Case No. 05-15759

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAVANA REDDING, a minor, by her mother and legal guardian, APRIL REDDING, Appellants, vs. SAFFORD UNIFIED SCHOOL DISTRICT #1; KERRY WILSON and JANE DOE WILSON, husband and wife; HELEN ROMERO and JOHN DOE ROMERO, wife and husband; PEGGY SCHWALLIER and JOHN DOE SCHWALLIER, wife and husband, Appellees.	Case No. 05-15759 (D.C. No. CV-04-00265-TUC-NFF) (District of Arizona, Tucson) (Appeal)

APPELLANTS' SUPPLEMENTAL BRIEF

REGARDING REASON FOR GRANTING

EN BANC REVIEW

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INTRODUCTION

The panel decision (attached as Exhibit 1) is the focus of national and state attention because it does not reflect what most Americans consider to be reasonable under the Fourth Amendment. Judge Thomas's dissent hits the nail on the head. It is not reasonable for a school official to strip search a thirteen year old girl. If there are extreme circumstances that would justify a strip search of a middle school student, those circumstances are not present here.

The panel decision conflicts with other court decisions throughout the country and "no federal case to examine the question extends official discretion as far. . . " (Thomas's dissent at p. 11). This decision also conflicts with earlier Ninth Circuit decisions. It conflicts with Arizona case law. It conflicts with common sense and decency. If strip searches are *per se* constitutional based on one girl's false claims that she received ibuprofen pills from another girl, then neither students nor their parents have a legitimate expectation of personal privacy at school. This decision merits the time and effort required by *en banc* review. Students and children are entitled to a better reasoned and candid opinion that will stop these intrusive, humiliating, and harmful searches.

ARGUMENT

The majority decision legitimizes harmful and unreasonable conduct by school officials. The decision begins with acknowledging that it is beyond reasonable dispute that "students do not shed their constitutional rights. . . at the schoolhouse gate," and refers to the Supreme Court's framework in *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), i.e., a search is reasonable only if justified in inception and scope. The majority then claims that "decisional law from this circuit is sparse" and sets up two contrasting strip search cases involving so-called "student informants": *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006) and *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991). It then chooses sides and argues that *Williams* is more similar and rejects *Phaneuf.*[1] *Williams* did not hold, as the majority seems to believe, that an uncorroborated statement by one child against another justifies a strip search. Uncorroborated accusations by one child against another should not give school administrators the license to strip search a student. *Phaneuf* recognizes the important privacy rights of students.

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[1] *Williams* has been criticized and is questionable precedent considering *Beard v. Whitmore Lake School Dist.*, 402 F.3d 598 (6th Cir. 2005); *see also* Tamela White, *Note*, Williams by Williams v. Ellington: *Strip Searches in Public Schools – Too Many Unanswered Questions*, 19 N. Ky. L. Rev. 513 (1992); David C. Blickenstaff, *Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve The Problem?*, 99 Dick. L. Rev. 1, (1994); Jacqueline A. Stefkovich, *Strip Searching After Williams: Reactions To The Concern For School Safety*, 93 Educ. L.R. 1107 (1994). The Sixth Circuit does not believe that its decision in *Williams* provided much guidance to school officials. Fourteen years after *Williams*, the Sixth Circuit in *Beard* found a student strip search unconstitutional, but then held that Sixth Circuit law was not sufficiently clear and granted judgment for the individual defendants on qualified immunity.

"While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search." *Phaneuf*, 448 F.3d at 598-599.

Both the majority and the dissent agree that *T.L.O.* provides the framework for considering this case. The *T.L.O.* framework developed from a search of a student's purse and application of the exclusionary rule. A school teacher had directly observed the student smoking in the bathroom in violation of school rules. *T.L.O.* analogized a school search case to administrative searches, and it dispensed of probable cause or a warrant. One of the key points in *T.L.O.* is that "intrusiveness" matters.

> What the T.L.O. majority does say on this matter of intrusiveness, however, is that schoolhouse searches must also be of proper scope - that is, the measures adopted must be 'reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.' Just what kind of limitation this will turn out to be in practice remains to be seen. At a minimum it surely means, as Justice Stevens noted in his dissent, that 'the shocking strip searches that are described in some cases have no place in the school house.'

