In The Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, *et al.*,
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 OF *AMICI CURIAE*
THE RUTHERFORD INSTITUTE,
GOLDWATER INSTITUTE
AND CATO INSTITUTE
IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because a decision adverse to the respondent will increase the threat to the fundamental rights of children in our public schools and will place them at risk of unwarranted invasions of the most intimate aspects of their privacy.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*,

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief.

and files *amicus* briefs with the courts. This case is of central concern to Cato because it involves an important application of the Fourth Amendment's protections against unjustified, arbitrary, and overly intrusive searches.

The Goldwater Institute's Scharf-Norton Center for Constitutional Litigation is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute advances public policies that further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis.

Strip searches are universally recognized as severe intrusions of personal privacy that ought to be strictly limited. For the reasons set forth in this brief, *amici* believe that the Ninth Circuit's *en banc* decision should be affirmed. School administrators should not be given a virtual *carte blanche* to conduct strip searches of students.

SUMMARY OF THE ARGUMENT

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), this Court accommodated the interests of public school educators and administrators in maintaining order and discipline in public schools by easing the restrictions on searches normally imposed upon state actors by the Fourth Amendment. In ruling that in-school searches of students in the school setting need not be supported by probable cause, however, the *T.L.O.* decision made clear that the "reasonableness" of a school search largely depends on whether the search is "excessively intrusive in light of the age and sex of the student and nature of the infraction." *Id.* at 342. This Court clearly signaled that the severity of the privacy invasion must be considered when deciding whether school officials have violated a student's Fourth Amendment rights.

In light of *T.L.O.*'s direction to consider the intrusiveness of a search, the *en banc* Ninth Circuit correctly understood here that a strip search of a student will be reasonable only when school officials have clear evidence to justify it. Strip searches are unquestionably privacy invasions of a different order and higher degree than "ordinary" searches and should be undertaken rarely. Only when school officials have highly credible evidence showing (1) the student is in possession of objects posing a significant danger to the school and (2) that the student has secreted the objects in a place only a strip search will uncover is such a search reasonable.

Questions involving Fourth Amendment reasonableness necessarily must be decided on a case-by-case basis, and the Ninth Circuit properly determined that the strip search of Savana Redding violated the girl's Fourth Amendment rights. Most importantly, the strip search was initiated on the basis of questionable information. Indeed, there was a complete absence of any information indicating that contraband would be found underneath Savana's clothing.

This Court should affirm the Ninth Circuit and, in so doing, provide guidance to school officials that will protect the security of students from severe intrusions into their personal privacy. This Court should establish that strip searches of children may be undertaken only after careful reflection and only when compelling evidence suggests that a search is necessary to preserve school safety and health.

I. STRIP SEARCHES, PARTICULARLY OF STUDENTS, ARE SUBJECT TO A HIGHER LEVEL OF SCRUTINY THAN OTHER KINDS OF SEARCHES

The serious nature of the intrusion effected by a strip search cannot be overstated. Strip searches are the most severe invasions of privacy that the government can legally commit. One court has described "strip searches involving the visual inspection of the anal and genital areas as 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive,

signifying degradation and submission[.]'" *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (quoting *Tinetti v. Wittke*, 479 F. Supp. 486, 491 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980)).

Strip searches of students specifically have been universally recognized as "highly intrusive." *Phaneuf v.Fraikin*, 448 F.3d 591, 596 n. 4 (2d Cir. 2006). "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old is an invasion of constitutional rights of some magnitude. More than that, it is a violation of any known principle of human dignity." *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir. 1991) (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir.), *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981)).

In the *T.L.O.* case, Justice Stevens and two other Justices made clear that strip searches are of a different order than other searches, and courts must take this difference into account when evaluating the reasonableness of these searches. "One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse. . . . To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm." *T.L.O.*, 469 U.S. at 381, n. 25 (Stevens, J., concurring in part and dissenting in part).

