No. 08-479

IN THE
SUPREME COURT OF THE UNITED STATES

SAFFORD UNIFIED SCHOOL DISTRICT #1; KERRY WILSON, HUSBAND; JANE DOE WILSON, WIFE; HELEN ROMERO, WIFE; JOHN DOE ROMERO, HUSBAND; PEGGY SCHWALLIER, WIFE; JOHN DOE SCHWALLIER, HUSBAND,
Petitioners,

v.

APRIL REDDING, LEGAL GUARDIAN OF MINOR CHILD,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Founded in 1940, the National School Boards Association ("NSBA") is a not-for-profit federation of state associations of school boards across the United States. Through its federation NSBA also represents the nation's 95,000 school board members who, in turn, govern nearly 15,000 local school districts that serve more than 49.3 million public school students.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional organization for more than 13,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

Amici have a strong interest in ensuring that school leaders have the ability to respond to student drug abuse in an effective manner through educational efforts and appropriate disciplinary measures that may include student searches. *Amici* believe that school officials should be afforded appropriate deference when making on the spot decisions that involve complex legal issues that require the balancing of student privacy rights with a compelling interest in ensuring a safe, orderly drug-free learning environment for all students. The

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[1] The parties were notified more than ten days before the due date of the *amici's* intent to file. The parties have given written consent to the filing of this brief. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

Ninth Circuit's ruling sharply limits the ability of school leaders to meet this responsibility without risk of personal legal liability.

SUMMARY OF THE ARGUMENT

Over 20 years ago, this Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985), rejected efforts to impose a warrant requirement and probable cause standard on searches by school officials. This Court recognized that the need for efficient school administration undertaken to preserve a safe school environment and to protect students from serious health risks required a more flexible "reasonable suspicion" standard to evaluate the constitutionality of school searches.

Since *T.L.O.*, this Court has reviewed other student search cases. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist., 47J v. Acton*, 515 U.S. 646 (1995). Those cases, however, did not involve searches based on individualized suspicion of a specific student. Contradictions in lower court precedent applying *T.L.O.*, as illustrated by this case, demonstrate the need for this Court to step in and clarify the application of *T.L.O.* to searches, including strip searches, that extend beyond the facts of that case. Otherwise, there is a risk that the lower courts, such as Ninth Circuit's majority here, will develop a jurisprudence that frustrates the ability of educators to effectively address a myriad of student behaviors that create risk for our nation's youth.

In addition, the Ninth Circuit majority opinion represents a sharp departure from recent decisions of this Court that give deference to the educators who administer our nation's schools. This tradition of deference animated the decisions in *T.L.O.*, *Acton*, and *Earls* and most recently was reaffirmed in *Morse v. Frederick*, 127 S. Ct. 2618, 2623 (2007). Deference to educators' judgments recognizes that the role of the courts in school administration should necessarily be limited to avoid placing unwise constraints on the ability of those educators to preserve the learning environment and protect the safety of students.

Rather than paying deference to the judgments of educators here, the Ninth Circuit majority trivialized the dangers posed by the non-medicinal use of prescription and over-the-counter ("OTC") drugs by students. *See Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1085 (9th Cir. 2008) (suggesting that prescription grade ibuprofen does not pose "an imminent danger to" anyone). Recent reports, however, highlight a much more alarming trend with respect to prescription and OTC drug abuse. By accepting review, the Court would have the opportunity to address the legal issues presented here in the context of a growing problem of prescription and OTC drug abuse among young people.

The Ninth Circuit's misunderstanding and misapplication of *T.L.O.* all but pre-determined its erroneous conclusion that the school administrator in this case was not entitled to qualified immunity because the law was clearly established at the time of the search. Not only is this conclusion wrong as a

matter of law, but it also has the undesirable effect of holding school administrators personally liable for making decisions of constitutional import on which experienced jurists cannot agree. This unfairly places school officials in the position of being sued and held personally responsible for good faith decisions intended to protect the health and safety of the students entrusted to their care and tutelage. This outcome demonstrates the critical need for clear guidance from this Court regarding the appropriate balance under the Fourth Amendment between the individual privacy rights accorded a particular student and the compelling interest of schools in maintaining a safe and healthy learning environment for all students.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION UNDULY COMPLICATES THE *T.L.O.* STANDARD AND CONTRAVENES THE STANDARD OF JUDICIAL DEFERENCE TO EDUCATORS ADDRESSING SERIOUS ISSUES OF STUDENT DRUG USE.