Wayne R. LaFave, *Search and Seizure*, §10.11(b) p. 501 (West 4th ed. 2004). Unlike *T.L.O.*, this is not the search of a purse. It is not the search of a book bag, locker or desk. It is not even asking a young student to empty her pockets

or submit to a pat-down search. This is the kind of search that, according to Justice Stevens, was beyond the scope of *T.L.O.* and should have "no place in the school house."[2] This case is about a young middle school student who was asked to take off her clothes and expose her breasts and pubic area based on a statement made by another girl who was caught with ibuprofen pills.

Since *T.L.O.* was decided courts have struggled with defining when and what kind of search is appropriate. One thing is clear, the more intrusive the search, the more justification is needed for it. *T.L.O.* may give needed leeway to school officials for various searches such as book bags and lockers but should a strip search be left to such foggy boundaries and broad discretion? How can school officials untrained in the law decide whether a strip search is allowed when three jurists on this court after careful consideration reach diametrically opposed conclusions? This case was not decided on qualified immunity but on the view by two of three judges that the strip search was constitutional *per se.*

This circuit has long recognized the invasive nature of a strip search. In *Bilbrey ex rel. Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984), the court noted

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[2] To protect children, some states have enacted specific statutes flatly prohibiting strip searches of students. *See,e.g.,* Cal. Educ. Code §49050 (West 2007) ("No school employee shall conduct a search that involves: (a) Conducting a body cavity search of a pupil manually or with an instrument; (b) Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil."); *Edgerly v. City and County of San Francisco,* 495 F.3d 645, 656 (9th Cir. 2007) (state law is relevant in analyzing reasonableness under the Fourth Amendment).

the intrusiveness of a student strip search and held it unconstitutional because the school officials had neither "reasonable cause" nor "probable cause." In *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1991), the court recognized the intrusive nature of a strip search of a three year old child in her own home by social workers and held that it violated the Fourth Amendment. The decision quoted with approval this language from *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980): "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 dignity." *Calabretta*, 189 F.3d at 819.

The court in *Doe* held that "[a]part 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.'" 631 F.2d at 93; *see also Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988) (holding unconstitutional routine strip search of juveniles at INS detention facilities stating that it was "axiomatic that a strip search entails perhaps the most severe intrusion upon personal rights"); *Craft v. County of San Bernardino*, 468 F. Supp. 2d 1172 (C.D. Cal. 2006) (policy of strip searching all arrestees who are returned to a jail facility from court violates the Fourth Amendment); *Way v. County of Ventura*, 445 F.3d

1157, 1160 (9th Cir. 2006) (violation of Fourth Amendment to strip search arrestee charged with being under the influence of a controlled substance; "The scope of the intrusion here is indisputably a frightening and humiliating invasion, even when conducted with all due courtesy.... Its intrusiveness cannot be overstated.... [T]he fact that a strip search is conducted reasonably, without touching and outside the view of all persons other than the party performing the search, does not negate the fact that a strip search is a significant intrusion on the person searched .... The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute.").

In the context of felony arrests, this circuit has examined and rejected blanket strip search policies. *Fuller v. M.G. Jewelry*, 950 F.2d 1437 (9th Cir. 1991); *Edgerly v. City and County of San Francisco*, 495 F.3d 645 (9th Cir. 2007) (strip search requires reasonable suspicion that arrestee is hiding contraband; state law relevant in jury determination as to whether Fourth Amendment was violated). The decision here conflicts with the respect to personal privacy provided by years of precedent and leaves school children exposed to a more intrusive search than a felony arrestee or prisoner. *See also Doe v. Groody*, 361 F.3d 232 (3rd Cir. 2004) (holding unconstitutional a strip

search of a young girl who was present at a home when a drug warrant was executed although the warrant stated that persons found could be searched).

As pointed out in the dissent, numerous cases have considered strip searches of students and emphasized their intrusiveness in no uncertain terms. (Thomas's dissent at 9-10). While "reasonable suspicion" under the *T.L.O.* standard may mean one thing when a school official looks in a student's book bag, it must mean more when it involves a strip search. Here, after the school official spoke with Ms. Redding, who denied possessing or giving any pills to the student caught with them, the school administrator then searched her bag and found nothing. What then justified taking the next step of ordering a strip search?

