

05-1338

**In the Supreme Court
of the
State of Grace**

Kit Politte and Corey 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 Petitioners

Team #29
For the Petitioners

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QUESTIONS PRESENTED

1. Did the Respondents violate Petitioner Politte and Petitioner Towles' First Amendment rights by suppressing petitioners' off-campus Internet speech?

Court of appeals held: Respondents' suppression of Politte and Towles' off-campus Internet speech did no violate Petitioners' First Amendment right to free speech.

- **List of Most Apposite Cases**

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

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

Porter v. Ascension Parish Sch. Bd., 393 F.2d 609 (5th Cir. 2004)

Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979)

2. Did the Respondents violate Petitioner Towles' Fourth Amendment rights when they subjected him to a warrantless strip search on school premises?

Court of appeals held: Respondents' search violated Towles' Fourth Amendment rights, but they were nevertheless entitled to qualified immunity.

- **List of Most Apposite Cases**

New Jersey v. T.L.O., 469 U.S. 325 (1985)

Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006).

Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071 (9th Cir. 2008)

Anderson v. Creighton, 483 U.S. 635 (1987)

STATEMENT OF THE CASE

This case first came before the Honorable Judge Sally Pearson in the Badger County District Court in the State of Grace in October, 2008. Plaintiff-Petitioners Kit Politte and Corey Towles originally brought suit against Defendant-Respondents Horton Hopkins School District and Principal Keena Smalls for deprivation of constitutional rights pursuant to 42 U.S.C. § 1983. Specifically, Petitioners alleged violations of their First Amendment right to free speech and Fourth Amendment right to be free from unreasonable searches and seizures. Respondents Horton Hopkins School District and Keena Smalls subsequently moved for summary judgment on both issues under Fed. R. Civ. Pro. 56(c). The District Court granted Respondents' summary judgment motion on both issues. Petitioners Politte and Towles appealed. The State of Grace Court of Appeals heard argument and affirmed the District Court's grant of summary judgment in January, 2009. Petitioners appealed to the Supreme Court of the State of Grace. This Court granted certiorari on January 26, 2009.

Petitioner Kit Politte is a senior at Horton Hopkins High School (hereinafter "Horton High") in Hopkinsville, State of Grace. (R. 2.) Politte began a student club at Horton High in September 2008 called Drug Use Damages Schools (DUDS). (R. 2.) Politte started the group to reduce and prevent drug use among students in Horton High in response to an increase in drug use and the death of volleyball team captain Kelly Smith in December, 2007. (R. 2, 1.) DUDS holds meetings after school in the Horton High building and holds assemblies during school to educate students about the dangers of drugs. (R. 2.) The school administration does not set a curriculum for DUDS and does not list educational goals for the group. (R. 2.)

Politte took her interest in reducing drug use into the community outside of Horton High when she created a webpage on the social networking site Friendkepedia in September, 2008. (R.

2.) Friendkepedia is a world-wide social networking site that has no affiliation with Horton High. (R. 2.) Politte's webpage, Fighting All Dealers (FAD), was devoted to preventing illegal drug sales in the city of Hopkinsville. (R. 2.) The website encouraged anonymous tips from residents of Hopkinsville. (R. 2.) Politte posted the strongest tips in the hopes they would assist Hopkinsville Police locate and apprehend local drug dealers. (R. 2.) Politte created the website on her personal computer at her home. (R. 2.) Politte did not access, edit, or otherwise utilize the FAD website from Horton High. (R. 2.) Politte spoke about the website at a September 15, 2008, meeting of the DUDS group, but she did not require that DUDS members sign up on the website. (R. 2.) Of the 235 members of the FAD network, 135 are not members of DUDS and 37 are not students at Horton High. (R. 2.)

Petitioner Corey Towles is a sixteen-year-old sophomore at Horton High. (R. 2.) Towles transferred to Horton High for the 2008-2009 school year. (R. 2.) At his former high school in the State of Disarray, Towles was an honor student who played on the junior varsity baseball team. (R. 2.) Aside from two detentions for tardiness, Towles had never been subject to any disciplinary action at his former high school. (R. 2.)

In order to improve his chances of making the Horton High baseball team, Towles attended a party thrown by the captain of the baseball team, Jeff Tweegs, on October 3, 2008. (R. 2.) Tweegs had been suspended for a week in September due to a marijuana incident at school. (R. 2.) In the week leading up to the party, rumors swirled that some Horton High students would bring marijuana to the party. (R. 2.)

Towles arrived at the party at approximately 9:00 p.m. and spent most of his time outside tossing around a football with some fellow sophomores. (R. 3.) Towles left the party by 11 p.m. (R. 3.) At least a half an hour after Towles left the party, Hopkinsville police arrived in response

to a noise complaint. (R. 3.) Frank Conrad, a Horton Hopkins sophomore, was found holding a marijuana joint and was cited for possession of marijuana. (R. 3.) Five Horton High students received citations for underage drinking. (R. 3.)

On October 4, 2008, Politte received an email from an unidentified Horton Hopkins student with a photograph attached. (R. 3.) The photograph showed Towles sitting with Conrad and sophomore John Thomson outside Tweegs' house during the party. (R. 3.) Conrad can be seen smoking an unidentified substance in the photograph. (R. 3.) Politte posted this photograph on FADS and captioned it: "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" (R. 3.)

The next morning, the police alerted Horton High Principal Keena Smalls of the students who had been cited at Tweegs' party. (R. 3.) She also received calls from parents of Horton High students directing her attention to the FAD photograph of Towles, Conrad, and Thomson. (R. 3.) Principal Smalls summoned Towles, Conrad, Thomson, and Tweegs to her office during school the next week. (R. 3.) Smalls questioned each student separately. (R. 3.) Towles, along with the three other students, denied possessing drugs. (R. 3.)

Despite their denials of possessing drugs, Smalls searched the students' lockers and book bags. (R. 3.) During the search, Smalls found marijuana in Conrad's locker. (R. 3.) Smalls did not find marijuana on Towles, Thomson, or Tweegs. (R. 3.) Smalls then asked the students to submit to a search of their persons. (R. 3.) The students refused. (R. 3.) Smalls ordered the searches of all four students anyway. (R. 3.)