A. The Court should clear up confusion among the federal courts and educators regarding individualized suspicion searches by educators in public schools.

In *T.L.O. v. New Jersey,* this Court appropriately recognized that school officials responsible for maintaining safe and orderly learning environments need more flexibility than the probable cause standard generally permits under the Fourth Amendment. In an effort to provide this flexibility, the Court adopted a reasonable suspicion standard that accorded deference to the judgments of school personnel in making disciplinary decisions about students suspected of violating school rules or the law. But instead of easing the constitutional burdens on school leaders, application of the *T.L.O.* standard has led to confusion among judges and educators alike. Accepting review and deciding this case on its merits would give this Court the opportunity to add some much needed clarity to the *T.L.O.* test.

The first part of the *T.L.O.* test requires courts to assess whether the search was justified at its inception. Courts have inconsistently applied this part of the test, resulting in mixed messages to educators who must evaluate information about alleged student misconduct that raises health and safety concerns and determine an appropriate course of action. *Compare Williams v. Ellington*, 935 F.2d 881, 887-89 (6th Cir. 1991) (using the "quantity and quality" stop approach set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), to determine that student informant tips were comparable to anonymous informant tips and must be corroborated) *with C.B. v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996) (ruling that student informants are inherently more reliable than other informants because, if student informants provide inaccurate information, they are subject to discipline themselves). Here, the principal had received relevant information from both students and adults and had knowledge of past incidents of student drug abuse that had resulted in bodily harm and even death. However, in the Ninth Circuit's estimation, the principal did not have sufficient basis for conducting a search of the student's clothes to find the illicit drugs students were reportedly planning to ingest that day.

Another area of confusion arises from the justified-at-inception prong of the *T.L.O.* test as applied to searches involving several different levels of privacy intrusion. Here, for example, the educators were looking for prescription pills, obviously a small item that could easily be concealed. When the pills were not found in the student's book bag, the principal decided to have the girl's clothes

searched by the school nurse. Under the Ninth Circuit's decision, both educators and courts must continuously re-assess the propriety of the search, using the justified-at-inception analysis, whenever the level of intrusion escalates during the search. *Redding*, 531 F.3d at 1081-85. Nothing in *T.L.O.* mandates that a new level of inquiry is required as the search progresses.

Consider the confusion that this progressive search requirement would have on other student searches. For example, what is the proper justified-at-inception standard for a search of a female student where the objective of the search is to turn up evidence that she is selling ecstasy pills to other students on campus? The student has a car, locker, desk, book bag, athletic bag, and a purse. Within the purse are numerous open and zippered pockets. Within the zippered pockets are wallets and smaller zippered bags. Within the book bag is a written journal, MP3 player, cell phone, and digital camera. Within the athletic bag is a toiletries bag. The student herself is wearing three layers of clothing, a hat, socks, and shoes. Imagine how complicated it would be for an educator to follow the Ninth Circuit's progressive search analysis for each level of intrusion.

The second part of the *T.L.O.* test, reasonable-in-scope, has also led to confusing and divergent legal guidance about how to assess the constitutionality of a search. When the objective of the search is to determine whether the student has concealed small items with potential for significant harm, on his or her person, then the search may need to be more intrusive to detect the items. The

lower courts have recognized this practicality in several cases. *See*, *e.g.*, *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993)(strip search to find drugs reasonable in scope where educators observed student undress from a distance and did not physically touch the student); *Singleton v. Bd. of Education USD 500*, 894 F. Supp. 386, 388-89, 91 (D. Kan. 1995) (strip search to find stolen $150 reasonable in scope where educators did not require student to remove underwear and performed no body cavity searches). But the Ninth Circuit majority's opinion rejects this approach, calling into question the ability of school officials to make these types of practical searches and hindering the ability of educators to enforce rules that prohibit possession of potentially dangerous, small items, such as drugs.

The *T.L.O.* decision included the nature of the infraction as part of its framework for analyzing the constitutionality of school searches but explicitly declined to preclude searches for certain infractions that some might regard as too "trivial." The federal courts have provided scant guidance to educators regarding the application of this factor. *See*, *e.g.*, *Cornfield*, 991 F.3d at 1320 (highly intrusive search in response to a minor infraction unreasonable). However, the Ninth Circuit's misapplication of this factor seems directly at odds with what the *T.L.O.* Court had in mind. *T.L.O.*, 469 U.S. at 342 n. 9. Despite this Court's admonition to avoid second-guessing educators about the importance of particular school rules, the Ninth Circuit simply dismissed the importance of the educator's interest here, and that attitude colored the entire decision.

