No. 08-479

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

RESPONDENT'S BRIEF IN OPPOSITION

BRUCE G. MACDONALD
MCNAMARA, GOLDSMITH,
JACKSON & MACDONALD, P.C.
1670 E. River Road, Suite 200
Tucson, Arizona 85718
(520) 624-0126

ANDREW J. PETERSEN
HUMPHREY & PETERSON, P.C.
3861 E. Third Street
Tucson, Arizona 85716
(520) 795-1900

DANIEL JOSEPH POCHODA
ACLU OF ARIZONA
P.O. Box 17148
Phoenix, Arizona 85011
(602) 773-6003

ADAM B. WOLF
Counsel of Record
M. ALLEN HOPPER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
1101 Pacific Avenue, Suite 333
Santa Cruz, California 95060
(831) 471-9000

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

QUESTIONS PRESENTED

1. Whether the court of appeals erred by holding that it is unreasonable and unconstitutional for a school official to strip search a thirteen-year-old girl based on unreliable information that she previously possessed ibuprofen and no information that she possessed ibuprofen underneath her clothing at the time of the search.

2. Whether a school official should have known that this traumatic and unnecessary strip search was unreasonable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 15, Respondent April Redding hereby submits this brief in opposition to the petition for a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

This case involves a school principal who ordered a strip search of a thirteen-year-old girl based on unreliable information that the girl had possessed ibuprofen at an unspecified time in the past and in an unspecified location. The Ninth Circuit Court of Appeals held that this traumatizing search was unreasonable and, relying on well-established precedent, ruled that the official who ordered the search should have known it was improper and illegal. Because the opinion below neither conflicts with decisions of other circuits nor raises an important question of federal law, the petition for a writ of certiorari should be denied.

1. Savana Redding was a model student at Safford Middle School. She received honors grades and maintained a clean disciplinary record. Pet. App. 117a. In the fall of 2003, Savana was thirteen years old. *Id.*

2. On October 8, 2003, a Safford Middle School student, Jordan, approached the school's assistant principal, Petitioner Kerry Wilson, and explained that he received a white pill earlier that day from a student named Marissa. Pet. App. 7a. Wilson verified with the school's nurse that the pill

was 400 mg ibuprofen. Pet. App. 7a. A 400 mg ibuprofen pill, while considered prescription strength, is equivalent to two over-the-counter 200 mg Advil capsules. Pet. App. 2a. Ibuprofen, like other common pills such as Naprosyn, is used to treat pain and inflammation, as well as to combat the discomfort related to menstrual cramps. Pet. App. 7a, 8a n.4.

Wilson summoned Marissa from class, asked her to gather her belongings, which included a planner, and escorted her to his office. Pet. App. 7a-8a. Marissa disclaimed any knowledge of the planner, even though it was sitting on her classroom desk. Pet. App. 101a-102a. The planner contained small knives, a lighter, and a cigarette. Pet. App. 8a.

With his administrative assistant, Helen Romero, observing, Wilson asked Marissa to turn out her pockets and open her wallet. *Id.* This search yielded several 400 mg ibuprofen pills and a 200 mg Naprosyn pill. *Id.* After being caught with these pills and worried about being disciplined, Marissa "offered up" Savana Redding by alleging that Savana had given her the pills. *Id.* Marissa did not provide any further details regarding Savana—e.g., when and where the alleged provision of pills occurred, whether Savana presently possessed pills, or where (in her purse, in her locker, or on her person) Savana kept such pills—and apparently Wilson did not ask any such follow-up questions. *Id.*

Wilson ordered Romero to escort Marissa to the nurse's office. *Id.* The nurse and Romero asked Marissa to remove her socks and shoes, raise up her shirt, pull out the band of her bra, take off her pants,

and stretch the elastic on her underwear. Pet. App. 8a-9a. These searches revealed nothing. Pet. App. 9a.

