Case No. 05-15759

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona
Case No. CV-04-00265-TUC-NFF
The Honorable Nancy F. Fiora, Magistrate Judge

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Strips searches—when a government official orders the removal of clothing and examines one's exposed body—are terrifying. Among the most traumatic of all such searches is for a thirteen-year-old girl to be disrobed and scrutinzed by her school officials. This case involves no ordinary search, but rather a search of significant, lasting consequence to a child.

Because strip searches of children are harrowing events that predictably inflict long-lasting emotional scars, the Constitution deems unreasonable, and therefore proscribes, strip searches of students in schools absent exceedingly strong suspicion that the search will uncover a very serious infraction, the prevention of which necessitates an immediate search. Here, school officials strip searched Savana Redding, an honors student with no disciplinary record, looking for anti-inflammatory ibuprofen pills based on an uncorroborated and non-specific statement from an unreliable student-informant who, trying to shift blame after being caught with ibuprofen, stated that Savana had provided the pills. Assessing Savana's claim that this search violated her right to be free from unreasonable searches, the district court was required to weigh the nature of the suspected rule infraction—possession of ibuprofen—and the low quantum of suspicion that she was committing this infraction against the profound consequences to a thirteen-year-old girl of being forced to endure a strip search. Because this traumatic event

exceeded all bounds of law and reason, this Court should reverse the district court's order upholding the strip search of Savana.[1]

ARGUMENT

I. THE STRIP SEARCH OF A 13-YEAR-OLD GIRL IS NEITHER JUSTIFIED AT ITS INCEPTION NOR REASONABLY RELATED IN SCOPE TO THE SCHOOL'S INTEREST IN FINDING AN IBUPROFEN PILL WHERE SCHOOL OFFICIALS STRIP SEARCH THE GIRL BASED ON A NON-SPECIFIC, UNRELIABLE, AND UNCORROBORATED TIP.

The Constitution prohibits government officials, including school officers, from executing "unreasonable searches." U.S. Const. amend. IV; *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). In *T.L.O.*, the Supreme Court ruled that a school search is reasonable only if it is "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S. at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)) (internal quotation omitted). While this school-search standard differs from that governing searches off school grounds, the benchmark for constitutional searches is the same regardless of location: The government violates the Fourth Amendment if, in light of the circumstances, it conducts a search that is unreasonable. *See, e.g.*, *Phaneuf v. Fraikin*, 448 F.3d 591, 595 (2d Cir. 2006) (noting that "[t]he essential purpose of the Fourth Amendment is to impose a standard of 'reasonableness' upon the

[1] In this supplemental brief, Savana relies on and adopts the facts and procedural history recited in the pleadings she previously has filed with this Court in this matter.

exercise of discretion by government officials" and that *T.L.O.* "appli[es] the Fourth Amendment 'reasonableness' standard to a search of a student by school administrators").

The *T.L.O.* test requires consideration of three factors when assessing whether a school official's search was reasonable: the quantum of suspicion indicating the student has committed an infraction, combined with the seriousness of that alleged infraction, as weighed against the extent of the intrusiveness of the search. The greater the quantum of suspicion and the more serious the alleged infraction, the greater the government's interest to justify a more consequential search. A highly intrusive search executed on scant evidence that a minor infraction has been committed is unreasonable and thus violates the Fourth Amendment.

Here, the infraction in question was nothing more than possession of ibuprofen, and there was a very low level of suspicion that Savana had placed ibuprofen pills under her clothes. It is plain that strip searching Savana, a thirteen-year-old honors student with no disciplinary history, was unreasonable under these circumstances.

A. A Strip Search of Savana Was Not Justified at Its Inception Because the School Was Seeking to Interdict Ibuprofen and There Was Only a Small Quantum of Suspicion That Savana Possessed Ibuprofen.

