No. 08-479

In the Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, ET AL.,
PETITIONERS

v.

APRIL REDDING

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record

MICHAEL F. HERTZ
Acting Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

DAVID A. O'NEIL
Assistant to the Solicitor General

LEONARD SCHAITMAN
ROBERT KAMENSHINE
MARK PENNAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

EDWARD H. JURITH
General Counsel
LINDA V. PRIEBE
Assistant General Counsel
Office of National Drug Control Policy
Washington, D.C. 20503

PHILIP H. ROSENFELT
Deputy General Counsel

STEPHEN H. FREID
MARI COLVIN
Attorneys
Department of Education
Washington, D.C. 20202

(Additional Counsel Listed on Inside Cover)

DANIEL J. DELL'ORTO
Principal Deputy General Counsel
KAREN GROSSO LAMBERT
General Counsel
Department of Defense Education Activity
Department of Defense
Washington, D.C. 20301
LAWRENCE J. JENSEN
Acting Solicitor
EDITH R. BLACKWELL
Associate Solicitor
BRENDA RIEL
Attorney
Department of the Interior
Washington, DC 20240

QUESTIONS PRESENTED

1. Whether public school officials violated the Fourth Amendment by requiring a 13-year-old student to expose her breasts and pelvic area in an effort to find prescription pills they suspected her of possessing in violation of school rules.

2. Whether the school official who ordered the search is entitled to qualified immunity.

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INTEREST OF THE UNITED STATES

This case concerns the Fourth Amendment standard applicable to searches of students in public schools and the qualified immunity of school officials who conduct such searches. The United States has a substantial interest in those questions. The federal government has provided billions of dollars to support state and local drug-prevention programs, and the efficacy and credibility of those programs is affected by the manner in which school officials enforce rules against drug possession. The United States also operates hundreds of primary and secondary schools on military installations and Indian reservations. Based on similar interests, the federal government has participated in previous cases addressing the application of the Fourth

Amendment in public schools, including *Board of Education of Independent School District No. 92* v. *Earls*, 536 U.S. 822 (2002), *Vernonia Independent School District, 47J* v. *Acton*, 515 U.S. 646 (1995) (*Vernonia*), and *New Jersey* v. *T.L.O.* 469 U.S. 325 (1985). Finally, the same principles of qualified immunity that apply in suits against state and local officials apply in similar actions against federal officials.

STATEMENT

1. At the time of the events at issue, respondent Savana Redding was a 13-year-old eighth grader at Safford Middle School, a public school in Arizona. Petitioners are Safford Unified School District #1 (SUSD) and various school officials.

a. SUSD has a policy prohibiting the possession of drugs at school. The policy defines "drugs" to include all controlled substances and alcoholic beverages, as well as "[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted." Pet. 4. The school district apparently implemented that ban after a student brought a prescription drug to school and distributed it to classmates, one of whom fell seriously ill. Pet. App. 100a.

b. On October 1, 2003, the mother of Jordan Romero, a student at Safford Middle School, requested a meeting with the school principal and petitioner Kerry Wilson, the assistant principal. During the meeting, Jordan's mother explained that a few nights before, Jordan acted violently toward her and became sick to his stomach. Jordan, who also attended the meeting, claimed that his conduct was caused by pills given to him by a classmate. He also informed the principal and Wilson

that certain students were bringing drugs and weapons to school. Pet. App. 6a.

Jordan proceeded to tell about violations of school rules committed by several students, including respondent. Pet. App. 6a. Jordan did not link respondent to the possession or distribution of pills. Instead, he stated that respondent had served alcohol to classmates at a party she hosted before a school dance earlier that year. *Id.* at 7a, 101a. Wilson had previously heard from school staff members that, at that dance, they had noticed "unusually rowdy behavior" by respondent and her friend Marissa, among a small group of other students, and had also detected the smell of alcohol coming from the group. *Id.* at 5a-6a. Respondent has denied consuming or serving alcohol before the dance. *Id.* at 101a n.2.

c. At the start of the school day on October 8, 2003, Jordan requested another meeting with Wilson. Jordan presented Wilson with a white pill, telling Wilson that Marissa had given it to him and that a group of students planned to ingest similar pills at lunch. Wilson took the pill to the school nurse, petitioner Peggy Schwallier, who identified it as Ibuprofen 400 mg, a prescription medication. Pet. App. 7a.

Based on this information, Wilson went to Marissa's classroom and asked her to gather her belongings. As Marissa complied, Wilson noticed a black planner on an adjacent desk. After discovering that the planner contained several knives, lighters, a cigarette, and a permanent marker, Wilson took it with him and escorted Marissa to his office. Pet. App. 7a-8a; *id.* at 131a.

Wilson asked his administrative assistant, petitioner Helen Romero, to witness while he had Marissa empty her pockets and open her wallet. The search produced a razor blade, several Ibuprofen 400 mg pills, and one

blue pill containing Naprosyn 200 mg, an over-the-counter pain drug. When Wilson asked Marissa where she had obtained the blue pill, Marissa responded "I guess it slipped in when *she* gave me the IBU 400s." Wilson asked who "she" was, and Marissa replied, "Savana Redding." Marissa denied knowing anything about the planner or the contraband inside. Pet. App. 131a.

After Wilson finished questioning Marissa, he instructed Romero to take her to the nurse's office to search her clothing and undergarments for more pills. Nothing was found during that search. Pet. App. 8a-9a.

d. Wilson then retrieved respondent from class and began questioning her in his office. Respondent denied any knowledge of the contents of the planner but admitted that she had loaned it to Marissa a few days earlier to help Marissa hide items from her parents. Pet. App. 3a-4a & n.2. When asked about the pills, respondent said that she knew nothing about them and had never carried or distributed pills at school. Wilson asked respondent if she would submit to a search of her belongings, and she agreed. With Romero witnessing, Wilson searched respondent's backpack. That search proved fruitless. Wilson then asked Romero to take respondent to the nurse's office and search her clothes. *Id.* at 4a-5a.

