

No. 05-1338

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IN THE  
SUPREME COURT OF THE STATE OF GRACE

Spring Term, 2009

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KIT POLITTE AND CORY TOWLES,

Petitioners,

v.

HORTON HOPKINS SCHOOL DISTRICT AND KEENA SMALLS,

Respondents.

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

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**BRIEF FOR PETITIONER**

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Team 09

## **QUESTIONS PRESENTED FOR REVIEW**

- A. Whether, under the First Amendment, Respondents violated Petitioners Kit Politte's and Cory Towles' constitutional rights to free speech when their expression did not materially disrupt classwork, was not lewd or offensive, was not school-sponsored and did not promote illegal drug use?
  
- B. Whether, under the Fourth Amendment, Respondents violated Petitioner Cory Towles' constitutional right to be free from unreasonable search and seizure when Respondents subjected him to a warrantless strip search and clearly established law demands that searches be reasonable?

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## CONSTITUTIONAL PROVISIONS AT ISSUE

### **First Amendment**

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

U.S. Const. amend. I.

### **Fourth Amendment**

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

U.S. Const. amend. IV.

### **Fourteenth Amendment**

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.

U.S. Const. amend. XIV, § 1.

## STATUTES INVOLVED

### 42 U.S.C. § 1983

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000)

## STATEMENT OF THE CASE

### Nature of the Case

This Court is being asked to reverse a judgment from the State of Grace Court of Appeals.

Petitioners Kit Politte and Cory Towles assert that Respondents' requirement that Kit and Cory shut down their websites was a violation of their rights to free speech under the First Amendment to the United States Constitution, as applied to school officials by the Fourteenth Amendment. (R. at 1.) Kit and Cory filed suit in Badger County Court pursuant to 42 U.S.C. § 1983. The court held that Respondents' regulation of Kit's and Cory's websites was constitutional under the First Amendment. (R. at 1.) The Court of Appeals affirmed the District Court's finding that Respondents did not violate their First Amendment rights. (R. at 10.)

Petitioner Cory Towles further asserts that Respondents' search of his person without consent or warrant constituted an unreasonable search under the Fourth Amendment, as incorporated by the Fourteenth Amendment to the United States Constitution. (R. at 1.) The Badger County District Court held that the warrantless search of Cory did not constitute an unreasonable search under the Fourth Amendment. (R. at 8.) The Court of Appeals affirmed the judgment of the District Court. (R. at 9.) The Court ruled that Respondents were entitled to qualified immunity, but found that the search was not justified at its inception and was not reasonably related in scope because of its highly intrusive nature. (R. at 11.)

## Statement of Facts

Kit Politte, 18-year-old senior, and Cory Towles, 16-year-old sophomore, are students at Horton Hopkins High School (“Horton Hopkins”), a public school in Hopkinsville within the State of Grace. (R. at 1-2.) Keena Smalls has been principal of Horton Hopkins for twenty years. (R. at 1.) Horton Hopkins recently implemented a policy that permits school officials to test students for drugs and conduct searches of lockers, desks, and personal property. (R. at 1.)

In September 2008, Kit established Drug Use Damages Schools (DUDS), a school-sponsored club to combat drug use. (R. at 2.) On September 10, Kit, working exclusively from her home computer, created a network webpage on Friendkepedia. (R. at 2.) Friendkepedia is a social networking site open to the public. (R. at 2.) Kit’s webpage, Fighting All Dealers (FAD), allowed residents of Hopkinsville to submit information regarding potential drug dealers. (R. at 2.) Kit reviews and then posts promising tips. (R. at 2.) Kit promoted her Friendkepedia page at an after school DUDS meeting that was held in a Horton Hopkins classroom. (R. at 2.)

Cory Towles transferred to Horton Hopkins for the 2008-09 school year. (R. at 2.) At his former school Cory was an honor student, played junior varsity baseball, had no disciplinary actions, and his record contained only two detentions for tardiness. (R. at 2.) To improve his chances of making the baseball team, Cory attended a party at the home of Jeff T., the captain of the team. (R. at 2.) During his brief stay from 9 to 11 p.m., Cory saw a few students drinking beer and smoking cigarettes but witnessed no drug use. (R. at 3.) Jeff T. had been cited in the past for drug possession. (R. at 2.) Near 11:30 p.m., the police arrived and broke up the party. (R. at 3.) One student, Frank C., was cited for drug possession. (R. at 3.)

Kit Politte, who did not attend the party, received an email with a photograph attachment the following day, October 4. (R. at 3.) The photograph, taken during Jeff T.’s party, showed

Cory sitting with Frank C., and John T. (R. at 3.) In the photo, Frank C. was smoking. (R. at 3.) Kit posted the photo on her FAD page with the caption “Are Horton Hopkins students becoming drug dealers?” (R. at 3.) She attributed it to an anonymous tip. (R. at 3.) Although Cory was not identified by name, his face was visible in the photograph. (R. at 3.)

On October 5, Respondent Smalls received calls from parents who had seen the photograph and were disquieted about the use of drugs. (R. at 3.) Respondent Smalls viewed the FAD webpage and summoned Cory, Frank C., John T., and Jeff T. for questioning. (R. at 3.) Although all four denied possessing drugs, Respondent Smalls searched their lockers and book bags. (R. at 3.) She located a small amount of marijuana in Frank C.’s locker. (R. at 3.) Despite finding no evidence of drugs in the lockers or book bags of three of the four students, including Cory, Respondent Smalls asked each of the boys to submit to a search of their persons. (R. at 3.) All four students refused. (R. at 3.) Each student was taken to a private room, ordered to strip to his undergarments, and their clothing was then searched. (R. at 3.) A small amount of marijuana was found in John T.’s pocket. (R. at 3.) Cory did not have any drugs. (R. at 3.)