Mr. Jim Waters, the gym teacher, conducted the search of Towles. (R. 3.) In private, Waters directed Towles to strip down to his undergarments. (R. 3.) Waters then searched the Towles' pockets. (R. 3.) Waters did not touch Towles at any point during the search. (R. 3.)

Waters found no drugs in Towles' possession. (R. 3.) Waters found a small amount of marijuana in Thomson's jeans pocket during a similar search. (R. 3.)

Shortly thereafter, Towles created a webpage on Friendkepedia in response to Politte's posting and the school's strip searches. (R. 3.) The text of his website is written verbatim in the District Court's opinion. (R. 3-4.) Towles stated his belief that FAD was defamatory. (R. 3-4.) Towles also used the webpage to express his opinion that Horton High's school officials had unreasonably and unfairly subjected students to strip searches. (R. 4.) Towles expressed his wish that Horton High students would "speak out" and tell school administrators about their criticism of the strip searches. (R. 4.) Towles did not call the students to any action other than to speak. (R. 4.) Towles created this webpage at home on his personal computer. (R. 3.) Towles did not access or edit his webpage from Horton High. (R. 4.) Students at Horton High accessed Towles' and Politte's webpages during their free time and after school hours from computers provided by Horton High for student use. (R. 4.)

Principal Smalls demanded that Politte and Towles remove their webpages from Friendkepedia. (R. 4.) Principal Smalls testified she "was angry about Towles' criticism of the school administration's actions" regarding the searches. (R. 4.) Principal Smalls testified that her "main concern" was discipline and order at school and preventing student protest. (R. 4.) Politte and Towles refused to remove their webpages from the world-wide social networking site. (R. 4.) Principal Smalls suspended both students until they acquiesced. (R. 4.) Both students removed their websites from Friendkepedia in response to the suspensions. (R. 4.) Politte and Towles subsequently brought suit against Principal Smalls and the Horton Hopkins School District for violation of their First and Fourth Amendment rights.

SUMMARY OF THE ARGUMENT

Under the guise of maintaining order in schools, Respondents have trampled on the constitutional rights of Petitioners Towles and Politte. Respondents improperly regulated the Petitioners' speech by requiring them to remove their personal webpages from a non-school affiliated social networking website. Because both webpages were created and edited entirely off campus the Court should not apply the *Tinker* reduced free speech standard. The Court should recognize that students have the full right to speak without government interference when outside the unique school environment. Nevertheless, even if the Court applies the *Tinker* standard, evidence on the record reveals material issues of fact which preclude summary judgment. The district court abused its discretion when it granted summary judgment to Respondents on Petitioners' First Amendment claim, and the court of appeals erred by affirming the district court. The court of appeals also erred in finding that Respondents are entitled to qualified immunity on Petitioner Towles' Fourth Amendment claim. Under clearly established Fourth Amendment law, the search of Towles was unjustified at its inception and went far beyond what was permissible in scope under the circumstances. Thus, Petitioners respectfully request that the Court reverse the court of appeals' grant of summary on their First and Fourth Amendment claims.

ARGUMENT

I. Standard of Review

An appellate court reviews a grant of summary judgment de novo. *Freire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992), *cert. denied*, 506 U.S. 973 (1992). Federal Rule of Civil Procedure 56(c) states a court should grant summary judgment where the evidence on the record shows no genuine issue of material fact. Fed.R.Civ.P. 56(c) (2008). A fact is material

when “it might affect the outcome” of the case. *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F.Supp.2d 698, 702 (W.D. Pa. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A genuine issue exists when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. The court must review all evidence on the record and “draw all reasonable inferences in favor of the nonmoving party.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (discussing judgment as a matter of law).

II. The Court of Appeals Erred When It Held that Politte and Towles Engaged in Restrictable “School Speech”

The Court of Appeals of the State of Grace erred by relying on *Doninger* to find speech which merely reaches campus is school speech for purposes of the First Amendment. (R. 9.); U.S. CONST. amend. I. Under the appropriate standard, Politte and Towles did not engage in school speech because they created their webpages off school grounds, without any school resources, never accessed or edited the webpages from Horton High, and the webpages did not sufficiently reach into the school environment. Because the webpages are not school speech, they should not be subject to school restrictions.

a. School Officials Have Significantly Less Authority to Regulate Off-Campus Speech than On-Campus Speech

The Supreme Court has not yet decided an off-campus student speech case. In *Tinker*, the Supreme Court stated what is perhaps the best-known standard for school regulation of on-campus student speech: regulation is permissible where the student speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others...” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). The Supreme Court has chosen not to apply *Tinker* to other on-campus student speech cases. see *Bethel Sch. Dist. v. Fraser*, 478 U.S.

675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 127 S.Ct. 2618 (2007). In *Bethel v. Fraser*, the majority found that a student was permissibly punished for his “lewd” speech at an on-campus school assembly. *Fraser*, 478 U.S. at 685-6. In *Kuhlmeier*, the Court upheld a high school administration’s decision to excise two articles from the school newspaper. *Kuhlmeier*, 484 U.S. at 572. The newspaper was published by the school and written by students as part of their school curriculum. *Kuhlmeier*, U.S. at 570. In *Morse*, the Supreme Court found that a school-sanctioned activity off school grounds and not directly sponsored by the school was “at school” for purposes of school officials’ authority. *Morse*, 127 S.Ct. at 2624. School officials had authority to restrict the student’s speech because it was school speech and the speech promoted drug use. *Id.* at 2629. In his concurring opinion, Justice Alito cautioned that *Morse* was the furthest the Court would go to restrict student speech. *Id.* at 2638.

