
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 PETITIONERS

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March 2, 2009

QUESTIONS PRESENTED

- I. Does a school violate the First Amendment by punishing its students for engaging in non-threatening online speech where the speech was expressed at home, during non-school hours, and other students accessed the websites during their free time while at school?

- II. Does a school violate the Fourth Amendment's prohibition on unreasonable searches when, prompted by an anonymous photographic tip, it forces a high-achieving student with no prior drug history to strip to his underwear in order to find a small amount of marijuana?

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I12

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

“Congress shall make no law . . . abridging the freedom of speech.”

The Fourth Amendment to the Constitution of the United States provides as follows:

“[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . shall not be violated.”

STATEMENT OF THE CASE

Facts

Kit Politte (Politte), 18, is a senior at Horton Hopkins High School (Horton Hopkins or the school). R. at 2. In September 2008, she started a school-sponsored club entitled Drug Use Damages Schools (DUDS). The club’s purpose was to curb drug use within the school and promote a drug-free lifestyle. R. at 2. The club had approximately 130 student members, and its members organized school assemblies to discuss the perils of drug use. R. at 2.

Cory Towles (Towles), 16, is a sophomore who recently transferred to Horton Hopkins. R. at 2. At his former school, Towles had no disciplinary action taken against him except for two detentions because of tardiness. R. at 2. He was also an honor student. R. at 2.

Horton Hopkins is located in the city of Hopkinsville, in the state of Grace. After the unfortunate death of a student due to a drug overdose, the school recently enacted a strict, zero-tolerance drug policy that allows school officials to test students for drugs and conduct searches of lockers, desks, and students’ personal property, including book bags and clothing. R. at 1. If a student possesses illegal drugs, the penalty is a suspension. R. at 1-2.

On September 10, 2008, Politte created a webpage on the website Friendkepedia. R. at 2. The website allows users to set up online social groups that other Friendkepedia users may join. R. at 2. Her webpage was entitled Fighting All Dealers (FAD), and its purpose was to

expose drug dealers to the community. R. at 2. She hoped that community members would submit tips to her webpage that would lead to the arrest of local dealers. Politte was especially concerned about this issue because of a recent increase in drug use at Horton Hopkins. R. at 1-2.

On October 3, 2008, Towles attended a house party hosted by a fellow student, Jeff Tweegs (Tweegs). R. at 2. Although the police cited five students at the party for drinking, only one student, Frank Conrad (Conrad), was caught with marijuana. R. at 3.

On October 4, Politte received an e-mail from an anonymous student that contained a photograph of Towles at the party with Conrad and another student, John Thomson (Thomson). R. at 3. Conrad was the only student smoking in the photo. R. at 3. Although it is unclear from the photograph what Conrad was smoking, Towles said he did not see any drug use at the party. R. 1, 3. Politte then posted the photograph on her webpage with the following caption: "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?" R. at 3.

On October 5, Horton Hopkins principal, Keena Smalls (Smalls), received calls from several concerned parents who viewed the photograph on the FAD webpage. R. at 3. The Hopkinsville police also contacted Smalls to alert her about the students they cited at Tweegs' party. R. at 3. The police did not mention Towles at all. After she viewed the FAD webpage and photograph, Smalls called Towles, Conrad, Thomson, and Tweegs into her office for questioning. R. at 3. Tweegs had already been caught earlier in the semester by Smalls for smoking marijuana. R. at 2.

Although all four students denied possessing drugs, Smalls conducted a locker search. R. at 3. She found a small baggie of marijuana in Conrad's locker. After searching their personal property, she asked each of the boys to submit to a more thorough search. R. at 3. Even though

all four students refused to be searched, she ordered the gym teacher to conduct a strip search. R. at 3. While the gym teacher did not touch them, each boy was forced to strip to his undergarments. R. at 3. During the search, the teacher found a small amount of marijuana in Thomson's jeans pocket. However, at no point during these searches were drugs found in Towles' possession. R. at 3.

After being searched, Towles created his own Friendepedia network page entitled Students Against Defamatory Statements (SADS). R. at 3. On his webpage, Towles stated that Politte's FAD webpage had invaded his privacy and defamed him. R. at 3. In addition, Towles criticized the school for subjecting him and his friends to unreasonable searches. R. at 4. Towles called the strip searches an "injustice," and stated that all Horton Hopkins students should "let our school administrators know that we will not tolerate this kind of treatment" and "speak out against Smalls and the rest of these Hopkins idiots." R. at 4.

Horton Hopkins students accessed both webpages while at school, but only during their free time. R. at 4. No evidence in the record suggests that any classes were delayed or cancelled. Nevertheless, Smalls demanded that both Politte and Towles shut down their webpages, R. at 4, even though both students had created their webpages from home, using personal computers, during non-school hours. R. at 2-3. When both students refused, Smalls suspended Politte and Towles until they complied. R. at 4.

Even though Smalls said she was concerned about keeping discipline and order at school, she admitted she was angry that Towles' criticized the school administration's actions. R. at 4. While Smalls stated that she saw a potential for student protest, R. at 4, she did not state why she thought so. No protest in fact took place.

Procedural History

Politte and Towles filed a Complaint in Badger County District Court against Horton Hopkins and Principal Smalls for violations of their constitutional rights. R. at 1. Both Politte and Towles claimed violations to their First Amendment rights due to the forced removal of their webpages, and Towles further alleged a violation of his Fourth Amendment rights due to the strip search. R. at 1, 3. The District Court granted the defendants' motion for summary judgment. On appeal, the State of Grace Court of Appeals agreed with the District Court on the First Amendment claim, holding that the webpages at issue created a risk of substantial disruption under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); R. at 10. However, the court found that the District Court erred in upholding the constitutionality of the strip search. R. at 10. Despite this finding, the court nonetheless upheld the grant of summary judgment based upon the doctrine of qualified immunity. R. at 12. A vigorous dissent argued that the First Amendment claims should have been remanded back to the District Court because regulating the webpages was outside the school's authority. R. at 12.