Commentators have explained that strip searches can have a devastating impact on a young child, and school children should be protected against them. Rosemary Spellman, *Strip Search of Juveniles and the Fourth Amendment: A Delicate Balance of Protection and Privacy*, 22 J. Juv. L. 159, 173 (2001-2002):

> In determining whether to conduct a strip search, school officials must weigh the danger of the student's alleged conduct against the need to protect him or her from the humiliation and other emotional harms such a search produces. In almost every case imaginable, the psychological damage that would be inflicted on the child is simply not justifiable.

James A. Rapp, Education Law, §9.08[10][f] (Matthew Bender 2007):

> A strip search should be undertaken only after other means are utilized and then only for the most serious infractions or most extreme circumstances. . . As a matter of practice, strip searches should not be used unless a risk of harm exists to the student being searched or to others.

David C. Blickenstaff, *Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve the Problem*?, 99 Dick. L. Rev. 1, 45-46 (1994):

> Although anyone would find strip searches intrusive and degrading, the fact that children are not sufficiently protected against them is particularly dangerous because they are the group most likely to suffer actual psychological harm.

Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned At School And How Local School Boards Can Help Solve The Problem*, 70 S. Cal. L. Rev. 921, 924 (1997):

> This Note advocates the categorical prohibition of strip searches in our public schools. School officials must be allowed to keep schools free from drugs and other crimes and, toward this aim, should be able to conduct reasonable student searches. However, a strip search simply goes too far. If an incident rises to the level where a school official believes such a search would reveal evidence of a serious crime, that official should notify the student's parents as well as local law enforcement agents. It would then be up to the police to determine whether the school official's suspicion is enough to make out probable cause and to obtain a warrant.

Ms. Redding was an honor student with no history of drug involvement. She had never been in trouble at school. After ordering a strip search of Marissa, the girl who was caught with the pills, and finding nothing, the school administrator decided to call Ms. Redding into his office. Ms. Redding denied ever bringing any prescription pills to school or giving any student any pills. Her book bag was searched revealing nothing. She was wearing a t-shirt and stretch pants and there was nothing indicating she was hiding anything. No school official claims that she was evasive or appeared to be concealing or hiding anything. And, no student had ever claimed that Ms. Redding concealed pills on her person.

Nothing was found. After the strip search, Ms. Redding was asked to sit outside the vice-principal's office in a chair for 2 ½ hours as the school conducted its investigation including searching yet another student. One wonders if there was so much need or justification for a strip search, why didn't the school immediately involve the police or call the children's parents in the first instance? No such considerations were given.

What is telling about the majority decision is that it does not even mention how embarrassing, humiliating, and frightening this was for Ms. Redding. Instead, the majority focuses on evidence that the school believed Ms. Redding was friends with Marissa and admitted giving her a day planner.

Strip searches at Safford Middle School are treated as routine occurrences. The school administrator who ordered the search later told Ms. Redding and her mother that because the search did not provide evidence of a crime, it was no big deal. Apparently, this school administrator believes that violating the Fourth Amendment means nothing if no incriminating evidence is found.

Arizona state courts and the Arizona Attorney General have considered student searches under the *T.L.O.* standard. In 1991, the Arizona Attorney General was asked whether school district personnel may conduct random searches of students, lockers, cars, desks and personal effects. 1991 Ariz. Op. Atty. Gen. 109; 1991 WL 488349. The Attorney General wrote:

> The Arizona Court of Appeals has interpreted the guidelines set forth in *T.L.O.* to require that a principal who conducts a student search have 'personal knowledge regarding the minor's conduct' or know of 'specific reports which would give rise to a reasonable suspicion' that illegal activity has taken place. *In the Matter of Pima County Juvenile Action No. 80484-1*, 152 Ariz. 431, 432, 733 P.2d 316, 317 (App. 1987). Awareness of drug use at the school, mention of a minor's name in connection with drug activity, and a minor's mere presence in an area where illegal activities may take place are not sufficient to satisfy the reasonableness standard.