In response to the strip search and the posting of the photograph, Cory generated his own page titled “Students Against Defamatory Statements” (SADS). (R. at 3.) The page was edited only at home and from his personal computer. (R. at 3.) Cory issued a statement calling for students to speak out against the “Hopkins idiots” and the strip searches. (R. at 3-4.) When Horton Hopkins students accessed both webpages at school, Respondent Smalls demanded that Kit and Cory shut them down. (R. at 4.) Both refused and were suspended until they agreed to shut down their pages. (R. at 4.) Respondent Smalls confessed that she was “angry about Towles’ criticism,” but alleges that she was concerned the websites were causing a disturbance and interrupting other students’ education. (R. at 4.)

## SUMMARY OF THE ARGUMENT

### I.

The State of Grace Court of Appeals improperly held that Petitioners Kit Politte's and Cory Towles' First Amendment rights were not violated. The United States Supreme Court's decision in *Tinker* established that school officials may not regulate student expression unless the speech materially disrupts classwork or involves substantial disorder or invasion of the rights of others. Kit's and Cory's rights to free speech were impinged upon because Respondents could not reasonably forecast that the websites would create a substantial disruption, and no substantial disruption resulted. Additionally, Kit's and Cory's speech was not lewd or offensive, was not school-sponsored, and did not promote illegal drug use. Thus, Respondents could not regulate the webpages under the narrow exceptions formulated in *Fraser*, *Kuhlmeir*, and *Morse*. Accordingly, this Court should reverse the Court of Appeals' ruling and find that Respondents' attempt to regulate Kit's and Cory's internet speech was a violation of their First Amendment rights.

### II.

The Court of Appeals properly held that the warrantless search of Cory was an unreasonable search under the Fourth Amendment, but incorrectly determined that even in light of the constitutional violation, Respondents were entitled to qualified immunity.

Respondents' warrantless search of Cory Towles was a violation of Cory's Fourth Amendment rights. First, Cory has a fundamental right to be free from unreasonable search and seizure. The United States Supreme Court's decision in *New Jersey v. T.L.O.* demands that searches of school students be justified at their inception and reasonably related in scope to the circumstances which justified the inference in the first place. The search of Cory was not

justified at its inception because Respondents did not have reason to believe that Cory was in violation of any laws or school rules. In addition, the search was not reasonable in scope because the measures adopted were not reasonably related to the objective of the search and were excessively intrusive.

Second, Respondents are not entitled to qualified immunity because the unconstitutionality of unreasonable strip searches was clearly established at the time school officials searched Cory. The instructions given by the Supreme Court in *T.L.O.* put Respondents on notice that the strip search of a student would be unreasonable in the absence of any reasonable suspicion.

Accordingly, this Court should reverse the decision of the Court of Appeals and find that the warrantless search of Cory was a violation of his Fourth Amendment rights and that Respondents are not entitled to qualified immunity because the law clearly established that the search was unreasonable.

## ARGUMENT

### I. THIS COURT SHOULD REVERSE THE STATE OF GRACE COURT OF APPEALS' RULING THAT RESPONDENTS DID NOT VIOLATE KIT'S AND CORY'S FIRST AMENDMENT RIGHTS BECAUSE THEIR SPEECH DID NOT MATERIALLY DISRUPT CLASSWORK, WAS NOT LEWD OR OFFENSIVE, WAS NOT SCHOOL-SPONSORED, AND DID NOT PROMOTE ILLEGAL DRUGS.

This Court should overturn the decision of the State of Grace Court of Appeals because Respondents' regulation of Kit's and Cory's internet speech was a violation of their First Amendment rights. The First Amendment to the United States Constitution states that "Congress shall make no law...abridging the freedom of speech." U.S. Const. amend. I. Speech may be oral, written or symbolized by conduct. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The United States Supreme Court first recognized that public school students' right to free speech is protected by the First Amendment in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The Court has refined that holding with a quartet of cases, beginning with the standard set by *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

In *Tinker*, the Court held that student conduct that materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not protected by the First Amendment. *Id.* at 513. In three subsequent cases, the Court has carved narrow exceptions to *Tinker*'s "material and substantial disruption" standard, beginning with *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

In *Fraser*, the Court ruled that lewd, indecent, vulgar, or plainly offensive speech in schools is not protected by the First Amendment. *Id.* at 685. Two years later, the Court further refined First Amendment protections in *Kuhlmeir*, holding that schools may exercise editorial control over the style and content of student speech in school-sponsored activities as long as the

reasons are related to legitimate pedagogical concerns. *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 273 (1988). Recently, the Court held that school districts may discipline student speech that advocates illegal drug use regardless of any potential substantial disruption. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

Courts apply the same level of First Amendment scrutiny to cases involving the internet as they do print media. *Reno v. Amer. Civil Liberties Union*, 521 U.S. 844, 870 (1997). In cases involving student cyberspeech, a threshold issue is whether the expression in question constitutes a true threat, which is an expression of intent to commit violence. *Virginia v. Black*, 538 U.S. 343, 359 (2003). Because neither Kit's nor Cory's webpages contain intent to commit an act of unlawful violence, there is no true threat.

Under *Tinker* and its three exceptions, schools may discipline student speech made on-campus that (1) materially disrupts classwork or involves substantial disorder or invasion of the rights of others; (2) is lewd or offensive; (3) is part of a school-sponsored activity and the school's reasons are related to legitimate pedagogical concerns; or (4) advocates illegal drug use.

**A. Respondents' Demand That Kit And Cory Remove Their Webpages Violated Their First Amendment Rights Because The Webpages Did Not Materially And Substantially Disrupt Classwork Or Discipline.**

Kit Politte's and Cory Towles' webpages did not materially or substantially interfere with the requirements of appropriate discipline. School officials may regulate expression that materially disrupts classwork or involves substantial disorder or invasion of the rights of others. *Tinker*, 393 U.S. at 513. In *Tinker*, three students attending public school wore black armbands to voice their disapproval of the Vietnam War and were suspended after they failed to adhere to a regulation banning such armbands. *Id.* at 504. In holding that the district's actions violated the students' First Amendment rights, the Court noted that neither students nor teachers shed their

constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker*, 393 U.S. at 506. Where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline, the prohibition cannot be sustained. *Id.* at 509.

