

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SAFFORD UNIFIED SCHOOL :

4 DISTRICT #1, ET AL., :

5 Petitioners :

6 v. : No. 08-479

7 APRIL REDDING. :

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9 Washington, D.C.

10 Tuesday, April 21, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:12 a.m.

15 APPEARANCES:

16 MATTHEW W. WRIGHT, ESQ., Phoenix, Ariz.; on behalf of
17 the Petitioners.

18 DAVID O'NEIL, ESQ., Assistant to the Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting
21 reversal.

22 ADAM B. WOLF, ESQ., Santa Cruz, Cal.; on behalf of the
23 Respondent.

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4	On behalf of the Petitioners
5	DAVID O'NEIL, ESQ.
6	On behalf of the United States, as amicus
7	curiae, supporting reversal
8	ADAM B. WOLF, ESQ.
9	On behalf of the Respondent
10	REBUTTAL ARGUMENT OF
11	MATTHEW W. WRIGHT, ESQ.
12	On behalf of the Petitioners
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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-479, Safford Unifed School District v. Redding.

Mr. Wright.

ORAL ARGUMENT OF MATTHEW W. WRIGHT

ON BEHALF OF THE PETITIONERS

MR. WRIGHT: Mr. Chief Justice, may it please the Court:

The search of Savana Redding in this case was constitutional because Mr. Wilson had reason to suspect that she possessed contraband which posed a health and safety risk. Therefore, searching any place where she might be reasonably hiding that contraband was constitutionally permissible.

CHIEF JUSTICE ROBERTS: Any place, even though he had perhaps no reasonable suspicion to suspect that she was hiding the contraband in her underwear?

MR. WRIGHT: Your Honor, Mr. Chief Justice, as long as he had reason to suspect, which we believe the evidence does show, he was entitled to search any place where the contraband might be reasonably hidden.

CHIEF JUSTICE ROBERTS: Any place? I mean, prison inmates, for example, are subject to much more

1 intrusive searches. Are you suggesting that would have
2 been justified in this case?

3 MR. WRIGHT: No, Your Honor. I'm -- I'm
4 suggesting that where it might be reasonably hidden is
5 based on an administrator's experience and certainly is
6 proven out by the reported cases that we've cite in the
7 reply on pages 8 and 9, which are that students often
8 will secrete items in and under their clothing. That is
9 not an uncommon thing to happen, although these kind of
10 intrusive searches are rare.

11 JUSTICE SCALIA: But I -- I think you're
12 really caught in -- in a dilemma here. Your answer
13 suggests that you would not have allowed a cavity search
14 in this case.

15 MR. WRIGHT: That's correct, Your Honor.

16 JUSTICE SCALIA: But people have been known
17 to secrete contraband in -- in bodily cavities. What is
18 the -- what is the principle under which you would allow
19 a strip search but disallow a cavity search?

20 MR. WRIGHT: The principle is, Your Honor,
21 is that the common experience with schoolchildren, as --
22 as school officials have a relation to schoolchildren,
23 is such that they might hide things, and they do hide
24 things, in and under their clothing.

25 JUSTICE GINSBURG: Was there --

1 MR. WRIGHT: But --

2 JUSTICE GINSBURG: Was there prior
3 experience in this particular school? Were there prior
4 occasions on which students had been strip-searched and
5 contraband found?

6 MR. WRIGHT: Your Honor, I don't know, and
7 that's not in the record, but I can tell that you that
8 that would not be the threshold requirement under this
9 Court's prior rulings to justify the search.

10 JUSTICE GINSBURG: But you -- I thought your
11 answer to Justice Scalia was that in the -- in the
12 school's experience, children do hide contraband in
13 their underwear but not in their body cavities.

14 MR. WRIGHT: Yes, Your Honor. To be more
15 specific, in the nationwide school experience, based on
16 the reported cases that we see, which are contained in
17 the reply at pages 8 and 9, we find that they hide them
18 in and under clothing, but I don't know of any case of
19 which I'm aware where there would be items secreted in
20 body cavities.

21 And I -- and I feel, Your Honor, that that
22 is a bright-line area because that -- that is -- that is
23 something that the Court can clearly say is off limits.
24 And --

25 JUSTICE SOUTER: Let me ask you about

1 another bright-line rule that I think you're assuming.
2 You -- you said in the course of describing the
3 justification for this search that one -- one of the
4 points of justification was that there was a health and
5 safety risk. And I assume from the way you put it that
6 you are grouping every drug, prescription or over the
7 counter, as posing a health and safety risk; is that
8 correct?

9 MR. WRIGHT: Yes, Your Honor.

10 JUSTICE SOUTER: Why -- why should we accept
11 that -- that blanket assumption? I mean, at some point
12 it gets silly. Having -- having an aspirin tablet does
13 not present a health and safety risk, and yet that's an
14 over-the-counter drug, and presumably you would have
15 gone through the same search for -- for an aspirin that
16 was conducted here.

17 MR. WRIGHT: For the very same reasons this
18 Court noted in T.L.O. 25 years ago, Your Honor, and that
19 is that the school officials have deemed, in their
20 judgment, that this is an important rule with regard to
21 health and safety. So --

22 JUSTICE SOUTER: Oh, and I agree with you,
23 and I -- I don't have any question with this kind of a,
24 let's say, a -- a broad swath of judicial hands-off in
25 determining what is a risk and what isn't. But at some

1 point it becomes sufficiently questionable that I do
2 think we have to raise it. And if your rule would
3 criminalize -- I shouldn't say "criminalize" -- would
4 put aspirin in the contraband category and justify the
5 kind of search that went on here, I think we've reached
6 the questionable point. And I -- my question to you now
7 is, why haven't we?

8 MR. WRIGHT: Well, Your Honor, if -- if an
9 administrator in their judgment, in their reasonable
10 judgment, believes that any -- any drug poses a
11 potential health and safety risk, because they have the
12 custodial and tutelary responsibilities for those kids
13 -- and it's not like a criminal issue where they're
14 trying to prosecute; this is a case where they're trying
15 to protect -- because they have those kinds of
16 obligations to provide for the safety of children, to
17 provide an orderly educational environment, it is best
18 for this Court to defer to their judgment when they
19 believe that certain rules are important and not
20 second-guess those rules.

21 JUSTICE SCALIA: Had it been --

22 MR. WRIGHT: So long --

23 JUSTICE SCALIA: Had it been the case that,
24 as I recall, someone had -- well, students were popping
25 ibuprofen, weren't they?

1 MR. WRIGHT: Yes, Your Honor.

2 JUSTICE SCALIA: I guess they might pop
3 aspirin as well. I'm not aware that one gets a high on
4 either one of those. Somebody in -- in the school had
5 gotten almost fatally ill about a year before this
6 incident; isn't that right?

7 MR. WRIGHT: Precisely, Your Honor.

8 JUSTICE SCALIA: On over-the-counter drugs.

9 MR. WRIGHT: On a prescription medication
10 that --

11 JUSTICE SCALIA: A prescription, not over-
12 the-counter.

13 MR. WRIGHT: -- that a student brought to
14 school and that a student ingested, another student
15 ingested, and then was airlifted out in an ICU in a
16 near-fatal experience.

17 JUSTICE GINSBURG: What was --

18 MR. WRIGHT: But just 7 days --

19 JUSTICE GINSBURG: What was -- what was the
20 drug involved in that case?

21 MR. WRIGHT: I don't know, Your Honor, and
22 it's not in the record.

23 JUSTICE GINSBURG: But it certainly was not
24 ibuprofen?

25 MR. WRIGHT: Again, I don't know, Your

1 Honor.

2 JUSTICE GINSBURG: You said it was a
3 prescription drug.

4 MR. WRIGHT: It was a prescription drug.
5 And -- and 7 days before this event, Your Honor, just 7
6 days before, the student informant Romero had taken a
7 prescription drug. Again, I don't know what the type of
8 drug was, but he became violently ill, which caused he
9 and his mother to come talk to the administrator. So we
10 had those two recent events.

11 JUSTICE GINSBURG: Yes, but he -- he was not
12 the one who identified Redding. It was her classmate.

13 MR. WRIGHT: Her friend Marissa Glines, yes,
14 Your Honor.

15 JUSTICE GINSBURG: And on that classmate's
16 say-so -- was the classmate ever asked, well, when did
17 you get this pill? Where did she give it to you?

18 MR. WRIGHT: Where -- the question, where
19 did this pill come from, was asked by the administrator.

20 JUSTICE GINSBURG: I mean, what place. I
21 mean, the child is caught with the pills. She blames it
22 on her classmate. She says: She gave them to me. Did
23 the school ever bother to ask when in time she gave
24 them, where in location she gave them?