Several federal courts of appeals and district courts have dealt with the issue of off-campus speech. Many courts distinguish between speech created on-campus and speech created off-campus. See *Beussink v. Woodland R-IV Sch. Dist.*, 30 F.Supp.2d 1175 (E.D. Mo. 1998); *Emmett v. Kent Sch. Dist.*, 92 F.Supp.2d 1088, 1090 (W.D. Wash. 2000); *Porter v. Ascension Parish Sch. Bd.*, 393 F.2d 609 (5th Cir. 2004). *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fl. L. Rev. 1027, 1056 (2008) [hereinafter Papandrea] (discussing courts’ approaches to off-campus speech). see also Sarah O. Cronan, Comment, *Grounding Cyberspeech: Public Schools’ Authority to Discipline Students for Internet Activity*, 98 Ky. L. J. 149 (2008-2009) [hereinafter Cronan]. Other courts apply *Tinker* to the speech, regardless of where it originated. See *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 983 (11th Cir. 2007). Still other courts apply *Morse*, even to speech created off-campus. See *Ponce v. Socorro Indep. Sch. Dist.*, 508

F.3d 765, 768 (5th Cir. 2007).

The Court should not apply *Tinker* or *Morse* to off-campus speech. The justifications for school authority over school speech do not apply to off-campus student speech. The *Tinker* Court famously wrote that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. In *Fraser*, the Court wrote that “the constitutional rights of students *in public school* are not automatically coextensive with the rights of adults in other settings.” *Fraser*, 478 U.S. at 682 (emphasis added). In his concurring opinion to *Fraser*, Justice Brennan explained that had the lewd speech taken place outside of school, the student “could not have been penalized.” *Id.* at 688. The Supreme Court has repeatedly emphasized the “special characteristics of the school environment” in its opinions upholding restrictions on school speech. *See Tinker*, 393 U.S. at 506; *Morse*, 127 S.Ct. at 2629; *Fraser*, 478 U.S. at 688 (Brennan, J. concurring); *Kuhlmeier*, 484 U.S. at 266.

To say that the school environment is a “special circumstance” is to say that there is something different about being *at school*. In time, place, and manner regulations, the justification for government restriction is not who the speaker is, but where the speaker is. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Similarly, it is not the nature of being a student that gives school officials authority to restrict disruptive speech, it is the nature of being in the school environment. As such, *Tinker* and *Morse* cannot appropriately be applied to off-campus speech. Limiting school authority to restrict student speech to the territory of the school, school-sponsored activities, and school events best fits with the Supreme Court’s emphasis on the special circumstances of school. Outside of these special circumstances, traditional first amendment principals should apply to speech regardless of the age of the speaker.

b. The Court Should Adopt a Nexus Test to Determine When Speech is “School Speech”

The Court should adopt a nexus test to distinguish between off-campus speech and on-campus, or school, speech. Courts distinguishing between on- and off-campus speech have applied two different tests: 1) the “territorial” approach, and 2) the “directed” or “foreseeable” approach. Papandrea at 1056-64. The “territorial” approach focuses on the actual connection, or nexus, between the speech and the school. *Id.* at 1058-59; Cronan at 161. The “directed” or “foreseeable” approach focuses on whether the student intended the speech for a school audience, or if it is “reasonably foreseeable that the speech will come to the attention of school authorities. Papandrea at 1059. *see Boim*, 494 F.3d at 985 (11th Cir. 2007); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007); *Doninger v. Neihoff*, 527 F.3d 41, 48-9 (2d Cir. 2008).

To determine whether the actual connection between the speech and the school is sufficient to justify school restriction, some federal courts applying the territorial approach focus on whether the speaker is the individual who brought the speech to campus. *Thomas*, 607 F.2d at 1052 n.18; Papandrea at 1057-59. Other courts focus on how far the speech reached into the school community once it arrived at school. *Coy v. Bd. of Educ. of the N. Canton City Sch.*, 205 F.Supp.2d 791, 799 (N.D. Ohio 2002); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp.2d 587, 599 (W.D. Pa. 2007) (requiring the school show “an appropriate nexus” between speech created off-campus and the school).

The Court should adopt a two-prong territorial nexus approach for determining when speech created off-campus should be considered school speech subject to school regulation. To justify school intervention with speech created off-campus, the school should show: 1) The student brought the speech to campus or caused the speech to be brought to campus by another;

and 2) the speech reaches significantly into the school environment. Only when both prongs are met can a school demonstrate the speech was sufficiently connected to the school.

The two-prong test is the most appropriate given today's social, technological, and legal landscape. As Papandrea discusses, today's adolescents use social networking sites and other technology in the same way that previous generations used conversation and diaries – to discuss their ideas, air grievances, and share the minutia of their days. Papandrea at 1030, 1032-37. The difference between today's technology and yesterday's is accessibility. Twenty years ago a school administrator would not know what posters a student had in his or her bedroom or what conversations had taken place at the mall; now the administrator can view online conversations and personal webpages. Accessibility alone does not justify a school administrator reaching even further out of school to restrict off-campus statements. As Judge McVerry writes in *Layshock*, “[t]he mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web.” *Layshock*, 496 F.Supp.2d at 597. An illustrative analogy is if student A brings a photograph of Student B's bedroom wall to school and shows it to his classmates. A school administrator would not be justified in demanding that Student B remove the poster from his bedroom wall. Similarly, a recording of a conversation at the mall could not justify a school administrator ordering a student to remain silent while outside school. The two-prong test would successfully and reasonably limit the reach of school administrators outside the school environment, while still recognizing that some speech created off-campus may have the potential for disrupting the school environment.

