed a gross invasion of my privacy and defamed me in front of my friends and peers. What we do on our own time for fun is our business. Horton Hopkins school officials committed

a far worse injustice when they subjected my friends and me not only to an unreasonable search of our lockers, but also to strip searchers. 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. at 3-4.)

Afterwards, HHHS students began accessing both Politte and Towles' webpages not only from their homes, but also from the school computer labs and library during their free time during the school day and after school hours. (R. at 4.) As a result, Principal Smalls demanded that Politte and Towles shut down their webpages. *Id.* When both students refused, Smalls suspended them until they agreed to take down the webpages. *Id.* Smalls has admitted that she was angry about Towles' comments on the school's actions in dealing with the drug problem on school grounds. *Id.*

B. Procedural History

The Badger County District Court originally heard this action. (R. at 1.) The District Court found that HHSD and Smalls' ("Respondents") attempt to regulate Politte and Towles' webpages did not conflict with the students' free speech rights under the First Amendment, as applied to school officials under the Fourteenth Amendment; and that their search of Towles' person without his consent or a warrant did not conflict with the Fourth Amendment, as applied under the Fourteenth Amendment. (R. at 1, 8.) The District Court granted Respondents' motion for summary judgment. (R. at 8.) The State of Grace Court of Appeals affirmed both holdings of the District Court. (R. at 9.) The Supreme Court of the State of Grace granted certiorari on both issues. (R. at 14.)

SUMMARY OF THE ARGUMENT

Respondents' decision to force Politte and Towles to shut down their webpages infringes upon their free speech rights under the First Amendment, as applied to school officials under the Fourteenth Amendment. Free speech is a fundamental right that can only be constrained by the government in the most compelling circumstances. Since Politte and Towles' private webpages were created on their personal computers at home and outside of school property, the webpages do not constitute student speech that can be reasonably regulated by Respondents. (R. at 2-3.) The mere fact that HHHS students accessed their webpages at school during their free time does not mean that the webpages should come under the school's control. The record indicates that Politte and Towles' punishment was mainly a result of Smalls' personal anger. (R. at 4.)

There is no evidence in the record that the webpages have caused a substantial disruption within HHHS, nor is there any evidence from which Principal Smalls could have reasonably predicted that a substantial disruption was going to occur. Although Politte's webpage may have affected the investigation of drug use in the community, it did not create any kind of material disturbance or substantial disruption. Just like any other webpage, it allowed interested online users to read and exchange relevant information. Although Towles wished to encourage HHHS students to stand up for their constitutional rights, he did not intend to incite a substantial disruption or material disturbance of any kind at HHHS or within the community (R. at 3-4.) Neither webpage used vulgar or misleading language or false information. Furthermore, neither webpage could be reasonably viewed as promoting drug use or as a "true threat." Therefore, the Respondents' act of shutting down Politte and Towles' webpages was unconstitutional.

The Fourth Amendment guarantees the privacy and dignity of all citizens from certain arbitrary and invasive acts by officials and protects adults and students alike from unreasonable

searches and seizures. Although the Respondents have a special need to maintain a drug-free environment and secure the general welfare of its students, such circumstances do not render a student's Fourth Amendment rights nonexistent. To balance these competing interests, the Supreme Court has established a two-pronged framework for determining when a strip search of a student is constitutional.

First, the search must be "justified at its inception." This requirement is only satisfied when, under the "totality of the circumstances," there are reasonable grounds for suspecting that the search will uncover evidence that the student has violated the law or the rules of the school. The Respondents had no reasonable basis for suspecting Towles had violated the school's drug policy in that Towles never conducted himself in a suspicious manner. The extent of his "conduct" was appearing in an ambiguous photograph and becoming acquainted with another student who had a history of violating the school's drug policy. Both of these factors are entirely insufficient to warrant a "reasonable suspicion" or otherwise justify an invasive strip search.

Second, the search must be reasonable in scope under the circumstances which justified the search in the first place. Even if the Respondents' strip search of Towles was justified under the totality of the circumstances, the manner in which they conducted the search was unreasonably invasive in light of other constitutionally permissible options available. For instance, Respondents could have instituted a drug testing policy as a means of determining which students were involved with illegal drugs. Asking Towles to strip down to his undergarments was unnecessarily intrusive in scope, and an offensive deprivation of his Fourth Amendment rights.

Furthermore, the Respondents cannot assert a defense of qualified immunity. The law on student strip searches varies depending on factual circumstances. In this case, it would have been

clear to a reasonable school official that conducting a strip search was unconstitutional. Strip searches have consistently been found unconstitutional when the student did not engage in any suspicious behavior or exhibit suspicious physical characteristics, or when school officials conducted the search without first investigating the matter further. The Respondents jumped from an unfounded suspicion to a strip search without first verifying the premature information they had received. Therefore, the Respondents strip search of Towles was unconstitutional.