25 MR. WRIGHT: No, but that's clear from the

1 record, Your Honor. The reason for that is Jordan
2 Romero said to Mr. Wilson that morning: I just received
3 this pill from Marissa Glines. The plan is that a group
4 of these kids are going to take these pills at noon. So
5 it's contemporaneous.

6 JUSTICE GINSBURG: But it's contemporaneous
7 with the -- with the student who blamed the other child.
8 I'm asking if there's any link other than one child
9 caught with the pills blurts out that it was someone
10 else? The tip from the young man had nothing to do with
11 Redding; it had to do with Glines.

12 MR. WRIGHT: But the tip from the young man
13 goes to Glines, and the young man's tip becomes reliable
14 when Glines produces the fistful of pills that he said
15 she would have, plus other pills.

16 JUSTICE GINSBURG: Maybe it becomes reliable
17 as to her, but it has nothing to do with Redding.

18 MR. WRIGHT: But, Your Honor, then it ties
19 in with the -- with the contraband -- excuse me -- the
20 planner that was laid open before Mr. Wilson when he
21 subsequently searches Savana Redding, and she admits to
22 him that that was her planner, but she denies any
23 knowledge of the contents. So did Marissa Glines. So
24 --

25 JUSTICE SCALIA: Did the school know what --

1 what particular pills it was searching for?

2 MR. WRIGHT: Not --

3 JUSTICE SCALIA: Did it know that -- what --
4 what the threat was was ibuprofen or aspirin or -- or
5 some prescription drug?

6 MR. WRIGHT: Not comprehensively, Your
7 Honor. What they knew was there was IBU 400s in an OTC
8 pill that was later identified. But he also knew there
9 was a variety of pills. What Mr. Wilson did not know --

10 JUSTICE SCALIA: How did he know it was an
11 OTC pill?

12 MR. WRIGHT: Because he --

13 JUSTICE SCALIA: Just by looking at it?

14 MR. WRIGHT: -- called poison control.

15 JUSTICE SCALIA: Okay.

16 MR. WRIGHT: And -- and once that was
17 assessed --

18 JUSTICE SCALIA: What was in it? Did he say
19 --

20 MR. WRIGHT: It was Naprosyn 200 milligrams.

21 And -- and, Your Honor, what -- that's a
22 good point because what Mr. Wilson doesn't know is what
23 other pills might be out there. He knows there's a
24 variety of pills, but he doesn't know of what type. He
25 doesn't know what amount.

1 JUSTICE SOUTER: Have you ever made -- has
2 your side of the case ever made the argument that it
3 needs this sort of blanket classification rule, any drug
4 over the counter or prescription, because when a, a pill
5 is found, they're not pharmacists, they don't know what
6 it is, and therefore they've got to have a blanket rule
7 or they simply cannot act effectively? I did not see
8 that argument in the briefs. Has that argument been
9 raised at any point?

10 MR. WRIGHT: Precisely, Your Honor. We have
11 argued that our administrators are not pharmacologically
12 trained?

13 JUSTICE SOUTER: Where did you argue it? I
14 mean, I want to know whether that argument is in the
15 case.

16 MR. WRIGHT: It's in the briefs.

17 JUSTICE SOUTER: Is it? I don't remember
18 it. Do you remember a page? Do you have a page
19 reference offhand?

20 MR. WRIGHT: I don't have one offhand, Your
21 Honor.

22 JUSTICE SOUTER: But you say it's in your
23 brief?

24 MR. WRIGHT: I'm fairly -- fairly certain
25 it's in the brief.

1 JUSTICE SOUTER: Okay, I'll go back.

2 JUSTICE GINSBURG: In the case, this case,
3 the school nurse -- the pills were given to the school
4 nurse and she identified what they were.

5 MR. WRIGHT: Precisely. And she called
6 poison control to figure that out, though, Your Honor.

7 JUSTICE ALITO: Mr. Mr. Wright, could I ask
8 you this question. There may be an issue as to what the
9 assistant principal could reasonably infer from the
10 facts that were known by him, whether he could
11 reasonably infer facts that would create a reasonable
12 suspicion that there were drugs hidden in the
13 plaintiff's undergarments. Is that a question for --
14 for the finder of fact in a case like this, so that it
15 can't be -- there can't be summary judgment for either
16 side unless no reasonable factfinder could find to the
17 contrary?

18 MR. WRIGHT: The problem with that is, Your
19 Honor, it wouldn't comport with the notion that we need
20 to shield administrators from lawsuits and legal
21 liability.

22 JUSTICE ALITO: No, not on the question of
23 qualified immunity. On the issue of whether there is a
24 Fourth Amendment violation.

25 MR. WRIGHT: Whether or not that would be a

1 factual determination, as to whether he could reasonably
2 suspect that the pills would be there?

3 JUSTICE ALITO: Right.

4 MR. WRIGHT: I think -- I think it could
5 lend itself to that, Your Honor, but I would prefer that
6 the Court -- we would ask the Court and it's our
7 position that the Court would lay down a bright line
8 rule such that it wouldn't end up in a factual dispute,
9 and that bright line rule is this. Once you had reason
10 to suspect a student is possessing any contraband that
11 poses a health and safety risk, then searching any place
12 where that contraband may reasonably be found is
13 constitutional, and --

14 JUSTICE SCALIA: Any contraband, like the
15 black marker pencil that -- that astounded me. That was
16 contraband in that school, wasn't it, a black marker
17 pencil?

18 MR. WRIGHT: Well, for sniffing.

19 JUSTICE SCALIA: Oh, is that what they do?

20 MR. WRIGHT: It's a permanent marker.

21 JUSTICE SCALIA: They sniff them?

22 MR. WRIGHT: Well, that's the -- I mean, I'm
23 a school lawyer. That's what kids do, Your Honor,
24 unfortunately, Your Honor. But --

25 JUSTICE SCALIA: Really?

1 MR. WRIGHT: But the point was is that the
2 rule -- the rule, Your Honor, is -- is grounded in the
3 notion that when there's a health and safety risk
4 because these people are charged and tasked with the
5 responsibility to keep these kids safe, they have to
6 have the opportunity to act flexibly, immediately, and
7 effectively when they're dealing with these risks.

8 JUSTICE GINSBURG: But there has to be -- I
9 mean, some -- the stark difference between this case and
10 T.L.O., in addition to the intrusiveness of the search,
11 was there was a teacher said: I caught those girls;
12 they were smoking in the bathroom. Here we have nothing
13 but this Glines identifying her classmate. And nothing
14 is done to check her veracity, nothing is done to follow
15 up on it at all. And the search is quite different from
16 the search of a purse that doesn't touch the child's
17 person.

18 MR. WRIGHT: Your Honor seems to be
19 concerned about the reliability of the tip in this case.
20 Your Honor, I would submit to you to that student tips
21 are the very thing that officials rely on probably the
22 most.

23 JUSTICE GINSBURG: But an official could
24 follow up to see whether this child -- whether there is
25 a basis for what she said. But there were no questions

1 asked at all.

2 MR. WRIGHT: There was additional
3 corroborating evidence, Your Honor. There was -- there
4 was suspicion by direct implication and there was
5 suspicion by circumstantial corroboration. These two
6 kids could, in Mr. Wilson's mind -- he believed that
7 they were working together to conceal other types of
8 contraband.

9 JUSTICE ALITO: Well, the school could keep
10 records on its students, like the police keep records on
11 confidential informants. So if -- unless this student
12 had a proven record of having accurately ratted out a
13 certain number of classmates in the past, she couldn't
14 be believed.

15 MR. WRIGHT: Except that, Your Honor,
16 there's a different incentive here. Students can be
17 disciplined if they -- if they tell tales. And so if
18 she tells a lie she faces the risk of discipline. In
19 addition to that, there was evidence that these kids
20 were friends, and he had reason to rely on that. He had
21 reason based on their association at the opening dance.
22 He had reason to believe that because --

23 JUSTICE STEVENS: What discipline did the
24 tipster receive? What discipline was the erroneous
25 tipster given?

1 MR. WRIGHT: Oh, there was no discipline
2 that I know of in the record, Your Honor. It's not in
3 the record and I do not know.

4 JUSTICE KENNEDY: Was she subject to a civil
5 suit by the plaintiff in this case?

6 MR. WRIGHT: Was the person Marissa Glines,
7 the person who gave the tip?

8 JUSTICE KENNEDY: Yes.

9 MR. WRIGHT: No, Your Honor.

10 JUSTICE SCALIA: Could I come back to your
11 distinguishing a strip search from a cavity search.
12 What would you require before you would allow a cavity
13 search?

14 MR. WRIGHT: Nothing at all. A bright line
15 rule. I would not allow it.

16 JUSTICE SCALIA: No cavity search in school,
17 no matter what?

18 MR. WRIGHT: We're not even clinically
19 trained to do that, Your Honor. I would submit that if
20 a child has something stuffed up one of their cavities
21 -- and I assume we mean private parts, the very private
22 parts -- that the first thing to do would be to send
23 them to the hospital. I mean, we just don't have that
24 clinical training.

