Case No. 05-15759

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAVANA REDDING, a minor,
by her mother and legal guardian APRIL REDDING,

Appellants,

v.

SAFFORD UNIFIED SCHOOL DISTRICT #1;
KERRY WILSON and JANE DOE WILSON, husband and wife;
HELEN ROMERO and JOHN DOE ROMERO, wife and husband;
PEGGY SCHWALLIER and JOHN DOE SCHWALLIER,
wife and husband,

Appellees.

On Rehearing En Banc

BRIEF OF AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF APPELLANTS AND FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae The Rutherford Institute, a Virginia nonprofit corporation, hereby makes the following disclosures:

1) There are no parent corporations for The Rutherford Institute; and

2) No public corporation owns 10% or more stock in The Rutherford Institute.

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STATEMENT OF THE AMICUS CURIAE

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

The Rutherford Institute is interested in the instant case because the District Court and panel decisions threaten the fundamental rights of children in our public schools and place them at risk of unwarranted invasions of the most intimate aspects of their privacy. Strip searches are universally recognized as severe intrusions of personal privacy that ought to be strictly limited. For the reasons set forth in the following Brief of Amicus Curiae, The Rutherford Institute believes that the decisions in this case must be reversed so that school administrators are not given a virtual *carte blanche* to conduct strip searches of students.

ARGUMENT

I. THE DETERMINATION OF WHETHER A STUDENT STRIP SEARCH IS REASONABLE MUST TAKE INTO ACCOUNT THE SEVERE INVASION OF PRIVACY INFLICTED BY A STRIP SEARCH.

Both the panel and District Court decisions in this case, as well as the parties, agreed that the Supreme Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), governed the determination of whether the strip search at issue in this case violated the Fourth Amendment.[1] *T.L.O* adopted the fundamental Fourth Amendment standard for student searches: "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341. The Court went on to identify two points of inquiry when judging student searches: "first, one must consider 'whether the action is justified at its inception,' . . .;

[1] However, it is not entirely clear that strip searches of children while at school should be judged by *T.L.O.* standards. As pointed out in the Appellants' Supplemental Brief supporting their request for en banc review, Justice Stevens, joined by two other justices, wrote in a separate opinion in the *T.L.O.* case that "[o]ne thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse. . . . To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm." *T.L.O.*, 469 U.S. at 381, n. 25 (Stevens, J., concurring in part and dissenting in part). This certainly raises questions about the applicability of *T.L.O.*'s qualified Fourth Amendment test to schoolhouse strip searches. At the very least, Justice Stevens' opinion recognizes the extreme nature of strip searches and counsels in favor of a more rigorous application of the *T.L.O.* standard to schoolhouse strip search.

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.'" *Id.* (citations omitted).

The reasonableness inquiry must give due regard to the intrusion that will be effected by the search. "The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search *against the invasion which the search entails*.'" *Id.* at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)) (emphasis added). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that investigatory stops of individuals involving "pat downs" were allowable where police have "reasonable suspicion," a standard of evidence short of probable cause that is equivalent to the standard adopted in *T.L.O.*, for student searches. The Court arrived at its holding only after considering "the nature and quality of the intrusion on individual rights," *Terry*, 392 U.S. at 24, and determining that pat-downs are "limited search for weapons" and do not involve an extensive exploration of the person. *Id.* at 25. The limited nature of the intrusion into privacy was also stressed in *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987), where the Court established that searches of government employee offices for evidence of work-related misconduct need only be supported by reasonable suspicion. Workplace searches entail an

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

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

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

Bell v. Wolfish, 441 U.S. 520, 559 (1979) (emphasis added).

Thus, in determining whether a strip search of a student is reasonable, it must be kept in mind that strip searches are the most severe invasions of privacy that the government can commit. As one court has noted, "strip searches involving the visual inspection of the anal and genital areas as 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission[.]'" *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (quoting *Tinetti v. Wittke*, 479 F. Supp. 486, 491 (E.D. Wis. 1979)). Strip searches of students have universally been recognized as "highly intrusive." *Phaneuf*

v.Fraikin, 473 F.3d 591, 596 n. 4 (2d Cir. 2006). This Court recognized that strip searches involve serious invasions of privacy when it adopted the conclusion of the Seventh Circuit that "[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old is an invasion of constitutional rights of some magnitude. More than that, it is a violation of any known principle of human dignity." *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir. 1991) (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980)).