3. Acting on Marissa's accusation, Wilson found Savana in her math class, ordered her to pack up her belongings, and instructed her to follow him to his office. Pet. App. 3a. Wilson asked Savana if she recognized the planner and whether its contents belonged to her. *Id.* Savana acknowledged that she had lent the planner to Marissa many days earlier, but told Wilson that it was empty when she lent it and that she had never previously seen the planner's contents. *Id.*

Wilson next directed Savana's attention to the ibuprofen pills he confiscated from Marissa. Pet. App. 4a. Savana replied that she had never seen the pills, had nothing to do with these pills, and had never brought prescription pills to school, let alone provided them to other students. *Id.* Even though Savana's answers were not evasive or otherwise troubling, Wilson asked to search Savana's belongings. *Id.* Wilson, aided by Romero, rummaged through Savana's backpack and found nothing suspicious. *Id.*

When the search of Savana's backpack yielded no evidence of contraband, Wilson did not contact people with relevant information or otherwise attempt to corroborate Marissa's accusation. Instead, Wilson ordered Romero and the school nurse to strip search Savana. Pet. App. 5a. The school officials ordered Savana to remove her shoes and outergarments. *Id.* With Savana seated in only her bra and underwear, Romero and the

school nurse found no pills in Savana's shoes or clothing. *Id.* Romero then instructed Savana to pull her bra to the side and shake it, exposing Savana's breasts to the school officials. *Id.* The shaking did not yield any pills. *Id.* Finally, Romero ordered Savana to pull out her underwear at the crotch and shake it, exposing her pelvic area to the officials. *Id.* This strip search, like the search of Savana's backpack, failed to reveal any pills. *Id.*

4. The strip search of Savana was no ordinary search of a locker, backpack or pencil case.[1] Pet. App. 16a ("Let there be no doubt: the Safford school officials conducted a strip search of Savana."). Such an invasive search of an adolescent girl, as Savana's testimony demonstrates and *amici* verified, has profound, long-lasting consequences.

Savana described the viewing of her naked body by school officials as "the most humiliating experience" of her short life. Pet. App. 5a. Embarrassed and scared, Savana held her head down throughout the strip search "so that they could not see that I was about to cry." Pet. App. 134a.

As set forth by *amici curiae* National Association of Social Workers *et al.* ("NASW") in a brief submitted to the court of appeals, the academic literature demonstrates that Savana's reaction was typical. Pet. App. 30a-31a. NASW's brief

---

[1] Even though Petitioners never once employ the phrase "strip search," this is undoubtedly an apt description of the search. *See* Pet. App. 16a-18a (citing numerous court of appeals opinions, state penal statutes, and Black's Law Dictionary to conclude that this was clearly a strip search).

documented that many young strip-search victims suffer post-search symptoms such as anxiety, depression, and suicidal thoughts. *Id.* A child who is strip searched, NASW reported through the citation of studies, can experience trauma similar in kind and degree to the suffering of sexual-abuse victims.

5. Wilson ordered this traumatic search of Savana based solely on the type of unreliable, blame-shifting allegations that are uttered daily in schools: one student, attempting to get out of trouble, implicates another student for the alleged wrongdoing. Other than the finger pointing by Marissa, no information connected Savana to the ibuprofen. *See* Pet. App. 9a-10a ("[O]n the sole basis of Marissa's attempt to shift the school officials' focus off herself and onto Savana, and without additional questioning or investigation, Wilson directed his assistant . . . to require a thirteen-year-old to disrobe."). Jordan, whose statements to Wilson precipitated the searches of Marissa and then Savana, did not even mention Savana's name. Pet. App. 6a-7a. Marissa, for her part, did not allege that Savana currently possessed any pills, let alone that Savana was secreting pills in her underwear. Pet. App. 8a, 29a. In fact, Marissa did not even claim that Savana gave her pills that day. Even if Savana had prior involvement with ibuprofen—which she did not—based on the information school officials had, the conduct could have taken place days, if not weeks, before.

