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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 cited in
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
25 in determining what is a risk and what isn't. But at

1 some point it becomes sufficiently questionable that I
2 do think we have to raise it. And if your rule would
3 criminalize -- I shouldn't say "criminalize" -- would --
4 would put aspirin in the contraband category and justify
5 the kind of search that went on here, I think we've
6 reached the questionable point. And I -- my question to
7 you now 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 the drug
20 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 -- 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
17 did 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. The
21 child is caught with the pills. She blames it on her
22 classmate. She says she gave them to me. Did the
23 school ever bother to ask when in time she gave them,
24 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.

5 So 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: And did it know that --
4 what -- what the threat was, was ibuprofen or aspirin or
5 -- or some prescription drug?

6 MR. WRIGHT: Not comprehensively, Your
7 Honor. What they knew was there was IBU 400s and 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
5 pill is found, they're not pharmacists, they don't know
6 what it is, and therefore they've got to have a blanket
7 rule or they simply cannot act effectively? I didn't
8 see 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, but I --

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.

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 -- there may be an issue as to
9 what the assistant principal could reasonably infer from
10 the 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 -- the notion that
20 we need 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 if you --

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

25 JUSTICE SCALIA: Really?

1 (Laughter.)

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

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

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

24 JUSTICE GINSBURG: But an official could
25 follow up to see whether this child -- whether there's a

1 basis for what she said. But there were no questions
2 asked at all.

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

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

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

25 JUSTICE STEVENS: What discipline did the

1 tipster receive? What discipline was the erroneous
2 tipster given?

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

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

8 MR. WRIGHT: Was the person -- Marissa
9 Glines, the person who gave the tip?

10 JUSTICE KENNEDY: Yes.

11 MR. WRIGHT: No, Your Honor.

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

16 MR. WRIGHT: Nothing at all. A bright-line
17 rule. I wouldn't allow it --

18 JUSTICE SCALIA: No cavity search in school,
19 no matter what?

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

1 clinical training.

2 JUSTICE SOUTER: Your basis for -- your
3 basis for saying that, I guess, is just sort of the
4 practical one: We don't know how to do that sort of
5 thing. So far as the legal principle is concerned on
6 the basis of which you justified this search, you could
7 justify that search, too, couldn't you?

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

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

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

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

24 MR. WRIGHT: Technically, but it will be
25 controlled by the community. It would be controlled by

1 the local board. The community would never --

2 JUSTICE KENNEDY: Do you know whether or not
3 in the Ninth Circuit in border search cases a body
4 cavity search can be conducted without a warrant? I
5 thought a warrant was required under the Ninth Circuit
6 rule. I could ask the government.

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

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

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

21 CHIEF JUSTICE ROBERTS: Okay.

22 JUSTICE GINSBURG: There's one aspect of
23 this, considering the reasonableness of the school
24 administrator's behavior. In addition to not following
25 up with Glines, after Redding was searched and nothing

1 was found, she was put in a chair outside the vice
2 principal's office for over 2 hours. What -- and her
3 mother wasn't called. What was the reason for that
4 humiliating -- putting her in that humiliating
5 situation?

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

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

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

21 JUSTICE SCALIA: I assume a school can
22 assign a student to study hall. That's not considered a
23 government seizure. Isn't that an obvious part of the
24 parental supervision that a school exercises?

25 MR. WRIGHT: That's exactly --

1 JUSTICE SCALIA: You know -- sit here and
2 stay there.

3 MR. WRIGHT: That's exactly right, Your
4 Honor.

5 JUSTICE SCALIA: Schools do that all the
6 time, don't they?

7 MR. WRIGHT: Yes. In fact, there was a
8 Ninth Circuit decision on the docket at the time, the
9 Smith v. McGlothlin case, where the plaintiff argued the
10 very thing, that she was detained for hours. And the
11 court recognized there -- I believe it was in the
12 concurrence by Judge Kozinski -- that -- that that's
13 entirely appropriate. That's where they are.

14 CHIEF JUSTICE ROBERTS: When was the -- when
15 was she detained there with -- in relation to the
16 lunchtime period, which was when the other student had
17 said that the -- all the kids were going to take these
18 pills?

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

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

25 JUSTICE BREYER: But aren't there things

1 here that are a little extreme? I mean, if she's to be
2 believed, then she was really naked, and the two
3 administrators deny that, but you have to take her side
4 of the facts. So taking her side of the facts, why
5 couldn't the school administrators just do what they
6 said they did? That is, you leave her in her underwear,
7 tell her go shake her underwear. No reason to do any
8 more than that. Or if she is really embarrassed about
9 that, say go put on a swimming suit, you know. Shake
10 the swimming suit, no problem. People see you at the
11 beach all the time. Or call your mother.

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

15 MR. WRIGHT: May I offer two principles?

16 JUSTICE BREYER: Yes.

17 MR. WRIGHT: First, this Court has
18 recognized that the least intrusive means is not a
19 threshold prerequisite to a constitutional search.

20 JUSTICE BREYER: I know, but I mean, here
21 she is embarrassed if -- if what she says happened
22 happened. There seems no reason for that, and it seems
23 so easy. Put on your gym clothes, okay? I mean, she
24 does that every day. It's just such obvious
25 alternatives to having her be really naked.

1 MR. WRIGHT: Very true, Your Honor.

2 JUSTICE BREYER: So that's what I -- I don't
3 see any basis for saying to the school administrator,
4 you know, you can do that. You can just turn her naked.
5 I mean, it just embarrasses her. What's the need for
6 it?