The fact that a strip search involves a nearly unparalleled invasion into personal solicitude and privacy must inform all aspects of the determination of whether such a search was reasonable under the *T.L.O.* standard. Yet the panel decision upholding the search of Savana Redding did not once mention this as a factor in examining either prong of the *T.L.O.* analysis. Significantly, in determining whether the strip search was justified in its scope, the panel considered the importance of the governmental interest at stake, the size of the contraband, and the physical setting of the search, but did not consider the nature of the intrusion. *Redding v. Safford*, 504 F.3d 828, 835 (9th Cir. 2007). The panel's treatment of the strip search of Savana as a "run-of-the-mill" invasion of privacy conflicts with the established requirement that reasonableness must take into account the

severity of the intrusion. It establishes a dangerous precedent that allows school administrators to conduct strip searches whenever minimal grounds for a search exists, regardless of the quality of the evidence of suspicion, the probability that a strip search will disclose the items sought, or the harm that will be caused to the student by the search of the student's most personal and intimate spaces.[2] Moreover, given the magnitude of the invasion and the absence of imminent threat to other students, the school's failure to contact the girl's parents is inexplicable.

II. THE STRIP SEARCH WAS NOT JUSTIFIED AT ITS INCEPTION BECAUSE THE INFORMANT WAS NOT RELIABLE.

The magnitude of the privacy invasion effected by a strip search should have been considered both by the Defendants Wilson and Romero and the panel when determining whether the strip search was "justified at its inception," i.e., whether the Defendants had grounds for believing Savana

[2]See Rosemary Spellman, *Strip Search of Juveniles and the Fourth Amendment: A Delicate Balance of Protection and Privacy*, 22 J. Juv. L. 159, 173 (2001/2002) ("In determining whether to conduct a strip search, school officials must weigh the danger of the student's alleged conduct against the need to protect him or her from the humiliation and other emotional harms such a search produces. In almost every case imaginable, the psychological damage that would be inflicted on the child is simply not justifiable").

had violated school rules and had in her possession evidence of that violation. *T.L.O.*, 469 U.S. at 342. As Judge Thomas wrote in his dissent from the panel decision, the inquiry is not simply whether *some* search is justified; "the appropriate inquiry is whether a *strip search* was justified at its inception." *Redding*, 504 F.3d at 837 (Thomas, J., dissenting) (emphasis in original. "The more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted." *Mary Beth G.*, 723 F.2d at 1273 (citing *Terry*, 392 U.S. at 18, n. 15).

Courts reviewing whether student strip searches violated the Fourth Amendment have stressed that a greater degree of certainty is required, given the nature of the search. "Although *T.L.O.* held that reasonable suspicion is the governing standard, the reasonableness of the suspicion is informed by the very intrusive nature of a strip search, *N.G. v. Connecticut*, 382 F.3d 225, 234 (2d Cir. 2004), requiring for its justification a high level of suspicion." *Phaneuf*, 448 F.3d at 596. Similarly, in *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993), the court held that "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may

constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search."

Nothing in the panel's decision indicates that it considered the severity of the intrusion in assessing the reliability of the information supporting the school administrators' conclusion that Savana had committed school offenses related to drugs. The primary, if not sole, information supporting the search was the allegation by informant Marissa that the drugs Principal Wilson found on Marissa had been given to her by Savana. The panel recognized that Marissa should be treated like an informant for purposes of determining whether her allegation was sufficient to justify the strip search of Savana. *Redding*, 504 F.3d at 833. Where cause for a search is based upon information from an informant, the search is justified only if the "totality of circumstances" shows that the information is reliable. *United States v. Bishop*, 264 F.3d 919, 924-25 (9th Cir. 2001). *See also United States v. Brown*, 448 F.3d 239, 246-47 (2d Cir. 2006) ("totality of circumstances" determines whether police have reasonable suspicion to conduct a *Terry* stop on the basis of information from an informant).