Wilson never corroborated Marissa's self-serving statement. Pet. App. 10a. He did not follow up with Savana's teachers, search Savana's locker, or

even call Savana's mother, who lived nearby. Finally, Savana's statements to Wilson, unlike Marissa's, completely checked out: Nothing in her backpack or outergarments led to suspicion that this honor-roll student was engaged in any suspicious activity. Pet. App. 22a ("[T]he initial search of Savana revealed nothing to suggest she possessed pills or that she was anything less than truthful when she emphatically stated that she had never brought pills into the school.").

6. Through her mother, Savana filed a complaint against the school district and various school officials for violations of the Fourth Amendment and state law. Pet. App. 10a, 127a. The district court granted Petitioners' motion for summary judgment and a three-judge panel of the court of appeals, over a vigorous dissent, affirmed. Pet. App. 10a-11a. Upon a vote of the majority of its active judges, the court of appeals then ordered rehearing en banc. Pet. App. 12a.

The court of appeals ordered further briefing. Supplementing the parties' briefs before the en banc court, *amici* The Rutherford Institute and NASW filed separate briefs supporting Savana. The Rutherford Institute focused on how this Court's precedent dictated that Marissa was so clearly an unreliable informant that her uncorroborated statement could not form the basis for such an intrusive search. NASW, as discussed above, highlighted for the court the grave consequences of a strip search, especially for an adolescent girl.

Following argument, the en banc court reversed the order granting summary judgment.

Pet. App. 1a-38a. Applying this Court's and court of appeals' precedent, the en banc court held, in a thorough opinion, that the strip search of Savana was neither justified at its inception nor permissible in scope. Pet. App. 12a-33a. The court then affirmed the grant of qualified immunity to the school officials who merely implemented Wilson's strip-search order, but reversed the grant of qualified immunity to Wilson himself. Pet. App. 38a. Wilson's order to strip search thirteen-year-old Savana, the court held, was "patently in defiance" of clearly established law. Pet. App. 35a.

REASONS FOR DENYING THE PETITION

The decision below follows clearly established law in finding that a school official cannot strip search a thirteen-year-old girl based on unreliable information that she might have possessed ibuprofen at an unspecified earlier time and in an unknown location. Review by this Court is unnecessary for three reasons: First, Petitioners do not allege a circuit split, and indeed there is none. Second, neither the parties nor the court of appeals seriously disputes the legal frameworks governing the constitutional inquiry and the qualified-immunity analysis. Far from raising an important question of federal law, Petitioners seek fact-bound error correction, which does not warrant this Court's discretionary review. Third, the court of appeals reached the correct result. Well-established case law dictates that Wilson should not have ordered the strip search of Savana. There is no reason for intervention by this Court.

1. Even Petitioners do not argue that the court of appeals' opinion creates a circuit split. In fact, the opinion is fully consistent with other appellate decisions. Courts of appeals have regularly held unconstitutional a strip search of a student based on an uncorroborated tip that the student possessed a controlled substance. *See, e.g.*, *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006); *Bilbrey ex rel. Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (per curiam).[2]

It is uncommon for a school official to strip search a student pursuant to an uncorroborated tip of possession of any drug—let alone ibuprofen. In the small number of cases where this has occurred, however, courts have not hesitated to hold that such searches are unconstitutional. The opinion below does not create a split in authority requiring the attention of this Court.

2. This case does not raise important questions of federal law. The court of appeals and the parties agree on the applicable legal frameworks: *TLO* guides the underlying constitutional inquiry about the reasonableness of the search, and the clearly-established-law standard governs the

---

[2] *Bilbrey* and *Renfrow*, pre-*T.L.O.* cases, are binding post-*T.L.O.* because they employed the reasonable-suspicion test that this Court adopted in *T.L.O.* *See Bilbrey*, 738 F.2d at 1464; *Renfrow*, 631 F.2d at 92 (adopting in relevant part district-court opinion, 475 F. Supp. 1012, 1024-25 (N.D. Ind. 1979), which utilized *T.L.O.*'s reasonable-suspicion analysis). In fact, the *T.L.O.* majority cited *Bilbrey* approvingly, 469 U.S. at 332 n.2, and courts have consistently relied on *Bilbrey* ever since, *see, e.g.*, *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001).