The Court should not adopt the “directed” or “reasonably foreseeable to reach school” approach to on- and off-campus speech. This approach immeasurably broadens school authority over non-school activities and would have a chilling effect on all student speech in the

increasingly important medium of the internet. As schools provide computers and internet access to students, any item posted on a webpage from home could reasonably be foreseen to be accessed by another student at school. Even a notebook, if not secreted away, or a conversation, if recorded by cellular phone, could reasonably be foreseen to reach school. Most student speech will likely be “directed” at other students or the school itself. If all this is school speech, *Fraser* and *Morse* would be expanded to cover all internet speech, much written speech, and perhaps even conversations. The Court should adopt the nexus test to protect student speech from such expansion. If students do not surrender their rights at the schoolhouse gate, they should not be required to surrender them every time they log onto their personal websites from home, write in their notebooks, or speak aloud. The over-broad reasonable foreseeability test would require them to do exactly that.

c. Under the Nexus Test, Politte and Towles’ Webpages Were Off-Campus Speech Not Subject to School Restriction

Using the two-prong nexus test, Politte and Towles’ webpages were off-campus speech and they were impermissibly restricted by the school administration. In *Porter*, the Fifth Circuit found that a student’s sketchbook was not “school speech” because it had been created off-campus and brought to campus without the creator’s knowledge. *Porter*, 393 F.2d at 615. In *Thomas*, the Second Circuit held that a student publication largely created and distributed off-campus was not subject to school control. *Thomas*, 607 F.2d at 1050. Like in *Porter*, Politte and Towles’ webpages were created and posted off school grounds from their home computers. Neither Politte nor Towles accessed their webpages from Horton High. While other students at Horton High accessed the webpages, neither webpage directs students to do so. This is akin to *Porter*. The first prong is not met.

The second prong of the test is also not met. The students had stored the newspapers in

the school building and typed a few articles on school typewriters. *Thomas*, 607 F.2d at 1050. The *Thomas* court found merely “de minimus” involvement with the school facilities. *Id.* As such, the speech did not reach far enough into the school environment to be considered school speech. Although students accessed the pages at school, the record shows they did so during their free time, and the record does not demonstrate how many students accessed it. There is also no evidence that teachers accessed the webpages or that there was any discussion of the pages at school. Like in *Thomas*, the webpages simply did not reach far enough into the school environment to be considered school speech.

The court of appeals erroneously relied on the *Doninger* court’s test to find that Politte and Towles’ webpages were school speech. Because the speech at issue was off-campus speech and not subject to school regulation as a matter of law, the Court should overturn the court of appeals decision to grant summary judgment to Respondents.

III. The Court of Appeals Erred When It Affirmed the District Court’s Holding that There Were No Issues of Material Fact

The court of appeals erred by affirming the district court’s holding that there were no issues of material fact. If the Court determines Politte and Towles engaged in off-campus speech, the restrictions were impermissible. If the Court determines the webpages were on-campus speech and applies the *Tinker* analysis, there are issues of material fact as to whether or not there was a reasonably foreseeable significant disruption at Horton High. Principal Smalls’ testimony also raises a genuine issue of material fact as to her motivation. These issues of material fact should go to a fact-finder for resolution. Thus, the summary judgment was erroneous.

a. If the Court applies the *Tinker* Standard to the Off-Campus Speech, There is a Genuine Issue of Material Fact

If the Court determines that the *Tinker* analysis applies to this case, there is a genuine

issue of material fact as to whether a substantial disruption was reasonably foreseeable. The *Tinker* court held that student school speech can be restricted where the circumstances “might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” *Tinker*, 393 U.S. at 514. (citing *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)). There need not be an actual disruption, but it is not constitutionally adequate for the school to rely on “undifferentiated fear or apprehension of disturbance.” *Id.* at 508. The test allows courts to “balance the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning.” *Layshock*, 496 F.Supp.2d at 595.

i. The Record Shows No Reasonably Foreseeable Disruption

The facts in the record demonstrate there was no reasonably foreseeable substantial disruption to justify suppression of Towles’ and Politte’s webpages. In *J.S. v. Bethlehem*, the plaintiff student created a webpage on his home computer which used vulgar language and graphic imagery to insult the school principal and algebra teacher. *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 416 (Pa. Commw. Ct. 2000). The site included a section titled “Why Should She Die?” and solicited contributions to hire a “hitman” to kill the algebra teacher. *Id.* The Commonwealth Court of Pennsylvania upheld the district court’s findings that the website caused the algebra teacher to become very frightened, caused her physical pain, led her to take significant time away from teaching, and had a “demoralizing” effect on the school community. *Id.* at 416, 421-22. The Commonwealth Court of Pennsylvania found these facts showed substantial disruption of the school’s functions. *Id.* at 421.

Unlike *J.S.*, there is no evidence on the record of this case of a “demoralizing” effect on the student body. While Politte’s website prompted a response from Towles in the form of his

website, there is no evidence that any other students were affected by the webpages. No teachers were affected by the websites, and there is no evidence of disruption of classtime or classwork during the school days because of the webages. Also in contrast to *J.S.*, Politte and Towles' webpages do not contain the offensive and potentially threatening language of J.S.'s website. Unlike in *J.S.*, the webpages at issue in this case caused no student or faculty member any harm and did not disrupt the normal functioning of the school.

In *Karp*, the student plaintiff brought signs to school to protest the firing of an English teacher. *Karp v. Becken*, 477 F.2d 171, 173 (9th Cir. 1973). The student and others planned a walk-out protest from a school assembly and notified the local media of their intent. *Id.* Before the assembly, school officials were informed that another group of students intended to prevent the walk-out. *Id.* School officials cancelled the assembly to avoid violence. *Id.* Later that morning, the plaintiff again notified the media of his intent to stage a protest at school, and retrieved the signs from his car. *Id.* at 174. School officials confiscated the signs. *Id.* at 175. On these facts, the Ninth Circuit found the school administrators had reasonably forecast a "material interference with the school's work." *Id.*

Unlike *Karp*, Towles and Politte had no plans or intent to stage a physical protest at the school. While Principal Smalls testified at the district court that a potential protest was one of her "main concerns," the evidence on the record demonstrates no protest was reasonably foreseeable. Towles merely called on the Horton High students to "speak out." He did not post directions for holding a walk-out, did not state any intention to bring signs or other large media to the school building, and did not contact any local news agencies to cover an event. Politte's website solicited only anonymous tips and did not call for any action related to Horton High. Unlike in *Karp*, there is no evidence on the record indicating a likely protest. Any fear Principal Smalls

had of an imminent student demonstration was unreasonable.