The case relied upon by the Attorney General, *In the Matter of Pima County Juvenile Action No. 80484-1*, found a violation of the Fourth Amendment:

> Unlike the facts in *T.L.O.*, the principal in this case had no personal knowledge regarding the minor's conduct and had received no specific reports which would give rise to a reasonable suspicion that the minor's pockets would contain cocaine. The principal testified that students found in the area of the bleachers during class hours go there for a variety of reasons, including merely avoiding attendance at required classes. The monitor who observed the minor did not report that she had seen any particular suspicious activity, but merely noted his presence in the bleachers area. No evidence was presented to establish that any school administrators or teachers had observed or reported drug use or sale on the part of the minor. The fact that the minor had been observed previously near the bleachers during school hours did not create a reasonable suspicion that the minor was in possession of illegal drugs.

Matter of Appeal in Pima County Juvenile Action No. 80484-1, 152 Ariz. 431, 432-433, 733 P.2d 316, 317- 318 (App. 1987). While not specifically addressing strip searches, the Attorney General emphasized that the "suspicions" raised by the majority in this case including a rumor that alcohol was served at a party at Ms. Redding's house, that Ms. Redding had given Marissa a day planner, and that Ms. Redding and Marissa were seen together are not sufficient to even search her pockets. Further, Marissa and Jordan, the two students who started all of this and whom the school chose to believe, were part of a group at school that would smoke, take pills and steal from stores. Yet, the school relied upon those two students to justify strip searching an honor student who had not been disciplined for any reason.

There was no school official with personal knowledge of wrongdoing here. The majority is not candid with the facts. The majority emphasizes several times in its decision the school administrator knew that Ms. Redding had given a day planner to her friend so her friend could hide cigarettes, a lighter, and a pocket knife. On page two the opinion states, "Redding acknowledged that the planner belonged to her but claimed that she had lent it to Marissa several days earlier to help Marissa hide some things from her parents." And, on page 5 of the opinion, it states, "Redding acknowledged her friendship with Marissa, and conceded that she had, in fact, lent her planner to Marissa with the express purpose of helping Marissa hide contraband from her parents. . ." And again on the same page it states, "Finally, and perhaps most significantly, during that same interview, Redding conceded to Wilson that she had lent Marissa her planner to help Marissa conceal contraband from her parents."

This is incorrect. Ms. Redding did not tell Mr. Wilson that she gave the planner to Marissa to conceal things. At paragraph 18 of Mr. Wilson's affidavit, he states, "I first showed Savana the planner and its contents. She confirmed that the planner was hers, but that she had lent it to Marissa a couple of days earlier." He does not allege that Ms. Redding told him why she gave the planner to Marissa. If Ms. Redding had given Wilson that information, it surely would have been in Wilson's affidavit. In Ms. Redding's affidavit at paragraph 9, she

states: "At Marissa's request I had lent her my planner a couple of days before this incident. She said she had some things she wanted to hide from her parents, specifically cigarettes, a lighter and some jewelry." At paragraph 10 she states: "When asked about the planner I admitted that it was mine, but indicated that none of the objects were mine and told Mr. Wilson that I had lent my planner several days earlier to Marissa." The panel wrongly states that Mr. Wilson knew when he ordered the strip search that Ms. Redding gave Marissa the planner so Marissa could hide things from her parents. This mistakenly emphasizes a perception by school officials that Ms. Redding conspired with Marissa to conceal things.

Most importantly, the majority gives little weight to the intrusiveness of the search and fails to draw a bright-line rule for school conduct that should have definite boundaries. One doubts that any school administrator can learn anything from this opinion. The decision does nothing to protect students or give direction to school officials and leaves the Fourth Amendment in a fog. This circuit should draw a line that recognizes the privacy rights of students and gives substance to their Fourth Amendment rights.

CONCLUSION

For these reasons, Appellants respectfully request *en banc* review.

Dated this 21st day of November 2007.

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#05-15759

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs/Appellants,

vs.

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 United States District Court, District of Arizona

CIV-04-265-TUC-NFF

APPELLEES' BRIEF OPPOSING REHEARING EN BANC

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OPPOSITION TO REHEARING EN BANC

Savana Redding and her mother opted not to petition for rehearing en banc. And the District and its staff oppose rehearing en banc as unnecessary under Rule 35(b).

The panel decision doesn't conflict with any of this Court's other decisions, nor with any decision of the United States Supreme Court. Rather, it is a product of properly applying the reasonableness standard adopted in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). And contrary to the dissent's suggestion, the panel decision doesn't conflict with the Second Circuit's decision in *Phaneuf v. Fraikin* because the student informant's tip was corroborated and because of the credible allegation that Savana had previously distributed alcohol illegally.