25 JUSTICE SOUTER: Your basis -- your basis

1 for saying that, I guess, is just sort of the practical
2 one, we don't know how to do that type of thing. So far
3 as the legal principle on the basis of which you
4 justified this search, you could justify that search,
5 too, couldn't you?

6 MR. WRIGHT: On the legal basis I could see
7 that, Your Honor. I could see that result. But
8 practically --

9 JUSTICE SOUTER: But if -- if we hold in
10 your favor in this case and the next school district
11 says, all right, we're going to have classes in body
12 cavity searches, then there would be no legal basis, if
13 we accept your principle, for saying that's out of
14 bounds as a matter of the Fourth Amendment; isn't that
15 correct?

16 MR. WRIGHT: I see your concern. That's to
17 be left up to the local governments, Your Honor. As you
18 have mentioned, this Court has mentioned, in *Ingraham*
19 and *Wright* --

20 JUSTICE SOUTER: So it would not -- it would
21 not be out of bounds under the Fourth Amendment?

22 MR. WRIGHT: Technically, but it will be
23 controlled by the community. It would be controlled by
24 the local board. The community would never --

25 JUSTICE KENNEDY: Do you know whether or not

1 in the Ninth Circuit in border search cases a body
2 cavity search can be conducted without a warrant? I
3 thought a warrant was required under the Ninth Circuit
4 rule. I could ask the government.

5 MR. WRIGHT: I just know that there has been
6 concern expressed over body cavity searches, even in the
7 prisoner environment and even in the border environment.
8 I can say to this Court you will not restrict or in any
9 way inhibit the discretion of an administrator by saying
10 you can't go there on a body cavity search, nor would
11 they want to, nor are they clinically trained to.

12 CHIEF JUSTICE ROBERTS: Can I ask just a
13 follow-up on your answer to Justice Kennedy's earlier
14 question about whether the informant was subject to
15 civil suit. When you said no, did you mean she hadn't
16 been sued or that she could not be sued?

17 MR. WRIGHT: I'm sorry, Your Honor. That
18 she had not been sued.

19 CHIEF JUSTICE ROBERTS: Okay.

20 JUSTICE GINSBURG: There's one aspect of
21 this considering the reasonableness of the school
22 administrator's behavior. In addition to not following
23 up with Glines, after Redding was searched and nothing
24 was found, she was put in a chair outside the vice
25 principal's office for over 2 hours and her mother

1 wasn't called. What was the reason for that
2 humiliating, putting her in that humiliating situation?

3 MR. WRIGHT: Your Honor, that is not a
4 matter of the record, but the inference is that the --
5 that the investigation was still ongoing because there
6 was a group of kids, and at that time the administrator
7 was making efforts to try to make sure that he had
8 gathered all the drugs that might be on campus. And in
9 any event that wouldn't --

10 JUSTICE GINSBURG: But how were they
11 investigating her when they did nothing but put her in a
12 chair outside the vice principal's office?

13 MR. WRIGHT: Well, Your Honor, I can see
14 where it might have been more reasonable in that sense
15 to have let her go back to class, but it certainly is
16 not a standard that would affect the constitutionality .

17 JUSTICE SCALIA: I assume a school can
18 assign a student to study hall. That's not considered a
19 government seizure. Isn't that an obvious part of the
20 parental supervision that a school exercises, sit here
21 and stay there.

22 MR. WRIGHT: That's exactly right, Your
23 Honor.

24 JUSTICE SCALIA: Schools do that all the
25 time, don't they?

1 MR. WRIGHT: Yes. In fact, there was a
2 Ninth Circuit on the docket at the time, the Smith
3 versus McLaughlin case, where the plaintiff argued the
4 very thing, that she was detained for hours. And the
5 court recognized there -- I believe there was a
6 concurrence by Judge Kozinski -- that that's entirely
7 appropriate, that's where they are.

8 CHIEF JUSTICE ROBERTS: When was the -- when
9 was she detained there in relation to the lunchtime
10 period, which was when the other student had said that
11 all the kids were going to take these pills?

12 MR. WRIGHT: I believe it went through the
13 lunchtime period, Your Honor, the detainment.

14 In addition, Your Honor, I would like to
15 point out also that trying to restrict any more the rule
16 that I've laid out, as the United States Government has
17 suggested, respectfully, would cause more problems.

18 JUSTICE BREYER: But aren't there things
19 here that are a little extreme? I mean, if she's to be
20 believed, then she was really naked, and the two
21 administrators deny that, but you have to take her side
22 of the facts. So taking her side of the facts, why
23 couldn't the school administrators just do what they
24 said they did? That is, you leave her in her underwear,
25 tell her: Go shake her underwear. No reason to do any

1 more than that. Or if she is really embarrassed about
2 that, say: Go put on a swimming suit, you know. Shake
3 the swimming suit, no problem. People see you at the
4 beach all the time. Or call your mother.

5 I mean, you know, we can think of another --
6 a number of things that seem a lot less restrictive than
7 her version of what went on here.

8 MR. WRIGHT: May I offer two principles?

9 JUSTICE BREYER: Yes.

10 MR. WRIGHT: First, this Court has
11 recognized that the least intrusive means is not a
12 threshold prerequisite to a constitutional --

13 JUSTICE BREYER: I know, but I mean, here
14 she is embarrassed if -- if what she says happened
15 happened. There seems no reason for that, and it seems
16 so easy. Put on your gym clothes, okay? I mean, she
17 does that every day. It is just such obvious
18 alternatives to having her be really naked.

19 MR. WRIGHT: Very true.

20 JUSTICE BREYER:

21 So that's what I -- I don't see any basis
22 for saying to the school administrator, you know, you
23 can do that. You can just turn her naked. I mean, it
24 just embarrasses her. What's the need for it?

25 MR. WRIGHT: In the record, Your Honor, she

1 did -- she did have her underpants on and her brassiere
2 still on.

3 JUSTICE BREYER: I know, but she says in the
4 record that they went further and required her to be
5 partly naked beyond just her underwear. They say --

6 JUSTICE SCALIA: Well, I suppose you could
7 say that about any strip search, couldn't you: That
8 there is never a need for a strip search? You could
9 always give the -- you know, the suspected felon, you
10 know: Here, change into this suit. And -- and we
11 haven't adopted some such rule, have we?

12 MR. WRIGHT: No, Your Honor. You have
13 specifically said the fact that other reasonable
14 alternatives are available doesn't mean that the
15 alternative that was used or the actual search that was
16 done was unreasonable.

17 JUSTICE BREYER: Okay. So that was my
18 question. My question was: Why wasn't it? I wasn't
19 asking about the law. I was asking: Why didn't they
20 choose one of these alternatives?

21 MR. WRIGHT: I'm sorry, Your Honor. I don't
22 -- I can't answer that question for Mr. Wilson, but I'm
23 sure that in the heat of the moment that that issue
24 wasn't thought through. And, of course, he wasn't
25 involved in the search because he's a male. Only the

1 females were involved in the search.

2 May I reserve the balance of my time, Your
3 Honor.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Wright.

6 Mr. O'Neil.

7 ORAL ARGUMENT OF DAVID O'NEIL

8 ON BEHALF OF THE UNITED STATES,

9 AS AMICUS CURIAE, SUPPORTING REVERSAL

10 MR. O'NEIL: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 Intrusive body searches in the school
13 context implicate fundamentally different expectations
14 of privacy than other -- other kinds of searches. For
15 that reason, they require greater justification under
16 the Fourth Amendment.

17 In the government's view, the best way to
18 give effect to that greater showing is to adhere to the
19 basic reasonable suspicion standard of T.L.O., but to
20 elaborate on that standard in two ways. First --

21 CHIEF JUSTICE ROBERTS: Before you get
22 started, do we have to reach the underlying merits or
23 can we just decide the qualified immunity issue?

24 MR. O'NEIL: The government agrees with the
25 parties and all amici in this case that this Court

1 should address the substantive Fourth Amendment issue.

2 CHIEF JUSTICE ROBERTS: Should -- should,
3 but must?

4 MR. O'NEIL: This Court could decide the
5 case on qualified immunity grounds alone.

6 JUSTICE SCALIA: Well, one of the defendants
7 doesn't have qualified immunity.

8 MR. O'NEIL: That's exactly right, Justice
9 Scalia.

10 JUSTICE SCALIA: So don't we have to, for
11 that defendant at least, decide the constitutional
12 question?

13 MR. O'NEIL: Well, this Court could remand
14 on Monell grounds for a hearing on that, which was not
15 addressed in --

16 JUSTICE GINSBURG: What would be, Mr.
17 O'Neil, the basis for the Monell claim? That would be
18 against the school district?