qualified-immunity analysis. Petitioners' complaint that the court of appeals erroneously applied these standards to the facts of this case does not merit this Court's review; a writ of certiorari is not warranted to correct an alleged misapplication of facts to established law.

a. The court of appeals' opinion is entirely consistent with *T.L.O.* Petitioners admit the court below recognized that *T.L.O.*'s reasonableness standard governs the school search, but then mistakenly claim that that the court applied a probable-cause standard to the strip search. Pet. for Cert. at 23. According to Petitioners, the court's primary error was in balancing the quantum of suspicion that the student has committed an infraction and the seriousness of the infraction that the student allegedly committed against the intrusiveness of the search. However, Petitioners' objection is really to *T.L.O.* itself, which gave content to its reasonableness standard by instructing school officials—and lower courts reviewing the actions of school officials—to consider whether a search is justified at its inception and, if so, whether the scope of the search is "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." 469 U.S. at 342.

That is precisely what the court of appeals did in this case and what numerous other appellate courts have done in applying *T.L.O.*'s balancing test. Pet. App. 13a-33a. In doing so, the court followed not only *T.L.O.* but also an unbroken chain of appellate cases that balance these same factors. *See, e.g.*,

Phaneuf, 448 F.3d 591; *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316 (7th Cir. 1993); *Williams ex rel. Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991). In none of these cases, including *T.L.O.*, did the courts transform the "reasonable-suspicion" standard into the more stringent "probable-cause" hurdle simply because the respective courts reviewed the factors bearing on the reasonableness of the school search in question. Indeed, assessing factors relevant to whether a search was reasonable at its inception or in its scope is a necessary part of the constitutional analysis.

The National Association of School Boards ("NASB") argues in its *amicus* brief supporting Petitioner that there is confusion in the lower courts because some student searches have been upheld under *T.L.O.* and others have been declared unconstitutional. It is hardly surprising that a fact-based balancing test leads to different results in different cases, *see infra* p.16, but that does not mean that there is a conflict in the circuits on the applicable legal standard. Neither Petitioners nor their *amici* point to a single lower court case that failed to apply *T.L.O.* in reviewing the constitutionality of a student search.

Petitioners likewise fail to raise a substantial federal question regarding the *en banc* court's holding that school officials should corroborate self-serving tips from student-informants before using that information as the sole basis for a consequential strip search. Pet. for Cert. at 25. Numerous opinions recognize that a school official should consider the reliability of a student-informant's tip—

and corroborate such a tip—prior to using it as justification for conducting a strip search. *See, e.g.*, *Phaneuf*, 448 F.3d at 598-99 ("While the uncorroborated tip no doubt justified additional inquiry . . ., we are not convinced that it justified a step as intrusive as a strip search."); *Williams*, 936 F.2d at 888-89 ("[T]here is concern that students will . . . falsely implicate other students in wrongdoing . . . . Because the tip lacks reliability, school officials would be required to further investigate the matter before a search or seizure would be warranted."); *see also Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 817 (W.D. Mich. 2002) (holding that an uncorroborated tip from an informant who may have an ulterior motive in divulging information to a school official cannot by itself support a strip search of a student). By noting that Wilson should have corroborated Marissa's statement inculpating Savana before ordering the strip search, the court below did not adopt a probable-cause test, but instead followed *TLO*'s logic and the well-considered approach employed in other circuits.

b. The lower court's analysis of whether the strip search violated clearly established law likewise does not present a substantial federal question. Rather, the court properly recognized this Court's qualified-immunity jurisprudence and applied the established immunity standard by assessing the facts of this case in light of appellate precedent. Petitioners cannot demonstrate the need for review of the lower court's approach to assessing qualified immunity, and are instead left seeking mere fact-bound error correction by this Court.

