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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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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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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INTRODUCTION

In a decision that defies this Court's precedents, the Ninth Circuit now requires probable cause for some searches in the school setting that may be deemed more intrusive. This abrupt change casts a roadblock to the type of swift and effective response that is too often needed to protect the very safety of students, particularly from the threats posed by drugs and weapons. Moreover, the Ninth Circuit upsets the long-standing tradition of deferring to the judgment and expertise of school officials in highly discretionary matters. The result is an opinion wholly uninformed about a disturbing new trend—teens' abuse of prescription and over-the-counter drugs.

The Ninth Circuit also deprived the school administrator of qualified immunity despite a sharp disagreement even among federal judges as to the constitutionality of the search. But to the extent that the administrator made any mistake, it was only in failing to accurately predict the future course of appellate jurisprudence.

Both aspects of the Ninth Circuit's decision have school officials across the country understandably alarmed.

OPINIONS BELOW

The order of the United States District Court for the District of Arizona granting petitioners' motion for summary judgment is reprinted at App. 126a-154a and is not otherwise published. The Ninth Circuit's original opinion affirming the district court is reprinted at 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 App. 1a-97a and is published at 531 F.3d 1071.

JURISDICTION

The Ninth Circuit issued its en banc opinion on July 11, 2008. Petitioners invoke this Court's 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 placed 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. Much of the difficulty in stemming the tide of drug abuse is directly attributable to shifting trends. Students have begun to experiment with drugs at a progressively earlier age, and the drugs of choice have changed. Whereas street drugs used to be the primary concern, more and more students have turned instead to a supplier of a different type—the family medicine cabinet, in search of prescription and over-the-counter (OTC) drugs.

For Safford, the most notable example of this occurred at its middle school in 2002. A female student surreptitiously brought a prescription drug onto campus and began passing the pills out to classmates. The result was any parent's or educator's worst nightmare—a near fatality. A boy had an adverse reaction to the drug,

became seriously ill, and had to be airlifted to Tucson, where he spent several days in an intensive care unit.

Unfortunately, Safford's experience is no random or isolated phenomenon. National studies show a troubling rise in the abuse of prescription and OTC drugs among teens. Office of National Drug Control Policy, Executive Office of the President, *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. These same statistics also 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. Moreover, the studies show that this disturbing trend is fueled, in part, by a dangerous myth that these drugs provide a "safe" high. *Id.* at 4-5.

For good reason then, Safford's policies strictly prohibit the nonmedical use or possession of drugs on campus. 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. Permission requires parental authorization, a physician's order, and delivery of the medication to the school office in either its original or prescription container.

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. School staff also noticed the distinct stench of alcohol that followed these students around. And before the night ended, a liquor bottle and pack of cigarettes turned up in the trash in the girls' bathroom.

Weeks later, school administrators, including Assistant Principal Kerry Wilson, received a call from the mother of another student, Jordan Romero, requesting a meeting. 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. Jordan explained that his fit of rage occurred after he ingested some pills that a classmate had given to him. He also advised the school administrators that certain students were bringing drugs and weapons onto campus.

Jordan identified students by name, including Marissa and Redding, along with very detailed accounts of their illicit activities. 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 liquor bottle was found in the girls' bathroom.[1]

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[1] Redding denies that she served or consumed alcohol the night of the dance, which the courts below properly accepted as (Cont'd)

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

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

Wilson went to Marissa's class and asked her to accompany him. As she stood up, he noticed a black planner in the desk next to her and asked the classroom teacher to identify its owner. The teacher discovered several knives and lighters, a cigarette, and a permanent black marker inside the planner, and turned them over to Wilson. App. 155a.

Wilson took the planner and its contents and escorted Marissa to his office, where he invited an administrative assistant, Helen Romero, to observe as Marissa turned out her pockets and opened her wallet. As Marissa did so, she produced a blue pill (later discovered to be Naprosyn 200 mg), several white pills

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(Cont'd)
true for purposes of the motion for summary judgment and the appeal. But whether Jordan's report is ultimately true or not misses the point and does nothing to change the fact that he made the report and that Wilson had ample reason to believe the report was true.

identical to the one that Jordan had turned in to Wilson, and a razor blade. App. 156a.

Wilson asked Marissa where the blue pill came from. She responded, "I guess it slipped in when *she* gave me the IBU 400s." Wilson asked "who is *she*?" Marissa responded ***"Savana Redding."***

Upon further questioning, Marissa denied any knowledge of the planner or its contents. So Wilson went to find Redding while Schwallier and Romero searched Marissa's clothes for any more pills.

Wilson found Redding in class and had her gather her things and come back to his office. There, he showed her the planner and the pills that he had gotten from Jordan and Marissa. Redding admitted that the planner was hers and that she had lent it to Marissa a few days earlier, while denying that the contents were hers.[2] She also denied that she had ever seen the pills before.