19 MR. O'NEIL: That's correct.

20 JUSTICE GINSBURG: What would the plaintiff
21 have to show to establish a claim under Monell?

22 MR. O'NEIL: The plaintiff would have to
23 show that this search was conducted pursuant to a -- an
24 official policy or that the vice principal was a person
25 who was acting with that authority. There are a number

1 of grounds that -- that the plaintiff could establish
2 the Monell claim on the basis of, but in this case the
3 Ninth Circuit did not address that. And, therefore, we
4 believe that this Court should not review in the first
5 instance, but if the Court were inclined to remand on
6 that ground to allow the Ninth Circuit to address it
7 before this Court reaches that.

8 JUSTICE KENNEDY: You -- you criticized the
9 Ninth Circuit in your brief for having a sliding scale
10 standard, which is a bad thing in your view. But it
11 seems to me that your standard comes close to that. You
12 call yours a differential level standard or something
13 like that?

14 MR. O'NEIL: No, Justice Kennedy. Our
15 standard is one of greater specificity in the
16 information, not a standard that rises and falls
17 depending on the level of intrusiveness.

18 JUSTICE SCALIA: You -- you have to, under
19 your standard, have reason -- a reasonable suspicion
20 specifically that -- that the student is hiding the
21 contraband in the student's underwear?

22 MR. O'NEIL: That's correct, Justice Scalia.

23 JUSTICE SCALIA: Now, if -- if you have a
24 reasonable suspicion that the student has drugs and you
25 search every other place, you search in the student's

1 pack, you search the student's outer garments, and you
2 have a reasonable suspicion that the student has drugs,
3 don't you have, after conducting all these other
4 searches, a reasonable suspicion that she has drugs in
5 her underpants?

6 MR. O'NEIL: No, Justice Scalia, we believe
7 that you don't --

8 JUSTICE SCALIA: All right.

9 MR. O'NEIL: -- without -- without --

10 JUSTICE SCALIA: Your logic fails me.

11 MR. O'NEIL: Well, Justice --

12 JUSTICE SCALIA: You -- you reasonably
13 suspect the student has drugs. You've searched
14 everywhere else. By God, the drugs must be in her
15 underpants.

16 MR. O'NEIL: Well, Justice Scalia, you
17 posited that the teacher began the search with
18 reasonable suspicion. And in that case, if you searched
19 the obvious places like a wallet, a pocket, a desk, a
20 locker, and you didn't find it in those places, the
21 logical conclusion would not be that it must be in the
22 student's underwear, but perhaps that the information
23 that you had --

24 CHIEF JUSTICE ROBERTS: That sounds like you
25 --

1 JUSTICE BREYER: -- putting things in their
2 underwear.

3 CHIEF JUSTICE ROBERTS: That sounds to me
4 like the sliding scale that you reject from the Ninth
5 Circuit.

6 MR. O'NEIL: No, because we believe that
7 where you have reasonable suspicion that there is
8 contraband in the underwear, then you could go directly
9 to that location, and you wouldn't have to work from the
10 outside in. But, Justice Scalia, it takes --

11 CHIEF JUSTICE ROBERTS: Oh, surely not. You
12 are saying if you have reasonable suspicion that it's in
13 the underwear, you shouldn't even bother searching the
14 pack or the pockets. You should go straight to the
15 underwear. That can't be right.

16 MR. O'NEIL: Well, to take T.L.O. as an
17 example, Justice Scalia, in that case the Court believed
18 that there was reasonable suspicion that the student had
19 cigarettes in her purse because that was the obvious
20 place to find them. Now, if the -- if the school
21 principal in that case had searched the purse, searched
22 the student's pocket, searched the locker, searched the
23 desk, I don't think this Court would have said that
24 there was reasonable suspicion to believe that the
25 cigarettes were in --

1 JUSTICE ALITO: Now, what specifically do
2 you think is missing here? They need -- the school
3 needed to have a direct statement from Marissa Glines
4 that -- that Redding had the -- had the pills in her
5 undergarments; is that correct.

6 MR. O'NEIL: The particularized suspicion
7 could come from information from students that reliably
8 adverted to the location of the contraband. That's the
9 --

10 JUSTICE ALITO: But you have to have direct
11 evidence that the -- the -- it can't be based on
12 inferences?

13 MR. O'NEIL: No --

14 JUSTICE ALITO: Is that the distinction you
15 are drawing? The location has to be supported by direct
16 evidence. Somebody has to say that that's where it is.

17 MR. O'NEIL: No, Justice Alito. We believe
18 that if teachers were aware of the general practice and
19 it was common knowledge that students did hide
20 contraband in this way and -- that would be relevant to
21 the totality of the circumstances in determining whether
22 this student was following that practice.

23 But we don't believe that the examples that
24 were provided in Petitioners' reply brief establish
25 anything like that practice. Petitioners cite 8 cases

1 over the course of approximately 30 years in which
2 contraband was found in those locations.

3 JUSTICE SOUTER: But you are -- you are
4 saying basically there is -- there is no general
5 understanding that people carry ibuprofen in -- in their
6 undergarments.

7 MR. O'NEIL: That is -- that is true. There
8 was no experience at this school. There was no
9 reasonable -- no reason to suspect that based on
10 experience in the world. And, in fact, by the time the
11 officials had conducted their -- this search, they had
12 searched Marissa, who was Respondent's friend. And they
13 had conducted a search of her pockets and her wallet and
14 they had found pills in her pockets and her wallet. But
15 they had not found pills in her underwear.

16 So even if that had been a suspicion that
17 one might have had even before beginning the search,
18 they certainly wouldn't have had that suspicion by the
19 time --

20 CHIEF JUSTICE ROBERTS: But if your --
21 accepting your argument that there may be no reasonable
22 suspicion based on Marissa saying this is the person who
23 gave me the drugs, does the fact that she said kids are
24 going to -- the kids are going to take these drugs at
25 lunchtime, a specific time, does that present a

1 difference in the level of concern that the school
2 should have?

3 MR. O'NEIL: We believe that the schools may
4 take seriously any information they receive and must
5 take seriously any information they receive about the
6 presence of prescription pills on campus. And the fact
7 that the teacher believed that these pills were going to
8 be consumed at lunch as part of an event that obviously
9 wasn't simply intended to get rid of the students'
10 headaches, we believe that that would give rise to
11 reasonable suspicion to initiate some search.

12 But we believe that without some
13 particularized suspicion or some specific indication
14 that this, the location, was a likely one to contain the
15 drugs, that this search was excessively intrusive. And
16 this is not a new standard. This is essentially the
17 same standard this Court adopted in the Montoya De
18 Hernandez case for intrusive body searches in other
19 contexts. It has proved workable in that context and we
20 believe that it would prove workable here.

21 We believe that it is also better than the
22 alternatives of a higher level of suspicion, which does
23 not bear any necessary logical correlation to the
24 likelihood that the --

25 JUSTICE ALITO: If Marissa Glines had said

1 specifically that Savana Redding has pills someplace on
2 her person and she's going to distribute them at lunch
3 in the cafeteria, would this be a different case?

4 MR. O'NEIL: It may well, Justice Alito. In
5 that circumstance it would likely be the reasonable
6 thing for the teacher --

7 JUSTICE ALITO: What is the difference
8 between that situation and this situation? The
9 differences are slight. Wouldn't that at least be a
10 question that has to be decided by the trier of fact?

11 MR. O'NEIL: That may present a triable
12 issue. Here --

13 JUSTICE SCALIA: Excuse me. That
14 wouldn't -- that wouldn't satisfy the test you've just
15 given us. I thought you said there had to be specific
16 indication that she was carrying it in her
17 undergarments. And what Justice Alito posed was not
18 that, just specific indication that she had it on her
19 person. Is that enough? Do you want to revise your
20 test so it's not just specific indication that it's in
21 her undergarments, but specific indication that it's on
22 her person? That's enough?

23 MR. O'NEIL: No, Justice Scalia. We believe
24 that there must be information beyond that. And I may
25 have misspoke, and I think the answer to that question

1 is that in that circumstance, a teacher would almost
2 certainly ask, well, where on her person is it? And if
3 the student doesn't know, then, yes, Justice Scalia,
4 that would not satisfy the standard that we would urge
5 this Court to adopt.

6 JUSTICE ALITO: I mean, the student says,
7 she has -- she has crack someplace on her person, and
8 she's going to distribute it to kids during the lunch
9 hour, and so they search her -- her garments, and they
10 don't find it. And you're saying that they cannot then
11 go ahead and search her undergarments --

12 MR. O'NEIL: The nature of the contraband --

13 JUSTICE ALITO: -- because --

14 MR. O'NEIL: The nature of the contraband
15 could be relevant in the totality of the circumstances
16 to the suspicion that the student has -- is hiding it in
17 some illicit place as -- Justice Souter, as you noted,
18 certainly there is no practice anywhere, that I'm aware
19 of, of hiding ibuprofen in underwear.