This Court granted certiorari on January 26, 2009.

SUMMARY OF THE ARGUMENT

I.

The State of Grace Court of Appeals erred when it held that the school did not violate Politte's and Towles' free speech rights. The school had no authority to regulate the students' speech; however, even if it did, the students' free speech rights outweighed the school's need to shut down the webpages.

The school had no authority to punish the students because the speech was expressed outside the school and was non-threatening. The speech was created at home, on personal

computers, during non-school time. R. at 2-3. Schools can only regulate students' out-of school speech if it threatens the school's immediate safety. Because there was no such immediate threat to the school's safety, the school had no authority to regulate the speech.

However, even if the school had the authority to regulate the speech, the students' free speech rights outweighed the school's need to shut down the webpages. Student speech, even when expressed at school or over the internet, is entitled to First Amendment protection. Furthermore, the speech should be afforded high First Amendment protection because the citizenry should not be denied the opportunity to consider the students' speech. Moreover, if the speech was of such low value that it should have been regulated, the police were the appropriate party to enforce it, not the school.

Furthermore, the students' speech did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509. Even though students accessed the webpages from school computers, R. at 4, more interference is required, such as disrupted classes. In addition, Principal Smalls failed to produce evidence showing that she reasonably anticipated that a protest would take place. Thus, the students' free speech rights outweighed the school's need to shut down the webpages.

II.

The Fourth Amendment protects everyone, including students, from unreasonable searches. Although these rights are normally protected by the warrant requirement, the Supreme Court has held that, in schools, officials only need to meet a reasonableness test. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). The Court has held that in order for a student search to be constitutional, the search must be 1.) justified at its inception and 2.) reasonable in scope.

The search of Towles was not justified at its inception. When analyzing whether a search based on another student's tip is justified at its inception, courts have focused on the nature of the tip and whether the tip was corroborated with additional evidence. In general, a tip made by a known informant is considered to be more reliable than an anonymous tip. Moreover, in order for an official to conduct a search based on an anonymous tip there must be sufficient corroboration. However, in the instant case, the tip was submitted by an “anonymous Horton Hopkins” student, R. at 3, and the school did not sufficiently corroborate it. Although parents called to express general concern about drug use at a party, R. at 2, and the principal had previously caught Tweegs smoking marijuana, R. at 2, this is not corroboration of Towles’ guilt. Instead this is nothing more than guilt-by-association which is too unjust to use when ordering a highly intrusive search.

Furthermore, even if this Court finds that the search was justified at its inception, the strip search was unreasonable in scope. Strip searches are highly intrusive, degrading, and potentially traumatic experiences for anyone, but especially for minors who are still coming to terms with their bodies. Consequently, a strip search can only be justified where the school has a significant interest at stake. However, the school’s interest in finding marijuana does not rise to the occasion. While marijuana possession is serious and illegal, it does not significantly impact the safety of the students or the educational environment. Consequently, this Court should rule in favor of the Petitioners on their constitutional claims.

ARGUMENT

The Constitution is more than a collection of lofty goals and idealized aspirations. It is a guarantee from the Founders of this Nation that all citizens have certain freedoms and privileges.

Even high school students, who fall under the *parens patriae* power of the state while they attend school, cannot be unjustly deprived of their rights. To the contrary, “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citation omitted).

Kit Politte and Cory Towles were deprived of their First Amendment rights when the school forced them to remove webpages that not only reflected their opinions, but were of substantial value to the community. The school further violated Towles’ Fourth Amendment rights when it subjected him to a dehumanizing strip search in a futile effort to locate a small amount of marijuana. Consequently, this Court should reverse the opinion of the lower court because to hold otherwise would “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *T.L.O.*, 469 U.S. at 739 (citation omitted).

The standard of review on a ruling for summary judgment is *de novo*. See e.g., *Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004).

I. The school had no authority to regulate the speech; however, even if it did, the students’ free speech rights outweighed the school’s need to remove the webpages.

Politte’s and Towles’ online speech is protected by the First Amendment for two main reasons. First, the school had no authority to punish the students because the students’ speech was expressed entirely outside the school, and a school’s power must be confined to “the metes and bounds of the school itself.” *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979). Second, even if the school had this authority, the speech was still protected because the students’ free speech rights outweighed the school’s need to regulate it. Accordingly, this court should reverse the lower court and hold that the students’ free speech rights were violated.

A. The school had no authority to punish the students because the speech occurred off school property and did not involve threats.

Because Politte and Towles spoke outside the school environment, and that speech did not involve threats, the school had no authority to force them to shut down their webpages. Recent increases in school violence have made it necessary for schools to punish students who threaten a school's immediate safety, even when such threats originate off campus. *Cf. Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes J., dissenting) ("we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."). However, school authority must stop there. Schools are not the police, courts, or parents, and they should not be allowed to act as such.

Schools have limited authority to punish student speech that occurs on-campus. In *Tinker*, the Court held that a school may regulate on-campus student speech only if it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." 393 U.S. at 509. The Court made exceptions to this rule in three cases. First, in *Bethel School District No. 403 v. Fraser*, the Court held that a school can regulate vulgar and lewd student speech occurring at school. 478 U.S. 675, 685 (1986). Second, in *Hazelwood School District v. Kuhlmeier*, the Court held that a school can exercise "editorial control over the style and content of student speech in school-sponsored expressive activities." 484 U.S. 260, 273 (1986). Third, in *Morse v. Frederick*, the Court held that a school can regulate student speech if it reasonably believes the speech promotes drug use. 127 S.Ct. 2618, 2622 (2007).