In the nurse's office, Romero told respondent to remove her jacket, socks, and shoes. When Schwallier entered, Romero directed respondent to remove her pants and shirt. Romero and Schwallier then instructed respondent to pull her bra out and to the side and shake it, exposing her breasts, and to pull out her underwear and shake it, exposing her pelvic area. Respondent later testified that she felt humiliated during the search and that she kept her head down so that the school officials would not see that she was about to cry. Pet. App. 5a, 134a.

The search revealed no pills. Pet. App. 5a.

After the search, respondent was directed to sit outside Wilson's office for over two hours before she was permitted to return to class. At no point did school officials attempt to contact her mother. Pet. App. 135a, 137a.

2. a. Respondent filed this suit under 42 U.S.C. 1983 alleging a Fourth Amendment violation. Petitioners moved for summary judgment, and the district court, applying this Court's decision in *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), granted the motion, concluding that the search of respondent was constitutional. Pet. App. 126a-156a.

b. A divided panel of the Ninth Circuit affirmed. Pet. App. 99a-125a. Writing for himself and Judge Hawkins, Judge Clifton concluded that the search did not violate the Fourth Amendment as interpreted in *T.L.O.* *Id.* at 112a-116a. Judge Thomas dissented, reasoning that under that decision the search was excessively intrusive. *Id.* at 117a-125a.

c. The en banc Ninth Circuit vacated the panel decision and reversed the judgment of the district court. Pet. App. 1a-97a. The six-judge majority concluded that the search violated the Fourth Amendment and that petitioner Wilson was not entitled to qualified immunity. *Id*. at 1a-38a.[1] In the court's view, *T.L.O.* requires a "sliding-scale" approach to the constitutional standard necessary to justify a student search. *Id.* at 33a. The court concluded that the "strip search" of respondent failed that standard because it was based only on Marissa's "tip," and "the self-serving statement of a cor-

[1] The court affirmed summary judgment as to petitioners Romero and Schwallier on qualified immunity grounds, reasoning that they merely complied with Wilson's instructions. Pet. App. 37a-38a.

nered teenager facing significant punishment does not meet the heavy burden necessary to justify" such an intrusive measure. *Id.* at 23a.

The majority also reasoned that the search was impermissible in scope. That conclusion was based largely on the court's belief that the infraction petitioners suspected—possession and distribution of prescription-strength ibuprofen on campus—was "minimal" and "pose[d] an imminent danger to no one." Pet. App. 29a, 32a.

Turning to qualified immunity, the court reasoned that the framework set forth in *T.L.O.* put petitioners on notice that the search here was illegal. Pet. App. 34a-35a. The court also concluded that petitioners' conduct was "patently in defiance" of "notions of personal privacy" that are "clearly established" in the Fourth Amendment. *Id.* at 36a-37a. The court therefore held that Wilson was subject to liability. *Id.* at 38a.

Judge Gould, writing for himself and Judge Silverman, dissented on the ground that although the search was unconstitutional, qualified immunity should apply. Pet. App. 39a-41a. In a separate dissent, Judge Hawkins, joined by Judges Kozinski and Bea, concluded that the school officials acted reasonably in searching respondent but in any event the individual petitioners were entitled to qualified immunity. *Id.* at 42a-97a.

SUMMARY OF ARGUMENT

The search of respondent violated the Fourth Amendment. Nonetheless, the school officials are entitled to qualified immunity because the law was unclear at the time they acted.

I. A. In *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), this Court adopted a "two-fold inquiry" for evaluating

the validity under the Fourth Amendment of a search prompted by a student's suspected wrongdoing. Under that inquiry, which is based on the standard of reasonable suspicion, the search must be both "justified at its inception" and "permissible in its scope." A search will generally satisfy that test when there are reasonable grounds to suspect the student of possessing contraband and "the measures adopted are reasonably related to the objectives of the search." *Id.* at 341-342 & n.9.

T.L.O. also instructed that the search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. at 342. That instruction reflects the special concerns implicated by intrusive searches of schoolchildren, who are uniquely sensitive about bodily privacy. *T.L.O.* thus implies two additional limitations on the conduct of strip searches in the school context.

First, school officials may not order a strip search unless they reasonably suspect that the student is hiding contraband in a place that such a search will reveal. That rule does not require any heightened *level* of justification beyond reasonable suspicion as to whether the student possesses contraband. Rather, it requires that the school officials' reasonable suspicion extends to the contraband's *location.*

Second, a particularly intrusive search is permissible only to address an infraction posing an immediate risk to health or safety. In determining what infractions pose such a risk, however, courts should defer to school officials, who are in a better position to identify any dangers to the school community. Thus, where contraband is barred by a school rule or policy based on an immediate health or safety risk, courts should not second-guess

the wisdom or necessity of that rule as a justification for an intrusive search.

B. Under *T.L.O.*, the search violated the Fourth Amendment. Some search of respondent was "justified at its inception" because the school officials reasonably suspected that she possessed prescription pills in violation of school rules. The circumstances the school officials confronted, however, did not furnish reasonable suspicion that respondent was hiding those pills in her underwear or on her naked body. Absent such particularized suspicion about the location of the pills, the search was "excessively intrusive" and thus impermissible in scope.

C. Although the court of appeals correctly held that the search was unconstitutional, it erred in its formulation of the Fourth Amendment framework in two respects. First, the court adopted what it called a "sliding-scale" approach to the showing necessary to justify a search. Unlike the government's proposed rule, which requires only a showing of reasonable suspicion, the Ninth Circuit's approach imposes an increasingly demanding standard with respect to whether the student possesses contraband as the intrusiveness of the search intensifies. That approach effectively culminates in a requirement of probable cause, if not a heavier burden. Second, the court improperly substituted its own judgment for that of the school officials, as reflected in a written school rule, about whether banning possession of the pills at issue was necessary to prevent immediate risks to health or safety.