Because of the assault on human dignity caused by a strip search and the danger of severe trauma to children, school officials must have particularly strong and targeted evidence to support the decision to require a student to disrobe and expose his or her private areas. *T.L.O.* recognized as much in holding that "[t]he determination of the standard of reasonableness governing any specific class of searches 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)) (emphasis added).

Indeed, this Court has repeatedly held that the determination of reasonableness under the Fourth Amendment is informed by the nature of the intrusion. *Terry v. Ohio*, 392 U.S. 1 (1968), held that investigatory stops of individuals involving "pat-downs" were allowable where police have "reasonable suspicion," a standard short of probable cause. This Court arrived at its holding only after considering "the nature and quality of the intrusion on individual rights," *Terry*, 392 U.S. at 24, and determining that pat-downs are a "limited search for weapons" and do not involve an extensive exploration of the person. *Id*. at 25.

The Court also stressed the limited nature of the intrusion into privacy in *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987). *O'Connor* established that searches of government employee offices for evidence of work-related misconduct need only be supported by reasonable suspicion. Workplace searches entail

an invasion of privacy interests that "are far less than those found at home or in some other contexts. . . . As with the building inspections in *Camara*, the employer intrusions at issue here 'involve a relatively limited invasion' of employee privacy." *Id*., quoting *Camara*, 387 U.S. at 587.

This balancing must be made on a case-by-case basis by government actors:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. *In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails*. Courts must consider *the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it*, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559 (1979) (emphasis added). As recognized in *Terry*, the "sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, *and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.*" 392 U.S. at 19, n. 15 (emphasis added).

Consistent with these principles and the analysis in *T.L.O.*, the Ninth Circuit's *en banc* decision held, in accord with other circuit courts, that "'the reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion.'" *Redding v. Safford Unif. Sch. Dist. # 1*, 531 F.3d 1071, 1081 (9th Cir. 2008) (quoting *Phaneuf*, 448 F.3d at 596). *Accord Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). The strip search of Savana failed that test because (1) the evidence implicating Savana with possession of ibuprofen, and in particular the accusation of another student that Savana was the source of the pills, was not sufficiently probative or reliable to support a strip search, *Redding*, 531 F.3d at 1082-84, (2) school officials had no evidence indicating that Savana was hiding any pills beneath her clothes, *id*. at 1084-85, and (3) the nature of the infraction was not such as to justify a strip search. *Id*. at 1088-87.

The Petitioners assert that the ruling below is inconsistent with *T.L.O.* and allows school officials insufficient latitude in determining what steps to take to preserve the order and safety of schools. But where strip searches of children are at issue, *T.L.O.* mandates a balancing of public and private interests such that school officials exercise more restraint and judges greater scrutiny. It is only proper that school officials be required to exercise more caution in making the decision to conduct a strip search, given the extreme invasion and grave risk of trauma

inherent to such searches. The ruling below is true to the interest-balancing required by *T.L.O.* by imposing heightened standards in judging whether school officials acted reasonably in strip searching a student.

A. This Court Has Consistently Held That More Intrusive Searches Require More Compelling Government Justifications

This Court's Fourth Amendment jurisprudence, capped by *T.L.O.*, militates an enhanced level of suspicion for strip searches. As described above, *T.L.O.*'s reasonableness standard ultimately depends upon a balancing of interests that takes into account the invasion which the search entails. *T.L.O.*, 469 U.S. at 337. A search must be "reasonably related in scope" to the circumstances justifying the interference. As a general matter, Fourth Amendment reasonableness depends upon the scope of the intrusion and the manner in which it is conducted. *Bell*, 441 U.S. at 559.