ARGUMENT

I. RESPONDENTS' DEMAND THAT POLITTE AND TOWLES SHUT DOWN THEIR WEBPAGES INFRINGES UPON THEIR FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT, AS APPLIED TO SCHOOL OFFICIALS UNDER THE FOURTEENTH AMENDMENT.

Respondents demand that Kit Politte and Cory Towles (“Petitioners”) shut down their private webpages violates their right to free speech under the U.S. Constitution. This Court must review *de novo* the appellate court’s judgment because “[in] cases raising First Amendment issues...an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Rankin v. McPherson*, 438 U.S. 378, 386 n.9 (1987) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)) (internal quotation marks omitted).

The Free Speech Clause of the First Amendment of the U.S. Constitution provides that, “Congress shall make no law...abridging the freedom of speech, or of the press...” U.S. CONST. amend. I. The Fourteenth Amendment extends the free speech protections of the First Amendment to cover the actions of state and local officials. U.S. CONST. amend. XIV, § 1. The theory underlying the First Amendment is that freedom of speech is a fundamental right that may be constrained by the government only under the most compelling circumstances. *See generally Boos v. Barry*, 485 U.S. 312 (1988). “Above all else, the First Amendment means that government has no power to restrict expression because of its message, ideas, its subject matter, or its content.” *Chicago v. Mosley*, 408 U.S. 92, 95 (1972). “Content-based regulations are presumptively invalid.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). “For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ. Assn. v.*

Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). The Respondents' act of shutting down the students' private webpages represents a traditional content-based restriction in that it responds directly to the ideas and messages contained in their speech, which have attracted the interest of other HHHS students. Even if the Respondents' interest in a drug-free school were considered compelling, their ability to unilaterally restrict online speech is not narrowly tailored to fit their concerns over potential drug use. The webpages at issue discussed the kind of political and social issues that are at the heart of the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Therefore, the Respondents' act of shutting down Politte and Towles' webpages does not survive a strict scrutiny analysis and is clearly unconstitutional.

The United States Supreme Court has not yet delivered a specific rule regarding online student speech. However, it has held that public high school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969). Moreover, speech on the Internet receives the same First Amendment protections as print media, requiring the government to demonstrate a compelling interest in order to justify its prohibition. *Reno v. ACLU*, 521 U.S. 844, 897 (1997). Although Politte and Towles are public high school students, their webpages were created and edited outside of school property and in a context that was completely independent from any control or regulation from HHSD. *See e.g., Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp.2d 1088, 1090 (W.D. Wash. 2000) (finding that speech outside of school grounds was "entirely outside of the school's supervision or control"). Accordingly, Politte and Towles' free speech rights should not be restricted at home on their personal computers.

The government is permitted to demonstrate merely a reasonable or significant interest instead of a compelling interest in order to prohibit free speech in only a limited handful of

circumstances. *See generally* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography). Politte and Towles' webpages do not fall under any of the limited exceptions to freedom of speech in which Respondents need only offer reasonable interests in silencing the speech. Therefore, the disciplinary actions taken by Respondents against Politte and Towles in response to their webpages are clearly unconstitutional.

A. Politte and Towles' webpages do not constitute the kind of student speech that Respondents can reasonably regulate.

Since Politte and Towles' private webpages were created on their personal computers at home and in a completely non-academic context, the webpages do not constitute student speech that can be reasonably regulated by Respondents. (R. at 2, 3.) The Supreme Court has held that public schools cannot punish speech that occurs "entirely outside of the school's supervision or control." *Emmett*, 92 F. Supp.2d at 1090. Furthermore, it has never held that public schools may regulate speech by its students that occurs off-campus or on the Internet. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla L. Rev. 1027, 1031 (2008). Accordingly, this Court should not hold so in this case.

Even though Politte spoke of her webpage at an after school meeting of DUDS, the webpage was not associated with the school or DUDS in any official capacity. (R. at 2.) Her webpage was directed toward and accessible to all residents of Hopkinsville who are members of Friendkepedia, and not only HHHS students. *Id.* In fact, only 130 of its 235 members are HHHS students, demonstrating how the webpage reached a broader audience beyond the confines of HHHS. *Id.* Moreover, the fact that students accessed Politte and Towles' webpages at school does not mean that their webpages should come under the control of the school. (R. at 4.) Like

any other webpage on the Internet, Politte and Towles' webpages could be accessed by any user on any online computer in addition to interested HHHS students.