Both of those conclusions conflict with *T.L.O.*, and together they create a highly indeterminate standard that would prove difficult for school officials to apply. In contrast, a consistent reasonable suspicion standard that

requires more specific justification for conducting a more intrusive physical search and that respects a school's identification of immediate health and safety risks accords with the balance the Court struck in *T.L.O.* and also provides school officials clear guidance. There is no reason to assume that school officials will use their discretion to engage in unnecessarily intrusive searches under that standard. School administrators are subject to intense public scrutiny, and they have powerful incentives independent of the Fourth Amendment to refrain from such conduct.

II. The school officials are entitled to qualified immunity because the illegality of the search was not clearly established. The Ninth Circuit erred in concluding that *T.L.O.*, by itself, dictated the conclusion that the search at issue violated the Fourth Amendment. As other courts have repeatedly recognized, *T.L.O.*'s general framework cannot plausibly be read to establish the law applicable to a case such as this with the requisite clarity.

The court of appeals similarly erred in deeming it "self-evident" that petitioners' conduct violated basic principles of privacy inherent in the Fourth Amendment. The court failed even to acknowledge the existence of prior lower court decisions upholding similar searches. Petitioners were "entitled to rely on [those] existing lower court cases without facing personal liability for their actions." *Pearson* v. *Callahan,* 129 S. Ct. 808, 823 (2009). The court of appeals' rationale was particularly inappropriate, moreover, because the constitutional question in this case has sparked sharp disagreement among the federal judges who have considered it.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE SEARCH OF RESPONDENT VIOLATED THE FOURTH AMENDMENT BUT APPLIED AN ERRONEOUS STANDARD IN REACHING THAT RESULT

The court of appeals correctly held that the search in this case was unconstitutional. In reaching its Fourth Amendment holding, however, the court applied a standard that conflicts with *T.L.O.* and fails to provide the clear guidance necessary for school administrators to safeguard within constitutional bounds the students committed to their care.

A. Targeted Searches In The Public Schools Must Be Supported By Reasonable Suspicion And, Where They Are Particularly Intrusive, Must Meet Specific Requirements

1. In T.L.O.*, this Court concluded that the "reasonable suspicion" standard properly accommodates the unique considerations in the public school context*

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures." Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979), "the specific content and incidents of this right must be shaped by the context in which it is asserted." *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)).

This Court has recognized that the public school context is unique for Fourth Amendment purposes. The "substantial need of teachers and administrators for

freedom to maintain order in the schools" demands that they have the flexibility to engage in "swift and informal disciplinary procedures." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340-341 (1985). Students, moreover, are subject to "a degree of supervision and control that could not be exercised over free adults," and they "have a lesser expectation of privacy than members of the population generally," *Vernonia*, 515 U.S. at 655, 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). For those reasons, "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Earls*, 536 U.S. at 829-830.

The unique character of this context has resulted in two distinct Fourth Amendment frameworks. One framework, developed in *Vernonia* and *Earls*, applies to suspicionless searches that are conducted as part of a systematic drug testing program. As to those searches, the requirement of individualized suspicion is "impracticable" and therefore unnecessary; the Fourth Amendment inquiry instead turns on a balancing of the strength of the governmental interests furthered by the testing program against the intrusion on the subject's legitimate expectation of privacy. See *Earls*, 536 U.S. at 830-838; *Vernonia*, 515 U.S. at 654-664. That standard is inapplicable here because the search of respondent was not undertaken pursuant to a general program.[2]

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[2] See Pet. App. 52a n.2 (distinguishing a "*T.L.O.* search," where school officials target a particular student based on a suspected infraction, from an "'*Acton* search[,]' in which school officials conduct a systematic search without any individualized suspicion" of wrongdoing, and noting that the two categories of searches should be governed by distinct standards). The *Vernonia*/*Earls* doctrine draws on decisions

Because this case concerns a search based on individualized suspicion of wrongdoing, it is governed by the separate framework set forth in *New Jersey v. T.L.O.* In that case, this Court concluded that the "school setting * * * requires some modification of the level of suspicion of illicit activity needed to justify [a targeted student] search." 469 U.S. at 340. In particular, the Court rejected the traditional "probable cause" requirement on the ground that it fails to accommodate the particular privacy interests of schoolchildren and "the substantial need" of school administrators for flexibility in preserving order. *Id.* at 341.

In place of that requirement, this Court adopted a "two-fold inquiry" based on the reasonable suspicion standard of *Terry* v. *Ohio*. *T.L.O.*, 469 U.S. at 341. "[F]irst, one must consider 'whether the . . . action was justified at its inception[;]' second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Ibid.* (internal citation omitted) (quoting *Terry*, 392 U.S. at 20). A search generally will be "justified at its inception" when "there are 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

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applying the "special needs" exception to drug testing programs for employees seeking safety-sensitive positions in regulated industries. See *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989). Under that framework, as in *Vernonia* and *Earls*, individualized suspicion as to any aspect of the search is unnecessary. *Von Raab*, 489 U.S. at 665 (noting that in that context, the Fourth Amendment does not require "any measure of individualized suspicion"); *Skinner*, 489 U.S. at 633.

school." *Id.* at 342. A search will be "permissible in its 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." *Ibid.*

2. T.L.O. *is properly construed to impose two specific limitations on the conduct of a highly intrusive student search*

The decision in *T.L.O.* implies two limitations on the circumstances in which school officials may conduct the type of "strip search" at issue in this case.[3] First, although school officials need not possess any higher level of suspicion for that form of distinctly intrusive search, they must possess reasonable suspicion about the location where the contraband is hidden. A strip search in the public schools is therefore permissible only if there is reasonable suspicion both that the student possesses contraband and that such a search will reveal it. Second, *T.L.O.* limits strip searches to the category of infractions that implicate rules designed to prevent immediate risks to health or safety.

