No. 08-479

IN THE
# Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT # 1; KERRY WILSON, husband; JANE DOE WILSON, wife; HELEN ROMERO, wife; JOHN DOE ROMERO, husband; PEGGY SCHWALLIER, wife; JOHN DOE SCHWALLIER, husband,

*Petitioners,*

*v.*

APRIL REDDING, legal guardian of minor child,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits public school officials from conducting a search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public school administrator may be liable in a damages lawsuit under 42 U.S.C. § 1983 for conducting a search of a student suspected of possessing and distributing a prescription drug on campus.

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## OPINIONS BELOW

The order of the United States District Court for the District of Arizona granting petitioners' motion for summary judgment is reprinted at Pet. App. 126a-54a and is not otherwise published. The Ninth Circuit's original opinion affirming the district court is reprinted at Pet. App. 98a-125a and is published at 504 F.3d 828. The en banc panel's subsequent opinion reversing the district court is reprinted at Pet. App. 1a-97a and is published at 531 F.3d 1071.

## JURISDICTION

The Ninth Circuit issued its en banc opinion on July 11, 2008. The petition for a writ of certiorari was filed on October 9, 2008, and was granted on January 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION, STATUTE, AND SCHOOL DISTRICT POLICIES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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 person or things to be seized.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . 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, . . . .

Safford Unified School District Policy J-3050 provides:

> The nonmedical use, possession, or sale of drugs on school property or at school events is prohibited. *Nonmedical* is defined as "a purpose other than the prevention, treatment, or cure of an illness or disabling condition" consistent with accepted practices of the medical profession.
>
> Students in violation of the provisions of the above paragraph shall be subject to removal from school property and shall be subject to prosecution in accordance with the provisions of the law.
>
> Students attending school in the District who are in violation of the provisions of this policy shall be subject to disciplinary actions in accordance with the provisions of school rules and/or regulations.

> For purposes of this policy, "drugs" shall include, but not be limited to:
>
> - All dangerous controlled substances prohibited by law.
> - All alcoholic beverages.
> - Any prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.
> - Hallucinogenic substances.
> - Inhalants.
>
> Any student who violates the above shall be subject to suspension or expulsion, in addition to other civil and criminal prosecution.

Safford Unified School District Policy J-5350 provides, in pertinent part:

> Under certain circumstances, when it is necessary for a student to take medicine during school hours, the District will cooperate with the family physician and the parents if the following requirements are met:
>
> - There must be a written order from the physician stating the name of the medicine, the dosage, and the time it is to be given.

- There must be written permission from the parent to allow the school or the student to administer the medicine. Appropriate forms are available from the school office.

- The medicine must come to the school office in the prescription container or, if it is over-the-counter medication, in the original container with all warnings and directions intact.

## STATEMENT OF THE CASE

### A. Factual Background

1. Like many public schools, Safford Unified School District (Safford) finds itself on the front lines of a decades-long war against drug abuse among students. As such, Safford has firsthand experience with some of the troubling trends in this area that are by no means unique to its community. First, students have begun to experiment with drugs at a progressively earlier age. So in addition to being vigilant about drug abuse at its two high schools, Safford has also had to be alert to the problem among its younger students at the middle school. Second, the abuse of prescription and over-the-counter (OTC) drugs has become more prevalent because of the relatively easy access to these drugs and a prevailing notion that they provide a "safe" high.

These troubling trends were fully evident as early as 2002 following a near fatality at Safford Middle School. A female student smuggled a prescription drug

onto campus and began passing the pills out to classmates. J.A. 7a, 10a. One boy who took the pills had an adverse reaction and became seriously ill. *Id.* In fact, the circumstances required that he be airlifted about a hundred miles away to Tucson, where he spent the next several days in an intensive care unit. *Id.*

For good reason then, Safford's policies strictly prohibit the nonmedical use or possession of drugs on campus. Pet. App. 128a. The term "drugs" includes, but is not limited to, all alcoholic beverages and any prescription or OTC drug except those for which permission to use in school has been granted. *Id.* Permission requires parental authorization, a physician's order, and delivery of the medication to the school office in either its original or prescription container. *Id.*

2. The 2003-2004 school year arrived with renewed concerns about drug abuse among students at Safford Middle School. At the opening dance, a small group of eighth-grade students, including Marissa Glines and Savana Redding, stood out for more than just their unusually rowdy behavior. J.A. 7a, 10a. The school staff also noticed the distinct stench of alcohol that followed these students around. *Id.* And before the night ended, a bottle of liquor and pack of cigarettes turned up in the trash in the girls' bathroom. *Id.*

Weeks later, school administrators, including Assistant Principal Kerry Wilson, received a call from the mother of another student, Jordan Romero, requesting a meeting. J.A. 7a-8a, 10a-11a. At the meeting, Jordan's mother described how her son had become violent with her a few nights earlier, and then

suddenly sick to his stomach. J.A. 8a, 11a. Jordan explained that his fit of rage occurred after he took some pills that a classmate had given to him. *Id.* He also advised the school administrators that certain students were bringing drugs and weapons onto campus. *Id.*

Jordan identified students by name, including Marissa and Redding, along with detailed accounts of their illicit activities. J.A. 8a, 11a. In Redding's case, he reported that she had served alcohol—Jack Daniel's, Black Velvet, vodka, and tequila—at a party that she hosted in her family's camper trailer before the school dance, the same dance at which the stench of alcohol had followed Redding's group around and at which a bottle of liquor was found in the girls' bathroom. *Id.* Jordan also reported that Redding's mother had purchased the alcohol at Thrifty's Food and Drug. *Id.*

3. Days after the meeting with Jordan and his mother, Wilson received hard evidence that drugs were again being distributed on campus. Jordan sought Wilson out as school was starting and handed him a white pill that Marissa had just given to him. J.A. 11a. He also told Wilson that there were more pills on campus and that a group of students was planning on taking them that day at lunch. *Id.*

Wilson took the pill to Peggy Schwallier, the school nurse, for help in identifying it. J.A. 12a, 15a. She recognized the pill as Ibuprofen 400 mg, which could only be obtained with a prescription. *Id.*

Wilson then went to Marissa's class and asked her to gather her things and come with him. J.A. 12a.

As she stood up, he noticed a black planner in the otherwise empty desk next to her and asked the classroom teacher to identify its owner. *Id.* The teacher discovered several knives and lighters, a cigarette, and a permanent black marker inside the planner, and turned them over to Wilson. Pet. App. 155a; J.A. 12a.

Wilson took the planner and its contents and escorted Marissa to his office, where he invited Helen Romero, an administrative assistant, to observe as Marissa turned out her pockets and opened her wallet. J.A. 12a, 18a. As Marissa did so, she pulled out a blue pill (later discovered to be Naprosyn 200 mg), several white pills identical to the one that Jordan had turned in to Wilson, and a razor blade. Pet. App. 156a; J.A. 12a-13a, 15a, 18a.

