

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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QUESTIONS PRESENTED

- I. Whether Respondents' attempt to regulate students' Internet speech created off-campus was a violation of Plaintiffs' First Amendment rights.

- II. Whether Respondents' warrantless search of Petitioner Towles on school premises violated Towles' Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF CONTENTS II

TABLE OF AUTHORITIES.....IV

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

 FACTUAL BACKGROUND 1

 DISTRICT COURT’S DECISION 2

 COURT OF APPEALS’ DECISION 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT..... 5

 I. THE SCHOOL VIOLATED PETITIONERS' FIRST AMENDMENT RIGHT OF
 FREE SPEECH WHEN IT REQUIRED THE STUDENTS TO TAKE DOWN
 THEIR RESPECTIVE WEBSITES..... 5

 A. The School unreasonably concluded that Petitioner Towles' off-campus internet
 speech would lead to a substantial disruption because the School had no reason
 to suspect any disruption would occur. 7

 1. Petitioner Towles' off-campus internet speech caused no actual disruption
 within the school..... 7

 2. Absent an actual disruption, the School still acted unreasonably because
 Petitioner Towles' webpage did not advocate student misconduct, encourage a
 student protest, or interfere with the educational responsibilities of the
 teachers..... 8

 B. The School unreasonably concluded that Petitioner Politte's off-campus internet
 speech would lead to a substantial disruption because no legitimate nexus existed
 between her website and any potential disruption at the school..... 11

1. When two different types of student expression are at issue, <i>Tinker's</i> standard requires an independent evaluation of a each student's particular expression.	14
2. Petitioner Politte's webpage deserves First Amendment protection because her speech related to an important governmental interest and reinforced the anti-drug policies of the School.....	15
II. SCHOOL OFFICIALS VIOLATED PETITIONER TOWLES' FOURTH AMENDMENT RIGHTS WHEN THEY IMPROPERLY SEARCHED HIS PERSON..	16
A. School Officials improperly searched Petitioner Towles because the search was not justified at its inception, highly intrusive in scope, and not reasonably related to the circumstances.	17
1. The search was not justified at its inception because School Officials impermissibly relied on an anonymous tip and determined Petitioner Towles guilty by his associations.	18
i. School Officials relied on an anonymous, unsubstantiated tip.	19
ii. School Officials unfairly determined that Petitioner Towles was guilty based on his associations.	21
2. The search was not reasonably related in scope because School Officials subjected Petitioner Towles to a highly invasive search to find drugs that posed no immediate danger to the school.	23
B. School Officials are not entitled to qualified immunity because they violated Petitioner Towles' clearly established constitutional rights.....	25
CONCLUSION.....	27
APPENDIX.....	A

TABLE OF AUTHORITIES

Cases

<i>Alabama v. White</i> , 110 S. Ct. 2412 (1990).....	19
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987).....	25
<i>Beussink v. Woodland R-IV Sch. Dist.</i> , 30 F. Supp. 2d 1175 (E.D. Mo. 1998).....	9
<i>Brannum v. Overton County Sch. Bd.</i> , 516 F.3d 489 (6th Cir. 2008).....	26
<i>Calabretta v. Floyd</i> , 189 F.3d 808 (9th Cir. 1999).....	26
<i>Coy v. Bd. of Educ. of the N. Canton City Sch.</i> , 205 F. Supp. 2d 791 (N.D. Ohio 2002).....	6
<i>Delaware v. Prouse</i> , 44 U.S. 648 (1979).....	17
<i>Doe v. Renfrow</i> , 631 F. 2d 91 (7th Cir. 1980).....	26
<i>Doninger v. Neihoff</i> , 527 F.3d 41 (2d Cir. 2008)	6, 10, 11
<i>Drummond v. City of Anaheim</i> , 343 F.3d 1052 (9th Cir. 2003).....	26
<i>Elkins v. United States</i> , 364 U.S. 206 (1960).....	17
<i>Florida v. J.L.</i> , 529 U.S. 266 (2000).....	19, 20, 21
<i>Guiles v. Guiles</i> , 461 F.3d 320 (2d Cir. 2006)	7
<i>Int'l Ass'n of Machinists v. Street</i> , 367 U.S. 740 (1961)	16
<i>Joint Anti-Fascist Refugee Comm. v. McGrath</i> , 341 U.S. 123 (1951)	22, 23
<i>Killion v. Franklin Reg'l Sch. Dist.</i> , 136 F. Supp. 2d 446 (W.D. Penn. 2001).....	9
<i>Lavine v. Blaine Sch. Dist.</i> , 357 F.3d 981 (9th Cir. 2001).....	9
<i>Layshock v. Hermitage Sch. Dist.</i> , 496 F. Supp. 2d 587 (W.D. Penn. 2007).....	6, 12
<i>Morse v. Federick</i> , 127 S. Ct. 2618 (2007).....	passim
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985).....	17, 23, 24
<i>Pearson v. Callahan</i> , 129 S. Ct. 808 (2009).....	25

<i>Phaneuf v. Fraikin</i> , 448 F.3d 591 (2d Cir. 2006)	20
<i>Redding v. Safford Unified Sch., Dist. No. 1</i> , 531 F.3d 1071 (9th Cir. 2008).....	22, 23, 24, 26
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001)	25
<i>Saxe v. State Coll. Area Sch. Dist.</i> , 240 F.3d 200 (3d Cir. 2001).....	6, 7, 9
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974).....	25
<i>Terry v. Ohio</i> , 392 U.S. 1 (1967).....	20
<i>Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.</i> , 607 F.2d 1043 (2d Cir. 1979).....	13
<i>Tinker v. Des Moines Ind. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969).....	passim
<i>Turner Broad. Sys., Inc. v. F.C.C.</i> , 512 U.S. 622 (1994).....	10

Constitutional Provisions

U.S. Const. amend. I	5, A
U.S. Const. amend. IV	17, A
U.S. Const. amend. XIV, §§ 1, 5	17, A

Statute

42 U.S.C. § 1983.....	A
-----------------------	---

Other Authorities

Irwin A. Hyam & Donna C. Perona, <i>The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior</i> , 36 J. School Psychology 7, 13 (1998)	24
Jess Ann White, <i>A Study of Strip Searching in Pennsylvania Public Schools an an Analysis of the Knowledge, Attitudes and Beliefs of Pennsylvania Public School Administrators Regarding Strip Searching</i> (2000)	24

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First, Fourth, and Fourteenth Amendments to the United States Constitution are provided in the Appendix at A. 42 U.S.C. §1983 is also provided in the Appendix at A.