Politte and Towles' case is distinguishable from *Hazelwood Sch. Dist. v. Kuhlmeier*, where a school newspaper was written in conjunction with an academic journalism class. 484 U.S. 260 (1986). In that case, the Court found that public schools may exercise editorial control over the style and content of student speech if the speech is school-sponsored. *Id.* The case distinguished between a school having to "tolerate particular student speech" and "affirmatively promot(ing) particular student speech." *Id.* Politte and Towles' private webpages do not constitute a school-sanctioned written or online publication. Neither webpage explicitly misled students into believing that it was a school-sanctioned publication, nor have Respondents claimed that the webpages were sanctioned and approved by the school. (R. at 2-3.) A person who rationally views their webpages would not think the school endorsed or condoned their statements. The facts do not indicate that Towles or Politte created either website in conjunction with an academic class offered by the school. *Id.* Therefore, the holding of *Hazelwood* and its limitation on student speech does not apply in our case.

Politte and Towles' case is similar to *Thomas v. Bd. of Educ., Granville Sch. Dist.*, where high school students created a "satirical publication addressed to the school community" that was written and sold outside of school grounds. 607 F.2d 1043 (2d Cir. 1979). The court found that any limitations upon the students' free speech rights ceased to exist away from school property "because school officials have ventured out of the school year and into the general community where their freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id.* at 1050. Thus, the

Respondents cannot force Politte and Towles to shut down their webpages. because they were created outside of school and in a completely non-academic context,

B. Politte and Towles’ webpages did not incite a substantial disruption or material disturbance of the school environment, nor is there any evidence that a substantial disruption or material disturbance was likely to occur.

Even if this Court finds that Politte and Towles’ webpages constituted student speech, the Respondents cannot force them to shut down their webpages unless they found that the webpages would “materially and substantially interfere with school work and discipline.” *Tinker*, 393 U.S. at 509. Not only is there no evidence that Politte and Towles’ webpages have substantially disrupted the school, Principal Smalls could not have reasonably predicted that a substantial disruption or material interference would have taken place if their webpages were not shut down.

In *Tinker*, the Court found that a group of students’ nonviolent act of wearing black armbands to school to protest the Vietnam War did not constitute a substantial disruption or material interference because the students “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.” *Id.* at 503. The Court found that if school officials could reasonably predict that school speech will create a “substantial disruption or material interference” with school activities or invade the rights of others, they may regulate the speech. *Id.* at 514. The Court defined a substantial disruption or material interference as follows:

Conduct by the student, in class or out of it, which for any reason – whether it stem from time, place or type of behavior – materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional freedom of speech. *Id.* at 512-3 (citing *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)).

A nonviolent response to speech does not constitute a substantial disruption or material interference. *See Layshock v. Hermitage Sch. Dist.*, 2007 WL 2022096 (W.D. Pa. July 10,

2007). Moreover, school officials may not suppress student speech merely because they do not approve of the speech or out of “undifferentiated fear or apprehension.” *Id.* at 508.

Though Principal Smalls feared that “the situation had gotten out of control,” the fact that HHHS students viewed the webpages on school grounds is not the equivalent of a substantial disruption or material interference. (R. at 3.) The record does not indicate that the students viewed these webpages during class time, which could have interfered with the educational process. *Id.* Although Politte’s webpage may have affected investigation of drug use in the community, it did not spur or create any kind of material disturbance or substantial disruption. Just like any other webpage on the Internet, it has merely served to allow interested users to read and exchange relevant information. Furthermore, the textual content of Towles’ webpage, in which he urges his fellow students not to tolerate the abuse of their free speech and privacy rights, cannot be reasonably viewed as a substantial disruption. In fact, the record is devoid of any evidence that his webpage had any effect on the behavior and opinions of the student body. It would appear that the Respondents’ real motivation to shut down both webpages rests merely upon the kind of unfounded and broad fear that the *Tinker* decision intended to forbid. The students’ punishment resulted not from a risk of serious disruption, but rather as a result of Ms. Smalls’ personal anger. (R. at 4.)

Politte and Towles’ case is distinguishable from *Wisniewski v. Bd. of Educ.*, which found that an eighth grader’s Internet transmission to fifteen classmates of a drawn icon that “depict[ed] and call[ed] for the killing of his teacher” did in fact “create a foreseeable risk of substantial disruption within a school.” 494 F.3d 34, 38-39 (2d Cir. 2007). Politte and Towles’ webpages cannot be reasonably viewed as violent or likely to “create a foreseeable of risk of substantial violence” in any capacity. *Id.* Neither student’s webpage explicitly or implicitly asks its readers

to engage in an act of violence, nor does either webpage even refer to an act of violence. (R. at 2-4.) Though Politte sought to curb drug use in the community, she did so through entirely peaceful means such as holding school assemblies and posting flyers. (R. at 2.) Likewise, though Towles encouraged HHHS students to stand up for their civil rights, he did not ask them to do so in any kind of violent manner. (R. at 3-4.) Accordingly, Politte and Towles' websites are distinguishable from the facts in *Wisniewski*.