However, in these cases, the Supreme Court implied that schools can only regulate student speech that occurs on school property or at a school event. *See Kuhlmeier*, 484 U.S. at

266 (citation omitted) (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”); *Fraser*, 478 U.S. at 688 (“If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”).

Lower courts have allowed schools to regulate student speech occurring off-campus if that speech involved threats and the student intentionally directed the speech at the school. *See Wisniewski ex rel. Wisniewski v. Bd. Of Educ.*, 494 F.3d 34, 35-36 (2d Cir. 2007) (Student sent online messages to 15 fellow students that included a “drawing of a pistol firing a bullet at a person's head . . . [and] the words ‘Kill Mr. VanderMolen.’”); *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 415-416 (Pa. Commw. Ct. 2000) (student’s website speech asked “Why should [the teacher] die?” and contained a diagram of his teacher with “her head cut off and blood dripping down her neck.”).

Aside from threats, courts have overwhelmingly held that schools do not have the authority to punish students for other forms of out-of school speech. *See Thomas*, 607 F.2d 1043 (school had no authority to punish students for publishing and distributing an obscene tabloid); *Killion v. Franklin Regional School Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) (school had no authority to punish student for emailing friends a list disparaging athletic director); *Flaherty v. Keystone Oaks School Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003) (school had no authority to punish student for indecent online speech made from both home and school computers).

Moreover, “[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 v. Hermitage School Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 1999). Several courts have held that schools do not have the

authority to punish students for internet speech expressed at home during non-school hours. *See Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000); *Layshock*, 496 F. Supp. 2d at 597; *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998). These cases demonstrate that schools cannot regulate a student’s online speech simply because other students can access those websites at school. Thus, the lower court erred in holding that the students could be punished simply because it was “foreseeable that the off-campus expression might also reach campus” via the internet. R. at 9 (*citing Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008)). Such a holding has a chilling effect on student speech because the threat of school punishment would keep students from speaking freely online. Instead, schools should use internet filters to prevent students from accessing those websites that are inappropriate or might interfere with the school’s operation.

After the Second Circuit correctly held in *Wisniewski* that schools could punish students for making school threats from off-campus, it erroneously held in *Doninger* that a student could be punished for off-campus speech even though that speech did not contain a threat. 527 F.3d 41. In that case, a school disqualified a student “from running for Senior Class Secretary after she posted a vulgar and misleading message about the supposed cancellation of an upcoming school event on a[] . . . web log (or ‘blog’).” *Id.* at 43. The school’s decision was based on the student 1.) having ignored the school administrator’s counsel to work with the administration to resolve the matter, 2.) using “vulgar language and inaccurate information . . . in the post,” and 3.) encouraging “others to contact the central office ‘to piss [the principal] off more.” *Id.* at 46.

The Second Circuit’s extension of the threat rationale from *Wisniewski* to *Doninger* stands in near isolation to the vast majority of lower court holdings regarding the authority of schools to punish students for out-of school speech, and therefore should not be followed.

However, even if *Doninger* is followed by this court, it is distinguishable because the school's punishment in *Doninger* was much less severe than in the present case. In *Doninger*, the school merely prohibited the student from running for student government which the school considered a privilege, not a right. *Id.* at 52. Horton Hopkins went much further when it forced Politte and Towles to completely shut down their webpages or face indefinite suspension. *R.* at 4. Horton Hopkins' punishment will ultimately chill student speech much more so than in *Doninger*.

Applying the rules to the facts of this case, the school had no authority to regulate the students' speech because the speech did not contain a threat, and it was expressed entirely outside of the school. Both students created their websites from their homes during non-school hours. *R.* at 2-3. Furthermore, the school cannot regulate the speech under the argument that the websites were sponsored by the school because the websites were not "part of the school curriculum" or "designed to impart particular knowledge or skills to student participants." *Kuhlmeier*, 484 U.S. at 271. In addition, even if some people, like Towles, incorrectly believed that the information on Politte's website was really the school's speech, "[t]he school's proper response [was] to educate the audience rather than squelch the speaker." *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993). Thus, because the speech occurred outside the school and did not involve threats, the school had no authority to force the students to shut down their webpages.

B. Even if the school had the authority to regulate the students' out-of school speech, the students' free speech rights outweighed the school's need to regulate.

The vigilant protection of student speech is necessary to help ensure that we do not discourage students from becoming active citizens. "It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506 (1969). As the Court explained in *Tinker*, a balancing test is appropriate

when considering the rights of the students against the needs of the school. *Id.* at 507. Politte's and Towles' speech should be afforded the full protection of the First Amendment because it was of considerably high importance to the citizenry, and it had no characteristics of other "low value" speech such as threats. In addition, the school is unable to show that the students' speech actually interfered, or was likely to interfere, with the operation of the school. Consequently, the students' free speech rights outweighed the school's need to regulate the speech.

i. The students' speech should be afforded the full protection of the First Amendment.

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I. The First Amendment has been held to protect both student speech and online speech. *See Tinker*, 393 U.S. at 506 ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students."); *See generally Reno v. ACLU*, 521 U.S. 844 (1997).

The students' speech deserves high first amendment protection because it was valuable to the citizenry. The citizenry had a right to consider the information Politte and Towles communicated on their webpages. *See Thomas*, 607 F.2d at 1047 ("Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decisionmaking [sic] if all ideas, discoveries, and points of view are before the citizenry for its consideration."); *Abrams*, 250 U.S. at 630 (Holmes J., dissenting) ("the ultimate good desired is better reached by free trade in ideas- . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."); *See also Tinker*, 393 U.S. at 512 (citation omitted) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"). The students' speech deserves

high first amendment protection because the citizenry has a right to consider the valuable “ideas” and “points of view” communicated on both webpages.