Wilson asked Marissa where the blue pill came from. J.A. 13a, 18a. She responded, "I guess it slipped in when *she* gave me the IBU 400s."[1] *Id.* Wilson asked "who is *she*?" to which Marissa responded, "***Savana Redding***." *Id.*

Marissa denied any knowledge of the planner or its contents. J.A. 13a. So Wilson asked Romero to take

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[1] Redding has made reference to the fact that ibuprofen and naprosyn are commonly used to treat menstrual cramps. But at the risk of stating the obvious, Jordan was not given a pill to relieve menstrual cramps. And by referring to the white pills as "IBU 400s" instead of simply as ibuprofen, Marissa displayed her ignorance of exactly what the pills were, let alone of what legitimate medical purpose they might serve.

Marissa to the nurse's office to search her clothing for any more pills while he went to find Redding. J.A. 13a, 18a.

Wilson found Redding in class and had her gather her things and come back to his office. J.A. 13a, 21a. There, he showed her the planner, its contents, and the pills that he had gotten from Jordan and Marissa. J.A. 14a, 22a. Redding admitted that the planner was hers and that she had lent it to Marissa several days earlier, while denying that the contents were hers.[2] *Id.* She also denied that she had ever seen the pills before. J.A. 14a, 22a-23a.

Wilson explained to Redding that he had received a report that she had been passing the pills out at school, which she denied. J.A. 14a, 22a-23a. He then obtained her consent to search her backpack, which did not contain any pills. J.A. 14a, 19a, 23a. Redding's clothes did not have any pockets to check. J.A. 23a.

4. At that point, Wilson had a decision to make. He confirmed that prescription pills were being distributed

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[2] Redding admits that she lent her planner to Marissa because she wanted to hide cigarettes, a lighter, and jewelry in it. J.A. 22a. Redding also admits that she recognized some of the contents found in the planner as belonging to Marissa. *Id.* Despite assisting Marissa to conceal such contraband as cigarettes and lighters, Redding touts her discipline-free record. Accordingly, her assertion should not be misread to infer that she never broke school rules, only that she was never caught. Moreover, the assertion is of limited probative value given the strong indications that she had recently served alcohol to classmates before the school dance.

again on campus that morning, although he still was not sure who else had pills and in what amounts, or for that matter, whether there were also other kinds of pills on campus.[3] Marissa directly implicated Redding as the supplier of the prescription pills, plus another OTC pill, based on personal knowledge as she claimed to have received the pills from her. And Wilson already had a strong basis for suspecting Redding of providing alcohol to students, including Marissa, before the school dance.

Marissa's implication of Redding certainly struck Wilson as reliable. He had not offered Marissa leniency in exchange for information, nor did he attempt to pressure her into naming anyone. He simply asked her where—not who—the blue pill came from. And Marissa's reluctant response could hardly be described as exculpatory because it in no way reduced her own guilt. Even if she did get the pills from Redding, she was still caught with them in her possession and had distributed at least one herself to Jordan. Furthermore, the girls' obvious friendship suggested that they would be knowledgeable about each other's activities and certainly guarded against an ulterior motive for implicating Redding.

As for Redding's denials, one possibility was that they were true, although she did not offer any reason why her friend would falsely accuse her. Of course, the other possibility was that her denials were merely self-

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[3] With Marissa's report that the blue pill must have inadvertently "slipped in" when Redding gave her the white pills, it was still an open question as to what other kinds of pills Redding may have had that she withheld from Marissa.

serving as she sought to avoid responsibility and probable discipline.

Also notable was Redding's admission that the planner was hers and that she had lent it to Marissa a few days earlier. This admission further linked the two as friends and raised a concern that Redding was involved with Marissa in bringing the planner's contents—knives and lighters, a cigarette, and a black permanent marker—onto campus. And if Redding was involved with Marissa in bringing these forms of contraband onto campus, it was certainly more probable that she would be involved with Marissa in bringing another form of contraband, i.e. prescription and OTC pills, onto campus.

Overlaying all of this, Wilson could recall at least two occasions when a student was harmed by taking pills distributed on campus. The most recent case was Jordan's just days earlier when he became violent with his mother and sick to his stomach. And the most serious case nearly resulted in a student's death the year prior.

Wilson certainly hoped to avoid a similar result, or worse, for Redding or any other student, particularly with Jordan's report that the plan was for a group of them to take the pills that day at lunch. So he asked Romero to take Redding to the nurse's office where she could be searched for any pills that might be discreetly hidden in her clothes. J.A. 14a, 19a, 23a.

Romero and Redding entered the nurse's office, and Romero closed and secured the door to prevent anyone from walking in on them. J.A. 15a-16a, 19a, 23a.

The only other person present, Schwallier, was also female. J.A. 15a-17a, 19a-20a, 23a-24a. Romero started by asking Redding to remove her shoes and socks, which Romero checked first. J.A. 16a, 19a, 23a. She then asked Redding to remove her shirt and pants. *Id.* Finally, Romero asked Redding to pull and shake her bra band as well as the elastic of her underwear. J.A. 16a, 19a, 23a-24a.

All of this was done without anyone touching Redding. J.A. 15a-17a, 19a-20a, 23a-24a. And as soon as Romero was able to confirm that Redding did not have any pills, she immediately returned her clothes so that she could get dressed. J.A. 16a-17a, 19a-20a, 23a-24a.

### B. Procedural History

1. Redding filed suit in the Superior Court of the State of Arizona seeking money damages against Safford, Wilson, Romero, and Schwallier. Her complaint included a claim brought under 42 U.S.C. § 1983 alleging that the search violated her Fourth Amendment rights. Petitioners timely removed the case to the United States District Court for the District of Arizona, and subsequently moved for summary judgment.

In granting the motion, the district court concluded that petitioners did not violate Redding's Fourth Amendment rights in any respect as the search complied with the standard set forth by this Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *T.L.O.*, the district court explained, balanced students' interest in privacy against the substantial need of educators to maintain discipline and order in the school setting and ultimately adopted

a reasonableness standard that stopped short of probable cause. Pet. App. 141a-42a.

Applying that standard, the district court first considered whether the search was justified at its inception with reasonable grounds for suspecting that it would turn up evidence that Redding was violating Safford's policies. In light of the totality of information available to Wilson, the court unquestionably determined that the search was justified at its inception with clear grounds for suspecting that Redding was in possession of prescription and OTC drugs in violation of Safford's policies. Pet. App. 145a-49a.

Next, the district court considered whether the search was permissible in scope with the measures adopted reasonably related to the objectives of the search and not excessively intrusive in light of Redding's age and sex and the nature of the infraction. In doing so, the court compared the measures adopted to those in several other reported cases and observed that the search for small pills was conducted in the privacy and security of the nurse's office by two female staff members who did not touch Redding in any way. Pet. App. 149a-51a. Accordingly, the court also determined that the search was permissible in scope while rejecting Redding's argument that the Fourth Amendment requires employing the least intrusive means possible. Pet. App. 151a-52a.

Because Redding's Fourth Amendment rights were not violated, the district court did not make any further inquiry concerning qualified immunity.

2. Reviewing the case *de novo*, the Ninth Circuit initially affirmed. Drawing on this Court's precedents, the court of appeals explained that the constitutional rights of students are not coextensive with those of adults in other settings because of the special characteristics of the school environment. Pet. App. 105a-06a. It then applied the *T.L.O.* standard to the search and arrived at precisely the same conclusion as the district court.