Politte and Towles' case is also distinguishable from *Doninger v. Niehoff*, where a student posted vulgar, misleading language on a webpage that erroneously stated that a school contest had been cancelled and urged readers to contact her school. 527 F.3d 41 (2d Cir. 2008). In *Doninger*, it was reasonably foreseeable that the student's blog posting would create a risk of disruption because she encouraged her readers to contact the school in vulgar and misleading language. *Id.* at 43. Here, neither student's webpage encouraged readers to contact the school in any manner. Though Towles' webpage urged students to defend their constitutional rights, it did not directly urge them to take part in any kind of disruptive action. (R. at 3-4.)

Moreover, the photo caption on Politte's webpage that asked whether HHHS students were becoming drug dealers was not misleading because there is substantial evidence in the record that drug use was an important concern in their community. (R. at 3.) Although Towles did not use drugs at the party on October 3, 2008, Frank Conrad, one of the three students depicted in the photo, was cited by the police for marijuana possession at the party; and John Thomson, another student in the picture, was found to have possessed a small amount of marijuana in his jeans during the Respondents' search of his person. *Id.* Because two of the three students depicted in the photo on Politte's webpage did possess illegal drugs, her photo caption cannot be considered misleading.

In addition to holding that a school may restrict student speech that “would foreseeably create a risk of substantial disruption within the school environment,” *Doninger* also noted that the school may control student speech if it is “similarly foreseeable that the off-campus expression might also reach campus.” 527 F.3d at 48 (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d at 40). This Court should not follow this unbinding ruling from the Second Circuit because it is overly broad and out of line with *Tinker*, which only allows a school to prohibit off-campus student speech if it presents a risk of substantial disruption or material interference. 393 U.S. at 514. Any and all online speech created by students that deals with school-related topics could foreseeably reach the campus, while not necessarily create a substantial disruption or material disturbance. Therefore, this Court should not follow this overly broad portion of *Doninger*.

Accordingly, the Respondents have not demonstrated that either student’s webpage caused or was likely to cause a substantial disruption or material interference with the school.

C. Respondents cannot shut down Politte and Towles’ webpages based on any other narrow restrictions to freedom of speech.

The Respondents cannot force Politte and Towles to shut down their private webpages based on any other narrow exceptions that the Court has recognized. For instance, this case is distinguishable from *Bethel School District v. Fraser*, where the Court found that public school officials can prohibit student speech that is vulgar, lewd or plainly offensive. 478 U.S. 675 (1986). In that case, the speech at issue related to a sexually suggestive campaign speech to be delivered by a student to an auditorium of his peers on school grounds and during school hours. *Id.* The decision was grounded in a reasonable government interest in protecting students from “an elaborate, graphic, and sexually explicit sexual metaphor.” *Id.* at 678. In this case, no speech on either website could be considered “offensive, lewd or plainly offensive” by any reasonable standard. *Id.* According to the record, neither website used plainly vulgar language or indirect

sexual metaphors. (R. at 2-4.) For instance, although Towles used the word “idiots” to broadly refer to school administrators, that could not be considered plainly offensive by the standards of *Fraser*. Accordingly, the limitations placed upon student speech in *Fraser* do not apply to this case.

Politte and Towles’ case is also distinguishable from *Morse v. Frederick*, where a student unveiled a “Bong Hits 4 Jesus” banner during an Olympic torch relay as it passed through his Alaska town. 127 S.Ct. 2618 (2007). The Supreme Court held that a public school can restrict speech that occurs during a school-sponsored event that it reasonably believes will promote drug use. Here, neither website could be reasonably viewed as promoting drug use, but only reacting critically and responding to the effects and presence of drug use. Politte’s webpage, for instance, was created with an intent opposite to that of promoting drug use. Rather, Politte’s webpage was created to prevent and curb local drug use by allowing community members to submit information about potential drug dealers to facilitate their arrest by the police. (R. at 2.) Similarly, Towles’ webpage could not be reasonably viewed as promoting drug use. Rather, Towles’ webpage was created in order to promote free speech and privacy rights. In fact, no explicit mention was even made to drug use on his webpage. (R. at 3-4.) Therefore, the holding of *Morse v. Frederick* does not apply to either webpage in this case.

Finally, Politte and Towles’ webpages do not constitute a true threat, which would not receive the same protection afforded to most free speech under the First and Fourteenth Amendments. *Watts v. U.S.*, 394 U.S. 705 (1969). “True threats encompass statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 534 U.S. 343, 359 (2003). The District Court correctly found that the speech clearly does not constitute a true threat in that there

was clearly “no ‘expression of an intent to commit’ an act of violence” on either webpage. *Id.* Accordingly, neither student’s webpage represents a true threat.

D. High school students such as Politte and Towles should be encouraged to exercise their free speech rights on their personal webpages.