7 MR. WRIGHT: In the record, Your Honor, she
8 did -- she did have her underpants on and her brassiere
9 still on.

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

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

19 MR. WRIGHT: No, Your Honor. You have
20 specifically said the fact that other reasonable
21 alternatives are available doesn't mean that the
22 alternative that was used or the actual search that was
23 done was unreasonable.

24 JUSTICE BREYER: Okay. So that was my
25 question. My question was: Why wasn't it? I wasn't

1 asking about the law. I was asking: Why didn't they
2 choose one of these alternatives?

3 MR. WRIGHT: I'm sorry, Your Honor. I don't
4 -- I can't answer that question for Mr. Wilson, but I'm
5 sure that, in the heat of the moment, that that issue
6 wasn't thought through. And, of course, he wasn't
7 involved in the search because he's a male. Only the
8 females were involved in the search.

9 May I reserve the balance of my time, Your
10 Honor?

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Wright.

13 Mr. O'Neil.

14 ORAL ARGUMENT OF DAVID O'NEIL

15 ON BEHALF OF THE UNITED STATES,

16 AS AMICUS CURIAE,

17 SUPPORTING REVERSAL

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

20 Intrusive body searches in the school
21 context implicate fundamentally different expectations
22 of privacy than other -- other kinds of searches. For
23 that reason, they require greater justification under
24 the Fourth Amendment.

25 In the government's view, the best way to

1 give effect to that greater showing is to adhere to the
2 basic reasonable suspicion standard of T.L.O., but to
3 elaborate on that standard in two ways. First --

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

7 MR. O'NEIL: The government agrees with the
8 parties and all amici in this case that this Court
9 should address the substantive Fourth Amendment issue.

10 CHIEF JUSTICE ROBERTS: Should -- should,
11 but must?

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

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

16 MR. O'NEIL: That's exactly right, Justice
17 Scalia.

18 JUSTICE SCALIA: So don't we have to, for
19 that defendant at least, decide the constitutional
20 question?

21 MR. O'NEIL: Well, this Court could remand
22 on Monell grounds for a hearing on that, which was not
23 addressed in the first instance.

24 JUSTICE GINSBURG: What would be, Mr.
25 O'Neil, the basis for the Monell claim? That would be

1 against the school district?

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

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

5 MR. O'NEIL: The plaintiff would have to
6 show that this search was conducted pursuant to a -- an
7 official policy or that the vice principal was a person
8 who was acting with that authority. There are a number
9 of grounds that -- that the plaintiff could establish
10 the Monell claim on the basis of, but in this case the
11 Ninth Circuit did not address that. And, therefore, we
12 believe that this Court should not review it in the
13 first instance, but if the Court were inclined to remand
14 on that ground to allow the Ninth Circuit to address it
15 before this Court reaches that.

16 JUSTICE KENNEDY: You -- you criticized the
17 Ninth Circuit in your brief for having a sliding scale
18 standard, which is a bad thing in your view. But it
19 seems to me that your standard comes close to that. You
20 call yours a differential level standard or something
21 like that?

22 MR. O'NEIL: No, Justice Kennedy. Our
23 standard is one of greater specificity in the
24 information, not a standard that rises and falls
25 depending on the level of intrusiveness.

1 JUSTICE SCALIA: You -- you have to, under
2 your standard, have reason -- a reasonable suspicion
3 specifically that -- that the student is hiding the
4 contraband in the student's underwear?

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

6 JUSTICE SCALIA: Now, if -- if you have a
7 reasonable suspicion that the student has drugs and you
8 search every other place, you search in the student's
9 pack, you search the student's outer garments, and you
10 have a reasonable suspicion that the student has drugs,
11 don't you have, after conducting all these other
12 searches, a reasonable suspicion that she has drugs in
13 her underpants?

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

16 JUSTICE SCALIA: All right.

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

18 JUSTICE SCALIA: Your logic fails me.

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

20 JUSTICE SCALIA: You -- you reasonably
21 suspect the student has drugs. You've searched
22 everywhere else. By God, the drugs must be in her
23 underpants.

24 MR. O'NEIL: Well, Justice Scalia, you
25 posited that the teacher began the search with

1 reasonable suspicion. And in that case, if you searched
2 the obvious places like a wallet, a pocket, a desk, a
3 locker, and you didn't find it in those places, the
4 logical conclusion would not be that it must be in the
5 student's underwear, but perhaps that the information
6 that you had --

7 CHIEF JUSTICE ROBERTS: That sounds like you
8 --

9 JUSTICE BREYER: Well, why isn't it a normal
10 thing --

11 CHIEF JUSTICE ROBERTS: That sounds like --

12 JUSTICE BREYER: -- putting things in their
13 underwear.

14 CHIEF JUSTICE ROBERTS: That sounds --

15 JUSTICE BREYER: Sorry.

16 CHIEF JUSTICE ROBERTS: That sounds to me
17 like the sliding scale that you reject from the Ninth
18 Circuit.

19 MR. O'NEIL: No, because we believe that
20 where you have reasonable suspicion that there is
21 contraband in the underwear, then you could go directly
22 to that location, and you wouldn't have to work from the
23 outside in.

24 But, Justice Scalia, take the --

25 CHIEF JUSTICE ROBERTS: Oh, surely not. You

1 are saying if you have reasonable suspicion that it's in
2 the underwear, you shouldn't even bother searching the
3 pack or the pockets. You should go straight to the
4 underwear. That can't be right.

5 (Laughter.)