A strip search of a child by school officials is justified at its inception only where the school has a high degree of suspicion that searching beneath the student's clothes will in fact yield serious contraband posing an immediate harm.[2] None of those requirements was satisfied here. Prior to executing the strip search, the school had only a small amount of unreliable and non-specific information that Savana might have been committing the infraction of ibuprofen possession.

1. The School Strip Searched Savana With an Insufficient Quantum of Suspicion That She Was Violating School Policy.

At the time that the school officials ordered Savana to disrobe, they had no reliable information that a search of Savana's body would uncover secreted ibuprofen pills. The officials had received one uncorroborated tip from one inherently unreliable informant—part of whose statement was contradicted—that could have been interpreted to suggest that Savana might possess ibuprofen. This is nowhere near the high level of suspicion required before a school can reasonably take the drastic step of strip searching a thirteen-year-old student.

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[2] In assessing the first prong of the *T.L.O.* analysis, this Court must ask, as Judge Thomas noted in dissent, "whether a *strip search* was justified at its inception." *Redding v. Safford Unified Sch. Dist. #1*, 504 F.3d 828, 837 (9th Cir. 2007) (Thomas, J., dissenting) (citing *Phaneuf*, 448 F.3d at 597-600; *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1321 (7th Cir. 1993)).

a. Courts Require a High Level of Suspicion to Strip Search Children Because Such Searches Cause Serious Damage.

Strip searching children has profound consequences. Such searches are more than significant intrusions on privacy; especially for children, strip searches can also result in serious and lasting emotional damage, including depression, loss of self-esteem, inability to concentrate, anxiety, and in some cases, post-traumatic stress disorder. *See generally* Br. of Amici Curiae Nat'l Ass'n of Soc. Workers et al. ("NASW") 6-9; *cf. Cornfield*, 991 F.2d at 1321 (recognizing that strip searches of children are "traumatic"); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446 (9th Cir. 1989) (noting that strip searches, even of adults, lead to "feelings of humiliation and degradation").

Savana described being strip searched as "embarrass[ing]" and "scar[y]," and stated that "I held my head down so that they could not see that I was about to cry." AER 25.[3] Seeing her school officials watch her undress and view her naked body was, in Savana's words, "the most humiliating experience I have ever had." AER 26. Indeed, the trauma that a child experiences when she is subjected to a strip search may be similar in kind and degree to the suffering of sexual-abuse victims. Br. of Amici Curiae NASW 8-9.

A school must have a *high level of suspicion* that a strip search will protect the school from *serious harm* before conducting such a consequential search of a

[3] Throughout this brief, "AER" refers to Appellants' Excerpts of Record.

child. *See, e.g.*, *Phaneuf*, 448 F.3d at 596 ("[T]he very intrusive nature of a strip search requir[es] for its justification a high level of suspicion."); *Cornfield*, 991 F.2d at 1320 (recognizing that a school can undertake such a search only in response to a serious threat of harm); *Bilbrey ex rel. Bilbrey v. Brown*, 738 F.2d 1462, 1468 (9th Cir. 1984) (denying qualified immunity to school officials who strip searched child in pursuit of drugs based on an employee-informant's tip).[4] *See generally Cornfield*, 991 F.2d at 1321 ("What may constitute reasonable suspicion for a search of . . . a pocket or pocketbook may fall well short of reasonableness for a nude search."). Speculative hunches in pursuit of drug possession will not suffice. *Bilbrey*, 738 F.2d at 1468 (holding that a strip search of a student for drugs was unconstitutional because "[s]uch intrusive handling of the minor[] required [greater] justification").