The lower court commenced its qualified-immunity analysis by asking whether Savana's right to be free of a strip search in these circumstances was "clearly established at the time of the search." Pet. App. 34a. An action is "clearly established" as unconstitutional, the court correctly stated, if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*; *see also, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2000) (per curiam) (providing this standard to govern the defense of qualified immunity).

The lower court held that a school official in Wilson's shoes should have known that it was unlawful to order a strip search of Savana. Pet. App. 34a-38a. Petitioners disagree with the lower court's ultimate conclusion, but they do not seek a new or different legal standard to guide the qualified-immunity analysis. They do not ask this Court to craft a new rule that would make schools easier to govern, student strip searches more prevalent, or officials any less liable for damages when they clearly cross the line. This case would not have broad impact on qualified-immunity defenses even if the Court were to adopt Petitioners' argument verbatim. Accordingly, this case does not present an important question of federal law that warrants this Court's review.

3. Applying well-established legal standards to a remarkable set of facts, the court of appeals reached the correct result. It was and should be unconstitutional for a school official to strip search a thirteen-year-old girl, based solely on the unsupported allegations of ibuprofen possession by

another student, especially when the school official knows that the accusing student has reason to shift attention away from her own bad acts. This student-accuser, Marissa, did not allege that Savana actually possessed ibuprofen at the time of the search, let alone that Savana now, or ever, secreted ibuprofen beneath her underwear. Appellate precedent makes it clear that a strip search in these circumstances would be unconstitutional. Common sense and proper practice should have put a quick end to any thought of a traumatic strip search in this setting.

a. In *T.L.O.*, this Court ruled that a school search is reasonable only if it is "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S. at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). While this school-search standard differs from the standard governing searches off school grounds, the benchmark for constitutional searches is the same regardless of location: the government violates the Fourth Amendment if, "under all the circumstances," it conducts an unreasonable search. *Id.*; *see also, e.g.*, *Phaneuf*, 448 F.3d at 595 (noting that *T.L.O.* "appli[es] the Fourth Amendment 'reasonableness' standard to a search of a student by school administrators").

A strip search is a scarring, harrowing event for a thirteen-year-old girl. Pet. App. 30a-31a; *Cornfield*, 991 F.2d at 1321. Some young people subjected to a strip search have even "been moved to attempt suicide." Pet. App. 31a (citation omitted). Accordingly, a school must have reasonable suspicion that a strip search will protect the school from

serious harm before conducting such a consequential search of a child. *See, e.g.*, *Phaneuf*, 448 F.3d at 596; *Cornfield*, 991 F.2d at 1320 (recognizing that a school can undertake such a search only in response to a serious threat of harm); *Bilbrey*, 738 F.2d at 1468 (denying qualified immunity to school officials who strip searched child in pursuit of drugs based solely on an employee-informant's tip). As the Seventh Circuit noted, "[w]hat may constitute reasonable suspicion for a search of . . . a pocket or pocketbook may fall well short of reasonableness for a nude search." *Cornfield*, 991 F.2d at 1321. *Accord Renfrow*, 631 F.2d at 92-93.

In light of these well-established balancing factors, courts have held that strip searches of teenage students are unconstitutional when the searches are ordered pursuant to an uncorroborated statement that the student possesses a controlled substance. *See, e.g.*, *Phaneuf*, 448 F.3d at 598-99; *Bilbrey*, 738 F.2d at 1468; *Renfrow*, 631 F.2d at 91-92; *Fewless*, 208 F. Supp. 2d at 817. Courts have held such searches unconstitutional even where the informant alleges that the student is hiding a substance underneath his or her clothing, *see Phaneuf*, 448 F.3d at 593 (tip that student planned to hide marijuana under her pants that day); such searches are even less reasonable where an official strip searches the student without an allegation that the student is secreting a drug beneath his or her undergarments, *see, e.g.*, *Bilbrey*, 738 F.2d at 1464; *Renfrow*, 631 F.2d at 91-92.