6 MR. O'NEIL: Well, to take T.L.O. as an
7 example, Justice Scalia, in that case the Court believed
8 that there was reasonable suspicion that the student had
9 cigarettes in her purse because that was the obvious
10 place to find them. Now, if the -- if the school
11 principal in that case had searched the purse, searched
12 the student's pocket, searched the locker, searched the
13 desk, I don't think this Court would have said that
14 there was reasonable suspicion to believe that the
15 cigarettes were in --

16 JUSTICE ALITO: Now, what specifically do
17 you think is missing here? They need -- the school
18 needed to have a direct statement from Marissa Glines
19 that -- that Redding had the -- had the pills in her
20 undergarments; is that correct?

21 MR. O'NEIL: The particularized suspicion
22 could come from information from students that reliably
23 adverted to the location of the contraband. That's the
24 Phaneuf case.

25 JUSTICE ALITO: But you have to have direct

1 evidence that the -- the -- it can't be based on
2 inferences?

3 MR. O'NEIL: No --

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

7 MR. O'NEIL: No, Justice Alito. We believe
8 that if teachers were aware of the general practice and
9 it was common knowledge that students did hide
10 contraband in this way and -- that would be relevant to
11 the totality of the circumstances in determining whether
12 this student was following that practice.

13 But we don't believe that the examples that
14 were provided in Petitioners' reply brief establish
15 anything like that practice. Petitioners cite eight
16 cases over the course of approximately 30 years in which
17 contraband was found in those locations.

18 JUSTICE SOUTER: But you're -- you're saying
19 basically there is -- there is no general understanding
20 that people carry ibuprofen in -- in their
21 undergarments.

22 MR. O'NEIL: That is -- that is true. There
23 was no experience at this school. There was no
24 reasonable -- no reason to suspect that based on
25 experience in the world. And, in fact, by the time the

1 officials had conducted their -- this search, they had
2 searched Marissa, who was Respondent's friend. And they
3 had conducted a search of her pockets and her wallet,
4 and had found pills in her pockets and her wallet. But
5 they had not found pills in her underwear.

6 So even if that had been a suspicion that
7 one might have had even before beginning the search,
8 they certainly wouldn't have had that suspicion by the
9 time --

10 CHIEF JUSTICE ROBERTS: But if your --
11 accepting your argument that there may be no reasonable
12 suspicion based on Marissa saying this is the person who
13 gave me the drugs, does the fact that she said kids are
14 going to -- the kids are going to take these drugs at
15 lunchtime, a specific time, does that present a
16 difference in the level of concern that the school
17 should have?

18 MR. O'NEIL: We believe that the schools may
19 take seriously any information they receive and must
20 take seriously any information they receive about the
21 presence of prescription pills on campus. And the fact
22 that the teacher believed that they -- that these pills
23 were going to be consumed at lunch as part of an event
24 that obviously wasn't simply intended to get rid of the
25 students' headaches, we believe that that would give

1 rise to a reasonable suspicion to initiate some search.

2 But we believe that without some
3 particularized suspicion or some specific indication
4 that this -- the location was a likely one to contain
5 the drugs, that this search was excessively intrusive.
6 And this is not a new standard. This is essentially the
7 same standard this Court adopted in the Montoya de
8 Hernandez case for intrusive body searches in other
9 contexts. It has proved workable in that context, and
10 we believe that it would prove workable here.

11 We believe that it is also better than the
12 alternatives of a higher level of suspicion, which does
13 not bear any necessary logical correlation to the
14 likelihood that the --

15 JUSTICE ALITO: If -- if Marissa Glines had
16 said specifically that Savana Redding has pills
17 someplace on her person and she's going to distribute
18 them at lunch in the cafeteria, would this be a
19 different case?

20 MR. O'NEIL: It may well, Justice Alito. In
21 that circumstance, it would likely be the reasonable
22 thing to do for the teacher --

23 JUSTICE ALITO: What is the difference
24 between that situation and this situation? The
25 differences are slight. Wouldn't that at least be a

1 question that has to be decided by the trier of fact?

2 MR. O'NEIL: That may present a triable
3 issue. Here --

4 JUSTICE SCALIA: Excuse me. That
5 wouldn't -- that wouldn't satisfy the test you've just
6 given us. I thought you said there had to be specific
7 indication that she was carrying it in her
8 undergarments. And what Justice Alito posed was not
9 that, just specific indication that she had it on her
10 person. Is that enough? Do you want to revise your
11 test so it's not just specific indication that it's in
12 her undergarments, but specific indication that it's on
13 her person? That's enough?

14 MR. O'NEIL: No, Justice Scalia. We believe
15 that there must be information beyond that. And I may
16 have misspoke, and I think the answer to that question
17 is that in that circumstance, a teacher would almost
18 certainly ask, well, where on her person is it? And if
19 the student doesn't know, then, yes, Justice Scalia,
20 that would not satisfy the standard that we would urge
21 this Court to adopt.

22 JUSTICE ALITO: I mean, the -- the student
23 says, she has -- she has crack someplace on her person,
24 and she's going to distribute it to kids during the
25 lunch hour, and so they search her -- her garments, and

1 they don't find it. And you're saying that they cannot
2 then go ahead and search her undergarments --

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

4 JUSTICE ALITO: -- because --

5 MR. O'NEIL: The nature of the contraband
6 could be relevant in the totality of the circumstances
7 to -- to the suspicion that the student has -- is hiding
8 it in some illicit place, as -- Justice Souter, as you
9 noted, certainly there is no practice anywhere, that I'm
10 aware of, of hiding ibuprofen in underwear, but --

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

13 MR. O'NEIL: No. It simply means that it's
14 relevant to whether in the totality of the circumstances
15 that school official could have reasonably suspected
16 that the student was hiding it.

