No. 09-2386

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUAN LOPERA, et al.,

Plaintiffs – Appellants

v.

TOWN OF COVENTRY, et al.,

Defendants – Appellees

On Appeal from the United States District Court
For the District of Rhode Island

BRIEF OF AMICUS CURIAE RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION in support of Plaintiffs/Appellants and Reversal of the District Court Judgment

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Identity of Amicus Curiae, its Interest in the Case, and Authority to File

The Rhode Island Affiliate, American Civil Liberties Union (RI ACLU) is the state affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization. Like the national organization, RI ACLU dedicates its efforts to promoting and preserving the principles of liberty embodied in the amendments to the United States Constitution comprising its Bill of Rights. Through volunteer attorneys RI ACLU has appeared in this Court, the Federal District Court for the District of Rhode Island, and the Rhode Island Supreme Court, in pursuit of preserving and promoting those liberties.

This case presents a significant issue concerning the Fourth Amendment and whether teachers, coaches and other school officials have *in loco parentis* authority to consent to a police investigative search of a student's person and personal belongings for evidence of a crime – in the absence of either "probable cause" or "reasonable suspicion" that the student committed the crime. This issue arises in the context of a civil damages action under 42 U.S.C. § 1983, based upon a suspicionless criminal investigative search of an entire high school soccer team by police officers – based solely on the consent of the team coach. The District Court dismissed the action, determining that the police officers, who searched through

the players' backpacks and athletic bags and examined the personal information on their cell phones and iPods, were entitled to the benefit of qualified immunity.

Determining whether a defendant in a civil rights action is entitled to qualified immunity has historically been a two-step sequential analysis; the court determining: 1) whether a constitutional right would have been violated on the facts alleged; and 2) if so, whether the right was "clearly established." *Saucier v. Katz*, 553 U.S. 194, 200 (2001). A negative answer to either question immunizes the defendant from suit. Here the District Court exercised its recently conferred discretion, *see Pearson v. Callahan*, 129 S.Ct. 808, 813 (2009), to assess whether the police officer defendants who conducted the search were entitled to qualified immunity by bypassing the question of whether school officials have the authority to consent to a police search of a student's possessions under the Fourth Amendment, and analyzed only whether the law was sufficiently clear on that question so that the officers could not have reasonably known the search was improper.

After declining to determine whether a school official has *in loco parentis* standing to validly consent to a police criminal investigatory search of a student's person and personal belongings, the District Court determined that even if they did not, that proposition was not sufficiently "clearly established" for the police to be on notice that the searches violated the Fourth Amendment. Therefore the District

Court determined the officers were entitled to qualified immunity and dismissed the § 1983 claim, and plaintiffs have appealed.

By declining to determine whether a school official can give police permission to search the person and possessions of any student or group of students, small or large, and leaving the law unsettled and unarticulated in that regard, the District Court's decision effectively frees local police to conduct criminal investigative searches on any public school student simply by obtaining the consent of an official of that student's school. That is a constitutionally untenable situation that can, and should, be addressed by this Court.

RI ACLU files this amicus brief to urge the Court to begin its review of the qualified immunity decision with the first prong. It is essential to clarify, if it is not already clearly established, that under the Fourth Amendment teachers, coaches and other school officials do not possess *in loco parentis* standing to consent to a criminal investigative search by police of a student's person and possessions as a substitute for probable cause. By doing so this Court will provide guidance and notice to local school and law enforcement officials of the Fourth Amendment limits of their authority over the person and possessions of public school students, and deter future searches where police attempt to substitute a school official's "consent" for evidence of probable cause.

RI ACLU seeks to file this brief under F.R.A.P. 29 (a), (b), and a motion for leave to do so is filed contemporaneously with this brief.

Statement of the Facts Pertinent to Search

Leaving the field after a soccer match with Coventry High School, the Central Falls High School boy's soccer team was followed by an angry crowd accusing them in loud, sometimes racially tinged tones, of stealing iPods and cell phones from the boy's locker room.[1] Becoming concerned with the situation, Coach Robert Marchand got his players on the team bus and told them to "keep your mouth shut and keep your heads down."