Because the record contains no facts which would indicate school officials could reasonably forecast a substantial disruption at Horton Hopkins, and a substantial disruption never resulted, Respondents' attempt to regulate Kit's and Cory's internet speech, created off-campus, was a violation of Petitioners' First Amendment rights.

**1. School Authorities Could Not Reasonably Forecast That The Webpages Would Generate A Material And Substantial Disruption.**

In this case, Respondent Smalls was not able to regulate Kit's and Cory's speech because she could not reasonably predict that the webpages would create a substantial disruption or material interference. (R. at 5.) Respondent Smalls acknowledged that she was angry about Cory's criticism of the school administration's actions. (R. at 4.) However, "the mere desire to avoid discomfort or unpleasantness is not enough to justify restricting student speech under *Tinker*." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001). In fact, Kit's webpage, in line with the Respondents' goal of combating drug use, was not challenged until Cory began criticizing the administration's actions. Respondents' inconsistent reaction casts doubt on their proffered explanation for censoring Kit's and Cory's expression.

The record provides no facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities. *Tinker*, 393 U.S. at 514. 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. Respondent Smalls alleges that protests and disorder could

result from Cory's call to "speak out" against the invasion of privacy he suffered. (R. at 4.) But the record is bereft of any facts supporting this assumption. (R. at 4.) Because the record details no past incidents of student speech producing protests, inciting disorder, or interrupting other high school students' education at Horton Hopkins, it was unreasonable for Respondents to assume that a disruption would result in this case. *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001).

The lack of prior disruptions distinguishes this case from two previous Circuit Court decisions upholding suspensions, *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), and *West v. Derby Unified Sch. Dist. No.260*, 206 F.3d 1358 (10th Cir. 2000). In both *Melton* and *West*, racial tension and increasingly hostile altercations forced the school districts to ban Confederate flags to avoid continued substantial disruption. *Melton*, 465 F.2d at 1334-35; *West*, 206 F.3d at 1362. In this case, there is no evidence of similar altercations stemming from past student expression.

In addition, the webpages' lack of offensive language and false information did not warrant the punishment meted out by Respondents. These facts are distinguishable from the facts in *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). In *Doninger*, the Second Circuit ruled that it was reasonably foreseeable a student's blog posting, made entirely off-campus, would cause a substantial disruption. *Id.* at 51. The post was a short diatribe deliberately misconstruing ongoing efforts by the school to reschedule a concert. *Id.* at 45. The post also contained offensive language that directed readers to contact the district superintendant in order to "piss her off more." *Id.* The court cited three factors in making its determination: (1) the language was plainly offensive and could also derail efforts to resolve the ongoing controversy;

(2) the post used misleading and potentially false information; and (3) the discipline involved the student's participation in an extra-curricular activity. *Doninger*, 527 F.3d at 51-53.

Unlike the blog in *Doninger*, Kit's page did not use language that was plainly offensive or potentially disruptive. Instead, FAD prompted tipsters to email the website directly. Although the caption "Are Horton Hopkins students becoming drug dealers?" was somewhat misleading, it hardly qualifies as posting false information. Finally, Respondents' decision to suspend Kit for failing to take down her webpage did not relate to her participation in an extra-curricular activity. Unlike in *Doninger*, where the student was disqualified from running for class secretary because her behavior was not "consistent with her desired role as a class leader," Kit's suspension had nothing to do with her position as head of DUDS or membership in any other school-sponsored activity. *Id.* at 52.

Although Cory's use of the term "idiot" may be construed as harsh, there is no information to suggest it was calibrated to disrupt efforts to resolve an ongoing controversy. Unlike in *Doninger*, where school officials were engaged in a continuing dialogue with students, there is no indication that Respondents made any good faith efforts to resolve student issues with the District's drug and strip search policies. If there was no ongoing controversy, Cory's webpage could hardly disrupt resolution efforts. Additionally, there is no evidence that Cory's webpage contained any false or misleading information. Finally, like Kit, there is no evidence that Cory's suspension was related to his participation in an extra-curricular activity.

## **2. No Material And Substantial Disruptions Occurred As A Result Of The Webpages.**

No substantial disturbances resulted from Kit's webpage or Cory's webpage. Although complete chaos is not required, there must be more than some mild distraction or curiosity created by the speech. *J.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638, 673 (Pa. 2002). If the

student expression did not interfere with educational activity, create a commotion, or distract the minds of the students away from their teachers, regulating that expression is an infringement on the student's right of protected speech. *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966).

Where courts have found evidence of substantial disruption in cases involving internet expression, the disruption has been extreme, costly, and had wide ranging effects. In *J.S. v. Bethlehem Area Sch. Dist.*, the Pennsylvania Supreme Court upheld a student's expulsion after he created a hoax website soliciting funds to hire a hitman to kill his math teacher. *J.S.*, 569 Pa. at 645. The targeted teacher suffered from high stress, high anxiety, loss of sleep, loss of short-term memory and was ultimately forced to take a leave of absence. *Id.* at 674. Similarly, in *Layshock v. Hermitage Sch. Dist.*, 412 F. Supp. 2d 502 (W.D. Pa. 2006), the court held that a parody webpage posted by a student created a substantial disruption when it forced the school to shut down the computer laboratories for five days, cancel several classes and devote a substantial amount of time to rectifying the situation. *Id.* at 508.

In this case, the record does not indicate that substantial disruption resulted from either Kit's or Cory's webpage. (R. at 4.) Although students accessed the sites at school, there is no evidence that "teachers were incapable of teaching or controlling their classes" as a result of the webpages. *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001). Indeed, Kit's website was up nearly a month prior to Respondent Smalls' demand that she take it down. (R. at 2-3.) During that time, the most disruptive consequence of her site was the single rebuttal page created by Cory and a few calls from parents. Both sites aroused nothing more than mild curiosity from the student body, did not interfere with educational activity, and did not create a commotion. Unlike *J.S.*, the webpages resulted in no serious physical or mental injuries to students or staff. Additionally, unlike the webpages in *Layshock*, the sites did not spawn a

rash of imitators, did not cause the school to restrict access to its computers or cancel classes and did not require the technology coordinator to spend a disproportionate amount of time rectifying the situation. Therefore, Kit's and Cory's webpages are properly classified as non-disruptive and are subject to First Amendment protection.