Wilson explained to Redding that he had received a report that she had been passing the pills out at school, which she denied. He then obtained her consent to search her backpack, which turned up nothing. Redding's clothes did not have any pockets to check.

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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. Despite assisting Marissa to conceal such contraband, 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.

4. At that point, Wilson had a decision to make. He confirmed that prescription pills had been distributed again on campus that morning, although he could not be sure who else had pills and in what amounts.[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.[4]

Marissa's implication of Redding had the indicia of reliability. Wilson did not offer Marissa leniency in exchange for information, nor did he attempt to coerce her into naming anyone. He simply asked her where the blue pill came from, unsure of whether another student was even involved. 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

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[3] Even with this additional information, educators cannot be expected to know students' full medical histories, including drugs that they may already be taking and any allergies. And educators certainly cannot be expected to have the medical expertise necessary to know all the risks associated with a particular drug or to predict how individual students may react to it.

[4] National studies note the frequent abuse of prescription and OTC drugs together with alcohol. Office of National Drug Control Policy, Executive Office of the President, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008).

her possession and had distributed at least one to Jordan. Furthermore, the girls' friendship guarded against an ulterior motive for implicating Redding, and if anything, created a disincentive to implicate her.

As for Redding's denials, one possibility was that they were true, although she did not offer any reason why another student would falsely accuse her. Of course, the other possibility was that her denials were merely self-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 one form of contraband onto campus, it was certainly more likely that she would be involved with Marissa in bringing another form of contraband, i.e. prescription pills, onto campus.

Overlaying all of this, Wilson could recall at least two cases when a student was harmed by ingesting 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 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.

Romero and Redding entered the nurse's office, and Romero closed and secured the door to prevent anyone from walking in on them. The only other person in the nurse's office, Schwallier, was also female. Romero started by asking Redding to remove her shoes and socks. She then asked Redding to remove her shirt and pants. Finally, Romero asked Redding to pull and shake her bra band as well as the elastic of her underwear. All of this was done without anyone touching Redding.

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.

B. Procedural History

1. Redding filed suit in the Superior Court of the State of Arizona. Petitioners timely removed the case to the United States District Court for the District of Arizona and 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.

Applying that standard, the district court first considered whether the search was justified at its inception with reasonable grounds for suspecting that the search 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.

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. 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.

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

2. 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. 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." 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. The court also noted the independent evidence that Redding had recently served alcohol to students, including Marissa, before the school dance.

For the court of appeals, a major factor in assessing the scope of the search was petitioners' "strong interest . . . in safeguarding students entrusted to their care from the harm posed by the misuse of prescription drugs." 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. Finally, the court rejected Redding's argument that the Fourth Amendment required petitioners to utilize the least intrusive means possible.

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 and again applied the *T.L.O.* standard to the search, but with a different result.

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. 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. 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. 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.

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. The majority also opined that the suspected

infraction—possession of prescription pills—"pose[d] an imminent danger to no one." App. 29a. Alternatively, the majority believed that Wilson had effectively neutralized any danger by removing Redding from class and bringing her to his office.

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. 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." App. 35a. In response, the dissent noted:

> It is of no small consequence to this analysis that three of the first four judges to address this issue found the Redding search to be constitutional, and two more judges of this en banc panel are of the same view. The majority feels that Wilson, with no legal training, should have known better.

App. 92a.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. First, the Ninth Circuit's decision conflicts with *T.L.O.* in a way that (1) places student safety and school order at risk by impairing the ability of school officials to effectively carry out their custodial responsibility, (2) further diverts school officials from the essential task of educating students, and (3) creates enormous confusion for school officials in trying to determine when and how searches may now properly be conducted. The Ninth Circuit's sliding-scale 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. Moreover, the Ninth Circuit completely disregarded this Court's direction to lower courts that they defer to school officials' judgment concerning the types of conduct that may threaten student safety and disrupt the school environment. *Id.* at 342 n.9. Instead, the Ninth Circuit, with the benefit of hindsight, substituted its own judgment for Wilson's to reach a result that places it well behind the curve in understanding the shifting trends in drug abuse. The Ninth Circuit's statement 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.

Second, 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 than federal judges. When the en banc panel concluded, 6-5, that it would have been clear to a reasonable school official in Wilson's position that the search violated Redding's constitutional rights, the majority blinked at the fact that the district court, the original panel, and three dissenting judges all found the search to be constitutional. To make matters worse, the majority turned its back to the existing case law that either supported the constitutionality of the search or granted qualified immunity to officials who conducted searches that were far more clearly unconstitutional.

Both aspects of the Ninth Circuit's decision are deeply troubling and have school administrators and teachers across the country understandably alarmed.

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *T.L.O.*

1. 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.

2. 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.