Politte’s speech was extremely important to the community because over the last five years the city and high school saw an increase in drug use, and a student recently died from a drug overdose. R. at 1. In just over a month, Politte’s anti-drug webpage gained 235 members, 198 of which were fellow high school students. R. at 2, 4. The other 37 members likely lived in the community, and were teachers, administrators, parents, or concerned citizens. Moreover, because information on the webpage resulted in school administrators locating drugs on campus, R. at 3, the webpage was effective in making the school and community safer.

Towles’ online speech was also valuable to the citizenry. By being able to post information on the SADS webpage, R. at 3, Towles provided invaluable information regarding the appropriateness of his school’s policies. Certainly, Towles’ online criticism of his school’s policies better enabled citizens to debate whether school personnel should be allowed to strip search teenagers.

In addition, the school cannot regulate Politte’s and Towles’ speech under the argument that it was of “low value.” Certainly, some forms of speech are of such low value that the state can regulate them. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). However, when such low value speech occurs outside the school, the police are the appropriate party to regulate it, not the school.

“[S]o long as the means are peaceful, the communication need not meet standards of acceptability.” *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). In the instant case, even the Badger County District Court recognized the speech was peaceful. R. at 5. Other examples of low value speech include “the lewd and obscene, the profane, the libelous, and the

insulting or ‘fighting’ words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942). The regulation of such forms of speech is justified because they are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.*

The speech at issue is not of low value. First, the content on Politte’s website was not “libelous” because it merely stated a factual observation that drugs had been found at a student party, and questioned whether students at the party were drug dealers. R. at 3. Nowhere did Politte accuse Towles, or any other student, of being a drug dealer or drug user. Her immediate concern was to protect the community, not to defame students.

Second, Towles’ “idiots” comment, though unpleasant, was not of sufficiently low value to justify regulation. R. at 4. In analogous circumstances, several courts have held that students who insult school personnel while off campus cannot be punished. *See Layshock*, 496 F. Supp. 2d at 591 (court protected a student who created a parody profile of his principal on the website www.MySpace.com, and implied that the principal used drugs, drank during school, and had been beaten up); *Emmett*, 92 F. Supp. 2d at 1089 (student had a right to post a commentary about school administration and faculty on a mock school website the student created). Certainly, Towles’ “idiots” comment was less insulting than the speech in *Layshock*, and consequently, the speech should be protected.

Finally, Towles statement that other students should “speak out” against the school administrators was not of sufficiently low value to justify regulation, and instead indicated a valuable call to action. R. at 4. For instance, in *Beussink*, the court held that a school could not punish a student for website speech that included using vulgar language to describe

administrators on his website, and telling people to contact school officials to “communicate their opinions.” 30 F. Supp. 2d at 1177.

Conversely, in *Doninger*, the Second Circuit held that a school could punish a student who stated on the internet that her school administrators were “douchebags” for cancelling a “battle of the bands,” and that other students should “contact the central office ‘to piss [the principal] off more.’” 527 F.3d at 46. The Second Circuit’s holding should not be followed because the school is not the appropriate party to regulate the speech. However, if followed, *Doninger* is distinguishable on two counts. First, unlike the speech in *Doninger*, Politte’s and Towles’ speech is valuable to the community. Second, the student’s “douchebag” comment in *Doninger* was more vulgar, and of lower value, than Towles’ “idiot” comment.

Thus, because the students’ speech was not of low value, and was valuable to the citizenry, this court should give the speech the full protection of the First Amendment.

ii. The school had no need to punish the students because the speech did not substantially interfere with the school’s operation.

The school is unable to show that the students’ speech actually interfered, or was likely to interfere, with the operation of the school. Consequently, the students’ free speech rights outweighed the schools need to regulate the speech. In *Tinker*, the Supreme Court laid out the framework for student free speech claims. 393 U.S. 503. Under *Tinker*, a school may regulate student speech only if it “*materially and substantially* interfere[s] with the requirements of appropriate discipline in the operation of the school.” *Id.* at 509 (emphasis mine). Specifically, the freedom of speech does not protect student behavior that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Id.* at 513.

In *Tinker*, several students violated a school policy by wearing black armbands to school to protest the Vietnam War. *Id.* at 504. However, the Court stated that there was no evidence

the students “substantially interfere[d] with the work of the school or impinge[d] upon the rights of other students.” *Id.* at 509. The students were simply making their views known, and “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.” *Id.* at 514. Moreover, “[t]hey caused discussion outside of the classrooms, but no interference with work and no disorder.” *Id.*

Similarly, Politte and Towles did not interfere with the operation of their school. No classes were cancelled, delayed, or disturbed. Students’ educations were not substantially disrupted. There was no student protest. Certainly, students accessed Politte’s and Towles’ webpages on school computers, but only during non-class time. *R.* at 4. However, as in *Tinker*, the webpages “caused discussion outside of the classrooms, but no interference with work and no disorder.” *Tinker*, 393 U.S. at 514. In addition, lower courts have uniformly held that when the only disruption to the school is that students have accessed distracting websites, *Tinker’s* standard is not met. *See Beussink*, 30 F. Supp. 2d at 1178-79 (no substantial interference where students used school computers to access a website that disparaged school administrators); *Layshock*, 496 F. Supp. 2d at 600 (no substantial interference where the “actual disruption was rather minimal-no classes were cancelled, no wide-spread disorder occurred, [and] there was no violence or student disciplinary action.”).