In *Doninger*, the student plaintiff wrote a blog entry insulting school administrators because of a possible cancellation of a school event. *Doninger*, 527 F.3d at 45. The plaintiff asked community and school members to contact the administrators to make them angry. *Id.* The plaintiff was a member of the student government and planning the band event in that role. *Id.* at 44. The *Doninger* court found the following material interference with school operations: 1) the blog entry prevented resolution of the matter between the school administrators and the student government; 2) there was misinformation in the blog entry that the school would need to correct, which would take time from the administrator's schedules; and 3) the speech was related to the student's participation in a school-run extra-curricular program with education goals, which allowed the school more leeway to regulate. *Id.* at 50-53.

Unlike *Doninger*, the content of Politte and Towles' webpages did not materially interfere with school operations. Towles called on the students to speak their minds to the school administration, not to anger a rival. There was no ongoing dispute between the school administrators and Towles or Politte, and their websites did not interfere with the resolution of a dispute. Towles alleged that Politte's website was misleading, but it was not the responsibility of school administrators to correct any misunderstandings resulting from Politte's website. There is no evidence that the webpages had an impact on Principal Smalls' schedule at school or prevented her from attending to her other duties.

Also unlike *Doninger*, Principal Smalls did not suppress the webpages because of extra-curricular activities. Towles is not a member of any club or organization at Horton High. Politte is the organizer of a school-sponsored club (DUDS), but the FAD website is Politte's own personal venture and not affiliated with the school club. FAD does not link to a DUDS website

or to the school website, FAD's network is not limited to DUDS members, and DUDS members are not required to join FAD. When Politte posts to the FAD website, she is not acting in her capacity as DUDS organizer. More importantly, Politte's involvement with DUDS is not the reason Principal Smalls restricted her speech. Rather, Principal Smalls testified that she demanded removal of Politte's website because of a general concern about protest. There is no evidence on the record that Principal Smalls intended conform to an educational mission for extra-curricular activities by suspending Politte.

In *Tinker*, students attending the junior high and high school planned to wear black armbands to express dissatisfaction with the war in Vietnam. *Tinker*, 393 U.S. at 504. The Supreme Court found substantial disruption was not reasonably forecast because the record showed the armbands merely "caused discussion" and did not "interrupt school activities." *Id.* at 514.

Like in *Tinker*, Politte and Towles' webpages did not interrupt school activities. The record shows that students who accessed the webpages at school did so in their free time or after school hours. This was not an interruption of school activities. There is no evidence the websites even caused discussion like the armbands in *Tinker*. In fact, there is no evidence on the record of any reaction from the student body to the webpages. Like in *Tinker*, there was no reasonable forecast of substantial disruption when Principal Smalls restricted Politte and Towles' speech.

The record demonstrates that there is a genuine issue of material fact on the issue of the reasonableness of the forecast of disruption at Horton High. No teachers were forced to address the webpages in class, students only accessed the webpages on their free time, there were no plans for demonstrations or protests, no teachers were forced to take leave, and the school administrators did not need to interrupt their schedules to deal with the webpages. A jury looking

at these facts could reasonably find for the plaintiff. The court of appeals erroneously affirmed the district court's grant of summary judgment for Respondents. The Court should reverse.

b. Principal Small's Motivation for Restricting Politte and Towles' Speech Is a Genuine Issue of Material Fact

The motivation behind Principal Small's suppression of the webpages is a genuine issue of material fact. Under the *Tinker* standard, the reasonably foreseeable disruption must be the actual reason for suppressing school speech. *see Tinker*, 393 U.S. at 509 n.3; *Beussink*, 30 F.Supp.2d at 1180; *Coy*, 205 F.Supp.2d at 801; *Doninger v. Niehoff*, 2009 WL 103322, 6-7 (D. Conn. 2009). Principal Smalls testified she was angry about Towles' criticism of the school. She also testified her "main concerns" were maintaining order and discipline at school and preventing a protest. However, the record shows Politte and Towles' websites had no negative effect on the order and discipline at Horton High. Further, there is no evidence of a likely demonstration or disruption at the school. Taking all reasonable inferences in favor of the appellant, Principal Smalls' testimony and the evidence on the record raise a serious question of her actual motivation behind suspending Politte and Towles and suppressing their speech. If the fact-finder determines that Principal Smalls' actual motivation was to suppress Towles' criticism, then the speech restriction would be improper. The fact is material and a genuine issue for a fact-finder.

IV. The Respondents Violated Petitioner Towles' Clearly Established Fourth Amendment Rights

The court of appeals erred in holding that the Respondents are entitled to qualified immunity. Under clearly established law, the search was unreasonable under the Fourth Amendment because it was neither justified at its inception nor permissible in scope. Because the Respondents should have known that they were violating Towles' rights, they are not entitled to

qualified immunity. Thus, Petitioner respectfully requests that the Court reverse the court of appeals grant of summary judgment on Towles' Fourth Amendment claim.

a. The Search Violated Towles' Fourth Amendment Rights

The Fourth Amendment prohibits the government from subjecting people to unreasonable searches and seizures. U.S. CONST. amend. IV. The Supreme Court has held that “‘the Fourth Amendment protects people, not places,’ and wherever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.” *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (internal citations omitted).

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Supreme Court clearly established that public school officials are subject to the Fourth Amendment's prohibition on unreasonable searches and seizures. The Supreme Court, recognizing that a strict adherence to probable cause requirements was unsuitable to the school environment, held that “the legality of a search of a student should depend simply on the reasonableness, under all circumstances, of the search.” *Id.* at 341. Whether a search is reasonable depends on the context of the search and requires “balancing the need to search against the invasions which the search entails.” *Id.* at 337.

In *T.L.O.*, the Supreme Court adopted a two-part test for determining the reasonableness of a public school official's conduct under the Fourth Amendment. *Id.* at 341. First, the search must be “justified at its inception.” *Id.* (citing *Terry v. Ohio*, 392 U.S. at 20). Second, the search must be “reasonably related in scope to the circumstances [justifying] the interference in the first place.” *Id.* A search will be “‘justified at its inception’ when 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.* at 341-342. “[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not

excessively intrusive in light of the age and sex of the student and the nature of the infraction.”
Id. at 342.