17 CHIEF JUSTICE ROBERTS: How is a school
18 administrator supposed to know? Marissa says, she gave
19 me these pills. What are they? I don't know. And so
20 how is the -- if it depends whether it's a dangerous
21 drug like crack or a relatively -- not harmless, but a
22 different one like ibuprofen, the search depends on
23 that, how is the school administrator supposed to know?

24 MR. O'NEIL: My point was simply that, with
25 a drug like crack, there is a more common understanding

1 that a drug like that can be hidden in a student's -- in
2 underwear.

3 CHIEF JUSTICE ROBERTS: So what is the
4 school administrator supposed to know when he sees a
5 white pill and doesn't know if it's something terribly
6 harmful, even deadly, or if it's prescription-strength
7 ibuprofen? You say in the former case he can search
8 undergarments, in the latter case he can't. So how is
9 the administrator supposed to know what he's dealing
10 with?

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

17 CHIEF JUSTICE ROBERTS: I'm sorry. Your
18 answer to me was they have to take it seriously. My
19 question to you is: What is the administrator supposed
20 to do? He sees a white pill. Nobody can tell him what
21 it is. Is he allowed at that point to search the
22 undergarments or not?

23 MR. O'NEIL: No.

24 CHIEF JUSTICE ROBERTS: He's not?

25 MR. O'NEIL: He is not.

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

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

7 CHIEF JUSTICE ROBERTS: That's what you just
8 told us we should do, in answer to Justice Alito's
9 question.

10 MR. O'NEIL: No, I simply -- the point was
11 simply that if there is some common understanding that a
12 type of contraband is generally secreted in a certain
13 way -- and the example was crack, and there is a known
14 understanding that crack can be hidden in that way --
15 that that would be relevant to the totality of the
16 circumstances.

17 JUSTICE SOUTER: And I don't see why your
18 answer might not be different if, under the Chief
19 Justice's question, he didn't know it was ibuprofen.
20 All he knew was that it was a white pill. He's not a
21 pharmacologist, he doesn't know what's in it. Wouldn't
22 the reasonableness of the -- wouldn't the -- the scope
23 of reasonable search at least potentially be greater for
24 the undifferentiated white pill than for the known
25 ibuprofen?

1 MR. O'NEIL: It may, Justice Souter, but I
2 think that the question would be whether the school
3 official has some reason to believe, based on a
4 practice, that -- that pills, for example, are hidden in
5 a student's -- can be hidden in a student's underwear.
6 Again, the example was crack, and that is a situation
7 where there is an understanding that that is -- can be a
8 place in which suspects will hide that type of item.

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

14 CHIEF JUSTICE ROBERTS: Mr. Wolf.

15 ORAL ARGUMENT OF ADAM B. WOLF

16 ON BEHALF OF THE RESPONDENT

17 MR. WOLF: Mr. Chief Justice, and may it
18 please the Court:

19 We agree with the Federal Government that
20 before conducting an intrusive strip search, a school
21 needs to have location-specific information. And while
22 this case can begin and end with that well-accepted
23 proposition, it's also important to recognize that a
24 school needs greater -- a greater degree of suspicion to
25 conduct a strip search than to conduct an ordinary

1 backpack search.

2 CHIEF JUSTICE ROBERTS: I don't think the
3 case can begin and end with that because we have a
4 separate issue of qualified immunity. Can we take that
5 off the table?

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

10 MR. WOLF: Your Honor, I don't think a head
11 count of the judges is the standard by which this Court
12 measures qualified immunity. That's what this Court,
13 you know, held, for instance, in *Groh v. Ramirez*.

14 But I do understand that it sort of gives
15 one pause. It says, well, what did they miss here? And
16 what they missed here is that this search violated the
17 clearly established point that in order to conduct an
18 intrusive search of one's body, the searching official
19 needs to at least reasonably believe that the object is
20 located underneath the undergarments. The Fourth
21 Amendment does not account -- it does not countenance
22 the rummaging on or around a 13-year-old girl's naked
23 body --

24 CHIEF JUSTICE ROBERTS: What if --

25 MR. WOLF: -- without any suspicion.

1 CHIEF JUSTICE ROBERTS: What if what Marissa
2 has is heroin? The school administrator recognizes
3 heroin. She says, this is what the student gave me.
4 Search the undergarments or not?

5 MR. WOLF: The nature of the infraction --
6 no. The nature of the infraction, as T.L.O. would put
7 it, is a nonstarter in this case, because we don't even
8 have the suspicion to get underneath Savana's
9 undergarments, even if you had -- regardless of the
10 substance.

11 Now, in T.L.O., the question was whether
12 there were drugs to be found. There was marijuana in
13 that case. And this Court set a relatively low
14 standard, that you need more than a hunch, and you need
15 particularized suspicion. Now, that's where this Court
16 set the balance for ordinary searches for drugs.

17 JUSTICE KENNEDY: I'm not quite sure where
18 we are in your answer to the Chief Justice's question.
19 He asked you a hypothetical case. And you said that's a
20 nonstarter because in this case. And the hypothetical
21 is that there is a very dangerous drug, meth, that's
22 going to be distributed and consumed that afternoon.

23 Does that make a difference in the
24 permissibility of the search and the reasonableness of
25 the search and the scope of the search?

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

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

6 MR. WOLF: Your Honor --

7 JUSTICE KENNEDY: That's the way -- we
8 should -- we should judge this case as though they were
9 searching -- the fact that it was -- is it ibuprofen,
10 have I got that? The fact that it was ibuprofen is
11 irrelevant; we can consider this case as if it were
12 meth?