20 JUSTICE SCALIA: So there is a sliding scale
21 for the dangerousness of what you're looking for?

22 MR. O'NEIL: No. It simply means that it's
23 relevant to whether in the totality of the circumstances
24 that school official could have reasonably suspected
25 that the student was hiding it.

1 CHIEF JUSTICE ROBERTS: How is a school
2 administrator supposed to know? Marissa says: She gave
3 me these pills. What are they? I don't know. And so
4 how is the -- if it depends whether it's a dangerous
5 drug like crack or a relatively -- not harmless, but a
6 different one like ibuprofen, the search depends on
7 that, how is the school administrator supposed to know?

8 MR. O'NEIL: My point was simply with a drug
9 like crack there is a more common understanding that a
10 drug like that can be hidden in a student's -- in
11 underwear.

12 CHIEF JUSTICE ROBERTS: So what is the
13 school administrator supposed to know when he sees a
14 white pill and doesn't know if it's something terribly
15 harmful, even deadly, or if it's prescription strength
16 ibuprofen? You say in the former case he can search
17 undergarments, in the latter case he can't. So how is
18 the administrator supposed to know what he's dealing
19 with?

20 MR. O'NEIL: Well, we believe that, as I
21 said, school administrators have to take seriously all
22 medication like this on campus. My point was simply
23 that where a particular type of contraband is known to
24 be carried in a certain way, that can be relevant to the
25 totality --

1 CHIEF JUSTICE ROBERTS: I'm sorry, your
2 answer to me was they have to take it seriously. My
3 question to you is, what is the administrator supposed
4 to do? He sees a white pill; nobody can tell him what
5 it is. Is he allowed at that point to search the
6 undergarments or not?

7 MR. O'NEIL: No.

8 CHIEF JUSTICE ROBERTS: He's not?

9 MR. O'NEIL: He is not.

10 CHIEF JUSTICE ROBERTS: Even if it turns out
11 to be -- you know, I don't know, some very deadly drug?

12 MR. O'NEIL: Mr. Chief Justice, we do not
13 believe that this Court should get in the business of
14 deciding that searches are okay for, for example,
15 heroin, but not okay for cocaine.

16 CHIEF JUSTICE ROBERTS: That's what you just
17 told us we should do, in answer to Justice Alito's
18 question.

19 MR. O'NEIL: No, I simply -- the point was
20 simply that if there is some common understanding that a
21 type of contraband is generally secreted in a certain
22 way, and the example is crack, and there is a known
23 understanding that crack can be hidden in that way, that
24 that would be relevant to the totality of the
25 circumstances.

1 JUSTICE SOUTER: And I don't see why your
2 answer might not be different if, under the Chief
3 Justice's question, he didn't know it was ibuprofen.
4 All he knew was that it was a white pill. He's not a
5 pharmacologist, he doesn't know what's in it. Wouldn't
6 the reasonableness of the -- wouldn't the scope of
7 reasonable search at least potentially be greater for
8 the undifferentiated white pill than for the known
9 ibuprofen?

10 MR. O'NEIL: It may, Justice Souter, but I
11 think that the question would be whether the school
12 official has some reason to believe, based on a
13 practice, that -- that pills, for example, are hidden in
14 a student's -- can be hidden in a student's underwear.
15 Again, the example was crack, and that is a situation
16 where there is an understanding that that is -- can be a
17 place in which suspects will hide that type of item.

18 But, again, there was no indication in this
19 case whatsoever and no basis for the school official to
20 suspect that that was a likely location.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. O'NEIL: Thank you, Mr. Chief Justice.

23 CHIEF JUSTICE ROBERTS: Mr. Wolf.

24 ORAL ARGUMENT OF ADAM B. WOLF

25 ON BEHALF OF THE RESPONDENT

1 MR. WOLF: Mr. Chief Justice, and may it
2 please the Court:

3 We agree with the Federal Government that
4 before conducting an intrusive strip search a school
5 needs to have location-specific information. And while
6 this case can begin and end with that well-accepted
7 proposition, it's also important to recognize that a
8 school needs greater -- a greater degree of suspicion to
9 conduct a strip search than to conduct an ordinary
10 backpack search.

11 CHIEF JUSTICE ROBERTS: I don't think the
12 case can begin and end with that because we have the
13 separate issue of qualified immunity. Can we take that
14 off the table?

15 I mean, we have got six to five in the Ninth
16 Circuit, disagreement throughout in this case, and yet
17 you say the rule is so clearly established that you can
18 make these school officials personally liable.

19 MR. WOLF: Your Honor, I don't think a head
20 count of the judges is the standard by which this Court
21 measures qualified immunity. That's what this Court,
22 you know, held, for instance, in *Groh v. Ramirez*. But I
23 do understand that it sort of gives one pause.

24 It says: Well, what did they miss here?
25 And what they missed here is that this search violated

1 the clearly established point that in order to conduct
2 an intrusive search of one's body, the searching
3 official needs to at least reasonably believe that the
4 object is located underneath the undergarments. The
5 Fourth Amendment does not account -- it does not
6 countenance the rummaging on or around a 13-year-old
7 girl's naked body --

8 CHIEF JUSTICE ROBERTS: What if --

9 MR. WOLF: -- without any suspicion.

10 CHIEF JUSTICE ROBERTS: What if what Marissa
11 has is heroin? The school administrator recognizes
12 heroin. She says: This is what the student gave me?
13 Search the undergarments or not?

14 MR. WOLF: The nature of the infraction --
15 no. The nature of the infraction, as T.L.O. would put
16 it, is a nonstarter in this case, because we don't even
17 have the suspicion to get underneath Savana's
18 undergarments, even if you had -- regardless of the
19 substance.

20 Now, in T.L.O., the question was whether
21 there were drugs to be found. There was marijuana in
22 that case. And this Court set a relatively low
23 standard, that you need more than a hunch, and you need
24 particularized suspicion. Now, that's where the Court
25 set the balance for ordinary searches for drugs.

1 JUSTICE KENNEDY: I'm not quite sure where
2 we are in your answer to the question of the Chief
3 Justice's question. He asked you a hypothetical case.
4 And you said that's a nonstarter because in this case.
5 And the hypothetical is that there is a very
6 dangerous drug, meth, that's going to be distributed and
7 consumed that afternoon.

8 Does that make a difference in the
9 permissibility of the search and the reasonableness of
10 the search and the scope of the search?

11 MR. WOLF: No, it does not. It does not in
12 this case, because without a suspicion that you're going
13 to find the object --

14 JUSTICE KENNEDY: So you don't mind our
15 judging this case as if they were searching for meth?

16 MR. WOLF: Your Honor --

17 JUSTICE KENNEDY: That's the way -- we
18 should -- we should judge this case as though they were
19 searching -- the fact that it was -- is it ibuprofen,
20 have I got that? The fact that it was ibuprofen is
21 irrelevant; we can consider this case as if it were
22 meth?

23 MR. WOLF: I think we all understand that
24 this -- that this case, you know, involves ibuprofen.
25 But our argument --

1 JUSTICE KENNEDY: I don't think I understand
2 that based on your answer. I'm -- I'm asking you -- you
3 said that the nature of the drug makes no difference,
4 It's a nonstarter.

5 MR. WOLF: Not in in this case, correct.

6 JUSTICE KENNEDY: Insofar as the rule that
7 we -- that's because in this case you don't think
8 there's a reasonable suspicion to begin with. But that
9 doesn't answer the hypothetical. We're trying to
10 announce a rule. And your rule, your submission, as I
11 understand you and as I understood the government, is
12 that the nature of the substance they're searching for
13 is irrelevant.

14 MR. WOLF: I think it's irrelevant when
15 you're making distinctions between drugs. If -- if the
16 question is whether you can strip search a child for
17 gum, for instance, because that might prohibit school
18 policy, I would --

19 JUSTICE KENNEDY: So that goes back to my
20 earlier proposition that you don't mind our deciding the
21 case as if this were a search for meth that was going to
22 be consumed at noon?

23 MR. WOLF: That's correct, Your Honor.

24 JUSTICE KENNEDY: Thank you.

25 MR. WOLF: Why? Because in this case there

1 was no suspicion -- and I think Justice Alito was
2 perhaps getting to this -- there was no suspicion that
3 these objects were going to be found inside Savana's
4 undergarments. And without that suspicion you cannot
5 conduct such an intrusive search.