1. School officials may initiate a search of a student consistent with *T.L.O.* if they are aware of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] in-

[3] The label "strip search" can cover a number of types of searches that vary in their intrusiveness. The search here consisted of a command to remove all of the student's clothes and to lift her undergarments for visual inspection in a private room under observation by school officials of the same gender. However it is labeled, the name of the search does not control or inform the Fourth Amendment analysis. See *Stanley* v. *Henson*, 337 F.3d 961, 964 (7th Cir. 2003) ("Whether we further label this process a 'strip search' or merely a 'search' is unimportant, as the analysis remains the same.").

trusion." *Terry,* 392 U.S. at 21. When such facts exist, the search is "justified at its inception," because, in the language of *T.L.O.*, there are "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." 469 U.S. at 342.

In general, the information giving rise to reasonable suspicion will also determine the permissible scope of the search. That information will define the "objectives of the search" and thus guide the inquiry whether "the measures adopted are reasonably related" to achieving those ends. *T.L.O.*, 469 U.S. at 342. For example, where school officials suspect the student of possessing a large weapon such as a baseball bat, they would act reasonably in searching for it in the student's locker but not in his pockets. See Pet. App. 73a; *T.L.O*, 469 U.S. at 346 (noting that a school official acted reasonably in searching for cigarettes in a student's purse, which "was the obvious place in which to find them"). A targeted search will thus typically satisfy the Fourth Amendment when it is based on reasonable suspicion and directed at places where school officials, exercising "reason and common sense," might expect to find the contraband. *Id.* at 343.

2. *T.L.O* also cautions that a search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. at 342. That caveat assumes particular significance where, as in this case, school officials conduct a search requiring a student to expose private parts of his or her body. That caveat also contemplates a departure from the general rule of the Fourth Amendment, which, consistent with the first portion of *T.L.O.*'s "permissible scope" test, defines the valid reach of the search by its object "and the places * * * [where the object] may be found."

Wyoming v. *Houghton*, 526 U.S. 295, 302 (1999) (quoting *United States* v. *Ross*, 456 U.S. 798, 824 (1982)). Under that basic rule, officers conducting a justified search may examine locations reasonably likely to contain the contraband "without a showing of individualized [suspicion] for each one." *Ibid.*

In the unique context of public schools, however, *T.L.O.* recognized that particularly intrusive searches raise special concerns. Adolescents are at "a time and condition of life when [they] may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). Requiring such a student to expose to school officials the most private areas of his or her body as part of a targeted search creates a potential for trauma that is not present in other settings. See *Cornfield* v. *Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) ("[N]o one would seriously dispute that a nude search of a child is traumatic."); *Flores* v. *Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988) ("Children are especially susceptible to possible traumas from strip searches."), rev'd on other grounds, 507 U.S. 292 (1993). For that reason, *T.L.O.* supports a distinction between the kind of search undertaken here and other types of searches that, because they extend only to such areas as the student's outer clothing, pockets, or effects, do not raise similar concerns about intruding on a child's bodily privacy.

a. Two Fourth Amendment limitations, both implicit in *T.L.O.,* flow from that distinction. First, before conducting a strip search, school officials must possess reasonable suspicion that the student is hiding the contraband in a place where such a search will reveal it. This type of search does not require that the evidence of the student's possession of the contraband meet the stan-

dard of probable cause. As with all targeted student searches, the applicable standard remains reasonable suspicion. The requisite reasonable suspicion, however, must extend both to whether the student possesses contraband and to where the contraband may be hidden. Thus, the distinguishing factor in this requirement is not the necessary *level* of suspicion—a conclusion that would conflict with *T.L.O.*, see pp. 23-24, *infra*—but rather the particularity of the suspicion regarding the *location* of the contraband.

That rule is implicit in *T.L.O.* By prohibiting searches that are "excessive" in scope, *T.L.O.* implied a requirement that, when school officials contemplate a particularly intrusive form of search, they must possess some specific need for that measure. At the same time, *T.L.O.* concluded that the requirement of reasonable suspicion correctly accommodates the various considerations in the school context and that the "the public interest is best served by a Fourth Amendment standard * * * that stops short of probable cause." 469 U.S. at 341.

The reasons for those conclusions remain persuasive today. A rule that school officials must possess probable cause before conducting a search would unduly hinder administrators in taking the "immediate, effective action" necessary to preserve the order and safety of the school community. *T.L.O.*, 469 U.S. at 339. Such a rule would also require "teachers and school administrators * * * [to] schoo[l] themselves in the niceties of probable cause," *id.* at 343, a legal standard that is "peculiarly related to criminal investigations, not routine, non-criminal procedures," *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976). See *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring in the judgment) ("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."). Those burdens would divert school officials from their principal mission, which is "teaching and helping students, [not] developing evidence against a particular troublemaker." *Ibid.*

Rather than depart from *T.L.O.* by requiring the more exacting and problematic standard of probable cause for intrusive searches, this Court should adhere to the reasonable suspicion standard but extend it to the contraband's location. Under that rule, strip searches are impermissible in the public schools unless the officials reasonably suspect not only that the student possesses contraband but also that it is hidden in a place that such a search will reveal. That requirement respects the unique blend of interests in this setting and ensures that school officials do not engage unnecessarily in the type of conduct challenged here.[4]

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[4] As explained above, see pp. 14-15, *supra*, this requirement is a departure from the general Fourth Amendment rule and is warranted only in this unique context. Particularized suspicion about the location of the contraband is plainly unnecessary in other settings, such as searches conducted in prison, see *Bell* v. *Wolfish*, *supra*; testing of employees who hold or seek to retain safety-sensitive positions in regulated industries, see *Skinner*, 489 U.S. at 619; or frisks conducted for weapons, see, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983). Those situations generally involve adults and implicate wholly dissimilar expectations of privacy. Cf. *Samson* v. *California*, 547 U.S. 843, 852 (2006) (noting the role of diminished expectations of privacy in the reasonableness calculus). Juvenile detention also presents different considerations because any bodily sensitivity in that setting is outweighed by diminished expectations of privacy and by the strong need to preserve security. See *T.L.O.*, 469 U.S. at 339 ("[T]he prisoner and

b. Second, the Fourth Amendment as interpreted in *T.L.O.* limits strip searches to situations involving the violation of certain types of rules. In particular, such searches are an available response only where the infraction at issue implicates a rule intended to prevent immediate risks to the health or safety of students or other members of the school community.