In considering whether the search was justified at its inception, the court of appeals observed that there were "several key pieces of information tying [Redding] to the possession and distribution of pills in violation of school policy." Pet. App. 107a. In particular, the court carefully assessed Marissa's implication of Redding as the supplier and found it credible based on the girls' prior interactions and friendship and Redding's admission that she had lent her planner to Marissa. Pet. App. 107a-11a. The court also noted the independent evidence that Redding had recently served alcohol to students, including Marissa, before the school dance. Pet. App. 111a-12a.

For the court of appeals, a major factor in assessing the scope of the search was petitioners' "strong interest both in safeguarding students entrusted to their care from the harm posed by the misuse of prescription drugs and in enforcing the school's official policy." Pet. App. 113a. Moreover, the court acknowledged that petitioners had good cause to be extra vigilant given the prior injuries to students, including a near fatality, from abusing prescription drugs and the report that a group of students was planning to take the pills that day.

Pet. App. 113a-14a. Finally, the court rejected Redding's argument that the Fourth Amendment required petitioners to utilize the least intrusive means possible. Pet. App. 115a-16a.

Like the district court, the court of appeals made no further inquiry concerning qualified immunity because Redding's Fourth Amendment rights were not violated.

3. The Ninth Circuit subsequently reheard the case en banc, reversed the district court's determination that there was no violation of Redding's constitutional rights, and denied Wilson qualified immunity.

The court of appeals concluded, 6-5, that the search was not justified at its inception. For the majority, the issue was not whether a search was justified at its inception, but rather, whether a strip search was justified at its inception. Pet. App. 19a. The majority explained its reframing of the issue this way by reference to intrusiveness. In the majority's view, as the intrusiveness of a search intensifies, so too does the level of suspicion required to justify the search. Pet. App. 18a-19a. Using this sliding-scale approach, the majority determined that petitioners failed to meet the heavy burden of justifying the search based on Marissa's implication of Redding, which the majority criticized as self-serving and self-exculpatory. Pet. App. 22a-24a. Nor did the majority deem any of the corroborating evidence—Jordan's report that Redding had recently served alcohol to students and contraband hidden in

the planner that Redding had lent to Marissa—logically related to the suspicion that Redding was in possession of prescription pills. Pet. App. 24a-26a.

The court of appeals further concluded, 8-3, that the search was not permissible in scope. Once again, the overriding factor for the majority was the question of intrusiveness and the potential emotional impact of the search. Pet. App. 29a-31a. The majority also opined that the suspected infraction—possession of prescription pills—"pose[d] an imminent danger to no one." Pet. App. 29a. Alternatively, the majority believed that Wilson had effectively neutralized any danger by removing Redding from class and bringing her to his office. Pet. App. 32a.

Having determined that Redding's Fourth Amendment rights were violated, the court of appeals proceeded to consider whether those rights were clearly established at the time of the search. The court concluded, 6-5, that they were, thereby depriving Wilson of qualified immunity and subjecting him to trial and possible damages.[4] Unable to find any case on all fours, the majority based its conclusion on *T.L.O.* itself and common sense and reason, which as the majority put it, "supplement the federal reporters." Pet. App. 34a-35a.

As for the dissent, it believed that the majority overlooked the impetus behind *T.L.O.* by failing to acknowledge petitioners' need to act swiftly in

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[4] Because the court of appeals concluded that Romero and Schwallier were merely following directions and not acting as independent decision-makers, summary judgment was affirmed as to them. Pet. App. 38a.

protecting students from harm. Pet. App. 44a-47a. Instead, the majority, with the benefit of hindsight, substituted its own judgment for petitioners' in a way that "will cause teachers and administrators to hesitate [even] when they in good faith believe children are at risk." Pet. App. 82a. And the dissent was simply dumbfounded by the majority's determination that Wilson was not entitled to qualified immunity, particularly when the district court and the original panel had both found the search to be constitutional:

> Looking forward, the denial of qualified immunity may have the greatest impact on this circuit's schools. It is now clear that school officials who conduct *T.L.O.* searches that judges later think unreasonable will face trial and the possibility of damages, without any case law to guide them and no means of divining our views of "common sense and reason."

Pet. App. 92a-93a.

4. On October 9, 2008, Safford, Wilson, Romero, and Schwallier filed their petition for a writ of certiorari. On January 16, 2009, the Court granted the petition.

## SUMMARY OF ARGUMENT

Under *T.L.O.*, the legality of this search depends simply on its reasonableness.

The search was justified at its inception with reasonable grounds for suspecting that it would turn up evidence that Redding was violating Safford's policies that prohibit the nonmedical use or possession of drugs on campus. Wilson confirmed that prescription pills were being distributed again on campus the morning of the search. Marissa directly implicated her friend Redding as the supplier of those pills, plus another OTC pill, with nothing to gain from doing so. Wilson already had a strong basis for suspecting Redding of having served alcohol, another drug prohibited by Safford's policies, to Marissa and others. And Redding's planner was now sitting open in front of him along with the other forms of contraband found inside.

The only way that the Ninth Circuit managed to avoid the conclusion that the search was justified at its inception was by adopting a sliding-scale approach that is both contrary to *T.L.O.* and unworkable. This approach effectively requires probable cause for some searches in the school setting that may be deemed more intrusive—with no guidance as to where the dividing line may be—despite this Court's conclusion that "the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." *T.L.O.*, 469 U.S. at 341. And as an indication of just how unworkable the approach is, the Ninth Circuit tripped over its own analysis.

The search was also permissible in scope with the measures adopted reasonably related to the objectives of the search and not excessively intrusive in light of Redding's age and sex and the nature of her suspected infraction. Wilson could recall at least two occasions when a student was harmed by taking pills distributed on campus, including a near fatality. He obviously hoped to avoid a similar result, or worse, for Redding, particularly with Jordan's report that the plan was for the group of students to take the pills that day at lunch. And knowing that the pills were small enough to be easily concealed, he thought it was important to have her clothes checked. But out of regard for Redding, he did not participate in the search. Instead, Romero and Schwallier conducted the search in the privacy and security of the nurse's office without ever touching Redding.

The only way that the Ninth Circuit managed to avoid the conclusion that the search was permissible in scope was by substituting its own judgment for Wilson's in violation of *T.L.O.* The Ninth Circuit's determination that the abuse of a prescription drug "poses an imminent danger to no one" ignores both Safford's experience and national studies, which detail the troubling rise in the abuse of prescription and OTC drugs among teens, while unwittingly fueling the dangerous myth that such drugs provide a "safe" high.

This case comes to the Court with the constitutional question having been fully briefed, argued, and decided three times by a total of fourteen judges. And with the benefit of this long-running discussion, the Court is now well-positioned to definitely resolve the constitutional

question. To do anything less would leave wide gaps of uncertainty in the law and cause school officials to hesitate or do nothing at all, even when they in good faith believe that students are at risk.

Finally, the Ninth Circuit's qualified immunity analysis no longer affords school officials any room for error. Indeed, in the Ninth Circuit, school officials are now subject to a higher standard on understanding the law than federal judges and are required to accurately predict the future course of appellate jurisprudence on pain of personal liability. This result is manifestly wrong.