The “exchange of ideas and the propagation of views” associated with freedom of speech goes to the core of American democracy and values. *Cornelius v. NAACP Legal Defense and Educational Fund Inc.*, 473 U.S. 788, 798 (1985). It is essential that public schools encourage and not punish free speech among its students. “Permitting school officials to restrict student speech in the digital media expands the authority of school officials to clamp down on juvenile expression in a way previously unthinkable.” Papandrea, 60 Fla. L. Rev. at 1030. The Supreme Court has repeatedly emphasized that “students in the public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’” *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506). Accordingly, schools should encourage debate and political engagement rather than punishing students who provide a forum for free expression. Furthermore, speech on the Internet, which remains an important and relatively new medium of communication, should not be arbitrarily restrained without a compelling justification. As the Court recognized in *Reno v. ACLU*, “through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.” 521 U.S. at 897.

In this case, the Respondents’ act of shutting down the students’ private webpages clearly transgresses the free speech protections of the U.S. Constitution. If Politte and Towles are to be punished for the written content of their webpages, that responsibility rests not with the school, but is instead a matter of parental discretion. This Court must protect the rights of students to

express their opinions in a non-academic setting without fear of retaliation or unnecessary discipline. If the students of HHHS are to grow up into mature and intelligent American citizens, their free speech rights cannot be arbitrarily and unreasonably interfered with by such an unnecessary chilling effect.

This Court must therefore reverse the findings of the State of Grace Court of Appeals and hold that Respondents have not presented a sufficient justification to infringe upon Politte and Towles' free speech rights.

II. THIS COURT SHOULD REVERSE THE DECISION OF THE STATE OF GRACE COURT OF APPEALS AND HOLD THAT RESPONDENTS' WARRANTLESS SEARCH OF TOWLES VIOLATED HIS FOURTH AMENDMENT RIGHTS.

Respondents violated Towles' Fourth Amendment rights when they subjected him to a warrantless strip search on school grounds that was neither justified at its inception nor reasonable in scope. Respondents failed to comply with the legal standard for searches performed by school officials, as enumerated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Furthermore, Respondents are not entitled to qualified immunity because the law on student strip searches was clear at the time and would have put reasonable school officials on notice that a search of Towles was unconstitutional under the circumstances. Accordingly, the State of Grace Court of Appeals' holding must be reversed.

The Fourth Amendment provides that, "the right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated..." U.S. CONST. amend. IV. The Fourth Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the government or those acting at their direction. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613 (1989). The Fourth Amendment's prohibition on unreasonable searches and seizures applies via the Fourteenth

Amendment to searches conducted by state officials, including public school officials. *T.L.O.*, 469 U.S. at 334. Respondents, though not official governmental officers, are equally compelled to respect the Fourth Amendment rights of their students. Although the Supreme Court carved out an exception when holding that “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), and that such special needs do exist in the public school context, it has also held that “there is no reason to conclude that [students] have necessarily waived all rights to privacy” merely by being on school grounds. *T.L.O.*, 469 U.S. at 339.

The leading case to establish the framework for a reasonable search on school grounds is *New Jersey v. T.L.O.*, which held that a warrantless search of a student is only constitutional under the Fourth Amendment if the search is both: (1) “justified at its inception,” and (2) “reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The Respondents fail on both counts: the search was not justified at its inception because there was no evidence to corroborate the initial tip that the Respondents had received, and the search was unreasonable in scope considering that less intrusive and more discrete options were available.

A. Respondents’ strip search of Towles was not justified at its inception because they made no effort to corroborate the initial tip and unconstitutionally proceeded without further investigation.

The Respondents’ strip search of Towles was not justified at its inception. Under ordinary circumstances, a search of a student will be justified at its inception if there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. *Id.* What is considered “reasonable,” however, depends on the circumstances of each case and there is no “ready test for determining

reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails.” *Terry*, 392 U.S. at 21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967)). The Respondents admittedly have an important interest in ensuring that HHHS is a drug-free environment and securing the general welfare of its students. However, what remains problematic is the means by which the Respondents have attempted to achieve their objectives. Under other, more reasonable circumstances, the Respondents’ zero-tolerance drug policy would have been carried out in a lawful and successful manner. As applied against Towles, however, it is simply unconstitutional.

Though the Supreme Court does not require school officials to apply a probable cause standard to a search of a student, it plainly requires them to act according to the dictates of reason and common sense. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1080 (9th Cir. 2008). “A lack of individual suspicion does not ipso facto render a school search unreasonable,” *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005), but a search is warranted only if “the student's conduct creates a reasonable suspicion” that a particular regulation or law has been violated. *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993). Reasonable suspicion is dependent upon both the content of information possessed by the officials and its degree of reliability. Both factors, quantity and quality, are considered in the “totality of the circumstances,” or “the whole picture,” that must be taken into account when evaluating reasonable suspicion. *Williams by Williams v. Ellington*, 936 F.2d 881, 888 (6th Cir. 1991).