Amici believe that permitting the Ninth Circuit decision to stand will have the practical effect of deterring many student searches and, in particular, searches to detect small items such as prescription drugs. As it stands now in the Ninth Circuit, educators lack the flexibility they need to make on-the-ground judgments to protect student safety. They are subject to judicial second-guessing rather than guided by judicial clarity.

B. The Court should reiterate the importance of judicial deference to educators attempting to combat student drug use.

Amici do not suggest that educators are not subject to judicial oversight. Public schools are governmental entities, and public school educators must comply with the Constitution. The Ninth Circuit, however, neglected to accord school officials the necessary flexibility and deference this Court has deemed appropriate to effectively address the serious problem of student drug abuse. Instead, the Ninth Circuit unwisely substituted its own judgment that the threat of several students ingesting prescription strength drugs did not pose the necessary degree of harm to student health and welfare that would justify searching the student's person and clothing.

The Court first recognized the need for deference to school official's efforts to combat drug abuse in *T.L.O.,* stating that, "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly

ugly forms: drug use and violent crime in the schools have become major social problems." *T.L.O.*, 469 U.S. at 339. Because of this alarming trend, the Court appropriately acknowledged "that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *Id.* at 340.

The Court continued this deferential approach in analyzing the constitutionality of the student drug testing policies at issue in *Acton* and *Earls*. In *Acton*, this Court emphasized the educator's interest in combating student drug use. The Court wrote: "[t]hat the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's school-children is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs." *Acton*, 515 U.S. at 661. The Court explained that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* Discussing further the systemic problem of drug abuse as a rationale for deferring to educators' judgments about how to combat the problem, the Court wrote that "of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 662. In the *Earls* decision, the Court reiterated its view that deference to educators when combating drug abuse is appropriate in deciding the constitutionality of school searches. The Court stated: "[t]he drug abuse problem among our

Nation's youth has hardly abated since [*Acton*] was decided in 1995. In fact, evidence suggests that it has only grown worse." *Earls*, 536 U.S. at 834. The Court explained that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Id.*

The Court most recently reaffirmed the need for deference in *Morse*. While *Morse* did not address the reasonableness of student searches, the Court again noted the critical importance of combating student drug use by stating "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Morse*, 127 S. Ct. at 2623. It would indeed be a strange result if the law allows educators to protect students from speech promoting drug use but constrains them from actually attempting to find and confiscate the drugs themselves when there are reasonable grounds to believe drugs are present at school.

By failing to give educators deference in dealing with drug use and substituting its own ideas of what threats are substantial, the Ninth Circuit has created the very atmosphere of the "courtroom as principal's office" that Justice Breyer warned against in his concurring opinion in *Morse*:

> Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship

> between teachers and students special. Under these circumstances, the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.

Id. at 2640 (Breyer, J., concurring).

The Ninth Circuit's approach also departs markedly from the decisions of other lower courts that have recognized that granting deference to educators not only furthers the goal of student safety but also avoids drawing courts into the daily operations of the school system. For example, in *Cuff v. Valley Central Sch. Dist.*. 559 F.Supp.2d 415 (S.D.N.Y. 2008), the court noted the limited role to be played by courts in student discipline, stating that "[t]he public-school system 'relies necessarily upon the discretion and judgment of school administrators and school board members, and §1983 was not intended to be a vehicle for federal-court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.'" *Id.* at 423 (quoting *Wood v. Strickland*, 420 U.S. 308, 326 (1975)).

Now more than ever, schools are in the forefront of addressing dangers to our youth,

including their growing abuse of prescription drugs. The Office of National Drug Control Policy ("ONDCP") found that in 2006, "more than 2.1 million teens abused prescription drugs." *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (January 2008) ("ONDCP Report"). ONDCP Report at 2. The report states that "more young people ages 12-17 abuse prescription drugs than any illicit drug except marijuana—more than cocaine, heroin, and methamphetamine combined." *Id.* at 1. Even more alarming, 12 to 13-year-olds indicate that prescription drugs are their drug of choice. *Id.* at 2.