STATEMENT OF THE CASE

Factual Background

Petitioners, eighteen-year-old Kit Politte (“Petitioner Politte”), and sixteen-year-old Cory Towles (“Petitioner Towles”), are high school students in the Horton Hopkins School District (“School”). (R. at 1.) Principal Keena Smalls and the administration (“School Officials”) were worried about illegal drugs on school grounds. (R. at 1.) In January 2007, Principal Smalls requested that the School enact a strict, zero-tolerance drug policy. (R. at 1, 15.)

In an effort to curtail drug use at her school and in her town, Petitioner Politte created a webpage on Friendkepedia, a social networking site. (R. at 2.) She created the webpage from her home computer and encouraged community members to submit any information that would be helpful to police. (R. at 2.) She decided what tips would be put on the site and all tips posted remained anonymous. (R. at 2.) Her webpage was up for almost a month without objection from the School or incident. (R. at 2.)

Petitioner Towles is new to the School. (R. at 2.) At his former high school, he was an athlete, an honor student, and had no history of drug infractions. (R. at 2.) On October 3, 2008, Petitioner Towles attended a classmate's party in order to ingratiate himself with members of the baseball team. (R. at 2.) At the party, Petitioner Towles saw some students smoking cigarettes and drinking beer, but witnessed no drug use. (R. at 3.) After Petitioner Towles left, police broke up the party and cited one boy for marijuana use. (R. at 3.)

The next day, Petitioner Politte received a photograph of Petitioner Towles sitting with two other boys, Frank Conrad and John Thompson, at the party. (R. at 3.) Conrad was the only boy smoking in the photograph. (R. at 3.) Petitioner Politte posted the photo on her Friendkepedia page. (R. at 3.) The photo was attributed to “an anonymous Horton Hopkins student” and the caption stated “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” (R. at 3.)

The next morning, after receiving calls from parents and viewing the website, Principal Smalls called Petitioner Towles, Conrad, Thompson, and Tweegs (the party’s host) to the office. (R. at 3.) All four boys denied possessing drugs. (R. at 3.) Principal Smalls nevertheless searched their lockers and book bags and found a small baggie of marijuana in Conrad’s locker. (R. at 3.) School Officials then forced the boys to submit to a search of their persons. (R. at 3.) The gym teacher insisted that each boy strip down to his undergarments and, while each one stood in front of him practically nude, he searched through their clothes. (R. at 3.)

Petitioner Towles, angry about the way he was treated, decided to create his own Friendkepedia page to express his frustration. (R. at 3.) Afterward, students began accessing both Petitioners' websites from their homes and during their free time at school. (R. at 4.) School Officials, angry that Petitioner Towles' website criticized the School, required him to take down his internet posting. (R. at 4.) In addition, even though Petitioner Politte's website denounced illegal drugs, School Officials insisted that she take hers down as well. (R. at 4.)

District Court’s Decision

The Badger County District Court held that the School did not violate Petitioners’ First, Fourth, or Fourteenth Amendment rights. (R. at 1.) Specifically, the District Court held that the School reasonably concluded that Petitioner Towles’ website could cause a disruption at school.

(R. at 6.) Further, it held that Petitioner Politte’s website “induced” Towles to create his webpage, thereby contributing to any potential disruption. (R. at 6.)

In addition, the District Court held that the search of Petitioner Towles did not violate his Fourth Amendment right because it was reasonable at its inception and in its scope. (R. at 6.) In particular, the court said that the search was reasonable at its inception because School Officials relied on a photograph of Petitioner Towles taken at a party where drugs and alcohol were present. (R. at 7.) Further, the search was also reasonable because Petitioner Towles’ friends had been involved in drug use in the past and marijuana was found in Conrad’s locker. (R. at 7.) The court found the search reasonable in scope because of the strong governmental interest in preventing school drug use. (R. at 7.) It found the School’s methods were not overly intrusive because only a male faculty member conducted the search, the teacher never touched the boys, and a thorough search was needed to find small baggies of marijuana. (R. at 8.)

Court of Appeals’ Decision

The State of Grace Court of Appeals affirmed the District Court’s ruling on Petitioners’ First Amendment rights, but reversed the District Court’s ruling that the search of Petitioner Towles did not violate the Fourth and Fourteenth Amendments. (R. at 10.) Specifically, the court found that the search was not reasonable at its inception because School Officials had no evidence to corroborate the anonymous internet tip. (R. at 10.) Additionally, the District Court erred when it considered Petitioner Towles’ friends’ disciplinary histories and the drugs found in Conrad’s locker. (R. at 11.) Nevertheless, the court found that School Officials had qualified immunity because the constitutionality of the strip search was not "clearly established" at the time of the search. (R. at 11).

SUMMARY OF THE ARGUMENT

This Court should reverse the Court of Appeals and find that the School violated Petitioners' First Amendment rights because the School unreasonably concluded that the students' speech would lead to a substantial disruption. Moreover, this Court should affirm the Court of Appeals' ruling that the School violated Petitioner Towles' Fourth Amendment rights because the School's search was not justified at its inception and it was unreasonable in scope. Nevertheless, this Court should reverse the ruling that Petitioner Towles' cause of action is barred by the doctrine of qualified immunity because the strip search was clearly established as unconstitutional when it was conducted.

The School violated Petitioners' First Amendment right of free speech when it required the students to take down their respective websites because it unreasonably concluded that the off-campus internet speech would lead to a substantial disruption at school. With respect to Petitioner Towles, his website did not substantially disrupt the school environment. Teachers never lost control of their classrooms and school operations never became interrupted. His speech also did not create a foreseeable risk of disruption because it did not encourage students to act subversively or engage in any unruly behavior. On the contrary, it is clear that the School only required him to shutdown his website because it disliked the content of his speech. With respect to Petitioner Politte, no sufficient nexus existed between her internet speech and any potential disruption; the fact that her website may have induced Petitioner Towles to create his own internet page is immaterial because the contrasting nature of their speech requires a completely independent evaluation of each student's expressive conduct. In addition, because Petitioner Politte's website vilified drug use, it is unquestionably the type of student speech that should receive First Amendment protection.