That limitation follows from *T.L.O.*'s instruction that whether a search is "excessively intrusive" depends partly on the "nature of the infraction." 469 U.S. at 342. As the dissent below noted, this Court gave "conflicting directions" about that factor. Pet. App. 75a. Although *T.L.O.* incorporated the "nature of the infraction" in the controlling test, it also disavowed any "standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules" and thus instructed that "courts should, as a general matter, * * * refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not." 469 U.S. at 342 n.9. Those instructions are best construed as permitting consideration only of the "nature" or *category* of the infraction when evaluating the permissibility of particularly intrusive forms of search. *Id.* at 342.

The category of infraction that potentially warrants a search of the kind at issue here is that posing an immediate risk to the health or safety of members of the school community. Under the general Fourth Amendment framework *T.L.O.* applied, the permissibility of a

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the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."); *Vernonia*, 515 U.S. at 656 ("the nature of [constitutional] rights is what is appropriate for children *in school*") (emphasis added).

particular intrusion depends on "balancing the need to search against the invasion which the search entails." *Camara* v. *Municipal Ct.*, 387 U.S. 523, 537 (1967); *Vernonia*, 515 U.S. at 661 (noting that the governmental interest must be "important enough" to justify the intrusion, though it need not be "compelling"). Infractions posing an immediate health or safety risk trigger the strongest need to search because the "government has a heightened obligation to safeguard students whom it compels to attend school." *T.L.O.*, 469 U.S. at 353; cf. *Earls*, 536 U.S. at 834 (emphasizing the importance to the Fourth Amendment balance of the "immediacy of the government's concerns").

In particular, as this Court has repeatedly emphasized, "drug use and possession of weapons have become increasingly common" in the public schools, and "an immediate response" to those types of infractions is often necessary "to protect the very safety of students and school personnel." *T.L.O.*, 469 U.S. at 352-353 (Blackmun, J., concurring in the judgment); see *Morse* v. *Frederick*, 127 S. Ct. 2618, 2621 (2007) (noting this Court's recognition that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest" and detailing the extent of the threat) (quoting *Vernonia*, 515 U.S. at 661); *Earls*, 536 U.S. at 834 (noting the grave "health and safety risks" posed by drug use in schools).

Although *T.L.O.* permits a categorical distinction among infractions, it also requires deference to the judgment of school officials about whether the particular infraction falls into the health-or-safety category. *T.L.O.* explained that "[t]he 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," and the Court therefore directed that "courts should, as a general matter, defer to that judgment." 469 U.S. at 343 n.9 Just as school officials are best suited to determine what rules are necessary to maintain order and discipline, they are also in a far superior position to identify dangers to the school community and to implement rules addressing them. Thus, where the school imposes a rule or policy forbidding particular contraband based on immediate health or safety concerns, courts should not reevaluate that judgment in reliance on their own views of whether the rule is necessary or worthy of enforcement by intrusive search. See *id.* at 342 n.9 (stating that courts may consider the "nature," but not the perceived "trivial[ity]," of the violated rule).

B. The Search In This Case Did Not Satisfy The *T.L.O.* Standard Because Petitioners Lacked Reasonable Suspicion That The Contraband Was Hidden In A Location That A Strip Search Would Reveal

Under the standard articulated above, the search of respondent violated the Fourth Amendment. Although the decision to conduct some form of search was justified at its inception, the search failed the second step of the *T.L.O.* framework because it was "excessively intrusive." 469 U.S. at 342.

1. A search of respondent was justified at its inception because petitioners reasonably suspected that it would "turn up evidence that [respondent] ha[d] violated or [wa]s violating either the law or the rules of the school." *T.L.O.*, 469 U.S. at 342. Petitioner Wilson knew from one student, Jordan Romero, that prescription pills had been distributed at school that day, and he had been

told by another student, Marissa, that respondent was the source. Wilson had a basis to credit Marissa's information about respondent because he could reasonably infer from a number of facts that the two girls were friends. Those facts included reports about the girls' interaction at the school dance as well as respondent's admission just before the search that she had loaned Marissa a planner to help Marissa hide items from her parents. Petitioners therefore possessed reasonable suspicion sufficient to initiate a search.

The information known to petitioners also justified the initial scope of the search. Just as the school official in *T.L.O.* could search a purse for cigarettes because that was the "obvious place" to find them, Wilson could search respondent's backpack and outer garments because pills might reasonably have been hidden there. Indeed, before he searched respondent, Wilson had searched Marissa and found pills in her pockets and wallet, supporting the assumption that if respondent did in fact possess pills, they would likely be in a similar place.

2. The circumstances petitioners confronted, however, did not justify extending the scope of the search to require respondent to disrobe to her bra and underwear and lift them off her body. The "excessive[] intrusive-[ness]" prong of *T.L.O.* required that, before proceeding beyond a search of respondent's effects or outer garments and ordering her to expose those uniquely private areas of her body, petitioners must have possessed reasonable suspicion that the contraband was hidden in a location that such an intrusive measure would reveal. See pp. 15-17, *supra.* That requirement was not satisfied here.