In cases where schools have successfully demonstrated that a student’s speech caused substantial interference with the school’s operation, more interference took place than in the present case. *See Wisniewski*, 494 F.3d at 36 (student’s threat required school to interview students and replace the threatened teacher); *J.S.*, 757 A.2d at 417 (student’s threat damaged school morale, caused teacher to suffer severe mental problems, and required school to replace teacher); *Doninger*, 527 F.3d at 43 (student’s comments not only caused other students to

threaten having a sit-in, the administrators to receive “a deluge of calls and emails,” and several students to be interviewed during class, but the comments were also “potentially disruptive of efforts to resolve the ongoing controversy.”). While the school may argue that *Tinker’s* substantial disruption standard was met because Towles’ rights were violated due to defamation, this argument overlooks the fact that the court, not the school, is the proper adjudicator of such a situation. Thus, the school cannot establish that there was interference with its operation.

Not only is the school unable to show that an actual disruption took place, it also did “not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption.” *Tinker*, 393 U.S. at 740. Certainly, schools “have a duty to prevent the occurrence of disturbances.” *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992). However, as the Court stated in *Tinker*, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. *Tinker*, 393 U.S. at 508-509; (citation omitted).

In *Tinker*, the school feared that the students’ anti-war demonstration might become “difficult to control” and could result in a pro-war demonstration because a former student had been killed in Vietnam. *Id.* However, the Court held that this evidence was not sufficient. *Id.*

Similarly, while Horton Hopkins claimed it was concerned about a student protest, R. at 4, it is unable to substantiate this fear with any actual evidence. Schools must show a “specific and significant fear of disruption,” such as “past incidents arising out of similar speech.” *Saxe v. State College Area School Dist.*, 240 F.3d 200, 211-212 (3d. Cir. 2001); *see also LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (citation omitted) (schools need to demonstrate “the existence of facts which might reasonably lead school officials to forecast substantial disruption.”)

For example, in *West v. Derby Unified School District No. 260*, the court found that a school could punish a student for drawing a Confederate flag in class because there had recently been racial incidents at the school such as “hostile confrontations” and fights. 206 F.3d 1358, 1366 (10th Cir. 2000). Similarly, in *LaVine*, where a student gave a poem to his teacher that was “filled with imagery of violent death and suicide,” the school successfully justified his emergency expulsion by not only showing that the student had a history of suicidal ideations, disciplinary problems, and family strife, but also had recently broken-up with his girlfriend, and been affected by a school shooting. 257 F.3d at 990-91.

Conversely, Smalls failed to produce evidence showing that she reasonably forecasted a substantial disruption. Smalls apparently thought there was “potential for student protest,” R. at 4, but *Tinker* requires more than a vague fear of protest to justify regulation. Furthermore, because Smalls was angry with Towles for criticizing the school, R. at 4, she may have acted without fully comprehending the situation. Regardless, unlike *LaVine*, Smalls showed no additional evidence to substantiate her fear. Furthermore, unlike *West*, Smalls cannot show that a past protest was likely to arise as a result of the students’ speech. Consequently, the school failed to show that Politte’s and Towles’ speech interfered with the school’s operation.

As a result, Politte’s and Towles’ free speech rights outweighed the school’s need to regulate the speech.

II. The strip search conducted by school officials was a humiliating experience that violated Towles’ Fourth Amendment rights.

Even students who are in the care of school officials have the right to be free from overly intrusive and degrading searches that force them to expose their bodies to older adults whom they see on a daily basis. As explained by the United States Supreme Court in *New Jersey v. T.L.O.*, the Fourth Amendment protects students from searches by school officials unless the

search was 1.) justified at its inception and 2.) reasonably related in scope to the circumstances which justified the search in the first place. 469 U.S. at 341. Under the guidelines developed by the courts, the search of Towles was neither justified at its inception nor reasonably related in scope to the objectives of the search.

A. After a search of Towles' locker yielded no evidence of drug use, a further search of his person was not justified.

The Supreme Court held in *T.L.O.* that a search 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.* at 342. An anonymous, uncorroborated tip and a “guilt-by-association” theory do not constitute reasonable grounds for suspecting that a search of Towles’ person would uncover evidence of deviant behavior.

i. Without further corroborating evidence of Towles' drug use, the school's reliance on an anonymous tip was misplaced and did not justify a further search of Towles.

Although informant tips can be a useful tool in catching those who willfully break the law, an unreliable or uninformed tip can cause serious damage to an innocent person like Cory Towles. For this reason, courts require “something more” than the tip itself when constitutionally questionable searches are at issue. *Illinois v. Gates*, 462 U.S. 213, 227 (1983). As the Supreme Court in *Alabama v. White* explained, an official engaging in a search “must be able to articulate something more than an ‘inchoate and unparticularized suspicion or hunch.’” 496 U.S. 325, 329 (1990) (citing *Terry v. Ohio*, 392 U.S. 1, 27(1968)). Furthermore, although the Supreme Court articulated a reasonableness standard governing student searches, lower courts have agreed that as the intrusiveness of the search increases, the standard for measuring reasonableness also increases. *Phaneuf v. Fraikin*, 448 F.3d 591, 597 (2d Cir. 2006); *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1321 (7th Cir. 1993).

When analyzing whether student tips justify a warrantless search, courts have found it useful to focus on two factors: 1.) if the tip was anonymous and 2.) if the tip was sufficiently corroborated. In the instant case, since the tip received by school officials was anonymous and not corroborated, this Court should find that the search was not justified at its inception.

The Supreme Court has emphasized that when tips are anonymous or otherwise lacking in reliability, a reasonable person would not believe that a search was appropriate. *White*, 469 U.S. at 329. The general rule is that anonymous tips are not as reliable as tips made by a known informant. *Phaneuf*, 448 F.3d at 598. Thus, if a school official receives an anonymous tip, only a cursory search of the student is justified. For example, in *In re K.C.B.*, the court held that an anonymous tip to a hall monitor did not justify a school official's search of a student's underwear. 141 S.W.3d 303 (Tex.App.2004).