Under the “totality of the circumstances,” Towles’ conduct did not create any kind of reasonable suspicion, let alone an embarrassing strip search. In fact, the full extent of Towles’ “conduct” was the misfortune of appearing in the background of an ambiguous photograph in

which he was simply sitting alongside two of his fellow classmates at a party. (R. at 3.) The Respondents merely viewed this single photograph and commenced the searches. Towles made no affirmative act whatsoever from which even an inference of suspicion could have been drawn. The Respondents questioned Towles, and other students who attended the party in question individually, but even after Towles denied possessing drugs, the Respondents continued with the searches. (R. at 3.) The Respondents haphazardly jumped from the initial stage of suspicion to the final stage of strip searches without taking the necessary intermediary step of corroborating the information and conducting further investigations.

Merely appearing in a photograph cannot constitute “conduct” that warrants “reasonable suspicion.” In a recent survey documenting the rising popularity of social networking sites, it was revealed that MySpace.com alone boasts 76 million active users, with nearly two-thirds of users between the ages of 12 and 17. *See Pew Internet & American Life Project*, http://www.pewinternet.org/pdfs/PIP_Adult_social_networking_data_memo_FINAL.pdf (last visited Feb. 24, 2009). If this Court finds that a single photograph is sufficient under the “totality of the circumstances” to constitutionally justify a strip search, then in this era of social networking sites and the growing trend of the American youth publishing private information, the Fourth Amendment rights of every student in the State of Grace, and indeed every state in the U.S., are in danger of being expelled.

Respondents could have easily made efforts to corroborate the Internet tip and make sense of the ambiguous photograph in a number of ways, including engaging in an open dialogue with the parents and teachers of the suspected students or by interviewing additional students who were present at Tweegs’ party. *See, e.g., Cornfield*, 991 F.2d at 1319. Either of these steps would have yielded the simple truth that Towles is an honor student and a law-abiding 16-year-old

youth who was not involved in any illegal activity at the party in question. Either of these steps would have dispersed the undeserving cloud of suspicion that hung over Towles, saved him from an utterly humiliating strip search, and kept his Fourth Amendment rights intact. The Respondents failed to take these reasonable steps and thus acted unconstitutionally in hastily proceeding with the strip search.

Furthermore, Towles' relationship with other students who had been involved with drug use in the past was wholly insufficient to justify strip searching Towles himself. As a new student who recently transferred to HHHS, Towles made great efforts to assimilate and socialize with many of his fellow students. (R. at 2.) The mere fact that one of Towles' new acquaintances has a record of recreational drug use cannot be used to unilaterally punish Towles. To hold otherwise would be an unfortunate example of "guilt-by-association," a rationale that has been consistently denounced. *See Redding*, 531 F.3d at 1084 (holding that "guilt-by-association" is "too thin of a reed for such a substantial intrusion into... expectations of privacy"); *See also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951) (declaring that "guilt in our system is personal" and finding guilt-by-association techniques to be among "the most odious institutions of history").

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. *Terry*, 392 U.S. at 9 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). Where the slightest suspicion can be used to justify the greatest intrusion into one's private space and freedoms, the protections and very essence of the Fourth Amendment become null and void. Where a student whose gravest academic infraction is tardiness can even be placed under the umbrella of

suspicion and be subjected to a warrantless strip search, every student attending HHHS faces the same risks of humiliation in front of their peers, groundless accusations of illegal activity, and the denial of his or her Fourth Amendment rights.

The Respondents undoubtedly have the responsibility of protecting the general welfare of its students, but not at the expense of the students' constitutional rights. Absent a reasonable suspicion, no purpose can justify breaching the personal space and freedom of the very same students the Respondents are allegedly protecting. The U.S. Constitution demands no less. Accordingly, this Court must reverse the State of Grace Court of Appeals and hold that the Respondents' strip search of Towles was not justified at its inception.

B. Respondents' strip search of Towles was unreasonable in scope and unnecessarily intrusive considering the other options available.

Even assuming that the Respondents' search was justified at its inception, the manner by which it was executed was nonetheless unreasonable in scope. Because of the unnecessarily intrusive nature of the Respondents' strip search of Towles, and the more reasonable and less intrusive options available, the Respondents fail the second prong of the *T.L.O.* test.

For the search of a student by a public school official to be constitutionally permissible, it must be reasonable in scope. *T.L.O.*, 469 U.S. at 342. A search is reasonable in its scope if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* Towles committed no “infraction” to which a strip search would be a reasonable response. Even if his conduct did warrant a reasonable suspicion, the Respondents' method in carrying out the strip search was excessively intrusive. Reasonableness depends on context and “as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness.” *Redding*, 531 F.3d at 1081 (quoting *Cornfield*, 991 F.2d at 1321).