Furthermore, School Officials violated Petitioner Towles' Fourth Amendment rights in subjecting him to an intrusive strip search that was not justified at its inception and unreasonable in its scope. The strip search was unwarranted at its inception because it was based on an anonymous, unsubstantiated internet tip and no other evidence suggested that Petitioner Towles likely possessed drugs on the school grounds. Additionally, the strip search was unreasonable in its scope because the School's actions were excessively intrusive under the circumstances. The School subjected a minor student to a highly invasive and humiliating search in order to find marijuana, a prohibited substance that posed no immediate danger to the safety of other students. Moreover, considering School Officials were or should have been aware that subjecting a teenager to an intrusive strip search would violate his Fourth Amendment's guarantee to personal privacy, they are not entitled to a qualified immunity defense.

ARGUMENT

I. THE SCHOOL VIOLATED PETITIONERS' FIRST AMENDMENT RIGHT OF FREE SPEECH WHEN IT REQUIRED THE STUDENTS TO TAKE DOWN THEIR RESPECTIVE WEBSITES.

The Court of Appeals erred when it found that the School permissibly regulated Petitioners' off-campus speech. The First Amendment to the United States Constitution provides in part, "Congress shall make no law . . . abridging the freedom of speech" U.S. Const. amend. I. For nearly half a century, the Supreme Court's student speech jurisprudence has stood firmly on the bedrock principle that neither students nor teachers "shed their constitutional rights of freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In *Tinker*, the Court determined that student expression may not be circumscribed unless school officials can demonstrate that the conduct would substantially disrupt or materially interfere with school operations. *Id.* at 514.

Even though the Supreme Court has recognized that the mode of analysis promulgated by *Tinker* is "not absolute," it has yet to carve out a specific rule pertaining to online student speech. *Morse v. Federick*, 127 S. Ct. 2618, 2627 (2007). Federal courts, in the absence of guidance on the issue, have applied *Tinker's* substantial disruption test to student internet speech created off-campus. See *Doninger v. Neihoff*, 527 F.3d 41 (2d Cir. 2008); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Penn. 2007); *Coy v. Bd. of Educ. of the N. Canton City Sch.*, 205 F. Supp. 2d 791 (N.D. Ohio 2002). The Second Circuit acknowledged that off-campus internet speech is beyond a school's regulatory authority "unless it was reasonably foreseeable that the [web] posting would create a risk of substantial disruption within the school environment" *Doninger*, 527 F.3d at 49. Nevertheless, in analyzing student speech under *Tinker*, a school must show that its speech restriction was due to something more than a mere desire to avoid "discomfort and unpleasantness." *Tinker*, 393 U.S. 503 at 509. *Tinker* explicitly stated that "undifferentiated fear or apprehension of disturbance" would be insufficient to justify restrictions on student speech. *Id.* at 508. Similarly, the Third Circuit emphasized that "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001).

In the present case, Principal Smalls maintained that she was concerned about "keeping discipline and order at the school," yet Petitioners' off-campus internet speech caused no widespread disorder, no student protests, no disruption of class time, nor any interference whatsoever with respect to the School's ability to control the student body. (R. at 4.) Apart from several students accessing the website during their *free time* throughout the school day, the record fails to depict any sort of disruption occurring at the school, nor does it indicate that one was likely to occur in the future. (R. at 4.) (emphasis added). Thus, the School violated

Petitioners' First Amendment right of free speech because it unreasonably concluded that Petitioners' respective websites would cause a substantial disruption at the school.

A. The School unreasonably concluded that Petitioner Towles' off-campus internet speech would lead to a substantial disruption because the School had no reason to suspect any disruption would occur.

The Second Circuit recognized that "*Tinker* established a protective standard for student speech under which it cannot be suppressed based on its content, but only because it is substantially disruptive." *Guiles v. Guiles*, 461 F.3d 320, 326 (2d Cir. 2006). Accordingly, in order for the School to prevail against Petitioner Towles, it must demonstrate that (1) his speech created an actual disruption or (2) the School reasonably believed that his expression would lead to a substantial disruption in the future. *Tinker*, 393 U.S. at 513-14. In his Third Circuit opinion, Justice Alito maintained that "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster." *Saxe*, 240 F.3d at 212.

However, in the present case, the School has not demonstrated a "well-founded" expectation of disruption. The facts clearly indicate that Petitioner Towles' webpage did not cause any actual disruption within the school and, since his message only expressed his opinion and did not advocate any specific student misconduct, it was unreasonable for the School to conclude that a future disturbance was inevitable or even likely.

1. Petitioner Towles' off-campus internet speech caused no actual disruption within the school.

Petitioner Towles, an honor student with no history of disruptive behavior, created a webpage from home that criticized the School for its disciplinary procedures. (R. at 2-4.) Although admittedly trenchant, his speech did not advocate that other students use violence or engage in any sort of remonstrance. (R. at 3-4.) His internet posting only expressed his opinion

regarding Petitioner Politte's webpage and his frustration with the School's disciplinary actions. (R. at 3-4.) Although he suggested that other students "speak out" against the school, he never explicitly encouraged students to protest or engage in any sort of unruly behavior. (R. at 4.)

In response to his internet posting, some students did access his webpage during their free time throughout the school day. (R. at 4.) However, teachers never lost control of their classrooms, students did not become disorderly or boisterous, and the School never had to take any further disciplinary action. (R. at 4.) On the contrary, the record clearly shows that Petitioner Towles' speech did not actually "interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509. Even though some students accessed the webpage during the school day, the Supreme Court has certainly upheld student speech in a far more clamorous and unruly school environment. *Id.* at 517-18 (Black, J., dissenting) (emphasizing that *Tinker's* factual record indicated that comments, hostility, and teasing occurred between students as a result of the armband student-protest). Undeniably, "[u]nder our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Id.* at 513. Petitioner Towles' speech did not substantially disrupt the school environment and, therefore, he is entitled to express his opinion, albeit critical, of the School.