The ONDCP identified teen aged girls as having a heightened risk for prescription drug abuse. Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (April 30, 2007). ONDCP reported "that females are at particular risk for prescription drug abuse, with higher rates of abuse among teen girls, more emergency room visits among young women, and higher rates of treatment admissions for dependence on some prescription drugs among females." *Id.*

Further, and contrary to the Ninth Circuit majority's dismissal of any imminent danger, the ONDCP Report states that "[t]here has been a dramatic increase in the number of poisonings and even deaths associated with the abuse of prescription and OTC drugs." *Id.* at 2. The National Institute on Drug Abuse ("NIDA") reports that abuse

of prescription or OTC drugs can have a number of adverse physical and psychological effects including impaired motor function, life-threatening respiratory and heart problems, hostility, paranoia and depression. NIDA, *Prescription and Over-the-Counter Medications*, 2-7 (July 2008); NIDA August 2005 Report at 2-4.

Because the Ninth Circuit did not view prescription strength versions of OTC drugs as any imminent threat, it discounted the educator's interest in preventing the abuse of such drugs in school. *See Redding* at 1086 ("We reject Safford's effort to lump together these run-of-the-mill anti-inflammatory pills with the evocative term 'prescription drugs,' in a knowing effort to shield an imprudent strip search of a young girl behind a larger war against drugs."). Not only is it unwise to exclude certain prescription drugs from discussion of prescription drug abuse, but even OTC drugs are being abused more and more. ONDCP Report at 3. OTC drug abuse is of particular concern "given the easy access teens have to these products." *Id.* On a related issue, teens are increasingly combining the use of both prescription drugs and alcohol with OTC drug use. Unfortunately, these risky combinations "can lead to dangerous consequences, including death." *Id.*

Responsible school administrators are well aware of such national trends in student drug abuse and are in a unique position to understand the substance abuse patterns in their own schools and communities, to take these problems seriously, and to use appropriate measures to respond to student drug abuse on an educational as well as disciplinary

level. But the message the Ninth Circuit's ruling sends is that prescription and OTC drug abuse is not significant enough a problem to warrant immediate intervention by school personnel who have reason to believe that students are planning to ingest drugs neither prescribed by a health care professional nor provided by their parents. While public health authorities are calling for increased awareness of this issue, the Ninth Circuit majority without any basis dismissed the concern as trifling. The Ninth Circuit's refusal to accord appropriate deference to school officials makes the difficult job of protecting students' health and welfare even harder. Review would allow this Court to emphasize the importance of showing deference to educators in such circumstances.

II. THE NINTH CIRCUIT'S DECISION REGARDING QUALIFIED IMMUNITY WILL HAVE A CHILLING EFFECT ON EDUCATORS SEEKING AND RETAINING POSITIONS OF LEADERSHIP IN AMERICA'S SCHOOLS.

A. Under the law at the time of the search, educators could not have been clear about what standards to apply when making search decisions.

Amici recognize that student strip searches are rightly controversial and that reasonable minds will differ about what kinds of exigencies could warrant such a drastic step in the school environment. Educators who must make snap decisions where student safety is concerned,

however, should not be subject to personal liability because of the sensitivity and controversy of a measure. School officials, like the principal here, should not be denied qualified immunity where their actions were neither plainly incompetent nor in knowing violation of clearly established law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (government officials have qualified immunity unless their actions were plainly incompetent or in knowing violation of clearly established law).

The legal uncertainties surrounding student searches, as described above, should preclude a finding of clearly established law necessary to deny a governmental official the protection of qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Both this Court and the Ninth Circuit have held that, to overcome qualified immunity, the "specific contours of the law" must be well developed or "sufficiently clear that a reasonable official would understand that what he is doing violates [a constitutional] right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citations omitted); *Rudebuch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002). This is a standard that "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier*, 533 U.S. at 201).

As noted above, applying *T.L.O.* is not an easy matter for an educator in an ongoing investigation of possible student misconduct. *See Beard v. Whitemore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (*T.L.O.* is not the kind of clear law necessary to clearly establish unlawfulness of student strip searches); *Ellington*, 936 F.2d at 886

(the *T.L.O.* test "has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to [§1983 liability]"). Prior to this decision, the courts had not provided clear guidance to educators in the Ninth Circuit about the law on student strip searches.[2] *T.L.O.*, the only individualized suspicion student search case decided by this Court, did not involve removal of student clothing, and while it established relevant factors to assess the constitutionality of school searches, it necessarily left application of these factors to the unique circumstances of each case to future courts. There have been few federal court decisions applying *T.L.O.* to strip searches and their results have been conflicting. Absent a declaration from this Court, clear law in the school administrator's own jurisdiction, or consistency among the circuits on strip searches, there can be no real argument that the specific contours of the law on strip searches of students were sufficiently clear so that the principal here should have reasonably known that his actions violated the student's Fourth Amendment rights.