The facts giving rise to reasonable suspicion did not include information indicating that respondent was car-

rying the pills inside her undergarments, attached to her nude body, or anywhere else that a strip search would reveal. Marissa's statement to Wilson did not suggest that respondent was hiding the pills in such a manner. Neither Wilson nor any other petitioner has asserted, and the record does not otherwise indicate, that respondent's friends or students at Safford more broadly engaged in a custom or practice of secreting pills in their underwear.

Indeed, the facts suggested the contrary. Wilson's decision to credit Marissa was warranted in large measure by the inference that the two girls maintained a friendship. The previous search of Marissa, however, had uncovered pills in her wallet and pockets but not in her underwear. Thus, by the time of the search challenged here, Wilson had obtained important information about the practices of at least one student in respondent's peer group, and that information did not suggest that pills would be hidden in the locations Wilson required respondent to expose. Because there was no information supporting a reasonable suspicion that a strip search would reveal the contraband, the search was "excessively intrusive" and therefore impermissible in scope. *T.L.O.*, 469 U.S. at 342.

C. The Ninth Circuit's Flawed Approach Creates A Fourth Amendment Standard That Conflicts With *T.L.O.* And Is Unacceptably Indeterminate

The court of appeals reached the correct conclusion on the merits of respondent's Fourth Amendment challenge. It did so, however, on the basis of reasoning that is flawed in two important respects.

1. a. First, the court of appeals erred in adopting a "sliding-scale" standard that varies depending on the

qualities of the particular search. Pet. App. 33a. The court held that "as the intrusiveness of the search of a student intensifies," the Fourth Amendment requires a progressively higher burden to justify it. *Id.* at 18a (quoting *Cornfield*, 991 F.2d at 1321). Applying that standard, the court reasoned that although Marissa's statement likely provided "reasonable suspicion" sufficient to support a search of respondent's pockets, that statement was too "unreliable" and "self-serving" to "meet the heavy burden necessary to justify" a "highly invasive strip-search." *Id.* at 22a, 23a, 27a. As the court of appeals noted, two other circuits, the Second and Seventh, have adopted a similar "sliding-scale" approach. See *Cornfield,* 991 F.2d at 1321; *Phaneuf* v. *Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006).

That approach is fundamentally different from the rule, which the government believes is implicit in *T.L.O.* (see pp. 15-17, *supra*), that to justify a search requiring a student to expose private parts of his or her body, school officials must have reasonable suspicion regarding the *location* of the contraband. The standard the government proposes does not require a degree of justification greater than reasonable suspicion about whether the student possesses the contraband. Instead, it adheres to *T.L.O.*'s reasonable suspicion standard and simply extends that requirement, in the context of a search such as that at issue here, to the place where the contraband may be hidden. The "heavy burden" the Ninth Circuit applied, in contrast, would depart from the *T.L.O.* standard by demanding a progressively "high[er] *level* of suspicion" about the student's possession of contraband as the search becomes more intrusive. Pet. App. 19a (emphasis added) (quoting *Phaneuf*, 448 F.3d at 596). At least with respect to some searches, that

floating standard effectively requires probable cause, contrary to *T.L.O.*'s explicit rejection of such a rule. See *T.L.O.*, 469 U.S. at 340-341.

The court of appeals' "sliding-scale" standard would also prohibit searches in situations where the framework of *T.L.O.* permits them. That approach appears categorically to bar a strip search based on information provided by another student, even if that student is deemed trustworthy and specifically indicated where the contraband was hidden. Indeed, the Ninth Circuit cited with approval the Second Circuit's decision in *Phaneuf*, which invalidated such a search that was prompted by a disinterested student's statement "that Phaneuf, a student with a history of disciplinary problems, planned to stuff marijuana down her pants that day to take along with her on the senior class picnic." Pet. App. 27a. The Second Circuit concluded that this information warranted only "additional inquiry and investigation." *Phaneuf*, 448 F.3d at 598.

The government's approach would lead to a different result in *Phaneuf* because the school officials there could reasonably suspect both that the student possessed contraband and that the contraband was hidden in a location that an order to disrobe would reveal. Although the tip may not have furnished probable cause to believe the student possessed the drugs and did not satisfy the "heavy burden" the Ninth Circuit's "sliding scale" required, it was particular as to the location of the drugs and therefore furnished "specific and articulable facts which, together with rational inferences from those facts, reasonably warrant[ed] th[e] intrusion." *Terry*, 392 U.S. at 21.

That result is consistent with *T.L.O.* and the realities of the school setting. Because "[a] single teacher often

must watch over a large number of students," 469 U.S. at 352 (Blackmun, J., concurring in the judgment), school administrators frequently have no choice but to rely on classmates to discover and report threats to health and safety. Beyond discounting any obvious ulterior motive of a fellow student, moreover, it is not clear what "additional inquiry and investigation" a school official could profitably undertake in these circumstances. In any event, a requirement of additional inquiry and a per se rule against reliance on student-provided information to conduct intrusive searches would render impossible the type of "immediate response" that "frequently is required * * * to protect the very safety of students and school personnel." *Id.* at 353.

b. Second, the court of appeals seriously misconstrued *T.L.O.*'s instruction to consider the "nature of the infraction" in determining the permissible scope of the search. Although the court properly focused on whether the infraction posed an immediate risk to health or safety, it erred in failing to defer to the school on that question. Under the correct reading of *T.L.O.*, see pp. 19-20, *supra*, the school's promulgation of a health-or-safety rule reflects its judgment that violations of the rule represent a danger to the school community, and courts should not second-guess that determination. The court of appeals, however, essentially ignored the SUSD rule against possession of the prescription medication in this case. Rather than defer on that point, the court invalidated the search based on its own belief that, even though it violated school rules, possession or distribution of these particular pills "pose[d] an imminent danger to no one" and constituted only a "minimal" infraction. Pet. App. 29a; see *id.* at 32a (rejecting "any suggestion that finding the ibuprofen was an urgent matter

to avoid a parade of horribles"). The court of appeals thus engaged in precisely the sort of analysis *T.L.O.* prohibits. See 469 U.S. at 342 n.9 (rejecting the dissent's reliance on its perception that the school rule was "trivial").[5]