However, the panel decision's examination of the totality of circumstances was woefully inadequate and failed to account for circumstances that affirmatively negated the reliability of Marissa's

accusation of Savana. In particular, Marissa's accusation should have been looked on with skepticism because it was given after she was caught red-handed with pills. Case law holds that informant statements inculpating others made after the informant has been apprehended or arrested are not considered reliable. Thus, in *Lilly v. Virginia*, 527 U.S. 116, 133 (1999), the Supreme Court pointed out that "our cases consistently have viewed an accomplice's statements that shift or spread the blame to" another are insufficiently reliable to be admitted in evidence, even if the statements are part of an otherwise inculpatory confession. Statements made while in custody implicating others in an offense are not considered reliable because there often is a motive to mitigate culpability by spreading or shifting blame to others. *Lee v. Illinois*, 476 U.S. 530, 544 (1986). *See also United States v. Mangana-Olvera*, 917 F.2d 401, 408 (9th Cir. 1990) (courts have closely scrutinized statements made while a declarant is in custody and offered against an accused because such statements may be made with the purpose of placating authorities or diverting their attention; such statements are consistently held to be unreliable).

This principle has been applied in the context of informant statements used as the basis for conducting searches or seizures. In *United States v. Hall*, 113 F.3d 157 (9th Cir. 1997), this court held that evidence was properly

suppressed because it was seized upon the basis of statements made by an unreliable informant (Dang), writing as follows:

> In this case, however, the police had already caught Dang red-handed, so his admission of what he knew the police already knew did not make what he said more credible. His claim that "Ron" was his supplier was more in the nature of trying to buy his way out of trouble by giving the police someone "up the chain," than a self-inculpatory statement which also implicated "Ron." Once a person believes that the police have sufficient evidence to convict him, his statement that another person is more important to his criminal enterprise than he gains little credibility from its inculpatory aspect.

Id. at 159. *See also United States v. Soriano*, 361 F.3d 494, 506 (9th Cir. 2003) (recognizing that statements of apprehended suspects shifting primary responsibility to others are unreliable where suspects do not incriminate themselves as to anything more than the officers already have) and *United States v. Jackson*, 818 F.2d 345, 349 (5th Cir. 1987) (affidavit's recitation of statements made by named informant did not support issuance of warrant; statements did not have sufficient indicia of reliability where the informant was in custody and constituted shifting or spreading of blame to others).

Marissa's statements clearly fall into this category of inherently unreliable statements. The statements essentially named Savana as the source of the pills, *Redding*, 504 F.3d at 830, and indicate an attempt to not merely spread blame but to implicate and divert attention to Savana as the more culpable "dealer." At the time, Marissa had been found possessing one

blue pill, several white pills, and a razor blade, *id.*, and so was clearly in trouble. Given her incentive to deflect focus from herself to someone else, school officials were not reasonable in determining that Marissa's statements were grounds for conducting a strip search of Savana.

Additional significant indicia of reliability of Marissa's accusation were necessary in order to justify the severe intrusion upon the privacy of Savana. Again, the panel's decision fails to identify any such facts other than the existence of some friendship between Savana and Marissa. However, friendships, especially among teenage girls, can be particularly volatile and involve dynamics that prevent one from presuming that a "friend" will not seek to shift blame to another friend. The panel referred to the "fact" that Savana told Principal Wilson that she had loaned her black planner to Marissa "to help Marissa conceal contraband," *id.* at 834, as the most significant fact supporting the reliability of Marissa's information. But as pointed out in Appellants' Supplemental Brief on Rehearing En Banc, Principal Wilson's affidavit relates only that Savana admitted loaning Marissa the planner, *not* that it was done for the purpose of concealing contraband.

The panel also referred to Wilson's "diligent efforts" to corroborate Marissa's accusation as justifying the reliability of her claim that Savana

was the source of the pills. But effort alone is not enough; there must have been some significant corroborating evidence as a result of that effort for the strip search of Savana to be considered reasonable. The panel identifies no such corroboration, with the exception that Jordan's report that Marissa was distributing pills was corroborated by the discovery of pills on Marissa. But this corroboration only supported Jordan's reliability, not Marissa's. Significantly, Jordan, a person with inside information who was apparently trying to assist school administrators, did not implicate Savana in the possession of pills.

In sum, there were insufficient additional indicia of reliability to justify a strip search of Savana at its inception. The inherent unreliability of Marissa's blame-shifting statements were not offset by any significant corroboration.

III. THE STRIP SEARCH OF SAVANA WAS NOT REASONABLE IN SCOPE BECAUSE THERE WAS INSUFFICIENT BASIS FOR SUSPECTING THAT SAVANA WAS HIDING DRUGS IN HER CLOTHING.