A non-specific, unreliable, or uncorroborated student-informant's tip about another student's infraction does not provide the requisite high level of suspicion to justify a strip search. Like a tip from an uncorroborated anonymous informant, which cannot justify a strip search because the informant lacks sufficient reliability, *see, e.g.*, *In re A.T.H.*, 106 S.W.3d 338, 347-48 (Tex. Ct. App. 2003); *see also United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993) (requiring

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[4] *Bilbrey*, a pre-*T.L.O.* case, is binding post-*T.L.O.* because it employed the reasonable-suspicion test that the Supreme Court subsequently adopted in *T.L.O.* 738 F.2d at 1464. In fact, the *T.L.O.* Court cited *Bilbrey* as an example of a case that utilized the *T.L.O.*'s reasonable-suspicion standard. 469 U.S. at 332 n.2.

corroboration of anonymous tip), a tip from a student-informant who might have an ulterior motive—i.e., anyone other than an objective, disinterested observer—cannot by itself support a strip search of a student, *see, e.g.*, *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 888-89 (6th Cir. 1991); *Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 817 (W.D. Mich. 2002). The stakes are too high to rely on dubious information.

Courts have long been wary of allowing strip searches even when the tip comes from an apparently reliable student-informant. In *Phaneuf*, an informant who was known to school administrators and who lacked any ulterior motive told a school official that another student was hiding marijuana in a precise location under her clothing. 448 F.3d at 593. Nevertheless, the Second Circuit held that it was unreasonable for the school to have strip searched the student without having conducted additional inquiry and corroborated the informant's statement. *Id.* at 598-99; *see also, e.g.*, *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (per curiam) (holding that school officials violated clearly established Fourth Amendment rights when they strip searched a thirteen-year-old girl based solely on an uncorroborated alert to the student by a drug dog).[5] Considering the extraordinary consequences

[5] Although *Renfrow* is a pre-*T.L.O.* case, it is relevant post-*T.L.O.* because it employed the reasonable-suspicion analysis that the Supreme Court utilized in *T.L.O.* 631 F.2d at 92 (adopting in relevant part district-court opinion, which utilized *T.L.O.*'s reasonable-suspicion analysis, *see Doe v. Renfrow*, 475 F. Supp. 1012, 1024-25 (N.D. Ind. 1979)).

of strip searching children, the courts of appeals "have concluded . . . that student tips alone are insufficient to support a . . . strip search." *Redding*, 504 F.3d at 837 (Thomas, J., dissenting).

Corroboration of an informant's tip is particularly important where the informant had something to gain by implicating someone else. The Supreme Court and this Court have stated on numerous occasions that informants' statements implicating others have "little credibility" when the informants themselves might be in trouble and attempt to re-focus the blame on another. *See, e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 133 (1999); *United States v. Soriano*, 361 F.3d 494, 506 (9th Cir. 2004); *United States v. Hall*, 113 F.3d 157, 159-60 (9th Cir. 1997);[6] *see also* Br. of Amicus Curiae The Rutherford Inst. 6-11 (citing cases and applying them to the facts of this case). As this Court stated in *Hall*:

> [Defendant's] claim that "Ron" was his supplier was more in the nature of trying to buy his way out of trouble by giving the police someone "up the chain" . . . . Once a person believes that the police have sufficient evidence [against him], his statement that another person is more important . . . than he gains little credibility . . . .

113 F.3d at 159. In such situations—where the informant may have a motive to implicate another student—the school must meaningfully corroborate the

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[6] While these cases involved adult-informants rather than student-informants, there is broad agreement that courts should "use[] case law from the criminal context to determine the circumstances under which such students' 'tips' could give rise to reasonable suspicion sufficient to justify a search." *Redding*, 504 F.3d at 833 (citing *Phaneuf*, 448 F.3d at 597-99; *Williams*, 936 F.2d at 888).

inherently unreliable statement before using that statement to justify a strip search of a child. *See, e.g.*, *Williams*, 936 F.2d at 888-89; *see also Phaneuf*, 448 F.3d at 598-99; *Fewless*, 208 F. Supp. 2d at 817.