13 MR. WOLF: I think we all understand that
14 this -- that this case, you know, involves ibuprofen.
15 But our argument --

16 JUSTICE KENNEDY: I don't think I understand
17 that based on your answer. I'm -- I'm asking -- you
18 said that the -- the nature of the drug makes no
19 difference. It's a nonstarter.

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

21 JUSTICE KENNEDY: In -- insofar as the rule
22 that we -- that's because in this case you don't think
23 there's a reasonable suspicion to begin with. But that
24 doesn't answer the hypothetical. We're trying to
25 announce a rule. And your rule, your submission, as I

1 understand you and as I understood the government, is
2 that the nature of the substance they're searching for
3 is irrelevant.

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

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

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

14 JUSTICE KENNEDY: Thank you.

15 MR. WOLF: Why? Because in this case, there
16 was no suspicion -- and I think Justice Alito was
17 perhaps getting to this -- there was no suspicion that
18 these objects were going to be found inside Savana's
19 undergarments. And without that suspicion, you cannot
20 conduct such an intrusive search. It just seems --

21 JUSTICE ALITO: Well, to play the devil's
22 advocate on that, why couldn't the assistant principal
23 reason as follows: that he has information from -- from
24 Ms. Glines that Ms. Redding has drugs. He has
25 information from another student that drugs are going to

1 be consumed during the lunch hour. Putting those two
2 together, he reaches the -- he suspects that the person
3 who has the drugs has the drugs on his or her person so
4 that they can be distributed at lunch. And then having
5 searched every other part of -- of -- having searched
6 Ms. Redding's outer garments, what's left are her
7 undergarments. So, therefore, there's a reasonable
8 suspicion that the drugs are -- are located there.

9 MR. WOLF: Justice Alito --

10 JUSTICE ALITO: What's wrong with that?

11 MR. WOLF: Justice Alito, I don't think that
12 accurately describes the record. And even if it did, it
13 wouldn't satisfy this Court's standard. Two things
14 about the record: One, I think the hypothetical
15 supposed that she had drugs, and in fact the -- what the
16 record reveals is that it was -- allegedly Savana
17 provided these drugs at some point. It's not that she
18 currently had them on her.

19 Second, that they searched every other part,
20 and it's an important -- it's an important point in this
21 case. Where did Marissa have her planner? It was in
22 the desk. Did they search the desk here? No. We know
23 that. It's not in the record, as Mr. Wright said, but
24 they have lockers in the school. Did they search any
25 locker? No. Can students keep drugs anywhere else on

1 school grounds? Perhaps, probably so. Did they search
2 everywhere? They absolutely did not.

3 But I want to get back to the legal answer,
4 too, which is that this Court said in T.L.O., and it's
5 on page 342 of T.L.O., that a search is reasonable only
6 when there are reasonable grounds for believing that it
7 will turn up evidence. There were no reasonable grounds
8 for believing that this search would turn up evidence,
9 none at all.

10 JUSTICE SCALIA: You're saying the whole
11 search, not just the search of the undergarments.
12 You're saying they couldn't even have searched her --
13 her backpack, right?

14 MR. WOLF: I think they could have searched
15 her backpack. And what --

16 JUSTICE SCALIA: Why?

17 MR. WOLF: -- that speaks to is the low
18 degree of the suspicion and the nonspecific suspicion
19 that's needed to conduct an ordinary search.

20 JUSTICE SCALIA: So you want a sliding
21 scale?

22 MR. WOLF: It's not a sliding scale, Your
23 Honor. This is a two-step framework, and that is it.
24 We have ordinary searches -- backpacks, pencil cases,
25 book bags, that kind of thing -- and then you have a

1 search where you require a 13-year-old girl to take off
2 her -- take off her pants, take off her shirt, move
3 around her bra so she reveals her breasts, and the same
4 thing with her underpants to reveal her pelvic area.

5 JUSTICE BREYER: I mean, I think there's a
6 dispute in the record about that. So -- so we have, I
7 mean you would have the right to prove your version,
8 obviously. But suppose you fail to prove that and that
9 the jury or judge, or whoever is deciding this fact,
10 concludes the school board's right on that; all they did
11 was ask her to strip to her underwear, period. Nobody
12 saw anything else.

13 Now, what's your view of that one? I mean,
14 let's also imagine that this is sufficient to prove --
15 to -- what happened was Marissa opens a planner, and in
16 the planner there's some small knives, a cigarette
17 lighter, and a cigarette. And who gave you the planner?
18 Well, Savana gave it to me. And they find some pills.
19 Let's imagine those pills are cocaine or something like
20 meth or something. And she says, well, where did you
21 get those? Savana gave them to me.

22 Okay. That seems to be possibly reasonable
23 suspicion to think Savana has some of these pills. And
24 they're going to distribute them at lunchtime. At that
25 point, they go look, whatever they did here. But then

1 they bring Savana in to the nurse, and the nurse and the
2 female official say, all right, Savana, strip to your
3 underclothes and shake your underclothes. That's what
4 happens, period.

5 Now, is that latter part a violation of the
6 Fourth Amendment?

7 MR. WOLF: It is, Your Honor.

8 JUSTICE BREYER: Because?

9 MR. WOLF: It is because that is an
10 intrusive, traumatic search. And the --

11 JUSTICE BREYER: All right. But it would be
12 okay to say: Change into a swimming suit or your gym
13 clothes? Hey, your gym clothes are in the locker,
14 they're about the same size, shape. Go do that.

15 MR. WOLF: It -- it might be different if
16 they asked Savana to go into the other room and to
17 change where you're not revealing your body to
18 any government official.