6 JUSTICE ALITO: Well, to play the devil's
7 advocate on that, why couldn't the assistant principal
8 reason as follows: that he has information from -- from
9 Ms. Glines that Ms. Redding has drugs. He has
10 information from another student that drugs are going to
11 be consumed during the lunch hour. Putting those two
12 together, he reaches the -- he suspects that the person
13 who has the drugs has the drugs on his or her person so
14 that they can be distributed at lunch. And then having
15 searched every other part of -- having searched Ms.
16 Redding's outer garments, what's left are her
17 undergarments. So therefore there's a reasonable
18 suspicion that the drugs are -- are located there.

19 MR. WOLF: Justice Alito --

20 JUSTICE ALITO: What's wrong with that?

21 MR. WOLF: Justice Alito, I don't think that
22 accurately describes the record. Even if it did, it
23 wouldn't satisfy this Court's standard. Two things
24 about the record: one, I think the hypothetical
25 supposed that she had drugs, and in fact what the record

1 reveals is that it was allegedly Savana provided these
2 drugs at some point. It's not that she currently had
3 them on her.

4 Second, that they searched every other part,
5 and it's an important -- it's an important point in this
6 case. Where did Marissa have her planner? It was in
7 the desk. Did they search the desk here? No. We know
8 that. It's not in the record, as Mr. Wright said, but
9 they have lockers in the school. Did they search any
10 locker? No.

11 Can students keep drugs anywhere else on
12 school grounds? Perhaps, probably so. Did they search
13 everywhere? They absolutely did not. But I want to get
14 back to the legal answer, too, which is that this Court
15 said in T.L.O., and it's on page 342 of T.L.O., that a
16 search is reasonable only when there are reasonable
17 grounds for believing that it will turn up evidence.
18 There were no reasonable grounds for believing that this
19 search would turn up evidence, none at all.

20 JUSTICE SCALIA: You're saying the whole
21 search, not just the search of the undergarments.
22 You're saying they couldn't even have searched her
23 backpack, right?

24 MR. WOLF: I think they could have searched
25 her backpack. And what --

1 JUSTICE SCALIA: Why?

2 MR. WOLF: What that speaks to is the low
3 degree of the suspicion and the nonspecific suspicion
4 that's needed to conduct an ordinary search.

5 JUSTICE SCALIA: So you want a sliding
6 scale?

7 MR. WOLF: It's not a sliding scale, Your
8 Honor. This is a two-step framework, and that is it.
9 We have ordinary searches, backpacks, pencil cases, book
10 bags, that kind of thing; and then you have a search
11 where you require a 13-year-old girl to take off her --
12 take off her pants, take off her shirt, move around her
13 bra so she reveals her breasts, and the same thing with
14 her underpants to reveal her pelvic area.

15 JUSTICE BREYER: I mean, I think there's a
16 dispute in the record about that. So -- so we have, I
17 mean you would have the right to prove your version,
18 obviously. But suppose you fail to prove that and that
19 the jury or judge, or whoever is deciding this fact,
20 concludes the school board's right on that; all they did
21 was ask her to strip to her underwear, period. Nobody
22 saw anything else.

23 Now, what's your view of that one? I mean,
24 let's also imagine that this is sufficient to prove --
25 to -- what happened was Marissa opens a planner, and in

1 the planner there's some small knives, a cigarette
2 lighter, and a cigarette. And who gave you the planner?
3 Well, Savana gave it to me. And they find some pills.
4 Let's imagine those pills are cocaine or something like
5 meth or something. And she says well, where did you get
6 those? Savana gave them to me.

7 Okay. That seems to be possibly reasonable
8 suspicion to think Savana has some of these pills. And
9 they're going to distribute them at lunchtime. At that
10 point they go look, whatever they did here. But then
11 they bring Savana in to the nurse and the nurse and the
12 female official say: All right, Savana, strip to your
13 underclothes and shake your underclothes. That's what
14 happens, period.

15 Now, is that latter part a violation of the
16 Fourth Amendment?

17 MR. WOLF: It is, Your Honor.

18 JUSTICE BREYER: Because?

19 MR. WOLF: It is because that is an
20 intrusive, traumatic search.

21 JUSTICE BREYER: All right. But it would be
22 okay to say, change into a swimming suit or your gym
23 clothes? Hey, your gym clothes are in the locker,
24 they're about the same size, shape; go do that.

25 MR. WOLF: It -- it might be different if

1 they asked Savana to go into the other room and to
2 change where you're not revealing your body to
3 any government official.

4 JUSTICE BREYER: No, they didn't -- she
5 didn't reveal her body beyond her underclothes. She --
6 that's the hypothetical that I'm trying to work out
7 here, because I'm not certain.

8 MR. WOLF: Right.

9 JUSTICE BREYER: I'm trying to work out why
10 is this a major thing to say strip down to your
11 underclothes, which children do when they change for
12 gym, they do fairly frequently, not to -- you know, and
13 there are only two women there. Is -- how bad is this,
14 underclothes? That's what I'm trying to get at. I'm
15 asking because I don't know.

16 MR. WOLF: Right.

17 JUSTICE GINSBURG: Mr. Wolf, one thing
18 should be clarified. I don't think there's any dispute
19 what was done in the case of both of these girls. It
20 wasn't just that they were stripped to their underwear.
21 They were asked to shake their bra out, to -- to shake,
22 stretch the top of their pants and shake that out.
23 There's no dispute, factual dispute about that, is
24 there?

25 MR. WOLF: There is none at all.

1 JUSTICE BREYER: Well, I thought there was,
2 because I thought on page 135 of the record the official
3 said they didn't see her naked, and so I thought that
4 there was --

5 JUSTICE GINSBURG: There was no dispute that
6 they asked her to shake her pants and her bra. Nobody
7 said that they touched -- the school officials didn't
8 touch her, that's a given. But they did ask her to
9 shake out her underwear.

10 MR. WOLF: That's right, Justice Ginsburg.
11 Everybody --

12 JUSTICE BREYER: My question -- my question
13 has to do with accepting --

14 MR. WOLF: Yes.

15 JUSTICE BREYER: What they said on page 135
16 of the record, and this is a genuine problem I'm having.
17 I'm trying to figure out, if that's so, and to repeat it
18 -- you heard what I said, there's no reason to repeat
19 it.

20 MR. WOLF: Yes.

21 JUSTICE BREYER: Okay. I want to know why
22 that search, if that's what happened, would violate the
23 Fourth Amendment, assuming reasonable suspicion to think
24 she possessed meth or cocaine at that time.

25 MR. WOLF: Yes. And it still would violate

1 the Fourth Amendment, and the question is why. Because
2 even that slightly less invasive search still implicates
3 legitimate and serious implications of privacy. The
4 National Association of Social Workers, for instance,
5 filed an amicus brief in this case, and what they showed
6 is that -- or they cited studies showing that when a
7 child undergoes a strip search -- and Justice Breyer,
8 your -- your hypothetical involves a strip search --
9 that that produces long-lasting and traumatic
10 consequences for a 13-year-old child.

11 Now, why does that matter? Because the
12 Fourth Amendment requires a balancing. On one side you
13 have legitimate expectations of privacy, and on the
14 other side you have the governmental need to conduct
15 that search. So --

16 JUSTICE BREYER: Maybe the psychologists --
17 "strip search" has a lot of meanings. And do the
18 psychologists focus on the situation with the child
19 involved, you know, this is an -- my hypothetical, is
20 that what they're talking about?

21 MR. WOLF: I believe it is, Your -- Justice
22 Breyer. And I believe that we cite such a study in --
23 in our brief, the red brief, where we say that it
24 doesn't require a student to take off his or her
25 undergarments so long as the shirt and the pants are

1 taken off, that that produces trauma.

2 JUSTICE SOUTER: Let me -- let me just, not
3 so much change the facts, but -- but emphasize a couple
4 of different aspects of the facts.

5 Assuming Justice Breyer's hypothetical of a
6 moment ago and assuming the following thought process on
7 the part of the principal -- I -- strike that.

8 I will vary the facts in one way. Let's
9 assume, following your categorical rule that the -- the
10 principal doesn't know whether it's ibuprofen or not.
11 He just knows that there's a pill and one of the other
12 kids said this person has got pills on -- on her person.
13 The principal says, I know as a matter of reliable fact
14 that one student got sick, violently sick, within the
15 past week or so on some pill; we don't know exactly what
16 it was. We also know within a reasonable period of time
17 from where we are now that there have been kids who died
18 from ingesting dangerous drugs. I've got suspicion that
19 some drug is on this kid's person. My thought process
20 is I would rather have the kid embarrassed by a strip
21 search, if we can't find anything short of that, than to
22 have some other kids dead because the stuff is
23 distributed at lunchtime and things go awry.

24 Is that the basis? Is that thought process,
25 that reasoning, the basis for a -- a reasonable strip

1 search?

2 MR. WOLF: And to make sure I understand,
3 it's that there's reasonable belief -- there's a
4 reasonable belief that a student has drugs on his or her
5 person?