By contrast, strip searches may be reasonable when schools meaningfully and substantially corroborate tips from reliable student-informants. Reliable informant tips can be corroborated by, for example, immediate sense data or other highly probative inculpatory information. *See, e.g.*, *Cornfield*, 991 F.2d at 1322-23 (upholding strip search where school officials noticed obvious bulge in student's pants and received reports of searched student's past drug-related activity from several people, including adults); *Williams*, 936 F.2d at 887 (holding that strip search did not violate clearly established law where school officials received a tip from a student who lacked any ulterior motive that she had just seen the plaintiff using drugs, were aware of parent's concerns about drug use, and observed the student's strange behavior in class); *see also, e.g.*, *Rinker v. Sipler*, 264 F. Supp. 2d 181, 188 (M.D. Pa. 2003) (upholding strip search where student smelled of marijuana, looked intoxicated from marijuana use, and was incoherent).

While strip searching students is, for good reasons, relatively rare, a body of case law has emerged that delineates the contours of permissible strip searches following a student-informant's tip: When the school receives a reliable and specific tip that another student is committing an infraction that could cause

serious harm, school officials have been permitted to strip search the student after corroborating the informant's tip. However, a strip search based on an uncorroborated informant's tip is unreasonable, especially when there is reason to doubt the veracity of the informant, where the tip is non-specific, or where the infraction at issue does not present grave and imminent danger.

b. Marissa's Unreliable, Non-Specific, Partially Contradicted, and Uncorroborated Statement Provided Scant Suspicion That Savana Was Violating School Policy.

To justify their strip search, school officials relied principally on a tip from Marissa that Savana had provided her with an ibuprofen pill. Marissa was unreliable, however, not only because of her obvious motivation to shift the blame, but also because part of her statement to the school officials had been contradicted before the school officials strip searched Savana. Such an inherently unreliable tip, especially when it is non-specific and uncorroborated, provided insufficient suspicion to strip search Savana.

There is a continuum of reliability among informants in the school-search context. At one end stands the known, reliable, and disinterested informant who has provided verified information in the past and who divulges specific information that has been corroborated and has not been contradicted. At the other end is an informant who has never previously provided verified information, who provides non-specific information, who has reason to shift the blame to someone

else, and who has uttered statements that have been contradicted. Because Marissa stands at the far latter end of this spectrum, school officials could not reasonably use her inherently unreliable information to perform a strip search of Savana without first substantially and meaningfully corroborating Marissa's tip.

Marissa's self-serving statement shifting responsibility to Savana exhibits the prototypical hallmark of unreliability: She attempted to focus the blame away from herself by implicating someone allegedly "up the chain" after her Vice Principal found pills on her person. As this Court and courts around the country have recognized, Marissa's interest in shifting blame makes her statement inherently unreliable. *See, e.g.*, *Hall*, 113 F.3d at 159; *see also supra* p. 8.

Marissa's credibility was further diminished when Savana contradicted a portion of what Marissa told Vice Principal Wilson. Where a "tip contains information that later investigation contradicts, . . . there is no reasonable suspicion." *United States v. Nelson*, 284 F.3d 472, 480 (3d Cir. 2002); *United States v. Chemaly*, 741 F.2d 1346, 1353 (11th Cir. 1984) (stating that inaccuracy of informant's tip "tended affirmatively to show lack of reliability"). Here, while Marissa completely disclaimed any knowledge of the planner and its contents, which were found next to her desk at school, Savana explained to the school officials that she had lent the then-empty planner to Marissa a few days before. AER 15. If Marissa possessed the planner for the past several days, she certainly

was aware, contrary to her statement to Vice Principal Wilson, of both the planner and its contents.

Despite the obviously low reliability of Marissa's statement, the school officials did not corroborate her claim before strip searching Savana. School officials did not, for instance, notice a bulge in Savana's clothing or discern any other physical indication that Savana possessed a vial of pills. *Cf. Cornfield*, 991 F.2d at 1322 (recounting reports of an "unusual bulge in [the student's] crotch area"). Nor did school officials call Savana's parents to inquire whether she used drugs, which could have corroborated Marissa's statement. *Cf. Williams*, 936 F.2d at 889 (noting that school employees talked with a student's father, who confirmed the student's drug use). There is no evidence that the school officials talked with Savana's teachers to ascertain whether any of them had witnessed her handling pills. *Cf. Cornfield*, 991 F.2d at 1322 (stating that school officials had talked with the student's teachers, to whom the student had confided his drug use and his history of secreting drugs beneath his clothing). Finally, there is no evidence that the school officials took other preliminary investigatory steps, such as searching Savana's locker, before executing the strip search.