Even when a tip is made by a known informant, the lower federal courts have required corroboration of the tip before a search is authorized. For example, the Second Circuit held that a strip search of a student was unconstitutional where the school official relied solely on the tip from another student instead of further investigating the tip. *Phaneuf*, 448 F.3d at 598. In *Phaneuf*, the court found that relying solely on a tip before ordering a strip search was enough to make the search unconstitutional, even when the tip came from a "reliable" student. *Id.*

Similarly, in *Redding v. Safford Unified School District #1*, the Ninth Circuit held that a search of a middle school student was unconstitutional when the assistant principal ordered the search after receiving a tip that shifted the blame from the informant to the stripped student. 531 F.3d 1071, 1083 (9th Cir. 2008). In *Redding*, a student was caught with prescription drugs and, when questioned, indicated that she had received the drugs from one of her friends. *Id.* at 1076. Based on this "tip", the assistant principal ordered a thorough search of the named student even

after a search of that student's belongings did not reveal any evidence that the student had drugs on her. *Id.* at 1077. The court reasoned that, at the very least, the assistant principal should have done further investigation before ordering the strip search. *Id.* at 1083.

Even those courts that have allowed strip searches have done so only after the tip was corroborated. *See Cornfield*, 991 F.2d at 1321 (student confessed to using drugs on several occasions); *Williams by Williams v. Ellington*, 936 F.2d 881, 882 (6th Cir. 1991) (teacher remembered a note on student's desk that referred to "rich man's drug"); *C.B. v. Driscoll*, 82 F.3d 838, 388 (11th Cir. 1996) (tip was corroborated because tipster stated drugs would be in student's "big old coat"). Therefore, the Circuit Courts are united in their requirement that corroboration of a tip is necessary before conducting an intrusive search of a student's person.

Based on the above, the search of Towles was not justified at its inception because there was no corroboration of the anonymous tip. While the school may argue the tip was not anonymous because Politte was the known administrator of the FAD webpage, this argument overlooks the fact that Kit Politte was the mere intermediary between the "anonymous Horton Hopkins student" and the official, like the hall monitor in *K.C.B.* Furthermore, though the photograph may have justified some initial questioning, once Towles denied any allegations related to drug use and a search of his locker revealed no illegal substances, the school was not permitted to search further. R. at 3.

Furthermore, although Smalls had previously caught Tweegs smoking marijuana and the police informed Smalls that students had been cited at a party for drinking, these facts had no bearing on Towles' guilt or innocence. R. at 2, 3. Like in *Redding*, the school officials in this case should have taken additional steps before ordering a search of Towles' person, such as calling his parents or questioning his teachers. In addition, the school cannot contend that the

marijuana found on Conrad and Thomson provides sufficient corroboration because it has long been the rule that the reasonableness of a search is dependent on what administrators knew before they began the search. *Phaneuf*, 448 F.3d at 597; R. at 3. Moreover, as students become much more technologically savvy, society can expect these types of “tips” to increase, allowing students to anonymously accuse one another electronically. Without requiring a sufficient amount of corroboration to accompany these tips before beginning a highly intrusive search, innocent students are more likely to have their privacy violated by state officials.

ii. The guilt of Towles’ companion did not justify the school ordering a deeper, more thorough search of Towles himself.

Despite the fact that there was no evidence that Towles had drugs in his locker, the school nonetheless proceeded with the search based on the fact that a locker search revealed a baggie of marijuana in Conrad’s locker. R. at 3. However, this “guilt-by-association” approach to searching students is not only unconstitutional, but this approach also violates our basic notions of justice and fairness.

In a series of three cases, the Supreme Court effectively struck down the guilt-by-association rationale that officials used to justify intrusive searches. The first case was *United States v. Di Re*, where the Court found that the police erred in arresting a defendant who had not committed any visibly criminal act and was merely in the presence of a known criminal. 332 U.S. 581, 593 (1948). Twenty years later, the Court reaffirmed this position in the case of *Sibron v. New York*, where a defendant was unlawfully searched after merely talking to narcotics addicts for several hours. *Sibron*, 392 U.S. 40 (1968). In *Sibron*, the Court held that the search was unconstitutional, reasoning that “the inference that persons who talk to narcotics addicts are engaged in the criminal traffic of narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual’s personal security.” *Id.* at 62-63.

Moreover, in *Ybarra v. Illinois*, the Court held that officers did not have probable cause to search a defendant who was present in a bar where heroin was being exchanged. 444 U.S. 85 (1979). Although these cases were operating under the principle of probable cause, they demonstrate the Court's rejection of a guilt-by-association approach. Consequently, a further search of Towles was not justified in this case simply because marijuana had been found on Conrad.

Nonetheless, some courts have adopted the "automatic companion" rule in criminal cases, which permits officers to automatically pat down all the companions of an arrestee who are capable of assaulting an officer. *Hunter v. State*, 783 A.2d 558, 561 (Del. 2001). However, an automatic companion rule should not be adopted in the educational environment. First, the rule is only justifiable on the grounds of protecting the life of an individual. No such emergency was present in the instant case. Second, an automatic companion rule is alien to our very system of justice, which is premised on the presumption of innocence. Such a rule makes "companionship ... the dispositive factor in determining the legitimacy of a ... search" and, as a result, gives officials an excuse to avoid analyzing the totality of the circumstances with regard to each student, as required by *T.L.O.* 469 U.S. at 341; David E. Edwards, *Criminal Law-United States v. Bell: Rejecting Guilty-by-Association in Search and Seizure Cases*, 61 Notre Dame L. Rev. 258, 270 (1986). Furthermore, such a rule would be especially damaging in public schools. If students were subjected to highly intrusive searches based solely on the company they keep, high-achieving, model students will be less likely to interact with the students who would likely benefit from their positive influence.