## ARGUMENT

### I. THE SEARCH WAS CONSTITUTIONAL.

#### A. Under *T.L.O.*, the legality of this search depends simply on its reasonableness.

In *T.L.O.*, this Court considered the proper application of the Fourth Amendment to a search conducted by a public school official. 469 U.S. at 327-28. At the outset, the Court explained that context matters and requires "balancing the need to search against the invasion which the search entails." *Id.* at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

The Court rejected the argument that students have no legitimate privacy interest, but also acknowledged "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds," especially with the rise in drug use and violent

crime in schools. *T.L.O.*, 469 U.S. at 339. Balancing the two, the Court thought it evident that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 340.

Following this reasoning, the Court held that the warrant requirement is unsuited to the school setting because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* But the Court did not stop there. It also concluded that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause." *Id.* at 341. "Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.*

The Court set forth a twofold inquiry for this reasonableness standard, asking first whether the search was justified at its inception, and second, whether the search was reasonable in scope. *Id.* A search will ordinarily be justified at its inception when a school official has "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42. And a search will be permissible in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

But in referring to the nature of the infraction, the Court added the following explanation and direction to lower courts:

> We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. . . . The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

*Id.* at 342 n.9.

The Court was satisfied that the reasonableness standard struck the appropriate balance between school officials' need to maintain order on the one hand and students' privacy on the other. *Id.* at 342-43. Of the former, the Court observed that "the standard will spare

teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 343.

In the last twenty plus years, the Court has only reaffirmed *T.L.O.* and its rationale. In *Vernonia School District 47J v. Acton*, the Court rejected a Fourth Amendment challenge to a school policy of conducting suspicionless drug testing of student athletes, which required those chosen at random to urinate under a school official's supervision. 515 U.S. 646, 648, 650, 664-65 (1995). The Court succinctly stated that "Fourth Amendment rights . . . are different in public schools than elsewhere" and later acknowledged that the "most significant element" in deciding that the search was reasonable was the school's role "as guardian and tutor of children entrusted to its care." *Id.* at 656, 665.

The Court further characterized the school's interest in deterring drug use as "important—indeed, perhaps compelling" because "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* 661. Moreover, "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 662.

The Court also rejected the argument that the Fourth Amendment requires the least intrusive search possible. *Id.* at 663. And the Court was not willing to require individual suspicion before drug testing, in part, because it would "add[] to the ever-expanding

diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Id.* at 664.

The Court subsequently upheld another drug testing policy that applied not just to student athletes, but to any student involved in any competitive extracurricular activity. *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 825 (2002). With the school setting serving as backdrop, the Court explained that "[a] student's privacy interest is limited . . . where the State is responsible for maintaining discipline, health, and safety." *Id.* at 830. The Court observed that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Id.* at 834. And the Court again rejected the argument that the Fourth Amendment requires employing the least intrusive means because it would "raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Id.* at 837 (quoting *United States v. Martinez Fuerte*, 428 U.S. 543, 556-57 n.12 (1976)).

Finally, the Court just recently held that "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." *Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

As shown, *T.L.O.* and its rationale remain strong. Students still have a diminished expectation of privacy in school. And school officials, in carrying out their custodial responsibility, still retain the flexibility to respond swiftly in order to protect students and maintain order. Rarely will that flexibility be needed more than when school officials confront the threat of drug abuse.

### B. The search was justified at its inception.

To date, a total of fourteen judges have reviewed this case and weighed in with their views. And all fourteen are unanimous in the conclusion that a search of Redding was justified at its inception. Indeed, even the majority from the en banc panel conceded that "[f]ollowing the logic of *T.L.O.*, the initial search of [her] backpack and her pockets may have been constitutionally permissible." [5] Pet. App. 22a.

And certainly the record substantiates the conclusion that a search of Redding was justified at its inception with reasonable grounds for suspecting that it would turn up evidence that she was violating Safford's policies that prohibit the nonmedical use or possession of drugs on campus.

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[5] The majority's statement that petitioners searched Redding's pockets is erroneous as her clothes that day had no pockets. Regardless, the majority's belief that such a search would have been constitutionally permissible necessarily means that a search was justified at its inception. Moreover, at oral argument before the en banc panel, Redding's counsel *repeatedly* conceded that a search of his client was justified at its inception.

Wilson confirmed that prescription pills were being distributed again on campus the morning of the search. J.A. 11a. Marissa directly implicated Redding as the supplier of those pills, plus another OTC pill, based on personal knowledge as she claimed to have received the pills from her. J.A. 13a, 18a. Wilson already had a strong basis for suspecting Redding of having provided alcohol, another drug prohibited by Safford's policies, to Marissa and others before a school dance. Pet. App. 128a; J.A. 7a-8a, 10a-11a. But even then, he continued to investigate further by asking Redding about the planner that had been found near Marissa and its contents, including several knives and lighters, a cigarette, and a permanent black marker. Pet. App. 155a; J.A. 12a-14a, 22a. And although she denied that the contents were hers, she did admit that the planner was hers and that she had lent it to Marissa a few days earlier. *Id.*

### 1. The Ninth Circuit applied a "crabbed notion of reasonableness."

Nevertheless, the en banc panel applied what this Court described and appropriately criticized as a "crabbed notion of reasonableness." *T.L.O.*, 469 U.S. at 343. School officials should not proceed based solely on an "inchoate and unparticularized suspicion or 'hunch'." *Id.* at 346 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). But they may make "the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people' . . . are entitled to rely." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). Moreover, for evidence to be relevant, it "need not conclusively prove the ultimate fact in issue, but only

have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 345 (quoting Fed. R. Evid. 401).

Ignoring these principles, the en banc panel set out to marginalize Marissa's implication of Redding as self-serving and self-exculpatory. Pet. App. 22a-23a. But there is nothing in the record to support either of these conclusory labels.

Wilson did not offer Marissa leniency in exchange for information, nor did he attempt to pressure her into naming anyone. He simply asked her where—not who—the blue pill came from. J.A. 13a, 18a. And Marissa's reluctant response could hardly be described as exculpatory because it in no way reduced her own guilt. Even if she did get the pills from Redding, she was still caught with them in her possession and had distributed at least one herself to Jordan.

If anything, Marissa had an interest in not implicating Redding. If Marissa knew that Redding did not have any pills, she could face additional discipline for falsely implicating her, to say nothing of jeopardizing their friendship. *C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996) (concluding that a fellow student's information that plaintiff carried drugs "was . . . more likely to be reliable because the student informant faced the possibility of disciplinary repercussions if the information was misleading"). And if Marissa knew that Redding did have pills, she still might not implicate her to avoid the stigma of being perceived as a snitch by her peers.

The en banc panel also failed to see the relevance of the available corroborating evidence, including the suspicion that Redding had recently served alcohol to Marissa and the other contraband found in Redding's planner just before the search.