3. The two flawed aspects of the court of appeals' *T.L.O.* analysis combine to create a Fourth Amendment framework that would be highly problematic for school officials to administer. Under the Ninth Circuit's decision, a school official facing a situation potentially fraught with risk and contemplating a search may not simply ask, consistent with *T.L.O.*, whether there is a "particularized and objective basis for suspecting" that

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[5] The facts of this case illustrate the pitfalls in the Ninth Circuit's approach. Possession of pills, even those that may appear harmless, can pose any number of dangers that school officials may reasonably fear at the time immediate action is necessary and that may seem remote to a court viewing the events in hindsight. Many illegal drugs, such as ecstasy, come in pill form, and it is often difficult to distinguish those pills from legitimate medication. Conversely, a number of prescription pills that can be possessed for legitimate reasons, such as Ritalin, present the same risks as illegal drugs if used improperly. School officials, who generally lack training in pharmacology, must therefore take seriously any information they receive about the possession of unauthorized pills. They cannot be expected to conduct a laboratory or toxicity test in each case where the nature of the pill is unknown. Even when the school officials know the type of pill they suspect a student of possessing, moreover, they reasonably may perceive serious risks to heath and safety if that medication yields an adverse reaction or is taken with a contraindicated drug either by the student who possesses it or by other students to whom it may be distributed. Indeed, the school's policy against unauthorized possession of medication appears to have been adopted in response to a near-fatality resulting from ingestion of pills. See Pet. App. 100a. Finally, the rule against such medication serves an important deterrent purpose, warning students against bringing any pills to school.

the search will yield contraband. *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). The official must instead evaluate each progressive interference with a student's privacy interests to determine the "intensi[ty]" of the intrusion it entails, anticipate a future judicial "sliding-scale" inquiry, and then calibrate accordingly the "level of suspicion" necessary to justify the search under the Ninth Circuit's variable standard. Pet. App. 18a-19a. And even if the official could resolve that inquiry with confidence, he must factor into the mix another variable in the "sliding scale": whether a court will later agree with his judgment that, in the particular circumstances, the violation of a valid health or safety rule presents an "immediate danger." *Id.* at 32a.

That indeterminate framework fails to heed the strong preference in this Court's Fourth Amendment jurisprudence for "standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after [a] * * * search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); see *New York* v. *Belton*, 453 U.S. 454, 458 (1981) (Fourth Amendment rules "ought to be expressed in terms that are readily applicable") (citation omitted). On that principle, this Court has rejected standards that, like the "sliding-scale" test the court of appeals adopted, rest on "subtle * * * gradations" of the Fourth Amendment showing "in addition to 'reasonable suspicion' and 'probable cause.'" *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 540-541 (1985) (concluding that such a standard would "obscure rather than elucidate the meaning of the provision in question").

The need for a clear, consistent, and easily applied rule is particularly compelling in the school context.

Teachers and school administrators are not law enforcement officers, and a multi-variable test that shifted depending upon the circumstances of each search would require them to discharge "a task for which they are ill prepared, and which is not readily compatible with their vocation." *Vernonia*, 515 U.S. at 664. Indeed, it was precisely those considerations that prompted this Court in *T.L.O.* to reject a requirement of probable cause. 469 U.S. 343 (reasoning that adoption of the "reasonable suspicion" 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").

4. The standard the government believes is implicit in *T.L.O.* not only adheres to the balance this Court has struck but also provides clear guidance. Under that standard, a school official may conduct a search if he reasonably suspects that doing so will uncover evidence of a crime or rule violation. Consistent with the ordinary Fourth Amendment rule, and so long as the student is not required to expose private areas of his or her body, the search generally will be permissible in scope if it targets places where the school official would reasonably expect to find the suspected contraband. The school officials may extend the search beyond the student's outer pockets and other features of clothing if they are responding to the violation of a rule designed to prevent immediate risk to health or safety and they possess particularized suspicion that the contraband is hidden in a location that a strip search will reveal.

There is no reason to assume that school officials will use their discretion to conduct unnecessarily intrusive searches under the standard set forth in this brief. "The

openness of the public school and its supervision by the community afford significant safeguards against" abusive conduct by school officials. *Ingraham* v. *Wright*, 430 U.S. 651, 670 (1977). A large and highly motivated segment of the public—parents with school-age children—will typically become aware of such conduct, can effectively protest practices it regards as unreasonable, and, acting through local school boards, can hold teachers and administrators accountable. Consistent with that influence, school districts in a number of major cities impose stringent limitations on strip searches and at least seven states prohibit them altogether. See Pet. App. 19a n.8. Thus, the type of conduct at issue is effectively addressed through means other than civil suits asserting a federal constitutional violation.

II. THE SCHOOL OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE ILLEGALITY OF THE SEARCH WAS NOT CLEARLY ESTABLISHED

Although the search of respondent violated the Fourth Amendment, the school officials are entitled to qualified immunity because the illegality of the search was not clearly established at the time they conducted it.[6]

1. "Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the

[6] Petitioner SUSD does not enjoy qualified or Eleventh Amendment immunity. See *Savage* v. *Glendale Union High Sch.*, 343 F.3d 1036 (9th Cir. 2003) ("Arizona schools are not agents of the state for Eleventh Amendment purposes."), cert. denied, 541 U.S. 1009 (2004). The liability of SUSD turns instead on the principles set forth in *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978), a matter the lower courts did not address. This Court should therefore remand for further consideration of that issue.

face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was." *Will* v. *Hallock*, 546 U.S. 345, 353 (2006). In determining whether the "law on point" was clear, this Court has repeatedly emphasized that the relevant "law" is that applicable in the "specific context of the case, not as a broad general proposition." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004).