In fact, the only school case to consider guilt-by-association as a basis for searching students has explicitly rejected this rationale. In *Redding*, one justification the school offered for its strip search of a student was her friendship with the student who had been caught with

prescription drugs. 531 F.3d at 1084. The court concluded that “this is nothing more than ‘guilt-by-association,’ certainly too thin of a reed for such a substantial intrusion into [the student’s] expectations of privacy.” *Id.*

Consequently, although two of Towles’ friends had been caught with marijuana, that is “too thin of a reed” to justify a personal search of Towles. School officials should have known that a strip search of Towles was not only unwarranted, but highly unethical, because Towles had left the party before the police arrived, the photograph on the FAD page did not show Towles engaging in any illegal activity, and Towles did not have any drugs in the obvious places. In fact, all these facts put together are evidence of Towles’ innocence rather than his guilt.

Since the anonymous tip received by Hopkins officials was uncorroborated, and because courts have repeatedly struck down a guilt-by-association approach to searches, the personal search of Cory Towles was unjustified at its inception. Thus, the school cannot meet the first prong of the *T.L.O.* test. As a result, this Court should hold that the school, through its agent Smalls, violated Towles’ Fourth Amendment rights.

B. The search was unreasonable in scope because it was highly intrusive and, without the search, the school would have suffered only minimal harm.

Even if this Court finds that the search was justified at its inception, reducing Towles to his underwear in order to find a small dose of marijuana was outside the scope of reasonableness. By having Towles remove his clothing, the school ordered a strip search that was unnecessary in light of the supposed harm that would have occurred. Although the search of Towles’ backpack and wallet were offensive and unnecessary, it is the strip search which is the most egregious and degrading. In balancing between the safety of the students and Towles’ privacy, this Court should hold that Towles’ privacy was unnecessarily violated. .

i. A strip search is a highly intrusive, potentially damaging invasion of privacy that can only be justified under extraordinary circumstances.

As the Supreme Court explained in *Terry v. Ohio*, “even a limited search of the outer clothing ... constitutes a severe ...intrusion upon cherished personal security.” 392 U.S. at 24-25. However, strip searches are more than a severe intrusion. They are also a degrading, humiliating experience and are therefore only reasonable under the most serious of circumstances. Consequently, a ruling in the school’s favor would give schools free reign to engage in this type of search even when such an intrusion is not necessary to protect the safety of students or preserve the learning environment.

The Circuit Courts have consistently held that stripping an individual down to his underwear is a strip search. *See Justice v. City of Peachtree City*, 961 F.2d 188, 190 (11th Cir. 1992); *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001); *Wood v. Hancock County Sherriff’s Dep’t.*, 354 F.3d 57, 63 n. 10 (1st Cir. 2003); *Redding*, 531 F.3d at 1080. Moreover, the damaging effects of strip searches have been well documented. For example, in considering the strip search policy of a juvenile detention center, the Second Circuit ruled that repeated strip searches of a female arrestee violated the Constitution. *N.G. v. Connecticut*, 382 F.3d 225, 237-238 (2d Cir. 2004). The court reasoned that “since ‘youth...is a...condition of life when a person may be most susceptible...to psychological damage’... ‘[c]hildren are especially susceptible to possible trauma from strip searches.’” *Id.* at 233 (citations omitted). Similarly, the other Circuit Courts have emphatically stated that a strip search is a horrifying event for the stripped individual. *See Mary Beth G. v. City of Chicago*, 382 F.3d 1263, 1272 (7th Cir. 1983) (citation omitted) (classifying strip search involving exposure of genitalia to be “dehumanizing,” “repulsive,” and a display of “degradation and submission”); *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) (stating that “the experience of disrobing and exposing one’s self for visual

inspection by a stranger clothed with a uniform and authority of the state... can only be seen as thoroughly degrading and frightening.”); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (strip searches are “humiliating”).

Furthermore, psychological evaluations of children who have been strip searched reveal the true impact of such a substantial invasion of privacy at a young age. The court in *Redding* noted that “clinical evaluations of the [young] victims of strip searches indicate that they can result in serious emotional damage, including the development of, or increase in, oppositional behavior.” *Redding*, 531 F.3d at 1086 (citing Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. School Psychology 7, 13 (1998)). Victims of strip searches often suffer “post-search” symptoms such as “sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions, and ...[have even] been moved to attempt suicide.” *Id.* (citing Stephen F. Shatz, et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991)). As the court in *Redding* stated, “the overzealousness of school administrators ... to protect students has the tragic impact of traumatizing those they claim to serve.” *Id.*

In the instant case, the strip search performed on Towles had all of the ingredients of a humiliating, degrading, and potentially traumatic experience. Towles was forced to strip off his clothing and expose his semi-naked body to his gym teacher, who proceeded to rifle through his garments while Towles was on display. R. at 3. Moreover, Towles’ friends also knew that Towles had been searched, further adding to his overall embarrassment and shame. R. at 3.

While Towles was allowed to remain in his underwear and the gym teacher did not physically touch him, it is the actual requirement to strip in front of an authority figure that is

traumatizing. *Redding*, 531 F.3d at 1086 (citation omitted). Furthermore, the trauma a student experiences from the initial search is only the beginning of the student's humiliation. Not only does the student have to see the authority figure regularly, but if word of the search gets out to other students, the student will undoubtedly be emotionally damaged and subjected to teasing and bullying. Therefore, due to the well-established law that expounds upon the degradation of a strip search, not to mention common sense, this type of search can only be reasonable in scope if the school had a powerful countervailing interest. Since that interest is sorely lacking, as will be explained below, the search was not reasonable in scope.

ii. Because marijuana possession does not threaten student safety or significantly interfere with the learning environment, it was not reasonable for the school to strip search Towles.