Instead, school officials merely spoke briefly with Savana, who explained—in a manner that did not arouse further suspicion—that she had never seen such pills before and had never given pills to any student. AER 15; *cf.*

Phaneuf, 448 F.3d at 593 (noting that student denied marijuana possession "in a manner that made [the school officials] believe she was lying"). Vice Principal Wilson, dissatisfied with that response, searched Savana's backpack. AER 15. Finding nothing suspicious, the Vice Principal still ordered a strip search. *Id.*

In the absence of corroboration of Marissa's statement, school officials instead relied on three things that are wholly irrelevant to whether Savana possessed ibuprofen. First, the school points to tips that Jordan gave Vice Principal Wilson about students other than Savana. However, reasonable suspicion for purposes of searching a student must be individualized suspicion that the particular student is currently violating school policy, not suspicion that *other* students were violating policy. *See, e.g.*, *N.G. v. Connecticut*, 382 F.3d 225, 234 (2d Cir. 2004) (requiring "reasonable suspicion pointing to [the child] as the culprit" before searching the child); *Bilbrey*, 738 F.2d at 1468 & n.7 (noting that district court "call[ed] it improper and 'irresponsible' to justify, even in part, a strip search of a child on the grounds that "other students, not including [the students who were searched], were suspected in some dealings of marijuana").[7]

[7] Similarly, the single, unconfirmed report that some students allegedly were planning on ingesting pills later in the day does not contribute to individualized suspicion that Savana possessed ibuprofen pills. While school officials are surely correct in investigating such a report, a generalized claim of that sort cannot justify a search of great consequence to a child who is under no reasonable, individualized suspicion. *See, e.g.*, *Bilbrey*, 738 F.2d at 1468 & n.7 (recognizing that others' disconnected actions cannot create any suspicion to justify the strip search of a

Second, the school relies on the rowdy behavior, which was not linked to the use of pills, of a group of girls months before at a dance and pre-dance party. However, reasonable suspicion to search a student, let alone to strip search a student, cannot derive from the belief that the student had violated some other policy in the past. *Phaneuf*, 448 F.3d at 600 (holding that a school cannot justify strip searching a student in pursuit of marijuana on the basis of finding cigarettes on her person).[8]

Third, the school highlights a number of troubling facts about *Marissa*: She had given pills to another student, Jordan, earlier that day; she possessed knives, lighters, and a cigarette; and she lied when she denied that she knew anything about the planner or its contents. AER 13-15. What the officials did not have was any suggestion that Savana had joined Marissa in any of this misconduct. These facts do not all corroborate Marissa's unreliable and non-specific statement regarding Savana. *Cf. Bilbrey*, 738 F.2d at 1468 & n.7.

The school's belief that Marissa and Savana were friends likewise does not corroborate Marissa's statement. Nor does the perceived friendship negate

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student).

[8] As the Second Circuit stated: "The school acted unreasonably in treating all contraband alike: Surely, a discovery of cigarettes cannot alone support a suspicion that a student is carrying a firearm or is bootlegging gin. . . . [T]he school cannot vault from the finding of one type of . . . contraband, to a suspicion involving . . . another." *Phaneuf*, 448 F.3d at 600.

Marissa's lying to school officials about her knowledge of the planner or rebut the fact that Marissa, a scared thirteen-year-old student who had been caught with pills that violated school policy, attempted to shift the focus of attention away from herself by implicating someone who was allegedly "up the chain." *Hall*, 113 F.3d at 159; *see also* Br. of Amicus Curiae The Rutherford Inst. 11 (discounting the perceived friendship as a sufficient basis to credit the informant statement as reliable).