### **3. The Threshold Adopted By The Court Of Appeals For Determining Whether Web-Based Student Speech Is On-Campus Was Improperly Broad.**

The standard adopted by the Court of Appeals for determining whether web-based student speech is on-campus, and thus subject to censorship or punishment, is unreasonably broad in scope. Only a few courts have been called upon to decide “whether the off-campus posting of email or a web site, and the accessing of the mail or site at school, constitutes on-campus or off-campus speech.” *J.S.*, 569 Pa. at 666. Several of the courts faced with this question have limited school official's ability to regulate web-based material. See *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 ( E.D. Mich. 2002) (evidence that some of the website's material may have been created on campus does not establish that any of the complained of conduct occurred on school property); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (school officials could not prohibit a web page that was created from home without using school resources or time).

The Court of Appeals relied on *Doninger* to conclude that because Kit's and Cory's webpages were accessed on-campus by students it was “a clear example of off-campus expression reaching campus.” (R. at 10.) This Court should not apply the overly inclusive *Doninger* standard, which allows administrators to infringe upon the First Amendment rights of students by regulating virtually any web-based student expression. Under a less sweeping standard, the webpages would have been properly classified as off-campus speech.

The *Doninger* court held that in internet student speech cases, punishment is appropriate only when: (1) it is reasonably foreseeable that the speech would come to the attention of school authorities; and (2) school authorities can forecast that it would create a risk of substantial disruption. *Doninger*, 527 F.3d at 50. In *Doninger*, the court ruled that a student's blog post, created exclusively off-campus, was designed to come onto school grounds because it directly pertained to school events, and it was written to encourage fellow students to read and respond. *Id.* The court found it was reasonably foreseeable that the blog would come to the attention of school officials, and that the posting created a risk of substantial disruption, warranting punishment. *Id.*

Overly broad thresholds, like that in *Doninger*, blur the line that separates on-campus and off-campus speech and ultimately infringe upon student expression. Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 *Hastings Const. L.Q.* 835, 882 (2008). With the proliferation of mobile devices that can access the internet, a school official could plausibly assert it is reasonably foreseeable that all internet speech may be brought on-campus. Thus, under the *Doninger* standard, a school officials' unconfirmed apprehension of disruption would presumably allow her to punish a student for virtually any statement emailed, posted to a webpage, printed and brought to campus, or accessed via computer on school grounds. Because much of the conduct between students outside of school occurs through web-based social networking, instant messaging or blogging, the stifling effects on free speech are potentially far-reaching and could deter students from making any reference to their school, teachers or curriculum. *Id.* Consequently, the *Doninger* "reasonably foreseeable" threshold is a proactive form of censorship and may subject speech not

traditionally under the purview of school officials to censorship and discipline. *Doninger*, 527 F.3d at 51.

Kit and Cory's webpages were off-campus expression. The two pages were designed at home, without using school equipment or time. (R. at 12.) Although Kit promoted her webpage during an after school DUDS meeting, there is no evidence that Kit or Cory encouraged students to log on to their sites or even spoke with fellow students regarding the pages during school hours. (R. at 2-4). Similarly, the record is devoid of any facts that would suggest Kit or Cory displayed their websites to others during school. Thus, the circumstances of this case militate in favor of a finding that the speech was off-campus and immune to Respondents' infringement.

This Court should eschew the *Doninger* court's overly broad threshold in favor of a standard that more effectively balances the off-campus nature of Kit's and Cory's speech, their actions, and any disruption caused. *Id.* at 881 (2008). It is axiomatic that writing on a webpage, at home, is different than delivering a speech in a crowded lunchroom. But under the *Doninger* standard, these disparate forms of expression are indistinguishable, and a school need only "forecast" a disruption to punish their creator. This potentially all-encompassing threshold allows the reach of the state to extend far beyond the schoolhouse gate. This Court should require a stronger connection than the tenuous link between Kit, Cory, the webpages and the school.

**B. The Exceptions In *Fraser*, *Kuhlmeir* And *Morse* Are Not Applicable to The Webpages And Respondents' Therefore Violated Kit's and Cory's First Amendment Rights.**

Because neither of the webpages created a substantial disturbance, Kit's and Cory's speech is not subject to censorship unless: (1) it is lewd or offensive; (2) it is school-sponsored

and the censorship is reasonably related to legitimate pedagogical concerns; or (3) it advocates illegal drug use.

### **1. The Webpages Were Not Sexually Explicit, Indecent, Offensive, or Lewd.**

The Supreme Court held that schools may prohibit speech that is sexually explicit, indecent, offensive, or lewd. *Fraser*, 478 U.S. at 684. In *Fraser*, a student was suspended for delivering a sexually suggestive speech at a school assembly. *Id.* at 677-78. The Court upheld the suspension, reasoning it is necessary for school officials to reserve the authority to determine appropriate speech for school assemblies and classrooms. *Id.* at 685.

No content on Kit's webpage qualifies as explicit, indecent, offensive or lewd. Although Cory's rhetoric includes the word "idiot," it does not rise to the level of indecency. Additionally, unlike in *Fraser*, this audience was not a captive one. Neither Kit nor Cory forced anyone to access their webpages, whereas in *Fraser*, the speech was delivered at a school-wide assembly. Thus, because neither webpage contained speech that was indecent, the pages do not fall under the *Fraser* exception, and are entitled to First Amendment protection.

### **2. The Webpages Were Not School Sponsored.**

Kit's and Cory's webpages were not school-sponsored, and thus, were not subject to censorship under the *Kuhlmeir* exception. So long as their actions are reasonably related to legitimate pedagogical concerns, educators may exercise editorial control over the style and content of student speech in school-sponsored expressive activities. *Kuhlmeir*, 484 U.S. at 273. In *Kuhlmeir*, a high school refused to run two stories relating to teen pregnancy and divorce in the school's newspaper. *Id.* at 263. The Court ruled against the authors, holding that activities by students that might reasonably be attributed to the school or bear the imprimatur of the school may be regulated without a finding of substantial disruption. *Id.* at 271.