6 JUSTICE SOUTER: That's right.

7 MR. WOLF: And by his or her person,
8 presumably it could be the pockets or it could be in the
9 backpack that he or she is holding?

10 JUSTICE SOUTER: Somewhere between the
11 surface of the clothes and -- and the body.

12 MR. WOLF: Right. And in that instance it
13 still would not be appropriate. There needs to be
14 suspicion that the object is located underneath the
15 clothing. And if that isn't there, then you can't
16 search there. Now that should be --

17 JUSTICE SOUTER: You -- you say that the --
18 the point of my question, this is what I'd like you to
19 focus on -- you're entirely right, I would accept that
20 argument and I think that argument is entirely right, if
21 the stakes are lower. If the risk of a mistake is going
22 to be less traumatic. In the hypo that I gave, the risk
23 of the mistake may well be violent sickness or death.
24 And the thought process in the principal's mind is, the
25 reasonableness analysis in the principal's mind is

1 better embarrassment than violent sickness or death.
2 What's wrong with that reasoning under the Fourth
3 Amendment?

4 MR. WOLF: Well, I mean, to start, that's
5 not what T.L.O. said. T.L.O. said that there needs to
6 be a reasonable --

7 JUSTICE SOUTER: I'm -- I'm saying it.

8 (Laughter.)

9 JUSTICE SOUTER: We -- We've got a new case.
10 (Laughter.)

11 JUSTICE SOUTER: And I'm saying to you, why
12 isn't that a -- a reasonable thought process within the
13 concept of Fourth Amendment reasonableness?

14 MR. WOLF: Because in order to conduct that
15 intrusive search, it seems like in that case you would
16 have to be doing guesswork, if you will, about where
17 those pills are located.

18 JUSTICE SOUTER: You've got reasonable
19 suspicion that they are somewhere on the person.

20 MR. WOLF: That's right. And presumably, if
21 they're -- if it doesn't show up in a pocket search,
22 then you can do a strip search; and if you don't find it
23 in the strip search, you could do a body cavity search;
24 and if it's not in the body cavity search --

25 JUSTICE SOUTER: And with those stakes in

1 mind, why isn't it reasonable? In other words, there --
2 there is a sliding scale of risk which is inherent in my
3 hypo, and why isn't that a sound basis for a -- a Fourth
4 Amendment analysis?

5 MR. WOLF: Because -- it all comes back to
6 the balancing of the Fourth Amendment. And here, where
7 you're conducting a traumatic search without a belief
8 that you're going to find it underneath the
9 undergarments, it --

10 JUSTICE SOUTER: I don't have a belief; I
11 simply have a reasonable suspicion. That's what I've
12 got all along the way. And it seems to me, when -- when
13 you take the position that you -- you were taking, you
14 are saying, better to have the risk of violent sickness
15 or death than the risk of embarrassment. Isn't that
16 what you're saying?

17 MR. WOLF: No, it's not what I'm saying,
18 Your Honor. There are many things that -- that this
19 principal could -- or the assistant principal could have
20 done here that would have mitigated any risk, and at the
21 same time not caused the trauma of -- the trauma
22 associated with a strip search. Sit the child down --

23 JUSTICE SOUTER: Some search is -- is
24 reasonable, I take it?

25 MR. WOLF: But -- absolutely.

1 JUSTICE SOUTER: All right. Now the -- we
2 get to the point as in prior hypos, in which it does --
3 they find nothing in the pockets. They find nothing in
4 the pocket book or other garments. The only thing
5 that's left is a strip search, and that's where you draw
6 the line. Why do you draw the line there, on the risk
7 analysis?

8 MR. WOLF: Well, the hypothetical supposes
9 they have searched everywhere. And I suppose if you
10 have -- if you are certain that somebody possesses a
11 drug and you have searched everywhere, perhaps you have
12 generated location-specific information. I would
13 readily agree to that.

14 But in this case, they certainly did not
15 search everywhere.

16 JUSTICE GINSBURG: Do you agree with Mr.
17 O'Neil when he said if the drug had been cocaine, and
18 it's well known that cocaine is carried in underwear,
19 that then this would not run afoul of the Fourth
20 Amendment? He gave an example of a drug where there was
21 a custom of carrying it in a certain way.

22 MR. WOLF: Right. I think if it were
23 readily known that this student had previously been
24 suspected of -- to use the term that's used in the court
25 of appeal cases -- "crotching" that drug, well, then,

1 perhaps that would have been appropriate.

2 JUSTICE GINSBURG: It has to be that
3 student. It can't be that it's customary among
4 students?

5 MR. WOLF: And it may be that if this
6 becomes so customary, that that somehow differently
7 calibrates the equation here, but it -- it's sort of
8 strange credulity to think that you would have loose
9 pills concealed against a student's genitalia. That's
10 what you'd have to think was the custom here.

11 JUSTICE SCALIA: As -- as I understand your
12 - your presentation, you qualify as a strip search any
13 search that requires the outer garments to be taken off.
14 So it didn't really matter whether they required her to
15 shake out her bra or stretch the elastic of her
16 underwear?

17 MR. WOLF: It certainly added to the trauma
18 -- trauma, Justice Scalia.

19 JUSTICE SCALIA: But is a strip search and
20 -- impermissible along the lines you say, to require the
21 student to even take off the outer garments?

22 MR. WOLF: That's -- that's right. That's
23 what the studies say, and that seems like a reasonable
24 calibration to me. You know, anything --

25 CHIEF JUSTICE ROBERTS: Just to combine it

1 with -- with your answers to Justice Kennedy, you are
2 saying it's unreasonable to take off the outer garments
3 even if your suspicion, reasonable suspicion for
4 justifying the preliminary search is that the student
5 has heroin?

6 MR. WOLF: Without any location-specific
7 information, that's correct, and anything else would
8 send a shudder down the spines of little boys and girls
9 around this country.

10 JUSTICE KENNEDY: Well, let me ask you this
11 about spine shuddering.

12 (Laughter.)

13 JUSTICE KENNEDY: Let's go back to Justice
14 Souter's question. We assume that there's meth,
15 something very dangerous, going to be smoked at noon,
16 there's very strong suspicion of this student. The
17 assistant principal says I'm going to give you a choice:
18 we're going to engage in an intrusive search, same sex
19 people, like what went on here; or we're going to call
20 the local police department, we'll have probable cause
21 to book you and they will search you at the jail house.
22 Which do you choose?

23 Would the school administrators be violating
24 their duty if they did that?

25 MR. WOLF: If -- if they called in the

1 police officers?

2 JUSTICE KENNEDY: They give the student the
3 choice. They say we'll do it here with a nurse right
4 here, where you know everybody, and there's nothing
5 wrong' or we'll call the police, and they'll do it down
6 at the police station.

7 MR. WOLF: I don't think that would violate
8 the Fourth Amendment, Justice Kennedy.

9 JUSTICE GINSBURG: But --

10 JUSTICE KENNEDY: Which -- which would be
11 the less traumatic of the two choices for the student?

12 MR. WOLF: Well I'm not sure that there's a
13 lesser or more traumatic. Both -- both are fairly
14 traumatic.

15 JUSTICE GINSBURG: But wouldn't the
16 police --

17 JUSTICE KENNEDY: You think it's less
18 traumatic, or it might be less traumatic to have
19 uniformed police officers take the person to the police
20 station and conduct the search there?

21 MR. WOLF: Well --

22 JUSTICE KENNEDY: You want us to decide the
23 case on the fact that that's probably less traumatic for
24 the student?

25 MR. WOLF: I'm saying both are remarkably

1 traumatic.

2 JUSTICE SCALIA: The police would require --

3 MR. WOLF: I'm not putting them one above
4 the other.

5 JUSTICE SCALIA: The police would require
6 probable cause, wouldn't they, not just suspicion?

7 MR. WOLF: They would require probable
8 cause.

9 JUSTICE KENNEDY: In the hypothetical wasn't
10 there a probable cause?

11 MR. WOLF: Well if there's probable cause
12 and they want to call the police officers in, then they
13 can do that. But that's not what happened here. What
14 this school official did was act on nothing more than a
15 hunch, if that, that Savana was currently concealing
16 Ibuprofen pills underneath her underpants for other's
17 oral consumption. I mean there's a certain ick factor
18 to this.

19 CHIEF JUSTICE ROBERTS: Well, you've made
20 that point several times. In fact the issue here covers
21 the brassier as well, which doesn't seem as outlandish
22 as the underpants, right?

23 MR. WOLF: Did you say the prisoner?

24 CHIEF JUSTICE ROBERTS: Yes.

25 MR. WOLF: Mr. Chief Justice? Well, yes, in

1 the prison context, the rules are different. They are
2 different, because this Court has --

3 CHIEF JUSTICE ROBERTS: Maybe I'm -- maybe
4 I'm not articulating this. You keep focusing on the
5 fact that it's unlikely that the pills would be
6 concealed in her underpants. That doesn't go to the
7 brassiere at all.