More recently, the Court 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, just last year, the Court 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.* clearly remains in effect. 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 and informally to protect students and maintain order. Rarely will that flexibility be needed more than when school officials confront the threat of drug abuse.

3. In this case, the Ninth Circuit gave lip service to the reasonableness standard, and then instead, subtly applied the very standard that *T.L.O.* rejected—probable cause.

On the first prong, the majority actually conceded that a search of Redding was justified at its inception by acknowledging that "the initial search of [her] backpack and her pockets may have been constitutionally permissible."[5] App. 22a. The majority avoided this conclusion, however, by reframing the issue from whether a search was justified at its inception to whether a strip search was justified at its inception.

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*

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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 the search was justified at its inception.

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 factored intrusiveness into its analysis under both prongs, and as a result, skewed the 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.

The majority's flawed authority resulted in a flawed approach that eschewed *T.L.O.'s* reasonableness standard. 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. On the opposite end of the scale,

highly intrusive searches, as the majority deemed the search of Redding to be, require something more than mere 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. Of course, 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. And with no apparent ulterior motive given the girls' friendship, Marissa simply had nothing to gain from implicating Redding, falsely or otherwise.

The majority also offered suggestions regarding what more Wilson could have done to corroborate Marissa's statement, including discussing the matter with Redding's teachers, calling her parents, and questioning still more students. But these hypothetical investigations would only have been designed to amass enough evidence to turn reasonable suspicion into probable cause.

Then, in a bit of irony, the majority rejected the corroborating evidence that petitioners did have, including Jordan's report that Redding had recently served alcohol to students and the other contraband found in her planner. Jordan's report of Marissa giving him a pill proved reliable when Wilson found more of the same pill in her possession. And Jordan had also given Wilson a detailed report about Redding serving alcohol to students, including Marissa, at a pre-dance party. The relevance of this report is clear; the suspicion that Redding had previously distributed one type of drug—alcohol—to Marissa and others made it more probable that she was distributing another type of drug—prescription pills—to Marissa and possibly others. The same can be said of the contraband found in Redding's planner. 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. 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, i.e. prescription pills, onto campus. The majority, however, refused to see the logic.

4. To make matters worse, when the Ninth Circuit moved to the second prong of *T.L.O.* and assessed whether the search was reasonable in scope, it disregarded this Court's direction to lower courts that they defer to school officials' judgment 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.

T.L.O., 469 U.S. at 342 n.9.

The majority did not deny that the measures adopted in this case were reasonably related to finding prescription and OTC pills. Indeed, the pills were certainly small enough to be concealed in or under clothing in a way that would avoid superficial detection.

Instead, the majority's concern was with the search's intrusiveness in light of Redding's age and sex.[6]

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[6] In considering the search's intrusiveness in light of Redding's age and sex, the majority afforded no weight to certain relevant factors, including that the search was conducted in the privacy and security of the school nurse's office by two female staff members who did not touch Redding in any way.

Of course, these factors also have to be considered in proportion to the nature of the infraction, with the search only being unreasonable in scope if it is "*excessively* intrusive." *T.L.O.*, 469 U.S. at 342 (emphasis added).

From Wilson's perspective, the infraction was particularly serious. He was aware of at least two cases when a student was harmed by ingesting 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. Moreover, Jordan reported that the plan was for a group of students to take the pills that day, and Wilson still could not be sure who else had pills and in what amounts.

The majority, however, wiped all of this aside in favor of its own judgment about what does and does not pose a threat to student safety and school order, and with the benefit of hindsight not available to Wilson, concluded that this infraction "pose[d] an imminent danger to no one."

5. With the Ninth Circuit defying *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, the effects will be far reaching.

First, the Ninth Circuit's decision places student safety and school order at risk by impairing the ability of school officials to effectively carry out their custodial responsibility. "[B]ecause drug use and possession of

weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel." *T.L.O.*, 469 U.S. at 352-53 (Blackmun, J., concurring). In many instances, that immediate response will no longer be possible as school officials wait for probable cause to exist before conducting a necessary search. *Id.* And the effect of that delay may well prove catastrophic given the obvious harm that drugs and weapons pose.

Moreover, petitioners had previously thought it inarguable that deterring drug abuse is an "important—indeed, perhaps compelling" concern. *Vernonia*, 515 U.S. at 661. But the Ninth Circuit 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." The Ninth Circuit thereby exposed its ignorance of the fact that the abuse of prescription and OTC drugs is one of the dominant new trends in the continuing war against drug abuse.

Teens are currently abusing prescription drugs far more than any illicit drug except marijuana. Office of National Drug Control Policy, Executive Office of the President, *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008). Among 12- to 13-year olds, prescription drugs are the drugs of choice. *Id.* at 1-2. And these statistics correlate with a sharp increase in poisonings and even deaths related to the abuse of prescription and OTC drugs. *Id.* at 3-4.