In this case, Kit’s webpage was not a school-sponsored activity. Although Kit was the founder of both DUDS and FAD, an activity is not considered school-sponsored simply because its founder also partakes in other school-sponsored activities. As outlined in *Kuhlmeir*, to be considered school-sponsored, an activity must be supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. *Kuhlmeir*, 484 U.S. at 271. The record contains no facts that suggest Kit’s webpage was part of the school curriculum or that it was supervised by a faculty member. Further, the webpage was directed “toward all residents of Hopkinsville,” rather than designed to impart particular knowledge to students only. (R. at 2.)

Additionally, members of the public would not reasonably perceive Kit’s webpage to bear the imprimatur of the school. School-sponsorship of “student speech is not lightly to be presumed.” *Saxe*, 240 F.3d at 214. Although Cory misinterprets FAD as a school organization, bans on speech are not justified under *Kuhlmeir* simply because observers might “infer that the school endorses whatever it permits.” *Id.* at 214. The Seventh Circuit struck down a school’s ban prohibiting the distribution of religious pamphlets, observing: “[p]ublic belief that the government is partial does not permit the government to *become* partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school’s proper response is to educate the audience rather than squelch the speaker.” *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (emphasis in original). Thus, it does not follow that simply because a school permits a member of a school organization to express her ideas on the internet, that speech bears the imprimatur of the school.

Similarly, no one would mistake Cory’s webpage for a school-sponsored activity. Cory’s website was not part of the school curriculum, was not supervised by faculty members, and was

not designed to impart particular knowledge or skills to students. Members of the public could not reasonably perceive it to bear the imprimatur of the school because he was advocating against the school's own policies. (R. at 3-4).

Neither Kit's nor Cory's webpages qualify as school-sponsored expressive activities or carry the imprimatur of the school. Therefore, the webpages do not fall under the *Kuhlmeir* exception for school-sponsored activities and must be accorded full First Amendment protection.

### **3. The Webpages Did Not Promote Drug Use.**

Neither Kit's nor Cory's webpages may reasonably be regarded as encouraging drug use, and thus, are not subject to censorship under *Morse*. *Morse*, 127 S. Ct. at 2622. The school environment's special characteristics, and the governmental interest in stopping student drug abuse, allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Id.* at 2629. In *Morse*, the school's principal suspended a student for displaying a banner advocating drug use at a school-approved social event. *Id.* at 2622. The Court concluded that the principal did not violate the student's First Amendment rights. *Id.* at 2629.

In this case, the purpose of Kit's webpage was to fight, not promote, drug use. Similarly, Cory's webpage cannot reasonably be seen as speech celebrating illegal drugs because the website does not even mention drugs. Therefore, neither FAD nor SADS fall under the narrow exception to *Tinker* outlined in *Morse*, and should be subject to First Amendment protection.

This Court should overturn the Court of Appeals' decision that Respondents' did not violate Kit's and Cory's First Amendment rights. Respondents were unable to forecast that Kit's and Cory's webpages would materially disrupt classwork, and no material disruption took place. Additionally, neither of the webpages were lewd, school-sponsored, nor promoted illegal drugs. Therefore, Respondents infringed upon Kit's and Cory's constitutional right to free speech.

**II. THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS AND FIND THAT THE WARRANTLESS SEARCH OF CORY T. WAS A VIOLATION OF HIS FOURTH AMENDMENT RIGHTS AND THAT RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.**

The warrantless search of Cory Towles was an unreasonable invasion of his Fourth Amendment rights. The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const., amend. IV. The Fourteenth Amendment extends this constitutional guarantee to state officers, “Boards of Education not excepted.” *Barnette*, 319 U.S. at 637. The Supreme Court has recognized that searches of students will only comport with the Fourth Amendment if they are reasonable under the circumstances. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). In assessing reasonableness, it is necessary to weigh the students’ interest in privacy against the school’s interest in maintaining a safe learning environment. *Id.* at 340. To balance these competing interests, the Supreme Court adopted a two-prong test for evaluating the constitutionality of a search of a student. *Id.* at 341. First, the search must be justified at its inception. *Id.* Second, the search must be reasonably related in scope to the circumstances which justified the inference in the first place. *Id.*

**A. The Warrantless Search Of Cory T. Was Not Justified At Its Inception Because Respondents Did Not Have Reasonable Grounds To Believe That Cory T. Was In Possession Of Contraband.**

The warrantless search of Cory was not justified at its inception because there were no reasonable grounds for suspecting that the search would turn up evidence of an illegal substance. For the search of a student by a school official to be justified at its inception, there must be reasonable grounds for suspecting that the search will uncover evidence that the student had violated or is violating either the law or the rules of the school. *Id.* at 342. In addition, a government officer “must be able to point to specific and articulable facts which, taken together

with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1967). The Court noted that simple “good faith” is not enough. *Id.*

**1. Respondents Had An Obligation To Further Investigate The Anonymous Tip.**

Respondents had no reason to believe that Cory was in possession of an illegal substance. Respondents predicated the search of Cory’s locker, bag, wallet and person, on a photograph obtained from an anonymous source and then posted on the internet. R. at 3. The Supreme Court has not addressed whether student tips alone are sufficient to justify a strip search of a student. However, the Court has noted, in the context of informant tips, that reasonable suspicion is dependent on the content of the information and its degree of reliability, considered in the totality of the circumstances. *Alabama v. White*, 496 U.S. 325 (1990). The Sixth Circuit has likened informant tips to student tips, noting that unreliable tips will require greater investigation and corroboration before a search would be warranted. *Williams by Williams v. Ellington*, 936 F.2d 881, 888 (6th Cir. 1991).