2. Absent an actual disruption, the School still acted unreasonably because Petitioner Towles' webpage did not advocate student misconduct, encourage a student protest, or interfere with the educational responsibilities of the teachers.

Even though *Tinker* does not require a showing of an actual disruption, School Officials must demonstrate "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" in order to justify a regulation on student speech. *Tinker*, 393 U.S. at 514. The Ninth Circuit noted that

"[f]orecasting disruption is unmistakably difficult to do" and a court's evaluation must "look to the totality of the relevant facts." *Lavine v. Blaine Sch. Dist.*, 357 F.3d 981, 989 (9th Cir. 2001). In addition, for a school to justify regulating a particular expression or opinion, "it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. The Third Circuit made clear that "*Tinker* requires a specific and significant fear of disruption not just some remote apprehension of disturbance." *Saxe*, 240 F.3d at 211.

In examining all the relevant facts of the present case, it is evident that School required Petitioner Towles to shutdown his website solely because it disliked the content of his speech. The School became upset about Petitioner Towles' website because the posting portrayed the School in a negative light. Principal Smalls even admitted that "she was angry about Towles' criticism of the School's actions in dealing with the drug problem on school grounds." (R. at 4.)

In an analogous case, *Killion v. Franklin Reg'l Sch. Dist.*, the court held that the school violated a student's First Amendment rights when it suspended him for creating a list that severely criticized an athletic director. 136 F. Supp. 2d 446, 456 (W.D. Penn. 2001). In *Killion*, a student assembled at his home a "top ten" list that harshly condemned a school official and he later emailed the list to several of his friends. *Id.* at 448. Eventually, the list appeared on school grounds and the administration subsequently disciplined the student. *Id.* at 449. The *Killion* court reasoned that, even though the student expression was rude and abusive, "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*." *Id.* at 455 (quoting *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998)). Similarly, in the case at bar, the School disciplined Petitioner Towles after students began to view his off-campus speech that severely criticized the

School. Just like in *Killion*, the School in the present case had no reason to anticipate a substantial disruption since the School never lost its ability to maintain control of the students and no evidence indicates that student internet speech had ever caused problems in the past. Moreover, even though Principal Smalls' comment confirmed that the School was legitimately upset about Petitioner Towles' critical message, merely disliking the content of his website is plainly "not an acceptable justification for limiting student speech." *Id.* at 455. Indeed, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression . . . [g]overnment action that stifles speech on account of its message . . . contravenes this essential right." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

In contrast, the present case is distinguishable from *Doninger v. Neihoff* in that Petitioner Towles did not potentially create a disruption by posting false or misleading information on his website. 527 F.3d at 51. In *Doninger*, a student posted a message on a publicly accessible internet blog that criticized school administrators and erroneously informed the community that a highly anticipated event had been cancelled. *Id.* at 45. The court held that the student's internet posting created a foreseeable risk of substantial disruption within the school. *Id.* at 50. It reasoned that administrators and teachers would likely be diverted from "their core education responsibilities" by the need to assuage student anger and confusion over the purported event cancellation. *Id.* at 51-52. Conversely, in the case at bar, Petitioner Towles' website did not mislead anyone or cause hostility amongst other students. His posting only expressed his own frustration with the School's disciplinary approach and the website did not contain any false information. Thus, it is unreasonable to assume that any teacher would be diverted from his or

her "educational responsibilities" by the need to clarify any student confusion or alleviate student acrimony.

Furthermore, the *Doninger* court determined that the student's posting created a foreseeable risk of disruption because it expressly encouraged other students to contact the school principal either by email or by phone to "piss her off more." *Id.* at 46. However, in the present case, even though Petitioner Towles advocated that other students "speak out" against the School's disciplinary tactics, he did not specifically encourage students to contact the School or act disruptively. (R. at 4.) He simply made a general statement suggesting that students should inform the School that strip searches are unreasonable and unjust. Even though the School may not have agreed with or liked Petitioner Towles message, a mere desire to avoid the "unpleasantness" of his viewpoint is insufficient to justify suppressing his freedom of speech. *Tinker*, 393 U.S. at 509.

Given that Petitioner Towles' webpage did not encourage students to defiantly protest or act in an unruly fashion and his website did not create an actual disturbance, School Officials had no reason to expect that a substantial disruption would likely occur in the future. Therefore, the School acted unreasonably and is liable for violating his First Amendment rights.

B. The School unreasonably concluded that Petitioner Politte's off-campus internet speech would lead to a substantial disruption because no legitimate nexus existed between her website and any potential disruption at the school.

In order for the School to justify its suppression of Petitioner Politte's freedom of speech, it must demonstrate facts which "might reasonably have led school authorities to forecast a substantial disruption of or a material interference with school activities" *Tinker*, 363 U.S. at 514. In *Morse*, Justice Stevens clarified *Tinker's* standard by stating that "some likely connection" must exist between the speech at issue and the school's "feared consequences."

Morse, 127 S. Ct. at 2647 (Stevens, J., dissenting). Thus, in applying *Tinker*, it is crucial to determine whether a sufficient nexus exists between the student's speech and the anticipated disruption. See *Layshock*, 496 F. Supp. 2d at 599. Absent a showing of a connection between Petitioner Politte's webpage and the School's apprehension of a disturbance, the School cannot prevail under the *Tinker* standard.

Petitioner Politte created a webpage from home on her personal computer that "called for community members to submit information about potential drug dealers." (R. at 2.) Commendably, she wanted to help police fight the growing drug problem in her community and, for nearly a month, Petitioner Politte maintained this website without one complaint from the School. (R. at 1-2.) It was not until the School initiated controversy by inappropriately strip searching some of its students that School Officials even identified the website as a source of a disruption. The facts clearly indicate that, but-for the School's actions, Petitioner Politte's website would have continued to serve the community without objection. Accordingly, given that no real connection existed between the website and the alleged disruption, the School cannot prevail under *Tinker*.