In sum, the school had no meaningful evidence to corroborate Marissa's self-serving, partially contradicted, and non-specific statement that attempted to shift the blame to Savana. The school had a paucity of suspicion, at best, that Savana was hiding ibuprofen pills underneath her clothes.

2. The School's Interest in Intercepting Ibuprofen Is Not Commensurate with the Damage Caused by Strip Searching Children.

The underlying rationale for strip searching Savana was the need to find a small amount of ibuprofen. While schools face a spectrum of problems that run from the relatively trivial (*e.g.*, theft of lunch money) to the extremely serious (*e.g.*, bomb threats), possessing ibuprofen can rarely, if ever, justify a strip search of a thirteen-year-old girl.

School officials must have an objectively important interest and pressing need in order to execute such a consequential search. *See, e.g.*, *Brannum v.*

Overton County Sch. Bd., -- F.3d --, 2008 WL 441536, at *8 (6th Cir. Feb. 20, 2008) (holding strip search unconstitutional in part because the search was "wholly disproportionate to the claimed policy goal of assuring increased school security"). *See generally T.L.O.*, 469 U.S. at 342 (noting that the reasonableness of a particular search depends in part on "the nature of the infraction" allegedly committed by the student). Wherever one places the possession of other drugs in the spectrum of truly important interests, the possession of a 400 mg pill of ibuprofen—equivalent to two over-the-counter ibuprofen pills, *see* Br. of Amici Curiae NASW 14 n.3—is not on the order of possessing a weapon that poses an imminent threat.[9]

In performing the balancing required by *T.L.O.*'s reasonableness standard, the harm of ibuprofen must be weighed against the harm of strip searching an adolescent student. As detailed by amici and recognized by courts, strip searches of children have profound impacts that endure well past adolescence. At the very least, given the lack of suspicion that Savana possessed ibuprofen, it was unreasonable for school officials to have strip searched Savana in pursuit of this anti-inflammatory pill. This traumatic search was thus unconstitutional at its inception.

[9] As Amici point out, ibuprofen is an anti-inflammatory pill that is commonly used to treat menstrual cramps. Br. of Amici Curiae NASW 14 n.3.

B. The Strip Search of Savana Was Unreasonable in Scope Because the School Lacked Reasonable Suspicion to Believe Savana Was Hiding Pills Under Her Clothes.

Because the strip search of Savana was not justified at its inception, there is no need to scrutinize the scope of the search. But while the scope analysis is unnecessary, the result is clear: Since the school had no reasonable suspicion that a strip search would turn up pills hidden underneath Savana's clothes, the strip search was not "reasonably related to the objectives of the search" and was "excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342.

The school officials' strip search of Savana was unreasonable in scope because they lacked the requisite specific and compelling evidence that Savana was secreting pills underneath her clothes. A search for an object must be limited in scope to the "particular place" where officials believe the item may be found. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This admonishment takes on heightened importance when a person, and not a car or building, is being searched. *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999); *see also* Br. of Amicus Curiae The Rutherford Inst. 13-14. Because of the potential for trauma and humiliation when the government searches a person—especially a search as personal and frightening as a strip search of a child—the government must have very good reason to believe that the object it is seeking will be located in the specific place it

wants to search. *See, e.g.*, *Houghton*, 526 U.S. at 303 (quoting *Terry*, 392 U.S. at 24-25).

Here, the school officials lacked any evidence that, even if Savana *did* in fact possess pills at some point in time, those pills would now be hidden in her undergarments. Marissa's tip was not that Savana possessed ibuprofen in her underwear, or even that she possessed ibuprofen at all, but rather that Savana had provided her with an ibuprofen pill. *Cf. Phaneuf*, 448 F.3d at 593 (holding strip search unconstitutional, even though informant told school officials that another student was hiding marijuana "down her pants"); *Fewless*, 208 F. Supp. 2d at 810 (holding strip search unconstitutional, even though informants told school officials that student was hiding marijuana "in his 'butt crack'").