Because a photograph given to a student anonymously and posted on the internet lacks reliability, Respondents would be required to further investigate the matter before a search would be warranted. Several Circuit Courts have addressed the reliability of student tips. In *Phaneuf v. Fraikin*, 448 F.3d 591, 593 (2d Cir. 2006), even though a student informant had notified officials that the suspected student was hiding marijuana “down her pants,” and had a history of disciplinary problems, the search was deemed unconstitutional. When assessing whether a reasonable suspicion justifies a “potentially degrading strip search,” courts should look to an informant’s veracity and reliability, as well as whether the information is corroborated by independent investigation. *Id.* at 597. The student tip was deemed inadequate to justify the strip search, even though the tip was made in person and was given with relatively specific

information, because school officials did not investigate or substantiate the tip. *Phaneuf*, 448 F.3d at 598.

Similarly, in *Redding v. Safford Unified Sch. Dist.*, 531 F.3d 1071 (9th Cir. 2008), the Ninth Circuit found a strip search of a student unconstitutional because the only link between the student and drugs was a tip made by another student. Like the case at bar, the student had never been disciplined for any infraction or possession of drugs. *Id.* at 1083. The court noted that at a minimum, school officials should have conducted additional inquiries to corroborate the student tip. *Id.*

In contrast, the Sixth Circuit in *Williams*, found that the search of a student based on a student tip was reasonable, precisely because the principal attempted to elicit information on whether the informant harbored ill will against the accused student, and contacted her father and aunt to verify the tip. *Williams*, 936 F.2d at 888. Thus, the court in *Williams* found the search to be reasonable because, unlike in *Phaneuf* and *Redding*, the school official took additional steps to substantiate the information. *Id.* at 887.

Here, Respondents took no additional steps to substantiate the information they received. Respondent Smalls predicated the search of Cory's locker, bag, wallet, and the invasive strip search, on a photograph posted on the internet that did not implicate Cory in any illegal drug use. (R. at 3.) The photograph merely showed Frank C. smoking. (R. at 3.)

This internet tip was unreliable, uncorroborated and necessitated additional investigation by Respondents. The photograph was emailed by an anonymous person to Kit Politte, and was then posted on a forum open to the general public. (R. at 2.) Yet, given the dubious reliability of the photograph, Respondents did not make any effort to investigate the tip. Respondent Smalls did not confirm when the photograph was taken, whether it was tampered with, or who it came

from, before subjecting Cory to a strip search. Accordingly, Respondents failed to show that the strip search was justified at its inception.

**2. Recent Supreme Court Cases Upholding Random Drug Testing In The Absence Of Individualized Suspicion Are Not Applicable To Strip Searches.**

The Supreme Court has found that individualized suspicion may not be necessary in the context of school drug testing. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002). The Court in *Vernonia* looked to three factors to determine if a search is reasonable in the absence of individualized suspicion: (1) the student's legitimate expectation of privacy; (2) the intrusiveness of the search; and (3) the severity of the school system's needs that were met by the search. *Id.* at 664-65. The Court found random drug testing for participation in student athletics and competitive extracurricular activities to be constitutional. The Court reasoned these students had a decreased expectation of privacy due to their voluntary participation. Additionally, the invasion of privacy was minimal, and the need to deter drug use is great. *Vernonia*, 515 U.S. at 664-65; *Earls*, 536 U.S. at 837.

Here, the strip search of Cory was unreasonable in the absence of individualized suspicion. First, Cory's legitimate expectation of privacy was great because, unlike student athletes or participants in competitive extracurricular activities, he was not voluntarily submitting himself to any intrusion of his privacy. Second, the strip search was highly invasive. The Seventh Circuit has noted that a strip search amounts to more than just a constitutional violation: "it is a violation of any known principle of human decency." *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980) (per curiam). Lastly, although deterring drug use is an important goal for school administrators, Respondents cannot legitimately argue that randomly strip searching students is a reasonable means of achieving that goal. Due to the absence of individualized suspicion, the strip search of Cory was unreasonable under the Fourth Amendment.

### **3. The Ambiguous Information Available To Respondents Was Unrelated To A Reasonable Belief That Cory Was Hiding Drugs On His Person.**

Due to the absence of reasonable suspicion, Respondents' search of Cory's person was unjustified. For a search to be justified at its inception, there must be reasonable grounds for suspecting that the search will turn up evidence that the student had violated or is violating either the law or the rules of the school. *T.L.O.*, 469 U.S. at 325.

In *Cornfield v. Consol. School Dist.*, 991 F.2d 1316 (7th Cir. 1993), the Seventh Circuit upheld a strip search of a student because school officials had collected a litany of suspicious actions, incidents, and claims from teachers and aides on relatively recent drug-related incidents. School officials had reasonable suspicion to search the student because the student said he was dealing drugs, he said he would test positive for marijuana, he said he was constantly thinking about drugs, he told his teacher's aide that he had "crotched" drugs during a police raid, a student reported seeing him smoke marijuana on the bus, a student said he possessed marijuana while on school grounds, and a teacher observed an "unusual bulge" in the student's pants. *Id.* at 1322. The court noted that these events occurred over some period of time, and more importantly, that the information provided a reasonable basis to believe that a strip search was necessary to find the hidden drugs. *Id.* at 1323.

Here, Respondents did not have any information or evidence that would justify a strip search. Because Cory had never been accused of using illegal substances, nor seen with illegal substances, it was an unreasonable hypothesis that Cory would be carrying illegal substances on his person. The attenuated nature of the evidence needed to be weighed against Cory's lack of disciplinary trouble and the absence of evidence of drug use. Due to the unreliability of the photograph, the evidence was insufficient to warrant a highly invasive strip search.

**B. The Warrantless Search of Cory T. Was A Violation Of His Fourth Amendment Rights Because It Was Not Reasonably Related In Scope To The Inference That Justified The Search In The First Place.**

Because Cory had committed no infraction, a highly intrusive strip search was not reasonably related to the objectives of the search. Even a limited search of the person is a substantial invasion of privacy. *Terry*, 392 U.S. at 24-25. Thus, a search is reasonable in scope only if the method: (1) is reasonably related to the objectives of the search; and (2) is not excessively intrusive in light of the nature of the infraction. *T.L.O.*, 469 U.S. at 342.