Because the search of Towles was neither justified at its inception nor permissible in scope, the search was unreasonable under the *T.L.O.* standard.

i. The Search Was Not Justified At Its Inception

The totality of the circumstances consists of only what was known to school officials prior to commencement of the search. *Phaneuf v. Fraikin*, 448 F.3d 591, 597 (2d Cir. 2006). In evaluating the totality of the circumstances, an anonymous tip may be considered but does not alone establish reasonable suspicion. *Alabama v. White*, 496 U.S. 325, 330 (1990) (holding that an anonymous telephone tip would not lead a reasonable man of caution to believe that a stop was warranted without further inquiry and corroboration). Both the quantity and quality of the information must be taken into account when analyzing reasonable suspicion. *Id.* An informant’s veracity, reliability, and basis of knowledge are considered “highly relevant in determining the value of” an anonymous tip. *Id.* at 329.

The only information that Ms. Smalls had prior to the search was the anonymous photographic tip. Apart from the anonymous photograph, Ms. Smalls had no other information that had any bearing on Towles likelihood to possess drugs. Significantly, the photograph fails to provide reasonable suspicion based on either the quality or quantity of information. Taking the photograph in the light most favorable to Mr. Towles, the photograph reveals three things. First, the photograph reveals that Towles did in fact attend Tweegs’ party. Second, the photograph reveals that at some point during the evening Towles sat in close proximity to Thomson and Conrad. Third, the photograph shows Conrad smoking an unidentified substance at that moment. Although Ms. Politte’s caption suggests that the substance Conrad was smoking in the

photograph an illegal drug, it is not clear on what grounds, if any, Ms. Politte had for believing Conrad was not smoking a tobacco cigarette. These pieces of information, taken together, create no reasonable basis for concluding Towles was likely to possess drugs several days later.

Significantly, Ms. Smalls made no attempt to conduct further investigation or to corroborate her unsubstantiated suspicions. In *Phaneuf v. Fraikin*, the Second Circuit found that a strip search of a student to recover drugs was unreasonable. 448 F.3d at 600. The determining factor in the court's holding was the school official's reliance on an uncorroborated student tip. *Id.* at 598. In *Phaneuf*, a student informant made a face-to-face claim to school officials that the student had put marijuana in her pants. *Id.* The informant had not personally seen the student with drugs. *Id.* In finding the search unreasonable, the Second Circuit relied on the fact that the school officials had no basis for believing the student was trustworthy and did not make any attempts to "investigate, corroborate, or otherwise substantiate [the tip] prior to ordering the strip search." *Id.* The court was troubled by the schools' "acceptance of one student's accusatory statement to initiate a highly intrusive search of another student—with no meaningful inquiry or corroboration." *Id.* Similarly, in the present case Ms. Smalls made no attempts to investigate or conduct further inquiry into the photographic tip. She did not question students who attended the party or Mr. Towles' parents, teachers, or fellow classmates.

Most damaging, Ms. Smalls made no attempt to discover the identity of the photograph's author in order to corroborate her suspicions or to verify the trustworthiness of the informant. The student may have had further information regarding whether the substance in the photograph was in fact marijuana or whether any of the other students in the photograph were also smoking. Although the school asserts that because the tip is in the form of a photograph it is more reliable than a verbal tip, this does not overcome the fact that the photograph is ambiguous on its face.

The Respondents offer no explanation why there was an immediate need for an invasive search other than a generalized need to prevent student drug use. In light of the ambiguous information that the photograph provided, the need for further investigation was particularly heightened. As a result, a reasonable school official would have conducted further inquiry into the circumstances before subjecting a student to a substantial invasion of privacy.

Further, it appears that the primary justification for the search was Towles' association with other students who were suspected of possessing marijuana. However, there is no indication in the record besides the mere existence of the photograph to suggest why Principal Smalls believed this association made it more likely that Towles himself possessed marijuana. Although the district court assumed the boys in the photograph were friends, the record is devoid of any evidence suggesting the students associated on any occasion other than the night of the party. There is no evidence that the students were considered friends or that they frequently associated with each other. Indeed, the record does not even suggest that the association lasted any longer than the few seconds it took to pose for a photograph. On summary judgment, it would be inappropriate to assume the boys were friends on such vague information. Basing a search of Towles on this photograph would amount to "nothing more than 'guilt-by-association,' certainly too thin of a reed for such a substantial intrusion into... expectations of privacy." *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1084 (9th Cir. 2008) (striking down a strip search where a friendly association with another student was not enough to make involvement in pill distribution more likely).

Moreover, even if we assume that Mr. Towles was photographed with drugs at Tweegs' party, this fact had a tenuous relationship with the likelihood that Towles would possess drugs several days later. The photograph was taken on a Friday night off of school property several

days before the strip search was conducted. There was simply no evidence that Towles was presently violating a school rule. *Cf. Redding*, 531 F.3d at 1083 (finding that further investigation was required where the initial tip provided no information as to whether student currently possessed pills or was hiding them in a place where they would be revealed by a strip search).

Several student search cases illustrate that the necessity of a present need to search. In *Cornfield by Lewis v. Consol. High Sch. Dist.*, 991 F.2d 1316 (7th Cir. 1993), the Seventh Circuit upheld a strip search where school officials observed an unusual bulge in the students' pants, which caused school officials to believe the student was presently hiding drugs in his pants. When confronted, the student became agitated and yelled obscenities at school officials, further supporting their suspicion. *Id.* at 1320. Significantly, the school officials' suspicion in *Cornfield* was also corroborated by a police tip that the student was selling drugs to students and the observations of two other school personnel. *Id.* at 1322. Similarly, in *Hedges v. Musco*, 204 F.3d 109, 113 (3rd Cir. 2000), the Court upheld a medical examination where school officials observed multiple signs that the student was presently under the influence of drugs. *See also Bridgman By Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146, 1147-1148 (7th Cir. 1997) (holding that a medical examination was reasonable where student displayed multiple signs of drug use); *Widener v. Frye*, 809 F.Supp. 35 (S.D. Ohio 1992) (finding partial strip search reasonable where student smelled of marijuana and displayed signs of drug use).