8 MR. WOLF: Well it -- the brassiere I think
9 as well. I mean there -- there was nothing in this
10 record that even the principal or assistant principal
11 said I suspect that it was there.

12 JUSTICE BREYER: It's not like you have any
13 studies on this. But I mean, I hate to tell you, but it
14 seems to me like a logical thing when an adolescent
15 child has some pills or something, they know people are
16 looking for them, they will stick them in their
17 underwear. I'm not saying everyone would, but I mean,
18 somebody who thinks that that's a fairly normal idea for
19 some adolescent with some illegal drugs to think of, I
20 don't think he's totally out to lunch, is he?

21 MR. WOLF: Well --

22 JUSTICE BREYER: Do you have any studies on
23 this? I doubt it.

24 MR. WOLF: No, but neither -- neither do
25 they.

1 JUSTICE BREYER: So what am I supposed to
2 do? In my experience when I was 8 or 10 or 12 years
3 old, you know, we did take our clothes off once a day,
4 we changed for gym, okay? And in my experience, too,
5 people did sometimes stick things in my underwear --

6 (Laughter.)

7 JUSTICE BREYER: Or not my underwear.
8 Whatever. Whatever. I was the one who did it? I don't
9 know. I mean, I don't think it's beyond human
10 experience, not beyond human experience.

11 MR. WOLF: Yes, but the "not beyond human
12 experience" --

13 JUSTICE BREYER: Well, what are they
14 supposed to do?

15 MR. WOLF: But the "not beyond human
16 experience" standard is not the standard that governs
17 whether the Fourth Amendment is violated.

18 JUSTICE BREYER: No, no, but it's supposed
19 to be what's reasonable.

20 MR. WOLF: Right.

21 JUSTICE BREYER: And a teacher is there
22 thinking what's reasonable? And I've already got the
23 thing sort of away from -- I see your point. I'm not
24 quite talking about that. I'm worried about what to
25 write in this as a general standard. And so am I

1 supposed to say, look, school -- school officials who
2 think that children could hide things in their underwear
3 when they know they're not supposed to have them, is
4 that school official really unreasonable except in a
5 special case? That's what's bothering me.

6 MR. WRIGHT: Well, it -- it is unreasonable,
7 and at the end of the day, it has to be unreasonable.
8 To think that -- for school officials to think that this
9 student was hiding -- this honor student was hiding
10 pills underneath her undergarments based on nothing in
11 the record that supports that, not a single thing. What
12 does the school official know? That there was an
13 accusation that Savana had provided pills at an unknown
14 time and at an unknown location, that Savana's backpack
15 search yielded nothing, not only pills, but no suspicion
16 that she possessed pills underneath her undergarments.

17 JUSTICE ALITO: Is that a question of law or
18 is that a question that goes to the trier of fact,
19 whether you could infer reasonable suspicion about the
20 presence of the pills in those locations?

21 MR. WOLF: That seems like a factual
22 question to me, Justice Alito. I mean, there's nothing
23 in the record to -- to indicate otherwise. And we
24 haven't moved for summary judgment here, but all
25 inferences are resolved in our favor when Petitioners

1 have moved for summary judgment.

2 JUSTICE SCALIA: Is probable cause a jury
3 question too?

4 MR. WOLF: Whether something rises to the
5 level of probable cause?

6 JUSTICE SCALIA: Yes, probable cause in the
7 ordinary criminal investigation cases. Is that a jury
8 question?

9 MR. WOLF: It strikes me as a factual
10 question, Your Honor, that may or may not -- I -- I
11 don't know the answer to that --

12 JUSTICE ALITO: In a 1983 action, wouldn't
13 it be a jury question?

14 MR. WOLF: I think in this case it certainly
15 is a jury question, without anything else in the record
16 that that -- that that is a reasonable inference, and
17 without it being self-evident -- and I would actually
18 argue that it was self-evident that those pills were not
19 located there and that that's not a reasonable
20 inference.

21 But if there is some doubt about that -- and
22 I was hearing some doubt from Justice Breyer and perhaps
23 other members of this Court -- well, that strikes me as
24 a factual question. And if that's a factual question to
25 be resolved by a jury, there must be a principle behind

1 that, which is that if it is not a reasonable inference
2 that those objects were located there, then it would be
3 an unreasonable search. And if that's true, then
4 qualified immunity, at least at this stage, was properly
5 denied.

6 JUSTICE SCALIA: I don't think it's a
7 question. You can -- even -- even in a 1983 action, I
8 don't think the courts allow a jury to decide whether
9 there was probable cause for an officer's search or
10 seizure. That's new to me.

11 MR. WOLF: Well, whether something was a
12 reasonable inference or not, it might strike one as a
13 reasonable inference --

14 JUSTICE GINSBURG: Did the Ninth Circuit --

15 MR. WOLF: -- and another as not a
16 reasonable inference.

17 JUSTICE GINSBURG: Did the Ninth Circuit
18 treat this as a jury question? I'm looking at page 38a.
19 They were quite definite that that was a Fourth
20 Amendment violation.

21 MR. WOLF: Right, because for the Ninth
22 Circuit, this -- it was self-evident to the Ninth
23 Circuit that the -- that there was not a reasonable
24 inference. And without that reasonable inference, there
25 was no reason to treat it as a jury question, but if

1 there were a reasonable inference, then it strikes me as
2 something that might be -- that might be better suited
3 for determination by the jury.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr. Wolf.

6 Mr. Wright, you have 3 minutes remaining.

7 REBUTTAL ARGUMENT OF MATTHEW W. WRIGHT

8 ON BEHALF OF THE PETITIONERS

9 MR. WRIGHT: Thank you, Your Honor.

10 The reality is that we've gotten past the
11 reasonable at its inception prong, and we're now on the
12 scope. And I think everyone concedes that. And, as to
13 the scope, I can tell you that if they found uncut
14 heroin or small-caliber bullets in this case, they would
15 have to reach the same results. And that is
16 unacceptable in the school setting. There's too much at
17 risk here when you're talking about the custodial and
18 tutelary responsibilities this Court has time and again
19 recognized as the most important elements in upholding
20 the three search cases, student search cases, that this
21 Court has upheld.

22 The other thing about the government's
23 proposal is -- is really troubling. It's because they
24 do not justify why they would pass a rule that would so
25 much stunt the administrator's discretion to respond,

1 even in the most serious situations that confront the
2 health and safety of kids. These -- these principles
3 are principles that have been restated by this Court.
4 You need the flexibility to act immediately and
5 effectively to keep kids safe.

6 JUSTICE SCALIA: Unless the people feel
7 differently.

8 MR. WRIGHT: That's right.

9 JUSTICE SCALIA: Some school districts have
10 rules against --

11 MR. WRIGHT: Absolutely.

12 JUSTICE SCALIA: -- simply forbidding strip
13 searches on any -- right?

14 MR. WRIGHT: There is an amicus brief that
15 cites 189 school districts which have substantially
16 limited strip searches, which proves the *Ingraham v.*
17 *Wright* theory, which is that it will be taken care of at
18 the local level.

19 But administrators, for now, need a
20 bright-line rule. And as to the scope, that bright-line
21 rule is if you have reason to suspect that a student is
22 processing contraband that poses a health and safety
23 risk, then searching any place where that contraband may
24 be reasonably hidden is constitutionally permissible.
25 And in any event, Mr. Wilson in this case certainly

1 could have believed that the Constitution permitted it,
2 Mr. Chief Justice, and so immunity is a foregone
3 conclusion in my opinion.

4 But I would ask the Court to rule on the
5 constitutional question in the affirmative because it
6 would further the interests of judicial economy. There
7 would not be any more Federal action in this case.

8 JUSTICE GINSBURG: Yes, there would.
9 There's a Monell claim against the school district
10 because there is no qualified immunity.

11 MR. WRIGHT: That's correct, Your Honor, but
12 if you ruled in the affirmative on the constitutional
13 question --

14 JUSTICE GINSBURG: Yes.

15 MR. WRIGHT: -- the case is over.

16 The additional issue, Justice Alito, on the
17 factual question is I understand you're not talking
18 about immunity, but the reality is we've got to be able
19 to make decisions, and if we get sued on factual
20 questions because somebody questions whether or not it's
21 reasonable for us to search where contraband may be
22 reasonably located, then we're going to end up in court
23 anyway on those factual questions, which is going to --
24 you know, deter officials from acting immediately and
25 effectively in those situations. So, I do not think it

1 is a factual question. And the District Court and the
2 first three-panel-judge court did hold as a matter of
3 law that this search was constitutional.

4 Thank you, Your Honors.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:15 a.m., the case in the
8 above-entitled matter was submitted.)

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