Against this backdrop, it was unreasonable and unconstitutional for Wilson to have ordered the

strip search of Savana. At the time Wilson ordered Savana to disrobe, he had no reliable information that a search of Savana's body would uncover ibuprofen pills. He had received one uncorroborated tip from an unreliable informant—a student who was trying to shift focus away from herself and who had provided a statement that was already contradicted—that Savana had provided her with ibuprofen pills at some unknown time in the past. The student-informant never even alleged that Savana possessed any pills at the time of the search, let alone that she was secreting them beneath her undergarments. This is nowhere near the information upon which a school official can reasonably rely in taking the drastic step of ordering the strip search of a thirteen-year-old girl.

Considering the information, or lack thereof, that Wilson possessed at the time he ordered the strip search, Petitioners and *amicus* NASB miss the mark when they contend that the court's ruling inappropriately second guessed—or failed to defer to—the school official. Armed with such a dearth of information inculpating Savana, and with absolutely no allegation that Savana was hiding pills under her clothing, Wilson's strip search was indefensible under even a generous interpretation of the facts. *But see Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) (holding that a court must view evidence on summary judgment in the light most favorable to the non-moving party, which in this case is Respondent Redding).

Throughout this litigation, Petitioners have justified the strip search by (1) erroneously claiming

that it was necessary to diffuse a hazardous situation, and (2) relying on cases with meaningfully different facts. As for the purportedly imminent hazard that Savana posed, the court of appeals correctly noted that any danger attendant to her alleged possession of ibuprofen was completely negated once she was sequestered in the principal's office: "Savana had no means at that point to distribute the pills, and whatever immediately threatening activity the school may have perceived . . . had been thwarted." Pet. App. 32a; *see also* Pet App. 29a. In short, strip searching Savana did not protect anyone, while it inflicted serious harm on Savana.

Nor does case law on which Petitioners rely support Wilson's strip search. In *Cornfield*, for example, the Seventh Circuit upheld a strip search of a student after corroborating a student's tip of drug possession by first noticing an "unusual bulge in [the student's] crotch area" and then discovering a police report finding that the student had previously "crotched drugs." 991 F.2d at 1322. Likewise, in *Williams*, the school strip searched a student following an informant's tip alleging the student's drug possession only after the tip had been corroborated through phone calls to the student's father, who confirmed that the student was a habitual drug user, and through the school's finding a note the student wrote acknowledging her drug use. 936 F.2d at 882-83.

Here, in contrast, the school officials did not even attempt to corroborate Marissa's tip. They did not search Savana's locker, speak with her mother,

or talk with anyone who further implicated Savana. Instead, they merely spoke briefly with Savana, who explained—in a manner that did not arouse further suspicion—that she had never before seen such pills and had never given pills to any student. *Compare Phaneuf*, 448 F.3d at 593 (noting that student denied marijuana possession "in a manner that made [the school officials] believe she was lying"), *with* Pet. App. 21a-22a (noting that "there was nothing to suggest" that Savana "was anything less than truthful when she emphatically stated that she had never brought pills into the school"). They then searched Savana's backpack, which likewise contained nothing that bolstered Marissa's accusation. Finding nothing suspicious, Wilson still ordered the strip search of this discipline-free, honors student.

While the school identified some of *Marissa*'s troubling actions, including rules violations, there was no allegation that Savana had joined Marissa in any of this misconduct or that Savana was otherwise connected to illegal pills. *See* Pet. App. 24a-25a (discussing how Marissa's actions do not bear on suspicion that Savana was violating any rule, and, if anything, diminish suspicion of Savana by casting doubt on the credibility of the lone informant who implicated Savana). At the end of the day, Wilson ordered a strip search of Savana based on nothing more than an inherently unreliable informant's tip that Savana had at some unspecified time possessed ibuprofen. There was no allegation that Savana currently possessed ibuprofen, and, significantly, no allegation that Savana was hiding pills beneath her

undergarments at the time of the strip search.[3] Wilson lacked reasonable suspicion that this thirteen-year-old honor-roll student with a clean disciplinary record had adopted drug-smuggling practices associated with international narcotrafficking, or that other middle-school students would willingly consume ibuprofen that was stored in another student's crotch. Wilson's order to strip search Savana was plainly unconstitutional.

b. The strip search of Savana violated her clearly established rights. Accordingly, the court below properly denied qualified immunity to the school official, Wilson, who ordered the search.