The objectives of the search included preventing and deterring the substantial harm of childhood drug use, but the Respondents had far more reasonable and less intrusive means at their disposal. For example, the Respondents could have implemented a drug testing policy in which students would submit urine samples to be screened for any illegal substances. Such a drug test would involve an interaction between the school and the individual student and would be infinitely more discrete and reasonable in scope in contrast to what Towles was forced to endure. HHHS students would undoubtedly be no more content with random drug tests, but neither would they be denied their constitutional rights. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822 (2001) (holding that while urination is an excretory function traditionally shielded by great privacy, testing students is a reasonably tailored means of addressing a school district's concerns in preventing, deterring, and detecting drug use).

Forcing students into a room on school grounds and demanding that they strip down to their undergarments is plainly unreasonable in light of the Respondents' objectives of deterring drug possession and abuse. Though the Respondents' may have instructed the gym teacher who conducted the strip search to not make any physical contact with any of the students who were searched, such a precaution does not render the search any less unconstitutional. (R. at 3.)

A school is not a prison; the students are not inmates for search and seizure purposes. *Redding*, 531 F.3d at 1087. Respondents have a compelling interest in maintaining a drug-free environment and deterring the possession of illegal drugs, but its drug policy was overzealously applied to a student who did nothing to warrant suspicion nor an unreasonably intrusive breach of his personal space and freedoms. It has been held that "a highly intrusive search in response to a minor infraction would... not comport with the sliding scale advocated by the U.S. Supreme Court in T.L.O." *Id.* (quoting *Cornfield*, 991 F.2d at 1320). The Respondents conducted a highly

intrusive search in response to no infraction at all and, in doing so, severely violated Towles' legitimate "expectation of privacy," and thus his Fourth Amendment rights. *T.L.O.*, 469 U.S. at 338.

The Supreme Court has declared that schoolchildren do not shed their constitutional rights at the schoolhouse gate. *Redding*, 531 F.3d at 1089 . If this court finds the Respondents' policy to be constitutional, the schoolchildren entering the gate of HHHS will continue to be stripped of their constitutional rights, their attire, and their pride. As such, the holding of the State of Grace Court of Appeals must be reversed.

C. Respondents are not entitled to a defense of qualified immunity because the law is clearly established that a student's Fourth Amendment rights may not be violated in the absence of suspicious conduct.

Contrary to the findings of the State of Grace Court of Appeals, the Respondents are not entitled to a qualified immunity defense. The right to be free from a warrantless search and seizure is clearly established via the Fourth Amendment. U.S. CONST. Amend. IV. Reasonable school officials in the position of the Respondents must know that conducting a strip search of a student without any reasonable suspicion is a violation of that right. *See Saucier v. Katz*, 533 U.S. 201 (2001). The case law on strip searches of students may be inconsistent in terms of their outcomes, but clear factual distinctions emerge and would have put the Respondents on notice that, under these specific circumstances, a strip search of Towels was unconstitutional. Therefore, the Respondents cannot prevail on their assertion of qualified immunity.

Until recently, the Supreme Court required a two-step process when evaluating a school official's qualified immunity defense: (1) looking at the facts in a light most favorable to the injured party, the court must decide whether the injured party suffered a constitutional violation; and (2) if the injured party's constitutional rights were violated, the court must next ask whether

the right was “clearly established.” *Id.* at 201. As stated above, Towles’ suffered a constitutional violation because the Respondents had no reasonable basis for suspecting Towles possessed drugs and, even if there was such a reasonable suspicion, conducting a strip search was unreasonable in scope. However, this rigid procedure is no longer mandatory and this Court is not obligated to follow the *Saucier* analytical framework in reviewing the Respondents’ assertion of qualified immunity. *See Pearson v. Callahan*, 2009 U.S. LEXIS 591 (Jan. 21, 2009) (finding that the *Saucier* procedure has been criticized by members of the Supreme Court and by lower court judges and holding that lower courts may still follow the *Saucier* protocol, but should have the discretion to decide whether the procedure is worthwhile in particular cases).

Even if this Court applied the *Saucier* test for qualified immunity, the Respondents would still fail because the right of a student to be free from an unreasonable strip search is clearly established. Under a qualified immunity analysis, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Saucier*, 533 U.S. at 202. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. *Id.* at 201. The State of Grace Court of Appeals cited a string of school strip search cases in support of its proposition that the law was not clearly established, but erroneously broadened the perspective under which the cases should be analyzed, rather than addressing them in light of their specific contexts. (R. at 12.) The fact that there is a discrepancy in the holdings is merely reflective of the importance of the specific facts in each case. The discrepancy does not, in and of itself, demonstrate that the law, or the constitutional protections of the Fourth Amendment, are not clearly established. If anything, this discrepancy clearly delineates between the factual circumstances under which a strip search would or would not be constitutional.

