No. 08-479

IN THE

Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, *et al.*,

Petitioners,

v.

APRIL REDDING,

Respondent.

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

REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In the brief in opposition, the ACLU maintains that the Ninth Circuit merely applied clearly established law to reach a result consistent with other lower courts.

But in reviewing the brief in opposition, the Court may also find it enlightening to review the petition for writ of certiorari that Redding filed less than a year earlier in Docket Number 07-846. Her petition laments that "there is no consistency in court decisions" on this issue and cites a series of commentaries in claiming that "[l]ower courts need better guidance." *Id.* at pp. 15, 18-19. Her petition then advocates for the adoption of probable cause as the proper legal standard for more intrusive searches in the school setting. *Id.* pp. 22-24.

Redding received her wish when the Ninth Circuit subsequently reheard the case en banc and effectively applied probable cause in defiance of this Court's decision in *T.L.O.* Moreover, the Ninth Circuit's denial of qualified immunity to the school administrator certainly did result in a split among the circuit courts on this important federal question.

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

In denying that the Ninth Circuit applied probable cause in defiance of *T.L.O.*, the ACLU failed to address or even acknowledge the majority's sliding-scale approach. App. 18a-19a. This approach follows the reasonableness standard of *T.L.O.* for minimally intrusive searches. But for more intrusive searches, as the majority deemed the

search of Redding to be, the approach adjusts to a more heightened standard. Again, although the majority avoided giving a name to this more heightened standard that it applied, that does little to hide the fact that it is probable cause in application.

Likewise, the ACLU failed to acknowledge or address the Ninth Circuit's complete disregard of this Court's direction to 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.

New Jersey v. T.L.O., 469 U.S. 325, 342 n.9. (1985). Instead, the Ninth Circuit, with the benefit of hindsight, substituted its own judgment for Wilson's to reach the clearly erroneous conclusion that the abuse of a prescription drug "poses an imminent danger to no one." App. 29a.

II. THE DECISION BELOW HAS RESULTED IN A SPLIT AMONG THE CIRCUIT COURTS ON THE IMPORTANT FEDERAL QUESTION OF QUALIFIED IMMUNITY.

Apparently unable to find a single case on all fours, the Ninth Circuit concluded that Wilson had fair notice that his conduct was unlawful based solely on *T.L.O.* App. 34a-35a. This conclusion is at odds with decisions from both the Sixth and Eleventh Circuits.

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). In its analysis, the Sixth Circuit expressed the following concern:

> A diligent but unsuccessful search for additional guidance from the designated jurisdictional pool leads us to a troubling conclusion: the reasonableness standard articulated in *New Jersey v. T.L.O.*, has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action.

Id. at 886.

The Sixth Circuit echoed this concern in *Beard v. Whitmore Lake School District*, which involved a search of an entire school class for missing money in the absence of any individualized suspicion. 402 F.3d 598, 601-02 (6th Cir. 2005). The boys were made to lower their pants and underwear and remove their shirts, and the girls stood in a circle together and pulled up their shirts and pulled down their pants. *Id.* But the Sixth Circuit nevertheless concluded that the school officials were entitled to qualified immunity because *T.L.O.* "is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions in this case." *Id.* at 607.

Nor is the Sixth Circuit alone in this assessment. In *Jenkins ex rel. Hall v. Talladega City Board of Education*, an en banc panel of the Eleventh Circuit considered the search 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). On the question of qualified immunity, the Eleventh Circuit noted that "*T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*" *Id.* at 828. Accordingly, the Eleventh Circuit concluded that the officials were entitled to qualified immunity because *T.L.O.* was not specific enough to place a reasonable official on notice that the search was unlawful. *Id.* at 824-28.

The Eleventh Circuit reached the same conclusion in *Thomas ex rel. Thomas v. Roberts*, which also involved a search of an entire school class for missing money in the absence of any individualized suspicion. 323 F.3d 950, 951-52 (11th Cir. 2003). The students were taken to their respective bathrooms in small groups, where the boys were

told to drop their pants, while most of the girls were also asked to lift their bras and expose their breasts. *Id.* at 952. Again, the Eleventh Circuit concluded that the school officials were entitled to qualified immunity, stating that "[i]f the salient question is whether *T.L.O.* gave the defendants 'fair warning' that a 'strip search' of an elementary school class for missing money would be unconstitutional, then the answer must be 'no.'" *Id.* at 954.

With this split among the circuit courts on whether *T.L.O.* alone clearly establishes the unlawfulness of searches in other cases with vastly dissimilar facts, further direction from the Court is critical.

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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