**1. The Method Adopted By Respondents Is Not Reasonably Related To The Objectives Of The Search.**

The method adopted, the strip search, was not reasonably related to the objectives of the search. Under no standard was Respondents' search of Cory reasonable without specific information that he was hiding drugs on his person. School officials in *Cornfield* gleaned information over a significant period of time that would justify an assumption that the student was hiding drugs in his pants. *Cornfield*, 991 F.2d at 1323. School officials in *Phaneuf* also gleaned information that a student was hiding drugs down her pants from a student tip. *Phaneuf*, 448 F.3d at 598-99.

Respondents had no particularized information that would lead to the conclusion that Cory had drugs on his person. The searches in *Cornfield* and *Phaneuf* were conducted on the basis of information that implicated a specific student and gave a specific location of drugs. Here, Respondents made a logical leap that because Cory was pictured with a student who was later cited for drug possession, it warranted a search of his person. Respondents subjected Cory to a strip search to find marijuana that he was never accused of possessing, which constitutes a disproportionately extreme method.

**2. The Strip Search Adopted By Respondents Was Excessively Intrusive In Light Of The Absence Of Any Infraction, The Manner Of The Search, And Cory T.'s Age.**

The strip search of Cory was excessively intrusive in light of Cory's age and the fact that he had committed no infraction. The court in *Cornfield* found that a highly intrusive search "in response to a minor infraction" would not comport with the test adopted by the Supreme Court in *T.L.O.* *Cornfield*, 991 F.2d at 1320. In *T.L.O.* the Supreme Court upheld an intrusive search of a student when a teacher reported seeing the student smoking in a school restroom, a direct violation of school rules. *T.L.O.*, 469 U.S. at 328. Here, Cory was merely photographed sitting with a student who was smoking, which does not constitute even a minor offense. Unlike in *T.L.O.*, Cory never committed an infraction.

The manner in which the search and seizure were conducted is "as vital a part of the inquiry as whether they were warranted at all." *Terry*, 392 U.S. at 28. The Seventh Circuit has noted that as the "intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness." *Cornfield*, 991 F.2d at 1321. Thus, what may amount to a reasonable suspicion for a search of a locker, bag, or pocket "may fall well short of reasonableness for a nude search." *Id.* Here, the search fell short of reasonableness because Respondents subjected Cory, a student in their care, to a highly intrusive search of his person. Respondents predicated this degrading search on weak information they never attempted to substantiate.

Courts have found extended levels of intrusion warranted when initial suspicions were corroborated. In *T.L.O.*, the principal searched a student's purse after a teacher reported seeing the student smoking at school. *T.L.O.*, 469 U.S. at 328. In his search for cigarettes, the principal found rolling papers, which are often associated with marijuana use. *Id.* The principal then used

this discovery to conduct a more invasive search. *T.L.O.*, 469 U.S. at 328. The Court noted that the discovery of the rolling papers was sufficient to give the principal a reasonable suspicion that the student was carrying marijuana as well. *Id.* at 346. Similarly, in *Williams*, the Court found that after new evidence of the student's drug use was presented, the principal's initial suspicions were raised, justifying the "extended level of intrusion." *Williams*, 936 F.2d at 887.

In both *Williams* and *T.L.O.*, the more in-depth, invasive search of the student was reasonable when further evidence of the alleged behavior came to light. *T.L.O.* 469 U.S. at 328; *Williams*, 936 F.2d at 887. In this case, there was no such discovery. Respondents did not locate any drugs in Cory's locker, bag or wallet, precluding an additional, more invasive search. Once the locker search turned up no contraband and any initial suspicions Respondents may have had were quashed, it was wholly unreasonable to conduct an invasive strip search of Cory.

Respondents impinged upon Cory's constitutional rights when conducting the initial search without justification. Respondents then surpassed all notions of reasonableness by subjecting him to an invasion even more indefensible than the first search. A strip search is a severe intrusion of an individual's basic expectation of privacy, the potential impact of which is substantial. *Cornfield*, 991 F.2d at 1323. As the Court noted in *Cornfield*, "no one would seriously dispute that a nude search of a child is traumatic." *Id.* at 1321. The Court observed that post-pubescent children are more likely to be self-conscious about their bodies, and therefore "[perhaps] counterintuitively, a very young child would suffer a lesser degree of trauma from a nude search than an older child." *Id.* at n.1. Respondents subjected an innocent 16-year-old student to a strip search based on nothing more than guilt-by-association suspicion. This unwarranted and extreme measure stripped Cory of his Fourth Amendment right to be free from unreasonable search and seizure.

**C. Respondents Are Not Entitled To Qualified Immunity Because It Was Clearly Established That Unreasonable Strip Searches Of Public School Students Were Unconstitutional At The Time Respondents Strip Searched Cory T.**

Respondents are not entitled to qualified immunity under 42 U.S.C. § 1983 because the unconstitutionality of unreasonable strip searches was clearly established when school officials searched Cory. 42 U.S.C. § 1983 (2000). The doctrine of qualified immunity will protect a government official from liability for civil damages only if their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

To be “clearly established,” a reasonable official must know “that his conduct was unlawful in the situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The official action taken need not have been previously held unlawful, but “in the light of pre-existing law the unlawfulness must be apparent.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Supreme Court previously mandated a two-step sequence when considering a question of a government official’s qualified immunity: looking at the facts in a light most favorable to the injured party, the court must decide whether the injured party suffered a constitutional violation; and if the injured party’s constitutional rights were violated, the court must then determine whether the right was “clearly established.” *Saucier*, 533 U.S. at 201. The Supreme Court recently signaled that although lower courts must still make the legal inquiries mandated by *Saucier*, they now have the discretion to determine the order of decision-making in each case. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009).