Studies show that this disturbing trend is fueled, in part, by the myth that prescription and OTC drugs provide a "safe" high. *Id.* at 4-5. So at the same time that the Ninth Circuit erects barriers to an immediate and effective response from school officials, it further endangers students by unwittingly sending the false though authoritative message that the abuse of these drugs does not place them at risk.

Second, the Ninth Circuit's decision "adds to the ever-expanding diversionary duties of schoolteachers," drawing time, attention, and resources away from education. *Vernonia*, 515 U.S. at 664. Indeed, "[t]he time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). Yet this is exactly what the Ninth Circuit advocates in suggesting that Wilson should have done more to corroborate Marissa's implication of Redding by consulting teachers and questioning still more students.

Of course, this even assumes that school officials are up to the task. But "[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." *Id.* Regardless, school officials now have no choice but to invest the time to educate themselves, instead of their students, on the complexities of probable cause.

Third, the Ninth Circuit's decision creates enormous confusion for school officials in determining when and how searches may now be conducted. 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." 469 U.S. at 343. But the Ninth Circuit's sliding-scale approach requires an analysis that is altogether more layered and complex than even probable cause.

This case illustrates the complexity of the analysis following the Ninth Circuit's decision. 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 mere reasonable suspicion.

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 to opine as to whether this was more or less intrusive. Indeed, the majority offered no guidance as to exactly which component(s) of this search crossed that threshold of intrusiveness, such that probable cause was required as justification.

If the Ninth Circuit is unable to apply its own analysis, there is little hope of school officials being able to. And instead of proceeding "according to the dictates of reason and common sense," their confusion about whether a particular search is now permissible is likely to result in paralyzing inaction. *T.L.O.*, 469 U.S. at 343.

II. THE DECISION BELOW DEPARTS FROM ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY AND WARRANTS THIS COURT'S IMMEDIATE REVIEW.

1. Wilson confronted a difficult situation for any school administrator. He confirmed that prescription pills were being distributed on campus, although he could not be sure who else had pills and in what amounts. Marissa directly implicated her friend Redding as the supplier with nothing to gain from doing so. Wilson already had a strong basis for suspecting Redding of having served alcohol to students. Her planner was now sitting open in front of him with knives, lighters, and other contraband. He could recall at least two prior occasions when a student was harmed by ingesting pills distributed on campus, including a near fatality. And his information was that a group of students was planning to take the pills that day.

In a 20-page ruling, the district court agreed that petitioners did not violate Redding's Fourth Amendment rights on these undisputed facts. Like Wilson, the court found reasonable grounds for suspecting that Redding was in possession of prescription and OTC pills in violation of Safford's policies. And in looking to how searches were conducted in several other reported cases, the court also found the search to be permissible in scope.

The original panel of the Ninth Circuit affirmed in a published decision. The panel noted all of the information tying Redding to the possession and distribution of pills and credited petitioners' need to respond swiftly and informally to protect students and maintain order.

On rehearing, a majority of the en banc panel concluded that Wilson, the district court, the original panel, and three dissenting judges all misapprehended the law. But when the majority further concluded, 6-5, that Wilson violated Redding's clearly established rights, it departed from an important guiding principle of the qualified immunity doctrine—"[i]f judges . . . disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *see also Morse v. Frederick*, 127 S.Ct. 2618, 2641 (2007) ("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, the Ninth Circuit holds Wilson to a higher standard on understanding the law than five federal judges, including four highly respected members of the court itself 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).

2. In denying Wilson qualified immunity, the Ninth Circuit essentially 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 ex rel. Williams v. Ellington*, the Sixth Circuit upheld a "strip search" of a student for an unknown drug even though she did not look disoriented or intoxicated, prior searches of her locker and purse failed to turn up any evidence of drug use, and she denied possession of any drug. 936 F.2d 881, 883, 887 (6th Cir. 1991). 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 "crotching" an unknown drug in a pair of sweatpants. 991 F.2d 1316, 1323 (7th Cir. 1993). 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 ex rel. Hall v. Talladega City Board of Education*, an en banc panel of the Eleventh Circuit considered the searches of two eight-year-old girls who were asked to remove their clothes not once but twice after being suspected of taking seven dollars from a classmate's purse. 115 F.3d 821, 822-23 (11th Cir. 1997). 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.

An important lesson emerges here, one that the majority 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." App. 85a.

3. In the majority's view, Wilson, the district court, the original panel, and three dissenting judges all misapprehended the law. But out of all of them, only Wilson is branded a constitutional violator. This is manifestly wrong.

School officials have a difficult enough job 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. Indeed, 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.

In view of the manifest error of the Ninth Circuit's qualified-immunity analysis, this Court may wish to consider summary reversal.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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