Conversely, there was no evidence that Towles possessed or was under the influence of drugs at the time of the search. There is not even any evidence that Towles was aware of the rumors that drugs would be available at the party, and his stated purpose for attending the party was to increase his chances of making the Horton High baseball team. It should take more than a vague suspicion to overcome Towles' untarnished student record. Furthermore, allowing a past

incident occurring outside of school with no substantiated connection to the present to by itself provide reasonable suspicion for searching a student is inherently unreasonable and would place almost no limitation on a school's ability to invade a student's privacy at school. Indeed, any student suspected or implicated in wrongdoing with no connection to the school would become subject to search as soon as he or she set foot on school property. Simply put, there must be a more particularized connection to the present in order to support a likelihood that the search will uncover evidence of wrongdoing.

Respondents initiated a search of an honor student based upon an unsubstantiated tip of doubtful significance without any attempt to conduct further investigation. The facts set forth in support of the search are logically unrelated to a reasonable belief that Towles currently possessed drugs. Thus, because Respondents did not have reasonable grounds for believing a search would reveal evidence of wrongdoing, the search was not justified at its inception.

ii. The Search Was Unreasonable in Scope

Even if the Court were to find that a minimal search was justified at the outset, a strip search went far beyond what was reasonable based on the weak information Respondents possessed. Neither the information possessed at the outset nor the information obtained through the initial search of Towles' locker and bag justified an excessively intrusive strip search. Thus, the Court should find that the search was impermissible in scope.

The reasonableness standard set forth in *T.L.O.* ensures "that the interests of the students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *T.L.O.*, 469 U.S. at 343. Under the *T.L.O.* balancing test, "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or

pocketbook may fall well short of reasonableness for a nude search.” *Cornfield*, 991 F.2d at 1321. Under this sliding scale, “[t]he scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” *Terry*, 392 U.S. at 19.

Regardless of how they are conducted, strip searches are “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.” *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir.1983). Noting their intrusive nature, courts have consistently required a high level of suspicion to justify strip searches. *See Phaneuf*, 448 F.3d at 596 (finding that an unreliable and uncorroborated tip did not support the high level of reasonable suspicion needed to justify an invasive strip search). *See also Bridgman By Bridgman*, 128 F.3d at 1146 (finding that a less intrusive search may be justified where there would be insufficient grounds for a strip search).

Petitioner submits that an intrusive strip search was not justified by the low level of reasonable suspicion, if any, present in this case. Respondents cite the school’s restrained process as evidence that the search was reasonable in scope. On the contrary, that the search was executed in private by a teacher of the same sex does not negate the fact that a strip search is still a substantial invasion of Towles’ privacy requiring a high degree of suspicion. *See Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (counseling that “a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.”).

This case is distinguishable from cases upholding strip searches. In *Williams by Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991), the Sixth Circuit held that a strip search was permissible in scope because school officials had a reasonable suspicion that the search would reveal a small vial of narcotics that could easily be hidden in clothing. In contrast to the present case, the school in *Williams* had a specific description of the drugs that the student had used

shortly before the search. *Id.* When an initial search did not uncover the vial of drugs, the Sixth Circuit found the school was justified in intensifying that search. *Id.*

Although Respondents were also searching for a small amount of drugs like the school officials in *Williams*, the facts are distinguishable. The mere fact that Smalls was looking for a small amount of drugs does not justify the scope of the search if she had no reasonable basis for actually suspecting Towles possessed the drugs. Rather, Smalls instead relied on a generalized suspicion that Towles *might* have been associated with drug use in the past. The school points to the drugs found on Conrad and Thomson to support the strip search of Towles, but the evidence fails to support that this makes it more likely that Towles would possess drugs. Because the photograph fails to sufficiently connect Towles with the other students' conduct, nothing found during the initial search warranted escalating the level of intrusion into Towles' privacy. Thus, the strip search was impermissible in scope. *Cf. T.L.O.*, 469 U.S. at 345 (finding escalation of search is reasonable where initial search of that student revealed drug paraphernalia).

Thus, because the search of Towles was impermissible in scope, the Court should find the search unconstitutional under the Fourth Amendment. The school relies heavily on the serious drug problem at Horton High to justify the search and its scope. While there is undoubtedly a strong governmental interest, the school must still respect students' Fourth Amendment rights. Indeed, the courts have emphasized that the special role of schools in "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. Of Ed. v. Barnette*, 319 US 624, 637 (1943). While the schools may have serious concerns about drug use "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *T.L.O.* at 338.

Allowing this search to stand as a reasonable search under the Fourth Amendment would certainly place few, if any, restraints on a school's ability to search in the name of drugs and would vitiate any protections of privacy that *T.L.O.* purported to bestow on students.

b. Towles' Fourth Amendment Rights Were Clearly Established

The balancing test announced in *T.L.O.* along with the numerous cases decided since should have led a reasonable school official to know that Respondents' conduct was unlawful under the Fourth Amendment. Because it was clearly established at the time of the search that Respondents' conduct constituted an unreasonable search, the Court should find that the Respondents are not entitled to qualified immunity.

A government official "conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment." *Pearson v. Callahan*, 2009 WL 128768 (2009) (holding that the two-step procedure for evaluating qualified immunity established in *Saucier v. Katz*, 533 U.S. 194 (2001), should be considered flexible rather than mandatory). "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 6 (quoting *Harlow v. Fitzgerald*, 457 US 800, 818 (1982)). Qualified immunity fails if the law is clearly established, "since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-819.

Whether a government official's conduct violates clearly established law "depends substantially upon the level of generality at which the relevant legal rule is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Supreme Court advised that in order for the right to be clearly established, "the contours of the right must be sufficiently clear that a

reasonable official would understand that what he is doing violates that right.” *Id.* “This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful...but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” *Id.* (internal citations omitted). Indeed, requiring that there “must be factual identity between a prior case and the case under consideration...would result in ‘absolute immunity,’ not ‘qualified immunity’.” *Konop for Konop v. Northwestern Sch. Dist.*, 26 F.Supp.2d 1189, 1196 (D.S.D. 1998).