In an analogous case, *Layshock v. Hermitage Sch. Dist.*, the court held that the school failed to satisfy *Tinker's* standard because no sufficient nexus existed between the student's speech and the portend disruption at the school. 496 F. Supp. 2d at 600. In *Layshock*, a student created a vulgar parody profile of his principal on MySpace (a similar internet site to the Friendkedia site) from his home computer and other students attempted to access the profile from school. *Id.* at 591. The court persuasively reasoned that the school failed to demonstrate that any "buzz" about the site was caused by the student's fake internet profile as opposed to the reaction of administrators. *Id.* at 600. Similarly, in the case at bar, any "buzz" that may have

occurred at the school clearly resulted from the controversial search methods employed by School Officials rather than Petitioner Politte's off-campus speech. The mere fact that students began to access Petitioner Politte's website at school provides an inadequate basis for concluding that a substantial disruption was probable because students had the same access to that same website for a significant amount of time beforehand and no problems occurred. On the contrary, after the search, any unusual computer activity that transpired at the school was likely the result of students' reaction to the School's conduct as opposed to Petitioner Politte's webpage.

Moreover, when evaluating student speech, it is germane to consider whether the speech at issue occurred on school grounds. Although not completely immune from *Tinker's* reach, off-campus student speech deserves a heightened level of scrutiny given that the likelihood of it causing a disturbance at school is unequivocally diminished. A mere tenuous connection between off-campus speech and an on-campus disturbance certainly does not suffice to establish the requisite nexus demanded by *Tinker's* standard. *Morse*, 127 S. Ct. at 2647. In considering the present case, the dissent from the Court of Appeals emphasized that "[b]ecause the Internet speech was conducted entirely off-campus, this is a situation appropriate for disciplinary action by the parents . . . [t]his is not a matter that falls under school officials' authority." (R. at 12.) Similarly, in considering off-campus speech, the Second Circuit acknowledged that "our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself." *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1052 (2d Cir. 1979).

Accordingly, because no legitimate nexus existed between Petitioner Politte's website and the alleged disruption, the School could not have reasonably concluded that her website would have caused a material or substantial disruption at school.

1. When two different types of student expression are at issue, *Tinker's* standard requires an independent evaluation of each student's particular expression.

The Court of Appeals misapplied the *Tinker* test by relying on the District Court's finding that Petitioner Politte's website would have contributed to any potential disruption because it "induced" Petitioner Towles to create his own webpage. (R. at 6.) In *Morse*, the Supreme Court affirmed that "student expression may not be suppressed unless school officials *reasonably conclude* that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse*, 127 S. Ct. at 2626 (quoting *Tinker*) (emphasis added). The *Tinker* inquiry, however, is not boundless in scope and the reach of school officials must be tempered by reasonableness. At a minimum, reasonableness requires a school to evaluate a student's particular expression for its potential to cause disruption in isolation; indeed, a failure to do so would provide school officials with unfettered discretion to regulate any student expression that even slightly relates to the conduct at issue. As the Supreme Court in *Tinker* poignantly articulated, "[i]n our system, state-operated schools may not be enclaves of totalitarianism." 393 U.S. at 511.

The case at bar presents two different students who engaged in two very different types of expression: Petitioner Politte's website vilified drug use whereas Petitioner Towles' website criticized the School. Given the disparate nature of the expressive conduct, this Court must evaluate each student's speech on its own platform and irrespective of the other. The Second Circuit acknowledged that *Tinker's* substantial disruption test "permits schools to restrict student speech *only where*, as noted, 'necessary to avoid material and substantial interference with schoolwork or discipline.'" *Guiles*, 461 F.3d at 326 (quoting *Tinker*) (emphasis added). Therefore, it is incumbent upon the school to demonstrate that the expressive conduct of each

student independently would have led to a substantial disruption as to avoid the chilling effect of silencing more speech than necessary.

Even assuming, arguendo, that Petitioner Politte's website did induce Petitioner Towles to create his own website, her expressive conduct cannot legitimately be viewed as corroborative. Petitioner Politte created her webpage almost a month before Petitioner Towles launched his own. (R. at 2-3.) Her website denounced student drug use and, as forum for community outreach, attempted to subvert the drug problem in her town. (R. at 2.) Moreover, the School actually utilized her website to help enforce its new drug policy. (R. at 3.) Even construing the facts in light most favorable to Respondents, it is completely unreasonable to presume that Petitioner Politte's website posed any risk of substantial disruption; this presumption is especially unreasonable considering her anti-drug message typifies the type of speech the Supreme Court has embraced as indispensable. *Morse*, 127 S. Ct. at 2628 (recognizing that deterring drug use in school is a fundamental goal for educators).

2. Petitioner Politte's webpage deserves First Amendment protection because her speech related to an important governmental interest and reinforced the anti-drug policies of the School.

In *Morse*, the Supreme Court held that a school could permissibly regulate student speech that promoted illegal drug use. 127 S. Ct. at 2629. In doing so, the Court acknowledged that "deterring drug use by schoolchildren [sic] is an 'important-indeed, perhaps compelling' interest." *Id.* at 2628. Notwithstanding this clear precedent, the Court of Appeals still improperly concluded that Petitioner Politte's anti-drug message fell outside the scope of First Amendment protection. (R. at 10.)

The facts of the present case are completely obverse to those of *Morse*. Unlike the student who celebrated illegal drug use in *Morse*, Petitioner Politte's website condemned illegal

drugs and assisted the police in ridding the community of local dealers. (R. at 2.) Her expressive activities precisely mirrored "the governmental interest in stopping student drug abuse-reflected in the policies of Congress and myriad school boards" *Morse*, 127 S. Ct. at 2629. Therefore, given the propriety of her speech, it is wholly inconsistent with the ruling of *Morse*, as well as the spirit of *Tinker*, to uphold the School's censorship.