At every stage of this case, the reviewing courts have properly credited Redding's denial that she served or consumed alcohol the night of the school dance. But that does nothing to change the fact that Wilson had ample reason to suspect that she had. His suspicion first developed the night of the school dance while observing the usually rowdy behavior of Marissa, Redding, and others in their small group and noticing the distinct stench of alcohol that followed them around. J.A. 7a, 10a. Then, before the dance ended, a bottle of liquor and pack of cigarettes turned up in the trash in the girls' bathroom. *Id.*

Weeks later, Jordan confirmed Wilson's suspicion when he reported that Redding had served alcohol—Jack Daniel's, Black Velvet, vodka, and tequila—at a party that she hosted in her family's camper trailer before the dance. J.A. 8a, 11a. And of course, Jordan's information proved reliable when he reported that Marissa had given him a pill on the day of the search and Wilson found more of the same pill in her possession. J.A. 11a-12a.

The relevance of Wilson's suspicion that Redding had served alcohol to students, including Marissa, at a pre-dance party is clear. If Redding had previously distributed one type of drug—alcohol—to Marissa and others, it was more probable that she was distributing

another type of drug—prescription and OTC pills—to Marissa and others.

The same can also be said of the contraband found in Redding's planner. Pet. App. 155a; J.A. 12a-14a, 22a. Her admission that she had lent the planner to Marissa further linked the two as friends and raised a concern that she was involved with Marissa in bringing the planner's contents—knives and lighters, a cigarette, and a black permanent marker—onto campus. *Id.* And if Redding was involved with Marissa in bringing these forms of contraband onto campus, it was more probable that she was involved with Marissa in bringing another form of contraband—prescription and OTC pills—onto campus.

Accordingly, Marissa's direct implication of Redding as the supplier of the pills, coupled with this corroborating evidence, justified the search at its inception.

### 2. The sliding-scale approach is both contrary to *T.L.O.* and unworkable.

Ultimately, the only way that the majority from the en banc panel avoided the conclusion that the search was justified at its inception was by reframing the issue. For the majority, the issue was not whether a search was justified at its inception, but whether a strip search was justified at its inception. Pet. App. 19a.

As ostensible authority for this reframing of the issue, the majority cited to decisions of the Second and Seventh Circuits for the proposition that as the

intrusiveness of a search intensifies, so too does the level of suspicion required to justify the search. *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006); *Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). The majority also pointed to *T.L.O.* and its analysis of two separate searches.

The majority's supposed authority for reframing the issue is deeply flawed. First, although intrusiveness is certainly relevant to the overall question of reasonableness, *T.L.O.* does not list it as a factor for consideration until assessing the scope of the search under the second prong. 469 U.S. at 341-42. Ignoring this, the majority also factored intrusiveness into its analysis of whether the search was justified at its inception under the first prong, and as a result, skewed the careful balance that this Court struck between school officials' need to maintain order on the one hand and students' privacy on the other.

Second, contrary to the majority's assertion, *T.L.O.* did not attribute the two separate searches to a difference in the level of their intrusiveness. The searches were distinct because two different objects were sought, "the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marijuana." *Id.* at 343-44. Indeed, it is difficult to understand how the search for marijuana in T.L.O's purse was any more meaningfully intrusive than the earlier search for cigarettes in the same purse.

Far worse, the majority's flawed authority resulted in an approach that runs contrary to *T.L.O.* If, as the majority advocates, the level of suspicion required to

justify a search varies with the intrusiveness of the search contemplated, the result is a sliding scale. On one end of the scale, minimally intrusive searches require only reasonable suspicion for their justification. While on the opposite end of the scale, more intrusive searches, as the majority deemed the search of Redding to be, require something more than reasonable suspicion for their justification.

The majority conveniently avoided giving a name to this newly minted standard for more intrusive searches. But that did little to hide the fact that it is probable cause in application. Perhaps the best evidence of this is the majority's wholesale adoption of criminal precedents, an area of the law where "reasonableness usually requires a showing of probable cause." *Earls*, 536 U.S. at 828.

For example, the majority attacked the primary source of petitioners' suspicion—Marissa's implication of Redding as the supplier of the prescription and OTC pills—by direct reference to criminal precedents analyzing whether informants' tips are sufficiently reliable. Pet. App. 22a-23a. But the adversarial relationship between law enforcement officials and criminal suspects is not an apt comparison to the relationship between school officials and students, where "[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring). Nor are school officials in the practice or habit of cutting deals with students in which leniency is exchanged for information that allows officials to pursue other students who may have broken school rules.

Of course, the application of probable cause to this search runs contrary to *T.L.O.*, in which this Court expressly declined to allow the legality of a search in the school setting to hinge on the presence or absence of probable cause. 469 U.S. at 340-41. The Court noted that probable cause "is not an irreducible requirement of a valid search" and observed that "we have in a number of cases recognized the legality of searches . . . based on suspicions that, although 'reasonable,' do not rise to the level of probable cause." *Id.* And in recognition of school officials' need to maintain security and order in schools, the Court concluded that the Fourth Amendment "does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law." *Id.* at 341.

Furthermore, the en banc panel's sliding-scale approach is simply unworkable in application. With its decision in *T.L.O.*, this Court intended to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. But the sliding-scale approach frustrates this intent and results in a legal morass.

This case illustrates the point. The majority examined at least two components of the search in isolation—looking through Redding's backpack and then the search of her clothes. It did so as a product of its sliding-scale approach in which the level of suspicion required to justify a search varies with the intrusiveness of the search contemplated. Because the majority

apparently did not consider the search of Redding's backpack too intrusive, only reasonable suspicion was required for its justification. But because the majority deemed the search of her clothes to be particularly intrusive, probable cause was required. Accordingly, in addition to understanding probable cause, school officials now also need to understand where one component of a search ends and another begins, as well as whether a particular component is intrusive enough to require probable cause instead of reasonable suspicion, or perhaps even some standard in between.

These inquiries are so onerous in their minute detail that even the majority failed to faithfully apply its own analysis. For example, one component of this search was asking Redding to remove her shoes and checking them for pills. But the majority never paused to consider this component in isolation, or for that matter, to opine as to how intrusive this was. Indeed, the majority offered no guidance as to exactly which component(s) of this search crossed that undefined threshold of intrusiveness, such that something more than reasonable suspicion was required as justification.

And if the Ninth Circuit is unable to apply its own legal framework, there is little hope of school officials being able to. "A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). A teacher is even less equipped to make such quick judgments while also having to continuously pause to break the contemplated

search down into each of its component parts and then recalibrate the applicable standard based on the level of intrusiveness. Such an exercise also "adds to the ever-expanding diversionary duties of schoolteachers," drawing time, attention, and resources away from education. *Vernonia*, 515 U.S. at 664.

More likely, the sliding-scale approach will end in hopeless confusion for the school officials who are left with the daunting task of trying to apply it. And that confusion will inevitably result in delays, if not paralyzing inaction, in responding to threats to student safety, which could well prove catastrophic when drugs and weapons are introduced into the school setting.

### C. The search was reasonable in scope.

A search is permissible in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342.

In this instance, the measures adopted were reasonably related to the objective of finding prescription and OTC pills. Indeed, the pills were certainly small enough to be concealed in or under Redding's clothing in a way that would avoid superficial detection.

The question then was whether the search was excessively intrusive in light of Redding's age and sex and the nature of the infraction.

**1. The search was not *excessively* intrusive.**

This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Vernonia*, 515 U.S. at 663. "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Earls*, 536 U.S. at 837 (quoting *United States v. Martinez Fuerte*, 428 U.S. 543, 556-57 n.12 (1976)).