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

341. Again, this reasonableness inquiry must be informed by the fact that Savana was subjected to a strip search. *Phaneuf*, 448 F.3d at 596-97.

The decision to conduct a strip search of Savana cannot be deemed reasonable under this stricter reasonableness standard because even if school officials had a reliable basis for believing Savana possessed drugs, they did not have sufficient grounds for believing that Savana had drugs secreted in her underclothing. Suspicion justifying a search must exist not only as to the individual or premises, but also as to the place where the search is to be conducted. "Thus, the scope of a lawful search is 'defined by the object of the search *and the places in which there is probable cause to believe that it may be found*.'" *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)) (emphasis added). The "totality of circumstances" approach to search justification requires that government officials have a basis for concluding that contraband will be found "in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

This concern that searches be focused as to the places where suspicion exists is of particular importance when searches of the person are at issue. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), although the Supreme Court held that probable cause to believe a vehicle contains contraband authorizes police to conduct a warrantless search of the belongings of a passenger, it

distinguished the decisions in *United States v. Di Re*, 332 U.S. 581 (1948), and *Ybarra v. Illinois*, 444 U.S. 85 (1979), which held that probable cause to search a car or business establishment did not justify a body search of a passenger or person on the premises. "These cases turned on the unique, significantly heightened protection afforded against searches of one's person. 'Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.' . . . Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car." *Houghton*, 526 U.S. at 303 (quoting *Terry*, 392 U.S. at 24-25). Searches of the person, and strip searches in particular, are severe privacy intrusions, and the scope of such searches must be supported by some particularized evidence that the items or contraband sought will be found in the particular place to be searched.

In this case, the Defendants did not have sufficient grounds for believing that drugs would be disclosed by a strip search of Savana. There is no indication in the record that school officials had knowledge of a practice among students to hide prohibited items in their undergarments. With respect to this particular incident, the Defendants had already conducted a strip search of Marissa *and found nothing hidden in her undergarments*; all

the pills and other prohibited items were found in Marissa's effects. Additionally, the circumstances give no indication that Savana or Marissa, having become aware that they were suspected of drug possession, had an opportunity to take steps to hide any drugs within their undergarments. Savana was taken directly from her class to Defendant Wilson's office and was under observation from that time forward; school officials had no grounds for suspecting that Savana might have been able to take added measures to hide pills upon learning that officials were looking for pills. *See Cornfield*, 991 F.2d at 1322 (strip search of student for drugs was reasonable where officials observed unusual bulge in the student's crotch area).

If the panel's decision here is allowed to stand and school officials are authorized to conduct strip searches simply because a student could *possibly* hide the sought item in his or her undergarments, the implications for student privacy rights are enormous. Indeed, such rights will become non-existent. Strip searches will be allowed whenever the item sought is small enough to fit inside clothing, regardless of whether there is any basis for believing a student has secreted an item near his or her body. This grants school officials a virtual *carte blanche* to conduct strip searches and paves the way for student strip searches to become the rule, rather than the exception.

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

CONCLUSION

The panel decision in this case must be vacated and an en banc opinion entered that undertakes a "reasonableness" analysis that properly takes into consideration the serious privacy invasion inflicted upon Savana. Courts and school administrators must not be allowed to rely upon the panel's decision as a standard for determining whether sufficient information exists for performing a strip search on a student. While the standards set forth in the arguments herein require school officials to engage in more searching and careful analysis of the circumstances in front of them before

conducting a strip search, that is only as it ought to be, given the severe and potentially traumatizing nature of strip searches. The alternative, if the panel decision is allowed to stand, is a signal to school officials that they may treat strip searches as "standard operating procedure," and not a limited option for only the most compelling of circumstances. As a matter of common sense and in the interest of protecting basic human rights, this Court should enter judgment reversing the decision below and holding that the search of Savana violated the Fourth Amendment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Fed. R. App. P. 29(d), Cir. R. 29-2 and 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains less than 7,000 words.

Dated: February 20, 2008

Douglas R. McKusick

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on February 21, 2008, and original and 30 copies of the foregoing Brief of Amicus Curiae The Rutherford Institute were sent by courier for next-day delivery to:

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The undersigned further certifies that on February 21, 2008, the foregoing Brief of Amicus Curiae The Rutherford Institute was served upon all parties to this action by sending two (2) copies of said brief by courier for next day delivery to each of the following:

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