**1. Respondents Are Not Entitled To Qualified Immunity Because Cory T.’s Constitutional Right Against Unreasonable Search And Seizure Was Violated.**

Because Cory was clothed in constitutional protections when Respondents strip searched him, they are not entitled to the qualified immunity. If this Court elects to analyze this prong of

the *Saucier* test first, the Court must examine the facts in a light most favorable to the injured party and determine whether he suffered a constitutional violation. *Saucier*, 533 U.S. at 201. Looking at the facts in the light most favorable to Cory, Respondents subjected him to an unreasonable strip search in violation of his Fourth Amendment rights. The test set out by the Supreme Court in *T.L.O.* is explicit: school searches will only comport with the Fourth Amendment if the search is justified at its inception and reasonably related in scope to the circumstances which justified the inference in the first place. *T.L.O.*, 469 U.S. at 341. For the reasons set forth in Part II-A and II-B of this brief, specifically that the search was not justified at its inception and not reasonably related in scope, Cory's Fourth Amendment rights were violated when Respondents subjected him to an unreasonable strip search.

**2. Respondents Are Not Entitled To Qualified Immunity Because Cory T.'s Right To Be Free From Unreasonable Search And Seizure Was Clearly Established At The Time Respondents Strip Searched Him.**

Respondents are not entitled to qualified immunity because unreasonable searches of students do not comport with the Fourth Amendment. *Id.* The standard set out in *T.L.O.* gave school officials a clear, twofold inquiry that must be made before even a minimally intrusive search can be conducted. Searches of students must be reasonable under all the circumstances. *Id.* Respondents conducted their search more than twenty years after the Supreme Court issued these instructions; instructions which put Respondents on notice that a strip search was not a reasonable measure to use on a student accused by nothing more than an anonymous tipster.

Cases involving strip searches of students are decided based on a fact specific inquiry. However, regardless of the unique circumstances in each case, certain rights to personal privacy are free from unwarranted governmental intrusion. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The Ninth Circuit noted that notions of personal privacy are clearly established "in that

they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches.” *Redding*, 531 F.3d at 1089. The principle that school children do not shed their constitutional rights at the doors of the school, and the guidance provided by *T.L.O.*, should have been clear to Respondents. Respondents had an obligation to balance the need for order in the school with the individual liberties of the students in their charge. *Tinker*, 393 U.S. at 506. In this case, the invasion predicated on vague suspicions was disruptive to the school environment and personal liberties of its students, tipping the balance in favor of a less intrusive method than the one employed by Respondents.

Additionally, a government official will not be entitled to qualified immunity “based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.” *Saucier*, 533 U.S. at 202-03. Five Circuit Courts have determined that the standard set out in *T.L.O.* governs the review of a strip search of a student,<sup>1</sup> and have emphasized a case-by-case fact specific inquiry as to reasonableness. Even under these novel factual circumstances, Respondents should have known, and this Court should hold, that their invasive actions were unreasonable and were therefore unconstitutional.

### **3. Respondents Are Not Entitled To Qualified Immunity Because They Should Have Known That Their Actions Were Unreasonable.**

Respondents should have known that their conduct violated the Fourth Amendment proscription against unreasonable search and seizure. An official cannot benefit from qualified

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<sup>1</sup> See, e.g., *Hedges v. Musco*, 204 F.3d 109, 116-17 (3d Cir.2000); *Williams by Williams v. Ellington*, 936 F.2d 881, 884 (6th Cir.1991); *Cornfield by Lewis v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1320-21 (7th Cir.1993); *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (9<sup>th</sup> Cir.2006); *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 824 (11th Cir.1997) (en banc).

immunity if the official “*knew or reasonably should have known*” that the action violated the constitutional rights of the injured party. *Wood v. Strickland*, 420 U.S. 308 (1975) (emphasis in original). Therefore, the conclusive inquiry is whether it would be clear to a reasonable official that her conduct was unlawful in the situation she confronted. *Saucier*, 533 U.S. at 201-12.

If Respondents actions were an obvious violation of constitutional rights, this Court need not have a body of relevant case law to answer the “clearly established” inquiry. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). As the Seventh Circuit noted in *Renfrow*, “[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude.” *Renfrow*, 631 F.2d at 92-93. The search of a 16-year-old student is no different. A reasonable teacher or administrator should have known that conducting a strip search on a 16-year-old boy, without a reasonable suspicion, was unlawful.

Common sense and reason should have further informed Respondents actions. The Sixth Circuit has held that any “person of ordinary common sense,” including school administrators, “would know without need for special instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty.” *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489 (6th Cir. 2008).

The Supreme Court has given teachers the benefit of the reasonableness standard to allow them to “regulate their conduct according to the dictates of reason and common sense.” *T.L.O.*, 469 U.S. at 343. One indication that school officials are capable of following this dictate is that there have been no reported cases that address a student strip search by a member of the opposite sex. The reasonableness standard is evidently clear enough for school officials to know that such

a search would be unreasonable. A strip search of a 16-year-old student, with no disciplinary problems, predicated on nothing more than an anonymously submitted, uncorroborated photograph is no different. An official exercising common sense would understand that such a search is unreasonable under the circumstances.

In the context of public education, there is an interest in ensuring teachers and administrators perform their duties responsibly. With this responsibility comes the duty to protect the constitutional rights of all students. The right to be free from unreasonable search and seizure is fundamental to our notions of liberty. Cory has sufficiently established that Respondents are not entitled to qualified immunity because their conduct so grossly violated clearly established constitutional rights of which a reasonable person would have known. Therefore, this Court should reverse the decision of the State of Grace Court of Appeals.

### **CONCLUSION**

Respondents violated Kit Politte's and Cory Towles' First Amendment rights by demanding that they remove their websites. The regulation was not constitutionally permissible because the webpages did not materially disrupt classwork or involve substantial disorder or invasion of the rights of others. Additionally, Respondents were unable to censor the speech because it was not lewd or offensive, was not school sponsored, and did not promote illegal drug use. Furthermore, Respondents violated Cory Towles' Fourth Amendment rights when they subjected him to an unwarranted, unjustified, and unreasonable strip search. Respondents are not entitled to qualified immunity because the law clearly established that the search was unreasonable. For these reasons, Petitioner respectfully requests that this Court reverse the decision of the State of Grace Court of Appeals.