Furthermore, not only would Petitioner Politte's website likely be acceptable to the Supreme Court, but it effectively parallels the School's own educational mission. According to the School's new drug policy, the School expressly recognizes that illegal drug use is "unacceptable" and it insists on "maintain[ing] a drug-free school system." (R. at 15.) Besides supporting the School's anti-drug mission, Petitioner Politte's website even went a step further and encouraged community members to lend a hand in curbing the town's drug problem. (R. at 2.) Unlike previous student speech cases, the speech at bar does not threaten to disrupt or circumvent the School's educational mission, but rather celebrates and promotes it. Accordingly, in shutting down the website, the School successfully subverted its own educational stratagem and violated Petitioner Politte's First Amendment rights in one fell swoop. When evaluating student speech, it is important to recall that "[t]he very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J., dissenting).

II. SCHOOL OFFICIALS VIOLATED PETITIONER TOWLES' FOURTH AMENDMENT RIGHTS WHEN THEY IMPROPERLY SEARCHED HIS PERSON.

This Court should invalidate the search of Petitioner Towles because the search was neither reasonable at its inception nor reasonably related in scope to the possible infraction. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against

unreasonable searched and seizures” U.S. Const. amend. IV. The purpose of the Fourth Amendment is to impose a standard of “reasonableness” on government officials to protect an individual’s privacy from unwarranted government intrusion. *Delaware v. Prouse*, 44 U.S. 648, 653–654 (1979).

The Fourth Amendment is applied to the states through the Fourteenth Amendment. *Elkins v. United States*, 364 U.S. 206, 213 (1960). The Supreme Court clarified that students do not lose their expectation of privacy when they enter school because “[i]n carrying out searches and other disciplinary functions pursuant to such [school] policies, school officials act as representatives of the State . . . and they cannot claim the parent’s immunity from the strictures of the Fourth Amendment.” *New Jersey v. T.L.O.*, 469 U.S. 325, 336–337 (1985).

A. School Officials improperly searched Petitioner Towles because the search was not justified at its inception, highly intrusive in scope, and not reasonably related to the circumstances.

The Court of Appeals correctly held that the search of Petitioner Towles violated his Fourth Amendment rights because it was unreasonable at its inception. School Officials acted unreasonably when they subjected a teenage boy to an unjustified and overly intrusive search based on scant evidence, unsubstantiated rumors, and the wrongdoing of others.

With respect to students’ Fourth Amendment rights, the Supreme Court recognized the need to balance the privacy rights of students against the interest of school administrators in maintaining a safe and well-ordered school. *Id.* at 341. In balancing these competing interests, the Supreme Court articulated the following standard for warrantless student searches conducted by school officials: A search must be (1) “justified at its inception,” and (2) “reasonably related in scope to the interference in the first place.” *Id.*

Here, the search of petitioner Towles was neither justified at its inception nor reasonable in its scope. At his former high school, Petitioner Towles was a student athlete, an honor student, and had no history of drug use or disciplinary infractions. (R. at 2.) School Officials, basing their actions on an unsubstantiated tip, subjected him to an unreasonable and humiliating search. (R. at 3.) Petitioner Towles attended a classmates' party at which he witnessed no drug use. (R. at 3.) He was photographed with two other boys, one of whom was smoking. (R. at 3.) It is unclear, however, what the boy was smoking. (R. at 3.) Given that Petitioner Towles stated there was no drug use at the party and he was in close proximity to the boy smoking in the photograph, it is likely that the boy was not smoking any illegal substances. (R. at 3.)

Furthermore, even though drugs were found in his classmate's locker, School Officials never found drugs in Petitioner Towles' locker or personal effects. (R. at 3.) Accordingly, they had no reason to believe Petitioner Towles had any drugs on school grounds. In addition, even though Petitioner Towles refused to consent to the search, School Officials completely ignored his respect for privacy. (R. at 3.) Undeniably, the School Officials acted unreasonably when they acted off a mere presumption and forced a child to strip in front of an adult.

1. The search was not justified at its inception because School Officials impermissibly relied on an anonymous tip and determined Petitioner Towles guilty by his associations.

The search was unreasonable at its inception because (1) it was based on an anonymous, unsubstantiated tip from a website, and (2) Petitioner Towles was improperly judged guilty by association. This Court should affirm the Court of Appeals' holding that the search was unreasonable at its inception. Petitioner Towles did not check his rights at the schoolhouse gate and he is entitled to relief for the School's unconstitutional conduct.

i. School Officials relied on an anonymous, unsubstantiated tip.

Petitioner Towles was subjected to a humiliating search of his person and his belongings based on an anonymously submitted photograph to a student's Friendkepedia site with the caption, "Are Horton Hopkins students becoming drug dealers?" (R. at 3.) The Supreme Court held that an anonymous tip without more is not enough to create a reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266, 274 (2000). It is true that an anonymous tip may be taken into consideration when considering the totality of circumstances. *Alabama v. White*, 110 S. Ct. 2412, 2416 (1990). The Court of Appeals properly determined that the anonymously submitted photograph, even when coupled with the fact that another student possessed marijuana, was insufficient to justify the search at its inception. (R. at 7.) A photographic tip, which showed a student likely smoking a mere cigarette, could not reasonably have led School Officials to believe that petitioner Towles had any drugs on his person at the time of the search.

In *J.L.*, the Supreme Court weighed the competing interests of the dangers posed by a person potentially carrying a concealed firearm and that person's personal privacy. 529 U.S. at 274. An anonymous caller phoned the Miami-Dade Police and reported that a young black man, wearing a plaid shirt and standing at a bus stop was carrying a gun. *Id.* at 268. Police officers responded and found three black youths, but apart from the tip, the police had no reason to suspect any of the youths were doing anything illegal. *Id.* The officers did not spot a gun, nor did the youths act aggressively. *Id.* Yet the officers proceeded to frisk all three boys and coincidentally found a gun on the boy wearing a plaid shirt. *Id.* The Court invalidated the search reasoning that the anonymous tip lacked the "moderate indicia of reliability." *Id.* at 271. The call provided no "predictive information" and left the police with no way to know if it was knowledgeable or reliable. *Id.* The fact that the officers found a gun is irrelevant because the

essential inquiry is what the officers knew before they conducted the search. *Id.* The Court has long recognized the importance of police officer safety and, had the officers had any reasonable suspicion apart from the tip, the search would have been upheld. *Terry v. Ohio*, 392 U.S. 1, 24-25 (1967). However, the officers were acting based exclusively on an anonymous tip, and the Court held that the interests of personal privacy and the right to be secure against unreasonable searches were more important. *J.L.*, 529 U.S. at 274.