The Petitioners' contention that the enhanced standard applied by the Ninth Circuit (and other circuit courts that have reviewed student strip searches) conflicts with *T.L.O.* is based on the assumption that *T.L.O.* establishes "reasonable suspicion" as the standard for student searches. Pet. Br. 30, 32. But nothing in *T.L.O.* indicates that it adopted the "reasonable suspicion" standard for all student searches. Instead, this Court held that reconciliation of student privacy interests with the

needs of teachers and school administrators to maintain order "does not require strict adherence to the requirement that searches be based on probable cause[.]" *T.L.O.*, 469 U.S. at 341. This Court did not rule out that probable cause, or some level of suspicion approaching probable cause, may be appropriate. Indeed, it held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id*.

T.L.O.'s reliance on the decision in *Terry v. Ohio*, *supra*, should not be taken as a signal that the reasonableness of each and every student search, and strip searches in particular, is to be judged under *Terry*'s "reasonable suspicion" standard. Because *Terry* authorized only the limited (albeit significant) invasion of a stop and "frisk," a single standard of "reasonable suspicion" could be established as justifying the invasion. However, as the instant case bears out, not all student searches involve the same degree of intrusion into privacy. It would be a departure from this Court's established precedent--which measures Fourth Amendment reasonableness by looking to the nature of the intrusion--to conclude that strip searches of students are justified by the same quantum of evidence that justifies an examination of those student's lockers or backpacks.

The Petitioners seek to divorce the nature and degree of the intrusion upon a student from the inquiry into whether a search is justified. They criticize the *en banc* opinion for breaking the search

of Savana into two components—the search of her belongings and the search requiring that she disrobe and expose her private areas to school personnel.

But this criticism fails to recognize that a strip search is an intrusion into privacy that is different of a wholly different magnitude from a search of a student's effects, or even of the student's outer clothing. Under established Fourth Amendment principles measuring reasonableness on the basis of the invasion involved, student strip searches must be evaluated under a higher standard of scrutiny than other student searches. Otherwise, school officials have essentially unfettered discretion to conduct strip searches whenever they suspect a violation of school rules regarding the possession of contraband.

B. The Court Below Correctly Found the Factual Predicate for the Strip Search—Especially Marissa's Accusation—Not to Be Reasonable

The *en banc* Ninth Circuit closely examined the information that was the basis for searching Savana. Citing other circuit courts that have considered strip searches, its decision noted that the nature and reliability of evidence is a crucial factor in determining whether a strip search is reasonable. *Redding*, 531 F.3d at 1081 (citing *Cornfield*, 991 F.2d at 1321, and *Phaneuf*, 448 F.3d at 596). Again, this approach is wholly consistent with the principle that the scope of the particular intrusion is the central

element in the analysis of reasonableness. *Terry*, 392 U.S. at 19, n. 15.

The lower court recognized that the primary basis for conducting the strip search, Marissa's accusation, was self-serving and of doubtful reliability. *Redding*, 531 F.3d at 1082-83. It relied on case law holding that informant statements inculpating others made after the informant has been apprehended or arrested are not considered reliable. *See, e.g. Lilly v. Virginia*, 527 U.S. 116, 133 (1999) ("our cases consistently have viewed an accomplice's statements that shift or spread the blame to" another are insufficiently reliable to be admitted in evidence, even if the statements are part of an otherwise inculpatory confession). This Court has recognized that such statements are clouded by the motive to mitigate culpability by spreading or shifting blame to others. *Lee v. Illinois*, 476 U.S. 530, 544 (1986). *See also United States v. Mangana-Olvera*, 917 F.2d 401, 408 (9th Cir. 1990) (courts have closely scrutinized statements made while a declarant is in custody and offered against an accused because such statements may be made with the purpose of placating authorities or diverting their attention).