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

23 MR. WOLF: Right.

24 JUSTICE BREYER: I'm trying to work out why
25 is this a major thing to say strip down to your

1 underclothes, which children do when they change for
2 gym, they do fairly frequently, not to -- you know, and
3 there are only two women there. Is -- how bad is this,
4 underclothes? That's what I'm trying to get at. I'm
5 asking because I don't know.

6 MR. WOLF: Right.

7 JUSTICE GINSBURG: Mr. Wolf, one thing
8 should be clarified. I don't think there's any dispute
9 what was done in the case of both of these girls. It
10 wasn't just that they were stripped to their underwear.
11 They were asked to shake their bra out, to -- to shake,
12 stretch the top of their pants and shake that out.
13 There's no dispute, factual dispute about that, is
14 there?

15 MR. WOLF: There is none at all.

16 JUSTICE BREYER: Well, I thought there was,
17 because I thought on page 135 of the record the official
18 said they didn't see her naked, and so I thought that
19 there was --

20 JUSTICE GINSBURG: There was no dispute that
21 they asked her to shake her pants and her bra. Nobody
22 said that they touched -- the school officials didn't
23 touch her. That's a given. But they did ask her to
24 shake out her underwear.

25 MR. WOLF: That's right, Justice Ginsburg.

1 Everybody --

2 JUSTICE BREYER: My question -- my question
3 has to do with accepting --

4 MR. WOLF: Yes.

5 JUSTICE BREYER: What they said on page 135
6 of the record, and this is a genuine problem I'm having.
7 I'm trying to figure out, if that's so, and to repeat it
8 -- you heard what I said. There's no reason to repeat
9 it.

10 MR. WOLF: Yes.

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

15 MR. WOLF: Yes. And it still would violate
16 the Fourth Amendment, and the question is why. Because
17 even that slightly less invasive search still implicates
18 legitimate and serious implications of privacy. The
19 National Association of Social Workers, for instance,
20 filed an amicus brief in this case, and what they showed
21 is that -- or they cited studies showing that when a
22 child undergoes a strip search -- and Justice Breyer,
23 your -- your hypothetical involves a strip search --
24 that that produces long-lasting and traumatic
25 consequences for a 13-year-old child.

1 Now, why does that matter? Because the
2 Fourth Amendment requires a balancing. On one side you
3 have legitimate expectations of privacy, and on the
4 other side you have the governmental need to conduct
5 that search. So --

6 JUSTICE BREYER: Maybe the psychologists --
7 "strip search" has a lot of meanings. And do the
8 psychologists focus on the situation with the child
9 involved, you know, this is an -- my hypothetical. Do
10 they -- is that what they're talking about?

11 MR. WOLF: I believe it is, Your -- Justice
12 Breyer. And I believe that we cite such a study in --
13 in our brief, the red brief, where we say that it
14 doesn't require a student to take off his or her
15 undergarments so long as the shirt and the pants are
16 taken off, that that produces trauma.

17 JUSTICE SOUTER: Let me -- let me just, not
18 so much change the facts, but -- but emphasize a couple
19 of different aspects of the facts.

20 Assuming Justice Breyer's hypothetical of a
21 moment ago and assuming the following thought process on
22 the part of the principal -- I -- strike that. I would
23 vary the facts in one way. Let's assume, following your
24 categorical rule that the -- the principal doesn't know
25 whether it's ibuprofen or not. He just knows that

1 there's -- there's a pill and one of the other kids said
2 this person has got pills on -- on her person. The
3 principal says, I know as a matter of reliable fact that
4 one student got sick, violently sick, within the past
5 week or so on some pill; we don't know exactly what it
6 was. We also know, within a reasonable period of time
7 from where we are now, that there have been kids who
8 died from ingesting dangerous drugs. I've got suspicion
9 that some drug is on this kid's person. My thought
10 process is I would rather have the kid embarrassed by a
11 strip search, if we can't find anything short of that,
12 than to have some other kids dead because the stuff is
13 distributed at lunchtime and things go awry.

14 Is that the basis? Is that thought process,
15 that reasoning, the basis for a -- a reasonable strip
16 search?

17 MR. WOLF: And to make sure I understand,
18 it's that there's reasonable belief -- there's a
19 reasonable belief that a student has drugs on his or her
20 person?

21 JUSTICE SOUTER: That's right.

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

25 JUSTICE SOUTER: Somewhere between the

1 surface of the clothes and -- and the body.

2 MR. WOLF: Right. And in that instance it
3 still would not be appropriate. There needs to be
4 suspicion that the object is located underneath the
5 clothing. And if that isn't there, then you can't
6 search there. Now, that should be --

7 JUSTICE SOUTER: Yes, but you -- you say
8 that the -- the point of my question, and this is what
9 I'd like you to focus on -- you're entirely right, I
10 would -- I would accept that argument and I think that
11 argument is entirely right, if the stakes are lower. If
12 the risk of a mistake is going to be less traumatic. In
13 the hypo that I gave, the risk of the mistake may well
14 be violent sickness or death. And the thought process
15 in the principal's mind is -- the reasonableness
16 analysis in the principal's mind is better embarrassment
17 than violent sickness or death. What's wrong with that
18 reasoning under the Fourth Amendment?

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

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

23 (Laughter.)

24 JUSTICE SOUTER: We -- we've got a new case.

25 (Laughter.)

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

4 MR. WOLF: Because in order to conduct that
5 intrusive search, it seems like, in that case, you would
6 have to be doing guesswork, if you will, about where
7 those pills are located.

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

10 MR. WOLF: That's right. And presumably, if
11 they're -- if it doesn't show up in a pocket search,
12 then you can do a strip search; and if you don't find it
13 in the strip search, you could do a body cavity search;
14 and if it's not in the body cavity search --

15 JUSTICE SOUTER: And with those stakes in
16 mind, why isn't it reasonable? In other words, there --
17 there is -- there is a sliding scale of risk which is
18 inherent in my hypo, and why isn't that a sound basis
19 for a -- a Fourth Amendment analysis?