“When determining whether a right is ‘clearly established,’ we ‘look first to decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits.’” *McBride v. Village of Michiana*, 100 F.3d 457, 460 (6th Cir.1996) (citation omitted). “An action's unlawfulness can be apparent even in novel factual circumstances ‘so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.’” *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (citation omitted).

In construing the law on strip searches in schools, the court of appeals erred in finding that *T.L.O.* and the numerous circuit court decisions applying the balancing test did not provide reasonable guidance for Horton High officials to know their conduct was unlawful in October of 2008. The court of appeals pointed to a discrepancy in the circuit court case law as evidence that the law is not clearly established. However, this argument misconstrues the issue before the court and the fact intensive nature of the inquiry. *See Reece v. Groose*, 60 F.3d 487, 490 (8th Cir. 1995) (“the legal question of qualified immunity is itself fact-intensive.”). The different outcomes reached in the case law is entirely consistent with the fact-intensive nature of the *T.L.O.* balancing test. The mere fact that circuits have upheld strip searches in some

circumstances and found some searches unconstitutional does not confirm that the law is not clearly established. Indeed, contrary to the court of appeals holding, the guidelines that have governed strip search cases remain consistent. Numerous decisions have addressed a situation substantially similar to the present case. The weight of the authority is apparent, and it provides reasonable notice that the search of Towles was unconstitutional.

It is undisputed that Towles was subject to a search under the Fourth Amendment. Although the Supreme Court has never specifically addressed the constitutionality of school strip searches, the several circuits have clearly established that *T.L.O.*'s reasonableness inquiry governs. See *Phaneuf*, 448 F.3d at 596. See also *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 824 (11th Cir.1997) (en banc); *Cornfield*, 991 F.2d at 1320-21; *Williams*, 936 F.2d at 884. *Hedges*, 204 F.3d at 116-17.

Although the Supreme Court in *T.L.O.* did not “consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion,” *T.L.O.* at 342 n.8, courts have consistently upheld strip searches only in cases of individualized suspicion. See *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984); *Burnham v. West*, 681 F.Supp. 1160, 1165 (E.D. Va. 1987); *Beard*, 402 F.3d 598; *Bellnier v. Lund*, 438 F.Supp. 47, (N.D.N.Y.1977). *Williams*, 936 F.2d 881; *Cornfield*, 991 F.2d 1316; *Redding*, 531 F.3d 1071. The narrow exceptions to individualized suspicion are informative since they “are generally appropriate only where the privacy interests implicated by a search are minimal and where ‘other safeguards’ are available ‘to assure that the individual’s reasonable expectation of privacy is not ‘subject to the discretion of the official in the field.’” *Burnham*, 681 F.Supp. at 1165 (quoting *T.L.O.*, 469 U.S. at 342 n.8). The present case would not fall under this narrow exception since no safeguards were employed and the search was far from minimal. Furthermore, the search was

based primarily on Towles' association with other students and not on a particularized suspicion that he possessed drugs. Thus, since it is clearly established that courts uphold strip searches only in circumstances of individualized suspicion, the Respondents should have known they were violating Towles' rights.

Furthermore, in applying the balancing test of reasonableness to intrusive strip searches, the courts have consistently held that a high level of suspicion is required. *See Phaneuf*, 448 F.3d at 596; *N.G. v. Connecticut*, 382 F.3d 225, 234 (2d Cir. 2004); *Cornfield*, 991 F.2d at 1321; *Redding*, 531 F.3d at 1081; *Bridgman*, 128 F.3d at 1150. Indeed, the court of appeals executed a formalistic reading of the *T.L.O.* cases on strip searches, and it failed to explain why the numerous courts applying the balancing test do not provide guidance in this case. A thorough reading of the cases reveals that it is clearly established that the reasonableness balancing test requires a strip search be justified by a high level of suspicion. No reasonable reading of the facts of this case could support that Respondents had a "high level of suspicion." Rather, Smalls should have known that a strip search based upon a generalized, weak suspicion was unlawful.

The Supreme Court advised that "general statements of the law are not inherently incapable of giving fair and clear warning, and ... a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." *United States v. Lanier*, 520 U.S. 259, 271(1997) (quoting *Anderson*, 483 U.S. at 640). Specific factual identity is necessary only when "an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue." *Id.* The Respondents assert that the reasonableness inquiry of *T.L.O.* is too generalized. Although at the fringes there will certainly be cases where the unlawfulness of particular strip searches may not be clearly established, the facts of this case are

clearly foreshadowed by the existing case law. The case law gave the Respondents “fair warning” that this search was not reasonable since they had neither “individualized suspicion” nor a “high degree of suspicion.” Thus, because the case law firmly and clearly establishes that the strip search of Towles was unconstitutional, the Petitioner respectfully requests that the Court reverse the court appeals grant of qualified immunity to the Respondents.

CONCLUSION

The court of appeals erred in upholding the grant of summary judgment to the Respondents. The Respondents violated the free speech rights of Petitioner Politte and Petitioner Towles. Politte and Towles’ webpages were off-campus speech not subject to school authority. Even if the Court finds school officials have authority to restrict off-campus speech, the record shows no reasonable forecast of substantial disruption – or disruption at all – at Horton High.

Although the court of appeals correctly concluded that the search of Petitioner Towles was unreasonable under the Fourth Amendment, the court of appeals erred in holding that the Respondents were entitled to qualified immunity. Because the law clearly established that the Respondents’ conduct was unlawful, the Court should find that the Respondents are not entitled to qualified immunity.

It is firmly established that students do not shed their constitutional rights at the schoolhouse gate. Although the nature of schools presents some unique circumstances, the pursuit of maintaining order in schools is not a carte blanche for schools to deprive students of their constitutional rights. Such a notion runs counter to the special place schools hold in producing tomorrow’s American citizens. In conclusion, the Petitioners respectfully request that the Court reverse the court of appeals grant of summary judgment on their First Amendment and Fourth Amendment claims.