DISCUSSION

1. "*...at its inception*"

Everyone acknowledges *T.L.O.* as setting the standard in this case. And under *T.L.O.*, the initial inquiry is whether the search was "justified at its inception."[1] Accordingly, the proper perspective is that of the public official just *before* the search.

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[1] 469 U.S. at 341.

Unfortunately, the dissent seems preoccupied with looking at and assessing the search in hindsight instead. The dissent describes the search as "fruitless" and notes that "[s]chool officials discovered nothing...."[2] Of course, this perspective overlooks the very purpose for the qualified immunity defense. The defense recognizes that public officials can and will err in the performance of their duties.[3] But rather than face the alternative of paralyzing inaction, qualified immunity accepts some risk of error.[4]

2. The student informant's tip was corroborated.

There were pills on campus. The staff knew that at least one student, Marissa Glines, was handing pills out to other students with the intent of everyone taking the pills that day during school. And Marissa claimed that she got her pills from Savana.

Marissa's tip was notable for several reasons. First, the tip was given face-to-face rather than anonymously.[5] Second, her information was based on direct and personal knowledge, as opposed to a mere statement, because she claimed to have actually seen Savana with pills and to have received pills from her. And

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[2] Dissenting opinion at pp. 12870-71.
[3] *Schuer v. Rhodes*, 416 U.S. 232, 241-42 (1974).
[4] *Id.*
[5] *United States v. Salazar*, 945 F.2d 47, 50-51 (2d Cir. 1991) ("[A] face-to-face informant must, as a general matter, be thought more reliable than an anonymous...tipster, for the former runs the greater risk that he may be held accountable if his information proves false.").

third, the staff had already witnessed evidence of the girls' friendship as they ran in the same social circle, which tended to disprove any improper motive on Marissa's part.

But even then, the staff opted to investigate further rather than to immediately search Savana. Savana was asked about the planner that had been found earlier and its contents, including knives, lighters, a cigarette, and a permanent marker. In response, she admitted that the planner was hers, and more importantly, that she had given it to Marissa to conceal contraband.

The dissent questions the relevancy of Savana's admission.[6] At a minimum, her admission lent independent credibility to Marissa's tip. The fact that Savana had helped Marissa to hide contraband further evidenced the closeness of their friendship and the confidences that they kept with each other. In other words, the girls were in the "know" when it came to the other, and Marissa would have no improper motive in implicating Savana.

3. The issue of Savana's history.

Before the search, the staff received a report from a student, Jordan Romero, that Savana had served alcohol to other middle school students. Although the District agrees that the Court must accept Savana's denial of this report as true for purposes of the appeal, the District certainly hasn't conceded

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[6] Dissenting opinion at p. 12872.

anything. Indeed, Jordan has yet to be heard from, and he's already proved himself a credible informant.

But whether Jordan's report is ultimately true or not misses the point. The fact is that he made the report and that the District staff had ample reason to believe it was true before the search.

4. A drug problem.

The panel credited Savana's denial of a drug problem on campus, despite its conclusory and self-serving nature. Of course, the existence of the problem is apparent from the uncontested record.

A student brought a prescription drug to school and began handing the pills out to her classmates. A boy nearly died from an adverse reaction to the drug. As it was, he spent several days in intensive care.

The staff found alcohol in the girls' bathroom during the dance to open the 2003-2004 school year.

Jordan became violent with his mother after taking some pills that a classmate had given him.

Marissa was passing out pills to students with the intent of everyone taking them that day during school.

And what's truly astounding is how Savana can deny a drug problem in the very same affidavit in which she also claims that her own friend Marissa was part of a group *at school* that got together to take pills.

Nor is the problem helped by excusing it as only aspirin, ibuprofen, or Advil. As the District had learned from sad experience, there are simply too many variables involved for an educator to predict the effect that a prescription drug may have on a student or to write off a drug as harmless, even without students trying to conceal the pills and the amounts being distributed.

CONCLUSION

A rehearing en banc is unnecessary. The panel decision reached the right result by properly applying the reasonableness standard. And no other decision is to the contrary.

Dated this 21st day of November, 2007.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the typeface and type style requirements of Rule 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 points or larger, in Times New Roman style.

Dated this 21st day of November, 2007.

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