The Petitioners take issue with the conclusion that Marissa's accusation was of limited reliability, arguing that this finding was based upon precedent arising from irrelevant criminal cases. Pet. Br. 30-31. But even *T.L.O.* looked to criminal law precedent in determining whether information possessed by the school officials supported the reasonableness of their

search. *T.L.O.*, 469 U.S. at 345-46 (citing *Warden v. Hayden*, 387 U.S. 294, 306-07 (1967), and *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

Moreover, cases involving informant reliability in the criminal context are relevant not because a criminal matter is involved but because they recognize '"common-sense conclusion[s] about human behavior' upon which 'practical people'—including government officials—are entitled to rely." *T.L.O.*, 469 U.S. at 346. The idea that a person, especially a young person, will try to minimize her guilt and shift blame to others when caught red-handed is simply a recognition of human nature borne out by experience. It does not cease to have relevance simply because the person is in a school and surrounded by school officials, as opposed to law enforcement agents. The decision below thus correctly held that school officials should have treated Marissa's accusation with skepticism.[2]

Marissa's statements clearly fall into the category of statements deemed inherently unreliable as a matter of experience and common sense. They named Savana as the source of the pills, and indicate an attempt not merely to spread blame but to

[2]The Petitioners, citing *C.B. by and through Breeding v. Driscoll*, 82 F.3d 383, 288 (11th Cir. 1996), assert that Marissa's accusation should not be deemed unreliable because she knew she faced discipline if her accusation proved to be false. But Marissa did not tell school officials that Savana had pills; she stated that she obtained the pills from Savana. Thus, there was nothing about Marissa's accusation that was provably false such that she could fear additional discipline for lying.

implicate and divert attention to Savana as the more culpable "dealer." At the time, Marissa had been found possessing one blue pill, several white pills, and a razor blade, and so was clearly in trouble. Given Marissa's incentive to deflect focus from herself, school officials were not reasonable in determining that her statements were grounds for conducting strip-searching Savana.

Marissa's accusation needed additional significant indicia of reliability to justify the severe intrusion upon Savana's privacy. Here again, the record fails to reveal any such facts, other than the existence of some friendship between Savana and Marissa. However, friendships, especially among teenage girls, can be particularly volatile and involve dynamics that prevent one from presuming that a "friend" will not seek to shift blame to another friend. As pointed out in the Respondent's Brief, there in fact had been a falling out between Savana and Marissa before Marissa was caught with the pills. Resp. Br. 33. The Petitioners point to the fact that Savana loaned Marissa the black planner in which knives and other contraband were found. Pet. Br. 10, 28. But the record is devoid of evidence showing that Savana loaned the planner to Marissa knowing Marissa would use it to hide pills or other drugs. Resp. Br. 33-34 (citing J.A. 14a). It also is significant that Jordan, a person with inside information who was apparently trying to assist school administrators, did not implicate Savana in the possession of pills. Pet. Br. 6.

In sum, the inherent dubiousness of Marissa's blame-shifting statements was not offset by any significant indicia of reliability. Absent some corroboration of Marissa's self-serving accusation, it was not reasonable for school officials to conduct a strip search.

C. The Court Below Also Correctly Found the Strip Search Not to be Reasonably Related in Scope to the School Officials' Investigation

T.L.O.'s two-fold inquiry also requires an examination of whether the search conducted by school officials was "reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S. at 341

The decision to strip-search of Savana cannot satisfy this stricter reasonableness standard--or even a less rigorous reasonable suspicion standard--because even if school officials had a reliable basis for believing Savana possessed drugs, they did not have reason to believe that she had hidden the drugs in her underclothing. Suspicion justifying a search must exist not only as to the individual or premises, but also as to the place where the search is to be conducted. "Thus, the scope of a lawful search is 'defined by the object of the search *and the places in which there is probable cause to believe that it may be found*.'" *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)) (emphasis added). The "totality of

circumstances" approach to search justification requires government officials to have a basis for concluding that contraband will be found "in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

This concern that searches be focused on the places where suspicion exists is of particular importance when searches of the person are at issue. For example, to find in *Wyoming v. Houghton*, 526 U.S. 295 (1999), that probable cause to believe a vehicle contains contraband authorizes police to conduct a search of the passenger's belongings, this Court first had to distinguish *United States v. Di Re*, 332 U.S. 581 (1948), and *Ybarra v. Illinois*, 444 U.S. 85 (1979), which held that probable cause to search a car or business establishment did not justify a body search of a passenger or person on the premises:

> These cases turned on the unique, significantly heightened protection afforded against searches of one's person. 'Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.' . . . Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car.