Based on *T.L.O.* and its progeny, it is clear to educators that, before they conduct a search, they must have reasonable suspicion that a search will turn up evidence that the student violated the law or

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[2] Two states in the Ninth Circuit prohibit strip searches of students by statute. Cal. Educ. Code § 49050 (2006); Wash. Rev. Code § 28A.600.230 (2008). Several states in other circuits have similarly banned strip searches by statute. *E.g.*, Iowa Code Ann. § 808A.2 (2003); N.J. Stat. Ann. § 18A:37-6.1 (1999); Okla. Stat. Ann. § 24-102 (2005); Wisc. Stat. Ann. § 118.32 (2004).

a school rule. It is not clear, however, that it would be unconstitutional to proceed with a search at its inception where the search is based on information obtained from student informants in the context of both school wide and student specific drug and alcohol abuse. *See, e.g.*, *T.L.O.*, 469 U.S. at 337-48 (search justified at inception based on informants indicating student was smoking in the lavatory; second search justified at inception based on finding evidence of violation during first search); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823-28 (11th Cir.)(search justified at inception where second grade student advised educator that someone stole his $7); *Driscoll*, 82 F.3d at 388 (search justified at inception where student informant advised educators that another student was going to sell drugs on campus); *Cornfield*, 991 F.2d at 1321-28 (search justified at inception where student had history of drug related offences and educators observed what appears to be a male student "crotching" drugs); *Rudolph ex rel. Williams v. Lowndes County Bd. of Educ.*, 242 F. Supp. 2d 1107, 1115-17 (M.D. Ala. 2003) (search not clearly unjustified at inception when, after a drug sniffing dog alerted in the library, drugs were found under the table where the student was sitting).

T.L.O. and its progeny also make it clear to educators that a search must be reasonable in scope to find the objectives of the search in light of the age/gender of the student and the nature of the infraction. It is not clear, however, that it would be unconstitutional to perform a strip search of a junior high female student to find prescription pills where: (a) prior to the strip search, educators searched the

student's personal belongings, (b) the strip search was performed by two educators of the same gender as the student, (c) the educators who searched the student never touched the student, and (d) the student was not required to remove her underwear. *See, e.g.*, *T.L.O.*, 469 U.S. at 337-48 (first search reasonable in scope because search of purse reasonable to find evidence of smoking; second search reasonable in scope because further search of purse reasonable to find evidence of possession and distribution of marijuana); *Jenkins*, 115 F.3d at 823-28 (strip search of second graders looking for stolen $7 not clearly unreasonable in scope where students were brought to the restroom to disrobe); *Cornfield*, 991 F.2d at 1321-28 (strip search reasonable in scope where educators suspected student to be "crotching" drugs, educators of the same gender searched by asking the student to remove his clothing and put on gym uniform, and no body cavity searches were performed); *Ellington*, 936 F.2d at 886-89 (strip search not clearly unreasonable in scope where educators trying to locate glass vial of drugs and educators first searched the student's purse and locker); *Rudolph*, 242 F. Supp. 2d at 1115-17 (nude search not clearly unreasonable in scope where educators looking for drugs); *Singleton*, 894 F. Supp at 390-91 (strip search reasonable in scope where search occurred in office with two educators of the same gender and student was not required to remove underwear).

Amici find it difficult to comprehend how the Ninth Circuit could rule that an educator is subject to personal liability for ordering a student search where even the judges reviewing the case cannot

agree on whether the search was legal. Here the federal district court found the search to be constitutional and a Ninth Circuit panel affirmed. It was only on appeal to the Ninth Circuit *en banc* that eight of eleven judges found the search unconstitutional. This Court has already opined that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603 (1999).