20 MR. WOLF: Because -- it all comes back to
21 the balancing of the Fourth Amendment. And here, where
22 you're conducting a traumatic search without a belief
23 that you're going to find it underneath the
24 undergarments, it --

25 JUSTICE SOUTER: I don't have a belief; I

1 simply have a reasonable suspicion. That's what I've
2 got all along the way. And it seems to me, when -- when
3 you take the position that you -- you are taking, you
4 are saying, better to have the risk of violent sickness
5 or death than the risk of embarrassment. Isn't that
6 what you're saying?

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

13 JUSTICE SOUTER: Some -- some search is --
14 is reasonable, I take it?

15 MR. WOLF: Absolutely. Yes.

16 JUSTICE SOUTER: All right. Now, the -- we
17 get to the point as in prior hypos, in which it does not
18 -- they find nothing in the pockets. They find nothing
19 in the pocketbook or other garments. The only thing
20 that's left is a strip search, and that's where you draw
21 the line. Why do you draw the line there, on the risk
22 analysis?

23 MR. WOLF: Well, the hypothetical supposes
24 they have searched everywhere. And I suppose if you
25 have -- if you are certain that somebody possesses a

1 drug and you have searched everywhere, perhaps you have
2 generated location-specific information. I would
3 readily agree to that.

4 But in this case, they certainly did not
5 search everywhere.

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

12 MR. WOLF: Right. I think if it were
13 readily known that this student had previously been
14 suspected of -- to use the term that's used in the court
15 of appeal cases -- "crotching" that drug, well, then,
16 perhaps that would have been appropriate.

17 JUSTICE GINSBURG: It has to be that
18 student. It can't be that it's customary among
19 students?

20 MR. WOLF: And it may be that if this
21 becomes so customary, that that somehow differently
22 calibrates the equation here, but it -- it sort of
23 strains credulity to think that you would have loose
24 pills concealed against a student's genitalia. That's
25 what they'd have to think was happening here.

1 JUSTICE SCALIA: As -- as I understand your
2 -- your presentation, you -- you qualify as a strip
3 search any search that requires the outer garments to be
4 taken off. So it didn't really matter whether they
5 required her to shake out her bra or stretch the elastic
6 of her underwear?

7 MR. WOLF: It certainly added to the trauma,
8 Justice Scalia --

9 JUSTICE SCALIA: No, but -- but it is a
10 strip search --

11 MR. WOLF: Yes.

12 JUSTICE SCALIA: -- and impermissible, along
13 the lines you say, to require the student to even take
14 off the outer garments?

15 MR. WOLF: That's -- that's right. That's
16 what the studies say, and that seems like a reasonable
17 calibration to me. You know, anything else would --

18 CHIEF JUSTICE ROBERTS: Just to combine it
19 with -- with your answers to Justice Kennedy, you're
20 saying it's unreasonable to take off the outer garments
21 even if your suspicion, reasonable suspicion, for
22 justifying the preliminary search is that the student
23 has heroin?

24 MR. WOLF: Without any location-specific
25 information, that's correct, and anything else would

1 send a shudder down the spines of little boys and girls
2 around this country.

3 JUSTICE KENNEDY: Well, let me ask -- ask
4 you this about spine shuddering.

5 (Laughter.)

6 JUSTICE KENNEDY: Let's go back to Justice
7 Souter's question. We assume that there's meth,
8 something very dangerous, going to be smoked at noon.
9 There's very strong suspicion of this student. The
10 assistant principal said, I'm going to give you a
11 choice: We're going to engage in an intrusive search,
12 same-sex people -- like what went on here -- or we're
13 going to call the local police department. We -- we
14 have probable cause for them to book you, and they will
15 search you at the jail house. Which do you choose?

16 Would the school administrators be violating
17 their duty if they did that?

18 MR. WOLF: If -- if they've called in the
19 school -- the police officers --

20 JUSTICE KENNEDY: No, in my hypothetical,
21 they give the student the choice. They say we'll do it
22 here with a nurse right here, where you know everybody,
23 and there's nothing wrong, or we're going to call the
24 police, and they'll do it down at the police station.

25 MR. WOLF: I don't think that would violate

1 the Fourth Amendment, Justice Kennedy.

2 JUSTICE GINSBURG: What reasonable cause --

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

5 MR. WOLF: Well, I'm not sure that there's a
6 less or a more traumatic. Both -- both are fairly
7 traumatic.

8 JUSTICE GINSBURG: But wouldn't the
9 police --

10 JUSTICE KENNEDY: You think it's less
11 traumatic, or it might be less traumatic to have
12 uniformed police officers take the person to the police
13 station and conduct the search there?

14 MR. WOLF: Well --

15 JUSTICE KENNEDY: You want us to decide the
16 case on the fact that that's probably less traumatic for
17 the student?

18 MR. WOLF: I'm saying both are remarkably
19 traumatic. I'm not --

20 JUSTICE SCALIA: The police would require --

21 MR. WOLF: I'm not putting them one above
22 the other.

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

25 MR. WOLF: They would require probable

1 cause.

2 JUSTICE KENNEDY: Well, the hypothetical was
3 that there was probable cause.

4 MR. WOLF: Well -- and if there's probable
5 cause and they want to call the police officers in, they
6 can do that. But that's not what happened here. What
7 this school official did was act on nothing more than a
8 hunch, if that, that Savana was currently concealing
9 ibuprofen pills underneath her underpants for other's
10 oral consumption. I mean, there's a certain "ick"
11 factor to this.