Marchand and his assistant coach then thoroughly searched each player's school bags containing books and other personal items, as well as their athletic bags containing their soccer gear. He then left the bus to advise the Coventry Athletic Director, who had arrived as the crowd grew in size and volume, that his players did not have any of the missing items. As he was doing so several police

[1] Prior to the game a small group of Central Falls players had briefly entered the locker room to use the bathroom.

cars rapidly approached with lights and sirens engaged. Eventually four police cars and four officers would arrive on scene.[2]

Marchand and the Athletic Director told the officers that the unruly crowd accused the Central Falls players of stealing iPods and cell phones from the locker room. To investigate the allegation and appease the crowd the officers asked Marchand for permission to search the Central Falls players and he agreed. Each player was ordered off the bus with both their bags and lined up along the side of the bus facing the angry, shouting mob, which periodically took their photographs with cell phone cameras. Without regard to which players had actually used the locker room prior to the match, the officers searched the bags of every player; asking some of the players to empty their pockets, lift up their shirts, and stretch open their pants.

Having no description of the missing devices or their number, when the officers found a cell phone or iPod they would display it to the angry crowd to see if anyone recognized it. The officers also asked the Central Falls players for personal information that could be found on the devices, thus identifying the device as theirs, and then searched the devices for this information. None of the stolen items were found.

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[2] The officers' emergency response was triggered by a call to the Coventry Police Department that led the dispatcher to believe a full scale brawl was taking place.

Through counsel the police officers admitted there was no "probable cause," or even "reasonable suspicion," to believe the Central Falls players had stolen the items in question to justify a search of their persons and belongings that would comply with the Fourth Amendment. The sole authority they relied on for the search was the third-party consent of Coach Marchand.

Argument

I.) By failing to address whether a school official can consent to a police search of a student, the District Court missed an important opportunity to give guidance to local police and school departments on a significant issue of constitutional law, left the door open to possible continued constitutional violations, and ultimately erred in its immunity analysis.

The Central Falls players brought this action alleging, *inter alia*, a claim under section 1983 for a violation of their Fourth Amendment protection from unreasonable searches. The police officers claimed qualified immunity, asserting the searches were constitutionally authorized because Coach Marchand allegedly stood *in loco parentis* to the student athletes with the authority to consent to a search of the contents of the personal backpacks, athletic bags, cell phones and iPods, as well as of their persons, for evidence of a crime - in the absence of probable cause or even a reasonable suspicion that they committed the crime being investigated. Alternatively, they argued that, even if the coach did not possess the

authority to consent to the searches, their belief that he did was reasonable because his lack of authority to consent was not clearly established.

Although the District Court described the two-step inquiry that had developed to determine whether immunity should attach, the court ultimately decided to leave aside the question of whether Coach Marchand had the legal right to consent to the searches of his players and all their belongings under the Fourth Amendment, and instead proceeded to decide the immunity question based upon only the "clearly established" prong of the test. *Lopera v. Town of Coventry*, 652 F.Supp.2d 203, 213 (D.R.I. 2009). The District Court decided to do so by reasoning as follows.

First, it recognized that qualified immunity shields government actors who perform their duties *reasonably*, that is, where their conduct does not violate a clearly established constitutional right of which "a *reasonable* person would have known." *Id.* at 211 (citing *Pearson*, 129 S.Ct. at 815) (emphasis added). The District Court correctly recognized that if an official errs about the existence of a constitutional right or prohibition, but the error is reasonable because the constitutional principle is not clearly established, immunity applies regardless of whether "the error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* (citing 129 S.Ct at 815). Second, aside from the immunity question, the court recognized that the searches would have been

permissible under the Fourth Amendment under either of two circumstances: 1) if Coach Marchand had authority to consent to criminal investigative search of the players and their bags under the *in loco parentis* doctrine; or 2) if the police officers "*reasonably believe[d]" he had the authority to give such consent. Id.* at 212 (citing *United States v. Carasco*, 540 F.3d 43, 49 (1st Cir. 2008)) (emphasis added).