Houghton, 526 U.S. at 303 (quoting *Terry*, 392 U.S. at 24-25). Searches of the person, and strip searches in particular, are severe privacy intrusions. The scope of such searches must be supported by some particularized evidence that the items sought will be found in the specific place to be searched.

In this case, the Petitioners did not have sufficient grounds for believing that they would find drugs by strip-searching Savana. There is no indication that school officials had knowledge of a practice among students to hide prohibited items in their undergarments. With respect to this particular incident, the Petitioners had already conducted a strip search of Marissa *and found nothing hidden in her undergarments*; all the pills and other prohibited items were found in Marissa's effects. Further, there was no indication that Savana or Marissa, having become aware that they were suspected of drug possession, had an opportunity to hide any drugs in their undergarments. Savana was taken directly from her class to Defendant Wilson's office and was under observation from that time forward. *Cf. Cornfield*, 991 F.2d at 1322 (strip search of student for drugs was reasonable where officials observed unusual bulge in the student's crotch area).

If, as urged by Petitioners, the *en banc* decision is reversed and the search held to have been reasonable in scope, it will signal to school officials that they have authority to conduct strip searches simply because a student could *possibly* hide the sought item in her undergarments. The implications

for student privacy rights are enormous. Strip searches would be allowed whenever the item sought is small enough to fit inside clothing, regardless of whether there is any basis for believing a student has secreted an item near her body. Student strip searches would become the rule, rather than the exception, particularly in our "zero tolerance" world.

The Fourth Amendment's guarantees to security and privacy are offended by a rule which would place so little restraint on the power of government officials. The heightened reasonableness standard required when examining strip searches demands that school officials in particular act on something more than hypothetical possibility when requiring students to shed their clothes and expose their bodies. Student strip searches should be allowed only when school officials have compelling information indicating a strong likelihood that the strip search will disclose contraband, not whenever officials suspect a student is carrying contraband.

D. The Court Below Also Correctly Found That the Strip Search's Level of Intrusion Was Disproportionate to the Nature of the Violated School Rule

The Petitioners also claim that the *en banc* decision erred by considering the nature of the infraction as part of the "reasonableness" calculus. Yet *T.L.O.* makes the infraction one consideration in determining the validity of a student search. That is a search must not be "excessively intrusive in light of

the age and sex of the student and *the nature of the infraction*." *T.L.O.*, 469 at 342 (emphasis added).

Notwithstanding this holding, the Petitioners point to a footnote in *T.L.O.* that expresses a hesitancy to make the legality of a student search dependent on a judge's evaluation of the importance of a school rule. *Id.* at 342, n. 9. However, this footnote does not indicate that no circumstances exist under which the nature and seriousness of the infraction at issue is relevant to determining a search's reasonableness. Instead, this Court wrote that "the courts should, *as a general matter*, defer to [the] judgment [of school officials] 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.* (emphasis added).

Compounding the overall unreasonableness of the search under the applicable standards is the special circumstance of the imposition of the search upon a minor of tender years in a school setting. The Court has recognized that young children are especially impressionable, which limits the type of coercive actions in which school officials permissibly may engage. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). Likewise, the Court has recognized that parents have the primary responsibility and control over their children's education. *Wisconsin v.* Yoder, 406 U.S. 205, 213-14 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). It is a cardinal principle "that the custody, care and nurture of the child reside first in the parents, whose primary