Petitioners do not deny the potential emotional effect of the search conducted in this case. In fact, it was for this very reason that they specifically took into account both Redding's age and sex.

After checking Redding's backpack, Wilson, a male administrator, withdrew from the search and turned it over to Romero, a female assistant, and Schwallier, a female nurse. J.A. 14a, 16a-17a, 19a-20a, 23a-24a. At the same time, they also moved the search from Wilson's office to the more private environs of the school nurse's office. *Id.* Once inside the nurse's office with the door closed, no one observed or was likely to observe the search, except the two female staff members. J.A. 16a-17a, 19a-20a, 23a-24a. The search lasted only as long as was necessary to insure that Redding did not have any pills on her before Romero immediately returned her clothes and allowed her to get dressed. *Id.* And the search was completed without anyone touching Redding. *Id.*

Of course, Redding's age and sex also have to be considered in proportion to the nature of the infraction. But when considering the nature of the infraction, the Court in *T.L.O.* declined "to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U.S. at 342 n.9. Instead, the Court advised lower courts to show deference to the judgment of school officials concerning the types of conduct that may threaten student safety and disrupt the school environment:

> The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

*Id.*

But yet again, the majority from the en banc panel disregarded *T.L.O.* by doing precisely the opposite. The majority's discussion of Redding's suspected infraction omitted any mention of or reference to Wilson's perspective at the time of the search. The majority instead elected to substitute its own judgment for Wilson's, and with all the benefits of hindsight and calm

reflection that were unavailable to him, concluded that the infraction "pose[d] an imminent danger to no one." Pet. App. 29a.

Although this Court's clear expression in *T.L.O.* should have been sufficient to deter the majority in this exercise, the dissent below offered some practical rules that should further prove helpful in guiding courts and school officials when considering the nature of the infraction. For example, the dissent noted that "school officials deserve the greatest latitude when responding to behavior that threatens the health and safety of students or teachers." Pet. App. 77a. And as a corollary, courts should distinguish between "those [searches] intended to uncover evidence of past wrongdoing, and those responding to an ongoing or future threat." *Id.* Under these rules, "when school officials reasonably believe that a student is carrying a weapon or harmful drugs, it will rarely be unreasonable for them to do what they can to neutralize the danger." *Id.*

Viewing the situation from Wilson's perspective at the time of the search, as *T.L.O.* instructs, and applying these rules leads to a very different conclusion about the potential danger posed by Redding's suspected infraction.

Wilson confirmed that prescription pills were being distributed again on campus the morning of the search. J.A. 11a-12a. Jordan reported that the plan was for a group of students to take the pills that day at lunch. *Id.* And then Marissa directly implicated Redding as the supplier of the pills, plus another OTC pill, based on personal knowledge as she claimed to have received the

pills from her. J.A. 13a, 18a. This coupled with the other corroborating evidence made it imminently reasonable for Wilson to believe that Redding was part of this group that had pills and was planning to take them at lunch.

But Wilson still was not sure who else may have been part of the group, what kinds of pills Redding and the others had, and in what amounts. Even with this information, he was in no position to assume that the situation was harmless. Whereas Jordan had only a single prescription-strength ibuprofen pill, Marissa had several plus an OTC naprosyn pill. J.A. 11a-12a, 18a. Had she been planning to take all of the pills at once, some, or only one? And if she took all of the pills at once or a combination of them, what would the result be?

And how would Wilson even be able to predict the result? He could not be expected to know the students' medical histories, including unobservable medical conditions, medications that they may already be taking, and any allergies. Nor could he be expected to have the training or expertise necessary to know all the risks associated with the various pills, their interactions if taken together, and their abuse.

On top of all this, Wilson could recall at least two earlier occasions when a student was harmed by taking pills distributed on campus. The most recent case was Jordan's just days earlier when he became violent with his mother and sick to his stomach. J.A. 7a-8a, 10a-11a. And the most serious case nearly resulted in a student's death the year prior. J.A. 7a, 10a.

So Wilson certainly did consider the nature of the infraction serious as he sought to avoid a similar harm, or worse, to Redding and any other student who may have been involved in the imminent plan to take the pills at lunch. And having given proper regard to Redding's age and sex, as discussed above, the search simply was not *excessively* intrusive under the circumstances.

### 2. The Ninth Circuit has set a dangerous precedent in substituting its own judgment for that of the school officials.

This Court was wise to not let the legality of a search depend on a judge's determination of the relative importance of school rules. *T.L.O.*, 469 U.S. at 342 n.9. Because as the dissent below noted, "[s]eemingly innocuous items can, in the hands of creative adolescents, present serious threats." Pet. App. 78a. Thus, "[c]ourts may not immediately appreciate the wisdom of a school policy . . . , but that is why judges are not chosen to run schools." *Id.*

On several prior occasions, this Court has also taken judicial notice of the problem of drug abuse that has continued to plague schools. "Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *T.L.O.*, 469 U.S. at 339. "And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Vernonia*, 515 U.S. at 662.

In the same year that petitioners nearly lost a student at Safford Middle School to the abuse of a prescription drug, the Court noted that "[t]he drug abuse problem among our Nation's youth has hardly abated"; to the contrary, "evidence suggests that it has only grown worse." *Earls*, 536 U.S. at 834. And then less than two years ago, and almost four years after the search conducted in this case, the Court acknowledged that "[t]he problem [still] remains serious today." *Morse*, 127 S.Ct. at 2628.

Accordingly, petitioners had thought it inarguable that deterring drug abuse is an "important—indeed, perhaps compelling" concern. *Vernonia*, 515 U.S. at 661. The Ninth Circuit, however, expressed disagreement when it substituted its judgment for Wilson's and concluded that the abuse of a prescription drug "pose[d] an imminent danger to no one." Pet. App. 29a. In fairness, the Ninth Circuit's quarrel does not seem to be with the more general proposition of whether drug abuse is a serious societal problem, but with the question of whether the abuse of prescription and OTC drugs is a component of that problem. If so, the Ninth Circuit is ignorant of the reality that school officials, like Wilson, have been confronting for years.

National studies reveal a troubling rise in the abuse of prescription and OTC drugs among teens. Office of National Drug Control Policy, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008). Teens are now abusing prescription drugs far more than any illicit drug except marijuana. *Id.* at 1-2. In fact, prescription drugs are the drug of

choice among 12- to 13-year olds. *Id.* at 2. And these statistics correlate with a sharp increase in poisonings and even deaths related to the abuse of prescription and OTC drugs, particularly when these drugs are abused in combination with other substances such as alcohol. *Id.* at 3-4.

Furthermore, traditional gender differences are reversed when it comes to teens' abuse of prescription drugs, with higher rates of abuse, emergency room visits, and treatment admissions among teen girls. Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (Apr. 30, 2007).

The studies also offer some explanation for this disturbing trend. First, teens have relatively easy access to prescription drugs, with most getting them from family or friends. *Prescription for Danger*, at 4-5. Second, many teens believe the myth that prescription and OTC drugs provide a "safe" high and alternative to street drugs. *Id.* at 3-4.