Thus the immunity defense raised two questions: whether Coach Marchand had, as a matter of law, *in loco parentis* authority to consent to the searches; and if he did not, whether his lack of authority to consent was so clearly established under the law that no reasonable police officer could have believed that he had that authority. If Coach Marchand's lack of authority was not so clearly established, then a police officer might reasonably believe he did possess such authority. The District Court concluded that not only would mean qualified immunity applied, it also "would, in essence, dictate a finding of no constitutional violation" in this particular instance. *Id.* at 213. Since the reasonableness of the officers' belief in Coach Marchand's authority to consent was central to both steps of the immunity inquiry – the constitutionality of the search and the analysis of the clearly established prong – the court determined "the prudent approach in this case [was] to resolve the qualified immunity analysis by examining the clearly established

prong, leaving the question of whether a constitutional violation occurred to the side." *Id.* at 213.

Consequently the District Court did not analyze whether a school official has, as a matter of law, the capacity and authority to consent to a criminal investigatory search of a student's person and possessions. The District Court simply concluded whether they did or not was not clearly established under the case law, and therefore the officers could reasonably believe Coach Marchand possessed that authority, and because of this "apparent" authority they "were entitled to rely on the consent[,]" *id.* at 215, and entitled to immunity.

But the "consent" issue here is significantly distinguishable from the typical consent case, because the question of Coach Marchand's authority to consent to the search *in loco parentis* is a question of law, rather than a question of fact based on the totality of factual circumstances a police officer might confront in a given case. The District Court declined to answer that question of law, but cautioned that it "was not suggesting that Coach Marchand had the authority to consent by virtue of any *in loco parentis* status he may have had." *Id.* at 215, n.7. The court even acknowledged that his authority to consent on behalf of his players was "far from clear[,]" *id.* at 212-213, because under "the rather clear language" of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), "a persuasive argument could be made that the *in loco parentis* doctrine serves no purpose in cases involving the Fourth Amendment

rights of public school students[.]" *Id.* at 214. Yet the court did not analyze or address that question of law, or the persuasive argument that may have "clearly established" that a school official *does not* possess *in loco parentis* authority to consent to a criminal investigative search of a student.

Amicus respectfully asserts that very significant question of law should be decided by this Court by critically examining both prongs of the two-step sequential analysis, for three reasons.

First, deciding whether *T.L.O.* forecloses any claim that a school official possesses *in loco parentis* authority to consent to searches like those that occurred here is integral to determining whether that proposition is clearly established, *see Pearson*, 129 S.Ct. at 818 ("it often may be difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be"), and amicus believes *T.L.O.* does in fact clearly establish that such a claim is foreclosed. Second, even if the Court concludes that a school official does not possess *in loco parentis* authority to consent to such searches, but that prior law was not sufficiently clear on this point, opining on whether a school official has such authority will provide essential guidance for local police and school officials, enabling them to conform their future conduct to the Fourth Amendment. And third, it will, at the least, deter future searches like this and ensure the Fourth Amendment is meaningfully applied to public school students.

II.) It is fundamentally important, and permissible, for this Court to articulate whether a warrantless police search of students, based solely on the consent of a school official and in the absence of probable cause, violates the Fourth Amendment.

A.) Determining whether *New Jersey v. T.L.O.* forecloses the officers' consent claim, and whether a constitutional violation occurred, will demonstrate that proposition is clearly established.

Amicus asserts that both the question of whether a school official has the authority to consent to a criminal investigative search of a student, and if not, whether that proposition was clearly established, fundamentally begins and ends with the Supreme Court decision in *New Jersey v. T.L.O.*

As the District Court decision demonstrates, the "consent" issue presented is a novel issue that does not appear to have been specifically addressed elsewhere. But often, "[i]n the course of determining whether a constitutional right was violated . . . a court might find it necessary to set forth principles which will become the basis for a holding that the right is clearly established." *Saucier*, 553 U.S. at 201. Amicus submits that this is such a case. The District Court essentially determined that the officers could reasonably rely on Coach Marchand's consent because whether he possessed the authority to consent under the doctrine of *in loco parentis* was not "clearly established." But that is a question of law to be determined by analyzing the *T.L.O.* decision, because that decision itself may, and amicus asserts it does, clearly establish that school officials do not have *in loco*

parentis standing to consent to criminal investigative searches, and therefore it was not reasonable for the Coventry police to believe Coach Marchand possessed such authority.