Wilson should have had no doubt that the strip search he ordered was unreasonable. Appellate case law, including binding Ninth Circuit precedent, compelled the lower court's holding denying qualified immunity. In *Bilbrey*, the Ninth Circuit held that a school could not strip search one of its students pursuant to an employee-informant's uncorroborated statement that the student possessed drugs in an unspecified place on his person. 738 F.2d at 1468. As in *Bilbrey*, the informant's statement here was non-specific: Marissa did not even allege that Savana currently possessed pills, much less that she possessed them beneath her underwear. Moreover, and as in *Bilbrey*, the school officials here did not corroborate the non-specific tip.

---

[3] Marissa, the only student found hiding pills, kept the pills in her pockets, not in her underwear. Moreover, Savana was not left alone after she was summoned to the principal's office—a time when she otherwise could have transferred pills from her backpack to her underwear.

While this binding precedent forecloses Wilson's qualified-immunity defense, opinions from other circuits, as well as common sense, bolster the lower court's decision. As discussed above, case law holds that a school strip search motivated by an informant's tip violates clearly established constitutional rights when the school official does not corroborate the informant's assertion—even where the informant was far more credible than Marissa. *See, e.g.*, *Williams*, 936 F.2d at 888-89; *Renfrow*, 631 F.2d 91 (holding that strip search based on uncorroborated drug-dog alert was unconstitutional); *Fewless*, 208 F. Supp. 2d at 822-23 (denying qualified immunity in school strip-search case because the school officials did not corroborate informants' statements before conducting the strip search of a student).

These cases do not diminish the importance of eradicating drugs from our schools. Nor do they question whether Wilson "confronted a difficult situation," Pet Br. at 32, or unduly tie Wilson's hands and prevent him from making "on the spot judgments," NASB Br. at 1-2, 9. Surely the school could have conducted some investigation upon receiving Marissa's tip: it could have spoken with Savana's mother; consulted Savana's teachers; perhaps sequestered Savana or asked her mother to take her home; or taken various other actions short of compelling the removal of Savana's clothes and undergarments and peering at her naked body. What it could not have done—and case law makes this abundantly clear—was strip search Savana. They had no corroboration of Marissa's self-serving

statement and no reason to believe that Savana was currently secreting pills beneath her undergarments.

A school official simply cannot order a strip search anytime a frightened student points an accusatory finger at another student. If that were not the case, strip searches would be as prevalent in our schools as the common practice of students tattling on each other. In light of binding case law, not to mention common sense and human decency, Wilson should not have ordered a search that inflicts such profound consequences based on such limited information regarding ibuprofen possession.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Adam B. Wolf
Counsel of Record
M. Allen Hopper
American Civil Liberties
Union Foundation
1101 Pacific Ave., Ste. 333
Santa Cruz, CA 95060
(831) 471-9000

Steven R. Shapiro
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Bruce G. Macdonald
McNamara, Goldsmith,
Jackson & Macdonald, P.C.
1670 E. River Rd., Ste. 200
Tucson, AZ 85718
(520) 624-0126

Andrew J. Petersen
Humphrey & Peterson, P.C.
3861 E. Third St.
Tucson, AZ 85716
(520) 795-1900

Daniel Joseph Pochoda
ACLU of Arizona
P.O. Box 17148
Phoenix, AZ 85011
(602) 773-6003

Dated: December 11, 2008