This Court has held that a non-specific tip that a student likely possesses drugs in an unknown location cannot by itself justify a strip search. In *Bilbrey*, a school employee reported to the school's principal that she witnessed a student disembark from a school bus carrying a paper bag hidden under his jacket and, joined by another known student, scurry to the side of the gym in order to engage in likely drug activity. 738 F.2d at 1467-68. Three days later, the same school employee told the principal that she just witnessed the same two students exchange money for an object she believed to be drugs. *Id.* at 1464. Upon hearing this second report and already fearing drug use spreading in the school, *id.* at 1468, the

principal ordered a strip search of one of the students and a pat-down search of the other student, neither of which yielded drugs, *id.* at 1464. The district court held that the searches violated the students' Fourth Amendment rights, but a jury found that the school-official defendants were entitled to qualified immunity. *Id.* at 1463. Employing a reasonable-suspicion standard, *id.* at 1466, this Court reversed the jury's finding, holding that it was objectively unreasonable for a school official to have strip searched the student based on the employee's non-specific statement, *id.* at 1468 (finding that there was "nothing to justify the strip search").

There was no reason to suspect that a thirteen-year-old honor-roll student with a clean disciplinary record had adopted drug-smuggling practices associated with international narcotrafficking, or to suppose that other middle-school students would willingly consume ibuprofen that was stored in another student's crotch. In fact, Marissa, the only student found hiding pills, kept the pills in her pockets, not in her underwear. Furthermore, after receiving Marissa's non-specific tip, a school official's search of Savana's backpack failed to turn up relevant evidence: no residue of pills, no portions of a broken pill, not even over-the-counter pills. Finally, Savana was not left alone after she was summoned to the principal's office—a time when she otherwise could have transferred pills from her backpack.

In short, the school officials had no specific evidence that Savana might be concealing pills on her person at the time of the search. The strip search of

Savana, which transpired without attempts to contact Savana's parents,[10] and which lacked any meaningful relationship to the available evidence, was thus unreasonable in its scope.

II. THE STRIP SEARCH OF SAVANA FOR IBUPROFEN BASED ON AN UNRELIABLE, UNCORROBORATED, AND NON-SPECIFIC TIP CONTRAVENED CLEARLY ESTABLISHED LAW.

The school officials are not entitled to qualified immunity because their strip searching Savana violated a clearly established Fourth Amendment right. It was apparent at the time of the search that it was unreasonable to strip search a child based on a non-specific, uncorroborated, and unreliable tip—especially when the targeted infraction is possession of ibuprofen.

Qualified immunity is not available when, as here, the school officials' search violated Savana's right to be free from an unreasonable search and the unreasonableness of the search was clearly established at the time. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A right is clearly established when it should be clear to an official that the challenged conduct is unlawful in the situation confronted. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Even when the exact circumstances have not been adjudicated in the past, a right is clearly established when, in light of "all available decisional law, including the law of other circuits

[10] *Cf. Phaneuf*, 448 F.3d at 594 (holding strip search unconstitutional, even though school had contacted student's mother and did not commence strip search of student until her mother arrived at school).

and district courts, . . . the unlawfulness [is] apparent." *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007).

Bilbrey forecloses any claim that the strip search of Savana was reasonable. This Court held in *Bilbrey* that an employee-informant's non-specific and uncorroborated statement that a student possessed drugs provided insufficient suspicion to strip search the student. 738 F.2d at 1468. As in *Bilbrey*, the informant's statement here was non-specific; Marissa did not even allege that Savana was possessing pills, much less that she was possessing them underneath her clothing. Moreover, and as in *Bilbrey*, the school officials here did not corroborate the non-specific tip. *Bilbrey* stands for the propositions that it is unreasonable to strip search a student based on a non-specific and uncorroborated tip that the child possesses drugs, and also that this was clearly established in 1984.