While possessing marijuana is a serious and illegal activity, the suspected offense in the instant case did not pose an immediate threat. As a result, this Court should find that the personal search of Towles was outside the scope of reasonableness.

Few circumstances exist that justify strip searches in schools. Accordingly, at least seven states have not allowed strip searches to be used in school *at all*.¹ A school can only search a student in order to protect student safety or maintain a learning environment. *T.L.O.*, 469 U.S. at 339. Stripping a student in order to find a small amount of marijuana is unreasonable in scope because the small amount of marijuana does not significantly jeopardize the safety of the students or interfere with the learning environment. For example, courts that have upheld strip searches in schools have only done so in cases involving drugs more dangerous than marijuana.

¹ See Cal. Educ. Code § 49050; Iowa Code § 808 A.2(4)(a); Okla. Stat. tit. 70, § 24-102; N.J. Stat. Ann. § 18A:37-6.1; S.C. Code Ann. § 59-63-1140; Wash. Rev. Code § 28A.600.230(3); Wis. Stat. § 948.50(3).

See Cornfield, 991 F.2d at 1322 (student had failed a urine test for cocaine); *Williams*, 936 F.2d at 887 (officials were looking for a small vial containing cocaine).

In addition, courts have consistently refused to uphold strip searches as reasonable in scope simply because the student may have been in possession of an illegal substance. In *Phaneuf*, the court refused to uphold a strip search where the student was suspected of carrying marijuana. 448 F.3d at 600. The Second Circuit reasoned that the district court erred by considering all contraband to be the same. *Id.* Moreover, in *Redding*, the court held that a strip search of a student was unreasonable in scope where the school was searching for prescription ibuprofen. 531 F.3d at 1087. The court found the search to be unconstitutional, even though some of the students planned to take the pills before lunchtime, because the search was excessively intrusive in light of the supposed infraction. *Id.* at 1086 (citing *T.L.O.*, 469 U.S. at 342). Furthermore, the *Redding* court reasoned that “contrary to any suggestion that finding the ibuprofen was an urgent matter to avoid a parade of horrors, even if [the student] had possessed the ibuprofen pills, any danger they posed was neutralized once school officials seized [the student] and held her in the assistant principal’s office.” 531 F.3d at 1087.

Similarly, in the instant case, the search was excessively intrusive considering the supposed violation committed by the students. Though marijuana possession is illegal and such possession should be investigated by the proper authorities, small amounts of marijuana are not enough of a threat to justify a strip search. The Hopkins community may still be mourning the loss of a former student to a drug overdose, but marijuana is distinguishable from cocaine, alcohol, and even ibuprofen because students cannot overdose on it. *See generally*, Dr. Leslie Iversen, *The Science of Marijuana*, §5 (2001); R. at 1-2. Furthermore, even if there was a sufficient fear for student safety, that fear was reduced once Towles was detained by school

officials. Also, the school cannot argue that because one of the students possessed marijuana, they may have possessed “harder” drugs. As the court explained in *Phaneuf*, “the school cannot vault from the finding of one type of (commonly used) contraband, to a suspicion involving the smuggling of another.” 448 F.3d at 600.

Furthermore, contrary to the assertion that *Redding* is distinguishable on the basis that ibuprofen is less harmful than marijuana, the situation in *Redding* was more dire because the students *planned* to take the 400 mg of ibuprofen, along with other pills, before lunchtime that very day. *Redding*, at 1076. By way of contrast, when deciding to strip search Towles, the school was not under the pressure of an immediate threat.

As a result, the search was not reasonable in scope, and the school has not and cannot meet the burden established by the Supreme Court in *T.L.O.* Consequently, the judgment of the State of Grace Court of Appeals should be vacated,² and the personal search of Towles should be found unconstitutional under the Fourth Amendment as a matter of law.

² The lower court ultimately found the search to be unconstitutional, but granted the school’s motion for summary judgment based on the doctrine of qualified immunity. R. at 12. That ruling, however, was erroneous. In order for a state official to be awarded qualified immunity, the law must not have been clearly established at the time of the offense. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). However, contrary to the opinion of the lower court, the Supreme Court articulated a clear enough standard in *T.L.O.* that a reasonable school official knew or should have known that ordering a strip search of teenage boys based upon unreliable evidence was unconstitutional. R. at 12. Even without a direct case on point, “a person of ordinary common sense ... would know without need for special instruction from a federal court, that teenagers have [a] ... sensitivity about their bodily privacy that are at the core of their personal liberty.” *Brannum v. Overton County School Board*, 516 F.3d 489 (6th Cir. 2008). In *T.L.O.*, the Court clearly articulated that the school was in charge of balancing these liberties against the needs of the school. 469 U.S. at 343. Thus, for the school to so blatantly cast aside these rights in order to find a small amount of marijuana goes against the rule of *T.L.O.* The fact that some circuits have upheld strip searches and others have not does not undermine this fact, but instead demonstrates that the Circuit Courts have uniformly required certain conditions such as corroboration of a tip or a clear and present danger before allowing a degrading strip search.

CONCLUSION

For the foregoing reasons, this Court should hold that the students' constitutional rights were unjustly violated. The Petitioners pray for this Court to vacate the judgment of the State of Grace Court of Appeals and to grant any other relief this Court deems proper and just.

Respectfully submitted,

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March 2, 2009