Morse provides further instruction on the implications of judicial disagreement for qualified immunity determinations. Not a single justice in *Morse* expressed any doubt that the educator at issue was entitled to qualified immunity. *Morse*, 127 S. Ct. at 2638-43 (Breyer, J., concurring in part and dissenting in part)(arguing that the "Court need not and should not decide this rather difficult *First Amendment* issue on the merits" but "simply hold that qualified immunity bars the student's claim..."); *id.* at 2643 (Stevens, J., dissenting) ("I agree with the Court that the principal should not be held liable...."). Also, during oral argument, Justice Souter—who would have found the educator's actions in that case unconstitutional—suggested that the spirited oral argument about the merits of the case was strong evidence that the educator at issue was entitled to qualified immunity.[3] Chief

[3] Transcr. of Oral Argument at 49-50, *Morse*, 127 S. Ct. 2618 ("JUSTICE SOUTER: We've been debating this in this courtroom for going over an hour, and it seems to me however you come out, there is reasonable debate. Should the teacher have known, even in the[] calm deliberative atmosphere of the school later, what the correct answer is?").

Justice Roberts and Justice Kennedy were even more direct in their opinion that the educator was certainly entitled to qualified immunity.[4]

B. Unless the Court accepts review and further clarifies the "clearly established" standard, educators will fear making tough decisions at risk of being personally liable.

Refusing to grant immunity to educators despite the lack of clarity over student search rights will have a harmful impact on the more than 15,000 school districts and 225,000 school administrators across this nation. If allowed to stand, the Ninth Circuit's qualified immunity rationale will create a chilling effect for educators following the approach and would result in fewer searches, particularly if the objective of the search is something other than firearms or more "hard drugs" like cocaine or heroin.

The threat of personal liability may also deter qualified educators from becoming school administrators. Given the current shortage of administrators in many areas of this country, the Ninth Circuit's decision will make it even more difficult to find qualified individuals to fill these positions. Del Stover, *Looking for Leaders, Urban districts find that the pool of qualified superintendents is shrinking*, Amer. Sch. Bd. J. (December 2002) ("there are too few skilled administrators moving up the supply pipeline"); Lynn Olson, *Principals Wanted: Apply Just About Anywhere*, Educ. Week (Jan. 12, 2000) (indicating

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[4] *Id.* at 29-30.

many teachers are disinterested in becoming administrators because position lacks appeal). Individuals who are taking these positions already do so at great personal sacrifice and should not be burdened with the fear of lawsuits and personal liability simply for carrying out their daily disciplinary duties.

C. Accepting review in this matter would allow the Court to revisit the analytical framework of *Saucier* or expand upon its forthcoming ruling in *Pearson*.

The Court has of late signaled its concern that the analytical framework of *Saucier* may invite judicial pronouncements on constitutional issues that are unnecessary to making qualified immunity determinations. Justice Breyer recently captured this concern as follows:

> I am concerned that the [*Saucier* rule] rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court. Indeed, when courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review.

Brosseau, 543 U.S. at 201-02 (Breyer, J., concurring) (citations omitted).

To address this concern the Court has ordered the parties *sua sponte* to brief and argue the issue of whether *Saucier* should be overruled in a case on its current docket. *Callahan v. Millard County,* 494 F.3d 89 (10th Cir. 2007), *cert. granted sub nom. Pearson v. Callahan*, 128 S. Ct. 1702, 1702-03 (2008) (No. 07-751). During the oral argument in *Pearson,* several Justices raised concerns about *Saucier* that may also be implicated in this case.[5] According to the dissenting opinion written by Judge Hawkins in *Redding*, this case is the "poster case" for revisiting *Saucier*. Even if the Court addresses *Saucier* in *Pearson*, this case may provide an opportunity to expand upon or clarify the ruling in *Pearson* in a unique context that, for the reasons detailed above, is long overdue for more attention from this Court.

CONCLUSION

For the reasons set forth above, *Amici* urge the Court to grant review in this case to rectify the errors made by the Ninth Circuit that seriously undermine school districts' efforts to address student drug abuse in an effective manner and place school

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[5] Transcr. of Oral Argument at 23-24, *Pearson*, 128 S. Ct. 1702 (No. 751)("JUSTICE BREYER:...As a judge I like to take what is the easier path...And if it's easier to deal with the qualified immunity, deal with it and forget the rest of it....CHIEF JUSTICE ROBERTS: Why isn't it purely an advisory opinion to say whether it's constitutional or not?...I just don't know why the first question isn't purely advisory, because you don't have to know whether it's constitutional or not.").

officials at personal legal risk for taking actions to safeguard the health and welfare of the students entrusted to their care.

Respectfully submitted,

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