function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

One aspect of this case that is especially shocking is that despite Savana's young age and the extreme coercion and intrusion on the part of school officials, Savana's parents were not notified of the strip search, nor invited to be present. Given that Savana was in a controlled setting at all times, and that as a result the prospect of hiding or disposing of evidence was minimal, it would not be cumbersome to have required the school to contact the girl's parents. An attempt should have been made to notify one of her parents of the situation and a reasonable opportunity allowed for a parent to be present and consulted about the search. To strip-search a young minor outside of the presence of parents invites abuse and, at the same time, the prospect of liability of school officials that the district here tries to avoid. Because this is far from the circumstances in which most criminal searches have been considered, *amici* urge the Court to take this important factor into account.

Strip searches of children in schools are not run-of-the-mill actions. The seriousness of the invasion resulting from a strip search requires that they be undertaken only in the most serious of circumstances. Courts must consider the seriousness of the infraction at issue before ratifying the decision to subject a student to a possibly traumatizing

examination if such examinations are to remain the exception rather than the rule.

II. THIS COURT SHOULD REACH THE SUBSTANTIVE FOURTH AMENDMENT ISSUE AT THE HEART OF THIS CASE

Amici agree with the views expressed in the other briefs filed in this action; the Court ought to rule on the substantive Fourth Amendment issue in this case. Although the Court's recent decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), allows a court discretion to dispose of a claim against individual state actors under 42 U.S.C. § 1983 on qualified immunity grounds by determining whether the right at issue was "clearly established," *Pearson* did not rule (or even suggest) that the preferred course is to avoid a decision on whether a constitutional right was violated:

> [W]e continue to recognize that [the two-step procedure of *Saucier v. Katz*, 533 U.S. 194 (2001)] is often beneficial. For one thing, there are cases in which there would be little, if any, conservation of judicial resources to be had by beginning and ending with a discussion of the "clearly established" prong.

Pearson, 129 S.Ct. at 818. In short, *Pearson* stressed that the policy underlying *Saucier*, *i.e.*, promotion of

the development of constitutional precedent, is an important one. *Id*.

Under the circumstances of the instant case, the policy of judicial economy supported by *Pearson* does not urge eschewing the *Saucier* procedure by deciding only whether the constitutional right at issue was clearly established. Claims were asserted against the School District as a governmental entity, and those claims are not barred by qualified immunity. *Leatherman v. Tarrant County Narcotics, Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993). Indeed, because the decision on the reasonableness of the strip search will advance resolution of other claims against the School District, judicial economy counsels in favor of settling the Fourth Amendment issue directly.

Pearson also holds that use of the *Saucier* procedure is warranted and valuable "with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson*, 129 S. Ct. at 818. That is, if qualified immunity is usually available in a particular kind of case, avoidance *Saucier*'s first prong will stifle development of constitutional precedent. That circumstance also applies here because student strip searches are most likely to be the result of school officials' *ad hoc* decisions where only individual capacity suits--subject to a qualified immunity defense--are available to the injured parties.

Of greater importance, however, is the need for a controlling decision offering guidance to school officials regarding strip searches. Given the substantial public and private interests at stake, officials must fully understand the limits on their authority. Anything less undermines student privacy.

CONCLUSION

Throughout their merits brief, Petitioners decry a regrettable consequence of the decision below: educators must now "school themselves" in Fourth Amendment jurisprudence and allows courts to second-guess their judgment. But, given the seriousness of the intrusion effected by strip searches, this consequence is unavoidable.

School officials must realize that they may conduct strip searches only in extremely limited circumstances, and only on the basis of compelling evidence. The alternative implicit in the Petitioners' suggested resolution of this case is an unblinking deference to school officials that places students' privacy and security in grave jeopardy.

For the above reasons, the Ninth Circuit properly found that the strip search of Savana Redding was not reasonable and therefore violated the Fourth Amendment. That decision should be affirmed as guidance to school officials, and to ensure that the practice of strip-searching students remains appropriately rare.

Respectfully submitted,

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