The unreasonableness of this strip search was clearly established even without *Bilbrey*. As discussed above, case law demonstrates that strip searching a thirteen-year-old girl is extraordinarily serious and that only a very significant governmental interest and a high degree of individualized suspicion can justify such a consequential search. The law was equally clear that Marissa's unreliable, non-specific, partially contradicted, and uncorroborated statement to school officials could not provide the officials with the high degree of individualized suspicion they needed. If it were *ever* reasonable for school officials to execute a

strip search based on suspicion that a student possesses ibuprofen underneath her clothes, officials would need much more specific and well-corroborated evidence than they had here. *See, e.g.*, *Renfrow*, 631 F.2d 91 (holding that strip search based on uncorroborated drug-dog alert was unconstitutional); *Fewless*, 208 F. Supp. 2d at 822-23 (denying qualified immunity in school strip-search case because the school officials did not corroborate informants' statements before conducting the strip search of a student); *see also, e.g.*, *Williams*, 936 F.2d at 888-89 (recognizing that "school officials would be required to further investigate [an informant's tip] before a search or seizure would be warranted"). "Human decency" and "simple common sense" demand that children not be subjected to strip searches under these circumstances, *Renfrow*, 631 F.2d at 92, and decisional law—even apart from *Bilbrey*—makes this clear.[11]

[11] Interpreting this case law, education experts have admonished school officials not to execute strip searches, except when they have overwhelming evidence that the search would uncover a serious infraction and prevent imminent harm. *See, e.g.*, William C. Bosher, Jr. et al., The School Law Handbook 9 (2004) (advising against strip searches and recommending turning the situation over to law-enforcement officials if there is a fear of imminent harm); Nathan L. Essex, School Law and the Public Schools: A Practical Guide for Educational Leaders 42 (1999) ("Strip searches should be avoided except under extreme circumstances . . . . There should be a strong sense of urgency accompanying a strip search that involves an immediate threat . . . . Thus, when a teacher conducts a highly intrusive invasion, such as a strip search, it is reasonable to approach the probable cause requirement.").

More than a quarter century ago, the Seventh Circuit stated:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law."

Id. at 92-93 (denying qualified immunity where student was strip searched by school officials looking for drugs) (internal citation omitted); *see also Brannum*, -- F.3d --, 2008 WL 441536, at *9 (noting, in denying qualified immunity in school-search case: "[S]ome personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution to ensure their protection against government invasion."). Because case law and common sense clearly establish that strip searching Savana was unreasonable in these circumstances, qualified immunity should be denied.

CONCLUSION

For a child, strip searches are terrifying. Such an invasion on school grounds is reasonable only when school officials have a high degree of individualized suspicion that the particular child is committing a serious infraction and when the government's interest is at least commensurate with the trauma that a strip search inflicts on a child. Here, with such a low level of suspicion that Savana possessed nothing more harmful than ibuprofen, it was unreasonable to

have strip searched this thirteen-year-old girl. Because the strip search of Savana violated her constitutional rights and contravened clearly established law, the district court's order should be reversed.

DATED: February 29, 2008

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to FRAP 32(a)(7), I certify that the text of this brief is proportionately spaced, has a typeface of 14 points, and consists of 5,724 words, including headings, footnotes, and quotations, as counted by the Microsoft Word 2003 word-processing program used to generate the brief.

_____ _____

Date Adam B. Wolf

CERTIFICATE OF SERVICE

I, LORENA FERNANDEZ, declare:

I am a resident of the County of Santa Cruz, California; that I am over eighteen (18) years of age and not a party to the within-entitled cause of action; that I am employed in the County of Santa Cruz, California; and that my business address is 1101 Pacific Ave., Suite 333, Santa Cruz, CA 95060.

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Dated: February 29, 2008

_____
Lorena Fernandez