More recently, the Second Circuit considered anonymous tips in the school context. *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006). Before a class trip a student reported to a teacher that Phaneuf, a student with a history of disciplinary problems not related to drug use, was planning to hide marijuana down her pants to avoid a mandatory bag search. *Id.* at 593, 599. The principal, acting on the tip, approached Phaneuf and asked her if she was carrying marijuana, but Phaneuf denied the accusation. *Id.* at 593. The principal believed Phaneuf was lying, and called her mother. *Id.* The mother came to the school and the principal required her to perform a strip search of her daughter. *Id.* at 594. While waiting for the mother, the principal searched Phaneuf's purse and found cigarettes and a lighter. *Id.* School officials acted on substantially more than an anonymous tip; they had a known informant, a student with a history of discipline problems, a "suspicious denial," and the cigarettes found in her purse. *Id.* at 597. Nevertheless, the Second Circuit still determined that the search of Phaneuf was not reasonable under the *T.L.O.* standard. *Id.* at 600. With respect to the tip, the court was unwilling to accept the principal's bald assertion that the tipster was a reliable source, and noted that the principal should have investigated, corroborated, or otherwise substantiated the tip before conducting the strip search. *Id.* at 598.

The Second Circuit invalidated a strip search based on substantially more than the anonymous and ambiguous photograph used by School Officials in the case at bar. *Id.* at 597. The only thing that tied Petitioner Towles to drug use was a photo taken of him at a party that was later posted anonymously on a website. (R. at 3.) The Supreme Court recognized that an anonymous tip, without more, is not enough to justify a search. *J.L.*, 529 U.S. at 274. School Officials did not investigate who took the photo, nor is it even clear that the students in the picture were smoking marijuana. (R. at 3.) Regardless, Petitioner Towles was certainly not smoking anything and, in relying only on this photo, School Officials subjected Petitioner Towles to nothing short of a witch-hunt. Allowing this search to stand is not in line with this country's Fourth Amendment jurisprudence and this Court should affirm the Court of Appeals by finding that the search was unreasonable at its inception.

ii. School Officials unfairly determined that Petitioner Towles was guilty based on his associations.

The Court of Appeals correctly determined that School Officials acted impermissibly by associating Petitioner Towles with the other boys on a suspicion of drug possession. (R. at 11.) Admittedly, there may have been a reason to suspect the other boys of possessing drugs, considering two of them had a history of drug-related disciplinary infractions. (R. at 3.) One of the boys searched was arrested at the party for drug use and, before searching the group, School Officials found a baggie of marijuana in that boy's locker. (R. at 3.) However, Petitioner Towles had no such disciplinary record, and as the Court of Appeals said, "absolutely nothing in the record demonstrates a likelihood that Towles himself possessed drugs on school grounds." (R. at 11.) It was clearly unfair and unreasonable to judge Petitioner Towles guilty based on the actions of his classmates.

This is certainly not the first time our courts have struggled with guilt by association. In the aftermath of World War II and at the beginning of the McCarthy era, the Supreme Court said “[t]he technique of guilt by association is one of the most odious institutions in history . . . the fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme . . . [g]uilt in our system is personal.” *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178-179 (1951). The Ninth Circuit relied on this reasoning in a case dealing with searches in the educational setting and held that a school cannot use guilt by association to validate an otherwise unreasonable search. *Redding v. Safford Unified Sch., Dist. No. 1*, 531 F.3d 1071, 1074 (9th Cir. 2008). Accordingly, this Court should affirm the Court of Appeals’ ruling that the search was unreasonable at its inception because School Officials decisively grouped the four boys together and petitioner Towles cannot be found guilty by mere association.

In *Redding*, school officials became concerned that students were violating their drug and alcohol policy. *Id.* at 1075. The school officials had a tip from a student that “certain students” were bringing drugs and weapons onto campus. *Id.* at 1076. On the day of the incident, the tipster approached an administrator with a white pill and explained that a girl named Marisa had given it to him. *Id.* When the administrator searched Marisa’s belongings, which included a planner that Marisa had borrowed from her friend Savana, he discovered a few painkillers. *Id.* at 1076. Marisa blamed the pills on Savana, but never indicated that Savana had any more pills on her person. *Id.* at 1077. Based on Marisa’s accusations, the school administrator subjected Savana to an invasive and humiliating strip search, which uncovered no contraband. *Id.* at 1077.

Here, two of the boys in the photo, Conrad and Thompson, had some history of drug use. (R. at 3.) Based on the photo and Conrad's citation for drug use at the party, School Officials

searched his locker and discovered marijuana. (R. at 3.) None of these facts, however, make it more likely that Petitioner Towles had drugs on his person and, to assume that they did, would clearly be guilt by association. In *Redding*, drugs were found in Marisa's belongings. 531 F.3d at 1074. Marisa blamed the drugs on Savana and the school officials used this information to strip search a thirteen-year-old girl in order to find some Ibuprofen. *Id.* at 1074. The Ninth Circuit prohibited the search stating, "[t]his is nothing more than 'guilt-by-association,' certainly too thin of a reed for such a substantial intrusion into Savana's expectations of privacy." *Id.* at 1084. In the present case, there is even less direct evidence against Petitioner Towles than there was against Savana. The search of the other boys may have been reasonable, but the search of Petitioner Towles was certainly not justified.

The Supreme Court recognized that guilt by association is an "odious institution," and allowing this search to stand would only perpetuate a system that promotes serious invasions of privacy. *McGrath*, 341 U.S. at 178-79. The School's own drug policy stated "[t]he District will balance the likelihood the student possesses drugs against the risk of infringing the student's individual rights." (R. at 15). In relying on scant and unsubstantiated evidence the School Officials violated not only the Constitution, but their own policy as well. Therefore, this Court must invalidate the School's search.

2. The search was not reasonably related in scope because School Officials subjected Petitioner Towles to a highly invasive search to find drugs that posed no immediate danger to the school.