In denying petitioner Wilson qualified immunity, the court of appeals rested principally on the test set forth in *T.L.O.* Pet. App. 34a-35a. But the general *T.L.O.* framework was not sufficiently clear or specific to support the imposition of civil liability in the particular circumstances presented here. As the analysis set forth above demonstrates (see pp. 13-20, *supra*), the application of *T.L.O.* to these facts requires several elaborations that are not clearly articulated in that decision and that entail the reconciliation of apparently "conflicting directions." Pet. App. 75a. Indeed, the Ninth Circuit itself misconstrued *T.L.O.* in important respects. The court of appeals therefore erred in holding that, as of the issuance of *T.L.O.*, "the legal framework was clearly established that would put school officials on notice that a strip search was not a reasonable measure to use on a thirteen-year-old girl accused by an unreliable student informant of having ibuprofen in violation of school rules." *Id.* at 34a-35a. *T.L.O.* cannot plausibly be read to establish the law applicable to such a highly particularized set of facts with the clarity necessary to defeat qualified immunity.

Other courts of appeals have recognized the indeterminacy of *T.L.O.* as applied to circumstances different from those at issue in that case. See *Beard* v. *Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (ob-

serving that *T.L.O.* "is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions"); *Thomas* v. *Roberts*, 323 F.3d 950, 954 (11th Cir. 2003) ("Defendants could not have compared their situation with the situation in *T.L.O.* and found that the comparison fairly and clearly warned that a 'strip search' of this kind would be unconstitutional."); *Jenkins* v. *Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir.) (en banc) ("*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.*"), cert. denied, 522 U.S. 966 (1997); *id.* at 825-826 (noting that *T.L.O.* gave "no illustration, indication, or hint as to *how* the enumerated factors might come into play," and listing questions unanswered by *T.L.O.*'s "broadly-worded phrases"); *Williams* v. *Ellington*, 936 F.2d 881, 886 (6th Cir. 1991) (concluding that "the reasonableness standard articulated in [*T.L.O.*] has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be" unconstitutional).

2. The court of appeals also based its denial of qualified immunity on what it deemed the "self-evident" character of petitioners' Fourth Amendment violation. See Pet. App. 36a. Stating that "[c]ommon sense and reason supplement the federal reporters," the Court concluded that the search was so "patently in defiance" of the governing standard that it violated "notions of personal privacy [that] are 'clearly established' in that they inhere in all of us." *Id.* at 35a-36a.

That conclusion was erroneous. The state of lower-court precedent could reasonably have led petitioners to believe that their conduct was not unconstitutional, much less "patently" so. As the dissent below explained,

the Ninth Circuit failed even to acknowledge previous decisions upholding similar searches in analogous circumstances. See *Cornfield,* 991 F.2d at 1323 (upholding the strip-search of a 16-year-old girl suspected of "crotching" drugs); *Williams*, 936 F.2d at 889 (deeming reasonable the strip search of a high school student for unknown drugs); *Singleton* v. *Board of Educ.*, 894 F. Supp. 386, 389, 390-391 (D. Kan. 1995) (upholding search of 13-year-old boy where officials "patted" his crotch, lowered his pants, and "searched the inside waist band of his boxer shorts" to find $150); *Widener* v. *Frye*, 809 F. Supp. 35, 36 (S.D. Ohio 1992) (upholding search in which minor student was required to lift his shirt, lower his pants, and pull his undershorts "tight around his crotch area" to permit visual inspection), aff'd, 12 F.3d 215 (6th Cir. 1993).

Although those decisions may be distinguished on their facts, they defeat any conclusion that the *T.L.O.* analysis should have been "self-evident" to the school officials in these circumstances. Teachers, no less than "[p]olice officers[,] are entitled to rely on existing lower court cases without facing personal liability for their actions." *Pearson* v. *Callahan,* 129 S. Ct. 808, 823 (2009).

The court of appeals' reliance on its own sense of what was "self-evident" was particularly inappropriate, moreover, given the sharp disagreement among the courts and judges below. The court of appeals should not have required school administrators, who are not ordinarily lawyers, to appreciate that a search was "patently" and "self-evident[ly]" unconstitutional where five federal judges—more than one-third of the total number to consider this case—have concluded that it was entirely valid. See Pet. App. 41a ("The [disagreement

among the judges on this case] says something about a lack of clarity in our law."). "If judges thus 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 *Morse*, 127 S. Ct. at 2641 (Breyer, J., concurring in part and dissenting in part).

CONCLUSION

The judgment of the court of appeals should be reversed as to petitioner Wilson and remanded for further proceedings as to petitioner SUSD.

Respectfully submitted.

EDWARD H. JURITH
General Counsel
LINDA V. PRIEBE
Assistant General Counsel
Office of National Drug Control Policy

PHILIP H. ROSENFELT
Deputy General Counsel
STEPHEN H. FREID
MARI COLVIN
Attorneys
Department of Education

DANIEL J. DELL'ORTO
Principal Deputy General Counsel
KAREN GROSSO LAMBERT
General Counsel
Department of Defense Education Activity
Department of Defense

LAWRENCE J. JENSEN
Acting Solicitor
EDITH R. BLACKWELL
Associate Solicitor
BRENDA RIEL
Attorney
Department of the Interior

EDWIN S. KNEEDLER
Acting Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
DAVID A. O'NEIL
Assistant to the Solicitor General
LEONARD SCHAITMAN
ROBERT KAMENSHINE
MARK PENNAK
Attorneys

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