For this reason, the Ninth Circuit's decision is doubly troubling. In concluding that the abuse of a prescription drug did not pose an imminent danger, the Ninth Circuit has made it more difficult for school officials to respond to that concern as opposed to say a street drug, even though the abuse of the former is the one currently on the rise among students. And at the same time, the Ninth Circuit has unwittingly endorsed the myth that students' abuse of prescription and OTC drugs does not place them at risk.

This disconnect between the Ninth Circuit's conclusion and the reality of today's school environment comes off looking like lunacy and should serve as a cautionary tale for judges who may contemplate substituting their own judgment for that of school officials in such matters.

## II. THE COURT SHOULD DECIDE THE CONSTITUTIONAL QUESTION.

In *County of Sacramento v. Lewis*, the Court stated that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." 523 U.S. 833, 841 n.5 (1998). If so, "it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question." *Id.* The Court subsequently made this two-step sequence mandatory in *Saucier v. Katz* by insisting that lower courts first determine whether a constitutional right was violated, rather than "skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." 533 U.S. 194, 201 (2001).

As of last month, the Court has now come full circle on the issue. In *Pearson v. Callahan*, the Court held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory." 129 S.Ct. 808, 818 (2009). Instead, "[t]he judges of the district courts and courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Id.*

Nevertheless, the Court "continue[s] to recognize that it is often beneficial" to follow the *Saucier* sequence as it "promotes the development of constitutional precedent." *Id.* Indeed, "[a]n immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional" and that uncertainty could work "to the detriment both of officials and individuals." *Lewis*, 523 U.S. at 841 n.5.

The district court and the original panel of the Ninth Circuit decided this case while the *Saucier* sequence was still regarded as mandatory. Accordingly, both began their analysis by determining whether Redding's Fourth Amendment rights were violated by the search conducted here. Pet. App. 106a-07a, 140a-41a. Of course, that was also the ending point of their analysis as both concluded that Redding failed to establish the violation of a constitutional right, even with all of the evidence viewed in the light most favorable to her. Pet. App. 99a, 105a-07a, 116a, 138a, 152a.

The *Saucier* sequence was also regarded as mandatory at the time that the Ninth Circuit reheard the case en banc. But by then, the en banc panel was very much aware that the Court had granted the petition for a writ of certiorari in *Pearson* and had specifically ordered those parties to brief and argue the question as to whether *Saucier* should be overruled. Pet. App. 13a. And yet the en banc panel still felt that it was necessary to determine whether Redding's constitutional rights were violated and not defer its decision until after *Pearson* was resolved. *Id.*

As a result, this case comes to the Court with the constitutional question having been fully briefed, argued, and decided three times. And with the benefit of this long-running discussion between the parties, *amici curiae*, and fourteen judges, the Court is now well-positioned to definitively resolve the constitutional question.

Deciding the constitutional question in this case will also provide some desperately needed guidance to the lower courts and, more importantly, school officials. The Court decided *T.L.O.* nearly twenty-five years ago and has not reviewed a case since that involved a search conducted by school officials based on individualized suspicion of wrongdoing. In the meantime, lower courts have had their struggles in applying the reasonableness standard to such searches.

For example, after a "diligent but unsuccessful search for additional guidance," the Sixth Circuit came to a "troubling conclusion": "the reasonableness standard articulated in *New Jersey v. T.L.O.*, has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action." *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 886 (6th Cir. 1991). Moreover, the Eleventh Circuit observed that "[s]pecific application of the factors established to define the constitutionally permissible parameters of a school search . . . is notably absent from the Court's discussion and conclusion with respect to T.L.O." *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 824-25 (11th Cir. 1997).

And if judges struggle in applying the reasonableness standard, the problem is only compounded for school officials, who do not enjoy the benefits of legal training, briefing and argument, time to reflect, law clerks to conduct research and analysis, etc.

Specifically, deciding the constitutional question here will allow the Court to (1) end the tension between *T.L.O.* and the sliding-scale approach that is gaining acceptance among the lower courts, (2) offer guidance on what weight school officials can appropriately assign to student "tips," and (3) reaffirm the level of deference owed to school officials' judgment concerning the types of conduct that may threaten student safety and disrupt the school environment.

In adopting the sliding-scale approach, the Ninth Circuit joined the Second and Seventh Circuits. *Phaneuf*, 448 F.3d at 596; *Cornfield*, 991 F.2d at 1321. But in doing so, these courts improperly factor intrusiveness into the analysis of whether a search is justified at its inception under the first prong, and thereby skew the careful balance that the Court struck in *T.L.O.* between school officials' need to maintain order on the one hand and students' privacy on the other. Similarly, these courts effectively apply probable cause to more intrusive searches even though *T.L.O.* expressly declined to allow the legality of a search in the school setting to hinge on the presence or absence of probable cause. 469 U.S. at 340-41.

In this instance and many others, the justification for the search is based, in whole or in part, on a student

"tip." The Ninth Circuit, however, criticized Marissa's tip as self-serving and self-exculpatory. As these conclusory labels have no evidentiary basis in the record, the only support offered is the citation to criminal precedents analyzing whether informants' tips are sufficiently reliable. But the adversarial relationship between law enforcement officials and criminal suspects is not an apt comparison to the relationship between school officials and students, where "[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring). Moreover, "teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." *Id.* at 348. Given these significant differences, the Court can elucidate the weight that school officials can appropriately assign to student "tips" in determining whether a search is justified at its inception.

Finally, this case presents a prime opportunity for the Court to reaffirm the level of deference owed to school officials. By substituting its own judgment for Wilson's and concluding that the abuse of a prescription drug posed no danger, the Ninth Circuit exposed its ignorance of the fact that the abuse of such drugs is on the rise among teens. *Prescription for Danger*, at 1-2. And it was simply inexcusable for the Ninth Circuit to endorse the myth that the abuse of prescription and OTC drugs is not dangerous when the statistics, to say nothing of Safford's own experience, show a sharp increase in poisonings and even deaths related to the abuse of these drugs. *Id.* at 3-4.

In contrast, dodging the constitutional question, even if the Court were to vacate the Ninth Circuit's en banc decision, would leave wide gaps of uncertainty in the law. With the advent of the sliding-scale approach, school officials can no longer rely on reasonableness as being the standard against which searches will be measured. And with the national attention that this case has drawn, school officials have no choice but to always be mindful of the possibility of being second-guessed by some judge who may simply disagree about the seriousness of the situation confronted. In either case, the net effect is the same—school officials hesitate or do nothing at all, even when they in good faith believe that children are at risk.

## III. THE SCHOOL OFFICIALS ARE CERTAINLY ENTITLED TO QUALIFIED IMMUNITY.

Government officials are granted qualified immunity as a "shield[] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under this objective test, a court may not deny immunity simply because the official's conduct was ultimately deemed unlawful. *Id.* "If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.*

The Court has also stressed that this inquiry must be made with a certain degree of specificity.

*Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Otherwise, the qualified immunity would be converted "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*

At this point, petitioners pause to briefly review this case's procedural history because of how highly probative it is on the question of whether Wilson could have reasonably believed, in light of the clearly established law, that the search of Redding was lawful.

