

No. 08-479

IN THE
SUPREME COURT OF THE UNITED STATES

SAFFORD UNIFIED SCHOOL DISTRICT #1; KERRY
WILSON, HUSBAND; JANE DOE WILSON, WIFE; HELEN

~~BOHMER, WIFE; JOHN DOE BOHMER, HUSBAND; BOB~~

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INTEREST OF *AMICI CURIAE* ¹

Founded in 1940, the National School Boards

Association ("NSBA") is a national federation of

state associations of school boards across the United
States. Through its federation NSBA also

Ninth Circuit's ruling sharply limits the ability of
school leaders to meet this responsibility without

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-

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

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

educators regarding individualized

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

[REDACTED]

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

[REDACTED]

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

[REDACTED]

searched by the school nurse. Under the Ninth Circuit's decision, both educators and courts must continuously re-assess the propriety of the search,

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

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

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

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*,

combating student drug use. The Court wrote: “[t]hat the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted.

Nation's youth has hardly abated since [Acton] was
decided in 1995. In fact, evidence suggests that it

Court explained that "the nationwide drug epidemic
makes the war against drugs a pressing concern in

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. H. Central Sch. Dist., 550 F.3d 91, 115

(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-

including their growing abuse of prescription drugs.
The Office of National Drug Control Policy

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million teens abused prescription drugs.”

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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 send 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.

however, should not be subject to personal liability because of the sensitivity and controversy of a

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).

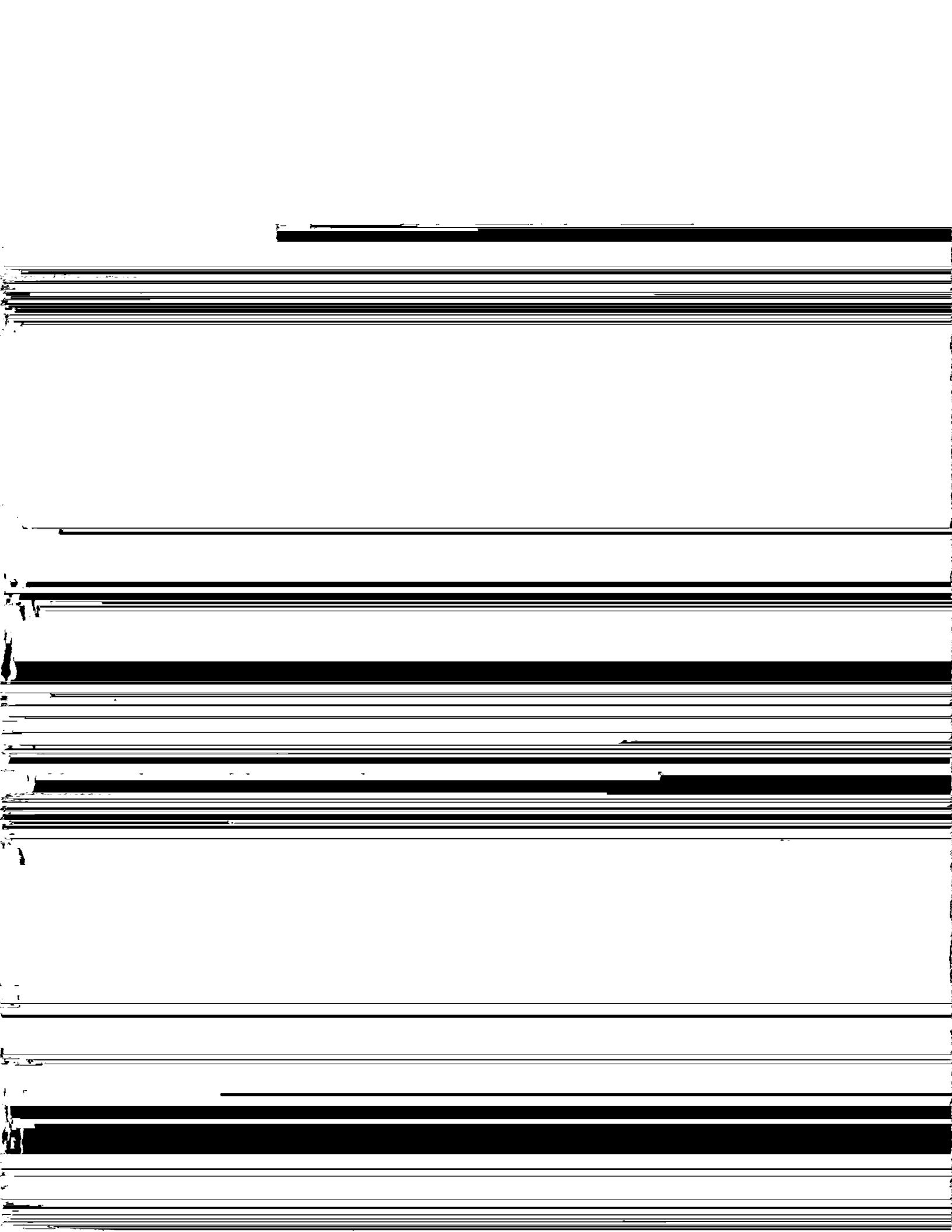
The legal uncertainties surrounding student searches, as described above, should preclude a finding of clearly established law necessary to deny a governmental official the protection of qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Both this Court and the Ninth Circuit have held

(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

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); *Jonhine n*

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



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.

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

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.

§ ~~Aggravating~~ ~~various~~ ~~is~~ ~~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

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

To address this concern, the Court has ordered

the parties and amici 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,

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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