While *T.L.O.* does not provide “detailed guidance” for applying the “reasonable suspicion” test, *Beard*, 402 F.3d at 607, it clearly requires greater diligence and good-faith efforts than what the Respondents exercised before strip-searching Towles. Under no reading of the *T.L.O.* decision can it be inferred that receiving a single tip and viewing a single ambiguous photograph is sufficient to establish a reasonable suspicion. If the Respondents had taken more reasonable steps to authenticate the anonymous tip and investigate the likelihood that Towles had drugs in his possession, they might indeed be eligible for a defense of qualified immunity. As it stands, Towles was entirely undeserving of the strip search. The Supreme Court has clearly established that unreasonable suspicion cannot justify a strip search.

With regards to circuit court findings, if this Court takes a closer look at the body of case law cited by the Court of Appeals, it will find that a simple yet determinative distinction emerges, a distinction of which any reasonable official in the position of the Respondents would have taken notice: if a student’s conduct does not affirmatively lead to a reasonable suspicion, an intrusive strip search of the student’s person is not permissible. In cases where school officials have sufficient evidence of a student’s involvement with an illegal activity, or where they make reasonable efforts to investigate suspicions of such involvement, the law is clearly established that the officials may constitutionally proceed with a search that is reasonable in scope. In cases where the student does not exhibit suspicious behavior and school officials have nothing but a single tip and act upon a mere “hunch” without first taking the necessary steps of corroborating the tip, the law is equally clear: a strip search of a student is not constitutional. The Respondents, and the facts of this case, fit in the latter category because the Respondents relied on merely an anonymous, uncorroborated student tip and an ambiguous photograph of Towles before commencing the strip search.

As stated above, Towles' exhibited no conduct whatsoever that would have warranted suspicion. If, for example, his eyes had been bloodshot, *see Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146 (7th Cir. 1997), or if his behavior had been erratic, *see Hedges v. Musco*, 204 F.3d 109 (3d Cir. 2000), then, in conjunction with the Internet tip, Respondents would have known that they were entitled to proceed with the search. In the cases cited by the Court of Appeals in which strip searches were found to be constitutional, the school officials did not act merely upon a whim without further proof. In each of those cases, there was either specific conduct by the student that warranted suspicion or at least further actions taken by the school officials to validate the cause for the suspicion. *See, e.g., Williams*, 936 F.2d 881 (upholding as constitutional a search of a student that occurred after school officials spent several days investigating the student's suspected drug use and receiving multiple statements that verified the initial suspicion).

In the cases in which the strip searches were found to be unconstitutional, the students either did not engage in any outwardly suspicious conduct or were searched without further efforts by school officials to corroborate the suspicion. This standard is clearly established. Reasonable school officials in the position of the Respondents should have known that conducting a strip search under such unsubstantiated circumstances would be a constitutional violation of the student's Fourth Amendment rights. *See, e.g., Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006) (holding that an uncorroborated tip justifies additional inquiry, but is insufficient by itself to justify a step as intrusive as a strip search).

Even if this Court finds that the case law on strip searches conducted by school officials remains unclear, the protections of the Fourth Amendment have been guaranteed since the Bill of Rights was added to the Constitution in 1791. Indeed, some safeguards on government intrusion

remain self-evident and do not require a case on point to prevent government officials from hiding behind the cloak of qualified immunity. *Redding*, 531 F.3d at 1088. Some personal liberties are so fundamental to human dignity as to need no specific explication in the Constitution in order to ensure their protection against government invasion. *Brannum v. Overton County School Board*, 516 F.3d 489, 499 (6th Cir. 2008). Reasonable school officials do not need a federal court to inform them that “teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty.” *Id.* Even without a specific case on point, “these notions of personal privacy are ‘clearly established’ in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment’s proscription against unreasonable searches.” *Id.*

Accordingly, the State of Grace Court of Appeals’ holding that the Respondents are entitled to qualified immunity must be reversed.

CONCLUSION

For the foregoing reasons, the decision of the State of Grace Court of Appeals must be reversed.

Respectfully Submitted,
Team No. 17

Attorneys for Petitioner

APPENDIX “A”
CONSTITUTIONAL PROVISIONS

First Amendment:

The First Amendment to the United States Constitution provides that:

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

U.S. CONST. amend. I

Fourth Amendment:

The Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons... against unreasonable searches and seizures, shall not be violated...

U.S. CONST. amend. IV

Fourteenth Amendment:

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

No State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1

APPENDIX “B”

STATUTORY PROVISIONS

Horton Hopkins School District Drug and Alcohol Use Policy

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

Suspicion of Drug Use or Drug Possession

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

a) Personal Search

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

b) Consequences

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

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

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