In a comprehensive 20-page ruling, the district court concluded that the search did not violate Redding's Fourth Amendment rights. Given the totality of information available to Wilson, the court determined that the search was justified at its inception with clear grounds for suspecting that Redding was in possession of prescription and OTC pills in violation of Safford's policies. Pet. App. 145a-49a. And in comparing the measures adopted for this search to those in several other reported cases, the court also found the search to be permissible in scope. Pet. App. 149a-51a.

The original panel of the Ninth Circuit subsequently affirmed in a published decision. The panel noted all of the information tying Redding to the possession and distribution of pills, including Marissa's credible implication of Redding as the supplier. Pet. App. 107a-12a. The panel also credited petitioners' strong interest in safeguarding students—particularly with the history of prior injuries from students abusing prescription drugs and the report that a group of students was planning to take the pills that day. Pet. App. 113a-14a.

Then on rehearing, a majority of the Ninth Circuit's en banc panel concluded that the district court, the original panel, plus three dissenting judges, all misapprehended the law. But when the majority further concluded, 6-5, that Wilson could not have reasonably believed that the search was lawful based on clearly established law, it departed from an important guiding principle of the qualified immunity doctrine: "If judges thus disagree on a constitutional question, it is unfair to subject [an official] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *see also Morse*, 127 S.Ct. at 2641 ("Indeed, the fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit's constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear.") (Breyer, J., concurring in part, and dissenting in part).

At the current count, Wilson—a school official with no legal training—is being held to a higher standard on understanding the law than five federal judges, including four distinguished members of the Ninth Circuit with decades worth of combined judicial experience. Given this patently absurd result, it can no longer be said that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In denying Wilson qualified immunity, the Ninth Circuit all but repeated the same mistake it made in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). There, it found that a police officer was not entitled to

qualified immunity because he had fair warning that his conduct was unlawful based on an existing general principle of law. *Id.* at 195, 199. "Of course, in an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199 (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)). The Ninth Circuit's mistake, however, was in concluding that the officer's particular situation presented a case that was obvious enough to be decided by a general standard alone. *Id.* Accordingly, this Court summarily reversed the Ninth Circuit's finding on qualified immunity. *Id.* at 198 n.3.

Similarly, the majority concluded here that Wilson had fair notice that his conduct was unlawful based solely on *T.L.O.* and its general legal framework. But once again, the majority erred in its assumption that Wilson's particular situation presented a case that was obvious enough to be decided on this basis. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) ("Accordingly, *T.L.O.* is useful in 'guiding us in determining the law in many different kinds of circumstances'; but is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions in this case."). Indeed, the majority needed to look no further than the prior decisions of the district court and the original panel, to say nothing of the dissent, to see that this case was not even close to being obvious enough to be decided by a general standard alone.

The majority also would have known that this was not an obvious case if it had bothered to consider the body of relevant case law applying *T.L.O.* For example,

in *Williams*, the Sixth Circuit upheld a "strip search" of a student for an unknown drug even though she did not look disoriented or intoxicated and denied possessing any drug. 936 F.2d at 883, 887. Moreover, the school officials had no information as to where the unknown drug might be, and prior searches of the student's locker and purse had failed to turn up any evidence of drug use. *Id.* The student also alleged that the assistant principal touched her during the search and was the one to pull on the elastic of her undergarments. *Id.*

Similarly, in *Cornfield ex rel. Lewis v. Consolidated High School District No. 230*, the Seventh Circuit upheld a strip search of a student suspected of hiding an unknown drug because of an "unusual bulge" in the crotch area of his sweatpants. 991 F.2d 1316, 1319, 1323 (7th Cir. 1993). Even after the student's mother refused consent, school officials proceeded with the search, which included a visual inspection of the student's naked body. *Id.*

In yet another case, a district court upheld a search of a thirteen-year-old boy in which the school official "patted" the boy's crotch, pulled the boy's pants down, and inspected the waistband of his underwear in search of some stolen money. *Singleton v. Board of Educ. USD 500*, 894 F. Supp. 386, 388-89, 390-91 (D. Kan. 1995).

In addition to the cases that support the constitutionality of the search of Redding, there are also cases that grant qualified immunity to school officials who conducted searches that were far more clearly unconstitutional. For example, in *Jenkins*, an en banc panel of the Eleventh Circuit considered the searches

of two eight-year-old girls who were asked to remove their clothes, with their underpants down to their ankles, after being suspected of taking seven dollars from a classmate's purse. 115 F.3d at 822-23. Later that day, the girls were even asked to remove their clothes for a second time. *Id.* Declining to decide the constitutionality of the searches, the court nevertheless concluded that the officials were entitled to qualified immunity because *T.L.O.* was not specific enough to place a reasonable official on notice under these circumstances that the search was unlawful. *Id.* at 824-28.

The Eleventh Circuit reached a similar conclusion in *Thomas ex rel. Thomas v. Roberts*. (*Thomas I*) 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002), *reinstated*, (*Thomas II*) 323 F.3d 950 (11th Cir. 2003). The case involved a search of an entire fifth-grade class—in the absence of any individualized suspicion—after an envelope containing twenty-six dollars went missing. *Thomas I*, 261 F.3d at 1163-64. The boys were taken to the bathroom in groups of four to five and shown what to do by the school official who pulled his own pants and underwear down to his ankles. *Id.* at 1164. The boys then pulled their own pants down, and some of them pulled down their underwear too. *Id.* As one group did this, two girls watched through the bathroom's open door. *Id.* Once the boys were done, it was the girls' turn. *Id.* The girls entered the bathroom in groups of two to five and were made to lower their pants and raise their dresses or shirts. *Id.* Most were also required to lift their bras and expose their breasts, and some were touched by the teacher in the process. *Id.*

The Eleventh Circuit did conclude that these suspicionless searches for money violated the students' Fourth Amendment rights. *Thomas I*, 261 F.3d at 1169. But it also concluded that the school officials were entitled to qualified immunity, stating that "[i]f the salient question is whether *T.L.O.* gave the defendants 'fair warning' that a 'strip search' of an elementary school class for missing money would be unconstitutional, then the answer must be 'no.'" *Thomas II*, 323 F.3d at 954.

From these cases emerges an important lesson, one that the Ninth Circuit failed to learn even after *Brosseau*. Although a general principle of law—like *T.L.O.*—may control, that is no excuse to ignore the body of relevant case law that has applied that general principle to fact-specific situations. That case law "may provide authority that clearly establishes a right," but it "may also create the legal ambiguity that allows a reasonable official to invoke the protections of the qualified immunity defense." Pet. App. 85a.

In the view of the majority from the en banc panel, Wilson misapprehended the law. Of course, if that is true, so too did the district court, the original panel, plus three dissenting judges. But the difference is that only Wilson is branded a constitutional violator, and only he is now subject to trial and personal liability. This is manifestly wrong.

School officials have a difficult enough job protecting students and maintaining order without the daunting threat of liability for damages solely because their legal sophistication does not allow them to predict the future

course of appellate jurisprudence. And no one could have foreseen that the Ninth Circuit would defy this Court's controlling authority in *T.L.O.*, both in its adoption of probable cause for some school searches and its willingness to displace the judgment of school officials in highly discretionary matters.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit that the search was unconstitutional and that Wilson could not have reasonably believed that the search was lawful.

Respectfully submitted,

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