Even if this Court determines that this search was reasonable at its inception it should still invalidate the School Official's search because it was unlawful in scope. The factors laid out in *T.L.O.* make it clear that a search must be both reasonable at its inception and the scope of the search must be reasonably related to the inference in the first place. 469 U.S. at 341.

Under the second prong of *T.L.O.* a search is permissible if, “the measures adopted are reasonably related to the objective 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 (emphasis added). The Ninth Circuit thoroughly investigated the effects of strip searches on children. *Redding*, 531 F.3d at 1086. It found that “[c]linical evaluations of the [young] victims of strip searches indicate that they can result in serious emotional damage” *Id.* (quoting Irwin A. Hyam & Donna C. Perona, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. School Psychology 7, 13 (1998)). In the case at bar, even though the District Court relied heavily on the fact that the gym teacher never touched the boys, the fact that children are “viewed rather than touched, does not diminish the trauma experienced by the child.” *Id.* (quoting Jess Ann White, *A Study of Strip Searching in Pennsylvania Public Schools an an Analysis of the Knowledge, Attitudes and Beliefs of Pennsylvania Public School Administrators Regarding Strip Searching* (2000) (on file with the Temple University Graduate Board)).

In *Redding*, the school administrators subjected a thirteen-year-old girl to a strip search when there was no indication that she had drugs anywhere on her person. 531 F.3d at 1087. The Ninth Circuit recognized that, even if the student did possess any prescription or over the counter drugs, there was no immediate danger once she was detained in the principal’s office. *Id.* The school administrators could have called the minor’s parents, or even the authorities, which would have afforded her a greater degree of constitutional protection. *Id.* at 1087.

Just like in *Redding*, School Officials in the present case had no reason to believe Petitioner Towles had any drugs on his person. Further, even if drugs were found on his person, there would have been no immediate threat of danger. The School Officials were unreasonable

in both their basis for the search and the extent to which they attempted to find possible drugs. A strip search by a strange adult is an extreme and highly embarrassing experience for a minor child, and this Court should not establish a precedent that would allow School Officials to continue their intrusive tactics on other students.

B. School Officials are not entitled to qualified immunity because they violated Petitioner Towles' clearly established constitutional rights.

This Court should reverse the Court of Appeals and hold that the School Officials are not entitled to qualified immunity because Petitioner Towles' Fourth Amendment rights were violated and those rights were clearly established at the time of the search. The doctrine of qualified immunity essentially gives government officials “a pass” when violating constitutional rights because otherwise they would be unable to carry out their duties for fear of personal liability.¹

Until recently the doctrine of qualified immunity was tempered by the *Saucier* doctrine, which required a two step process: (1) that the facts be considered in the light most favorable to the injured party, and (2) the constitutional right violated must have been clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). However, the Supreme Court declared that this was a permissible, but not a mandatory standard. *Pearson v. Callahan*, 129 S. Ct. 808 (2009). Because the lower courts used this standard and all other courts considering similar matters have used it, this Court should evaluate this case under the *Saucier* standard.

The “pass” of qualified immunity is revoked when a constitutional right is “clearly established” and the violator is, or ought to have been, aware of it. *Anderson v. Creighton*, 483

¹ “Two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.” (R. at 11.) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974)).

U.S. 635 (1987). The standard is flexible because “[i]t is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness was apparent in light of existing law.” *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060-61 (9th Cir. 2003). Courts look first to the decisions of the Supreme Court and then to the circuit courts to determine if a constitutional right is clearly established. *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489, 499 (6th Cir. 2008). However, “[c]ommon sense and reason supplement the federal reporters.” *Redding*, 531 F.3d at 1088.

In contrast to the Court of Appeals, the Ninth Circuit determined that the right of a minor to be free from a school-conducted strip search for the purpose of uncovering drugs was clearly established. *Id.* at 1099. Other circuits have also expressed strong doubts that school officials, the people entrusted with the care of our children, do not see that a nude search of a teenager is some sort of an invasion of constitutional rights. *See Brannum*, 516 F.3d at 499; *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir. 1999); *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980). In *Redding*, the court acknowledged that the notions of personal privacy are “clearly established” and inherent in the Fourth Amendment is a guarantee that students remain free from unreasonable searches and seizures. 531 F.3d 1088-89. Relying on the Sixth Circuit, the *Redding* court reasoned that “[a] person of ordinary common sense, to say nothing of professional school administrators, would know without need for special instruction from a federal court, that teenagers have an inherent personal dignity . . . and a sensitivity about their bodily privacy that are at the core of their personal liberty.” *Id.* at 1088 (quoting *Brannum*, 516 F.3d at 499).

Following the reasoning of the Sixth and Ninth Circuits, this Court should find that School Officials, as persons of "ordinary common sense," would recognize the tenets of personal

privacy and clearly realize that it is unconstitutional to subject a minor to a strip search based on mere rumor and conjecture. It has been over twenty years since *T.L.O.* was decided and School Officials were unquestionably on notice that a strip search of Petitioner Towles would violate his Fourth Amendment rights. It is important that this Court prevent School Officials from hiding behind the doctrine of qualified immunity when they certainly should have been aware of the unconstitutional nature of their actions.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals' First Amendment holding and affirm its decision with respect to the Fourth Amendment. Additionally, this Court should find that the doctrine of qualified immunity is not applicable in the case at bar.

Respectfully submitted,

Team Number 7
Attorneys for Petitioners

Date: March 2, 2009

APPENDIX

APPENDIX "A"

Constitutional Provisions

U.S. Const. amend. I (in pertinent part)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press

U.S. Const. amend. IV

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

U.S. Const. amend. XIV, §§ 1, 5

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statutory Provision

42 U.S.C. § 1983 (in pertinent part)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

APPENDIX "B"

Horton Hopkins School District DRUG AND ALCOHOL USE POLICY

Drug and Alcohol Use Policy

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

Suspicion of Drug Use or Drug Possession

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

a) Personal Search

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

b) Consequences

1. Illegal drugs

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

2. Alcohol or tobacco

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

3. Extra-curricular activities

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