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: Well, you've made
14 that point several times. In fact, the issue here
15 covers the brassiere as well, which doesn't seem as
16 outlandish as -- as the underpants, right?

17 MR. WOLF: Did you say the prisoner --

18 CHIEF JUSTICE ROBERTS: Yes.

19 MR. WOLF: -- Mr. Chief Justice? Well, yes,
20 in the prison context, the rules are different. They
21 are -- they are different, because this Court has --

22 CHIEF JUSTICE ROBERTS: I'm sorry. Maybe
23 I'm -- maybe I'm not articulating this. You keep
24 focusing on the fact that it's unlikely that the pills
25 would be concealed in her underpants. That doesn't go

1 to the brassiere at all.

2 MR. WOLF: Well, the -- the brassiere I
3 think as well. I mean there -- there is nothing in this
4 record that even the principal or assistant principal
5 said, I suspect that it was there. It's --

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

15 MR. WOLF: Well --

16 JUSTICE BREYER: Do you have any studies on
17 this? I doubt it.

18 MR. WOLF: No, but neither -- neither do
19 they.

20 JUSTICE BREYER: No. So what am I supposed
21 to do? In my experience when I was 8 or 10 or 12 years
22 old, you know, we did take off our clothes once a day,
23 we changed for gym.

24 MR. WOLF: Right.

25 JUSTICE BREYER: Okay? And in my

1 experience, too, people did sometimes stick things in my
2 underwear -- or not my underwear.

3 (Laughter.)

4 JUSTICE BREYER: All right. Whatever.

5 All right.

6 MR. WOLF: Justice Breyer, it's your
7 hypothetical --

8 JUSTICE BREYER: I was the one who did it?
9 I don't 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: So what are they supposed
14 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, that
4 that school official is 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 to
8 think that -- for a school official 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 did 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: Do you think that's a pure
18 question of law or is that a question that goes to the
19 trier of fact, whether you could infer reasonable
20 suspicion about the presence of pills in those
21 locations?

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

1 inferences are resolved in our favor when Petitioners
2 have moved for summary judgment.

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

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

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

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

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

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

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

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

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

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

15 JUSTICE GINSBURG: And did the Ninth Circuit
16 --

17 MR. WOLF: -- and another as not a
18 reasonable --

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

23 MR. WOLF: Right, because for the Ninth
24 Circuit, this -- it was self-evident to the Ninth
25 Circuit that the -- that there was not a reasonable

1 inference. And without that reasonable inference, there
2 was no reason to treat it as a jury question, but if
3 there were a reasonable inference, then it strikes me as
4 something that might be -- that might be better suited
5 for determination by the jury.

6 Thank you.

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

8 Mr. Wright, you have 3 minutes remaining.

9 REBUTTAL ARGUMENT OF MATTHEW W. WRIGHT

10 ON BEHALF OF THE PETITIONERS

11 MR. WRIGHT: Thank you, Your Honor.

12 The reality is that we've gotten past the
13 reasonable at its inception prong, and we're now on the
14 scope. And I think everyone concedes that. And, as to
15 the scope, I can tell you that if they found uncut
16 heroin or small-caliber bullets in this case, they would
17 have to reach the same result.

18 And that is unacceptable in the school
19 setting. There's too much at risk here when you're
20 talking about the custodial and tutelary
21 responsibilities this Court has time and again
22 recognized as the most important element in upholding
23 the three search cases, student search cases, that this
24 Court has upheld.

25 The other thing about the government's

1 proposal is -- is really troubling. It's because they
2 do not justify why they would pass a rule that would so
3 much stunt the administrator's discretion to respond,
4 even in the most serious situations that confront the
5 health and safety of kids. These -- these principles
6 are principles that have been restated by this Court.
7 You need the flexibility to act immediately and
8 effectively to keep kids safe.

9 JUSTICE SCALIA: Unless the people feel
10 differently.

11 MR. WRIGHT: That's right.

12 JUSTICE SCALIA: I'm sure some school
13 districts have rules against --

14 MR. WRIGHT: Absolutely.

15 JUSTICE SCALIA: -- simply forbidding strip
16 searches on any -- right?

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

22 But administrators, for now, need a
23 bright-line rule. And as to the scope, that bright-line
24 rule is if you have reason to suspect that a student is
25 possessing contraband that poses a health and safety

1 risk, then searching any place where that contraband may
2 be reasonably hidden is constitutionally permissible.
3 And in any event, Mr. Wilson in this case certainly
4 could have believed that the Constitution permitted it,
5 Mr. Chief Justice, and so immunity is a foregone
6 conclusion in my opinion.

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

11 JUSTICE GINSBURG: Yes, there would.
12 There's a Monell claim against the school district where
13 there is no qualified immunity.

14 MR. WRIGHT: That's correct, Your Honor, but
15 if you ruled in the affirmative on the constitutional
16 question --

17 JUSTICE GINSBURG: Yes.

18 MR. WRIGHT: -- that case is over.

19 The additional issue, Justice Alito, on the
20 factual question is I understand you're not talking
21 about immunity, but the reality is we've got to be able
22 to make decisions, and if we get sued on factual
23 questions because somebody questions whether or not it's
24 reasonable for us to search where contraband may be
25 reasonably located, then we're going to end up in court

1 anyway on those factual questions, which is going to --
2 you know, deter officials from acting immediately and
3 effectively in those situations. So, I do not think it
4 is a factual question. And the District Court and the
5 first three-panel-judge court did hold as a matter of
6 law that this search was constitutional.

7 Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

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

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