But even if the Court ultimately decides the officers are entitled to immunity, affirmatively articulating that the Fourth Amendment does not permit school officials to consent to a criminal investigative search of a student will serve the very significant purpose of placing local officials on notice that conduct violates the Fourth Amendment, and deter similar violations from occurring in the future.

B.) Determining whether school officials can consent to a criminal investigative search will, even if immunity is ultimately granted, enable local officials to conform their practices to the Fourth Amendment and ensure it is meaningfully applied to public school students.

> The Fourteenth Amendment protects the citizen against the State itself and all of its creatures – Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. *That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.*

T.L.O., 469 U.S. at 334 (quoting *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 637 (1943)) (emphasis added).

It is fundamentally important that this Court review the District Court's qualified immunity determination by first determining whether school officials have *in loco parentis* authority to consent to criminal investigative searches of students. Local police and school officials frequently wield the power of the state in their interactions with public school students, and civil rights claims under 42 U.S.C. § 1983 are the principal mechanism by which courts educate local state actors concerning the contours of the constitution so their conduct may conform to it. Section 1983 was enacted not only to provide compensation to victims of past constitutional violations, but of equal importance, to prevent *future* constitutional violations. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

That preventative rationale is also the central rationale for the two-step qualified immunity inquiry. *Erhlich v. Town of Glastonbury*, 348 F.3d 48, 55 (2d Cir. 2003). Determining whether a constitutional violation has been alleged, even if the defendants are ultimately entitled to immunity, informs local officials concerning the standards of official conduct required by the Constitution, *id.*, and promotes a clear constitutional standard for the policies they develop. *See County of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998). When courts leave the initial constitutional question unaddressed, as the District Court did here, the

constitutionally required standards of conduct remain uncertain to the detriment of both public officials and the individuals they interact with. 348 F.3d at 55 (citing *Lewis*, 523 U.S. at 841 n.5 (1998)).

While addressing both steps of the sequential analysis may occasionally cause a court to opine on a constitutional issue that it might have avoided, consistent with the generally sound doctrine of constitutional avoidance, it is often the preferred and better practice in the specific context of civil rights litigation so that courts may fulfill their responsibility "to explicate and give force to the values embodied in . . . the Constitution." *Horne v. Coughlin*, 191 F.3d 244, 256 (2d Cir. 1999) (Cardamone, J., dissenting) (quoting Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085 (1984)); *see also Pearson*, 129 S.Ct. at 818 (noting that the two-step sequential approach "is often beneficial"). Such constitutional analysis in civil rights litigation is not mere dictum in the ordinary sense, because its purpose "is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases[,]" *Bunting v. Mellen*, 541 U.S. 1019, 1024 (2004) (Scalia, J., dissenting from denial of certiorari), and prevent future abuses of constitutional principles and values.

Performing the constitutional analysis that is necessary to determine that a constitutional violation has occurred "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity

defense is unavailable." *Pearson*, 129 S.Ct. at 818. This is such a case. If the consent issue here is not addressed it effectively permits police officers to continue to enlist school officials to give them permission to search large groups of students without probable cause, based on the mere consent of the school official. If large numbers of searches are conducted without probable cause, it stands to reason many innocent students will be subject to unconstitutional searches without any legal mechanism to address the legality of the search, since they will be innocent and not tried criminally.

The central purpose of a complete two-step inquiry is to place governmental officials on notice that they ignore pronouncements from a court on constitutional standards and rights at their peril. "[L]ucid and unambiguous dicta concerning the existence of a constitutional right can without more make that right clearly established for purposes of a [future] qualified immunity analysis[,]" *Wilkinson v. Russell*, 182 F.3d 89, 110 (2d Cir. 1999). (Calabresi, J. concurring), and dismissing a civil rights claim on immunity grounds, without analyzing the constitutional question presented, leaves a question controversial enough to engender litigation unanswered and fails to help parties structure future conduct. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepp. L. Rev. 667, 683 (2009).

> Governments [will] lack guidance in training their employees and crafting policies to conform to

> constitutional standards. And for citizens, a potential category of wrong remains, troublingly, irremediable for the indefinite future. Without clarification of the law, no future plaintiff, even one who has suffered an identical injury, can overcome a government official's defense that the relevant law was not clearly established.

Id.

As described earlier, the District Court concluded that it was "a close call as to whether a constitutional violation . . . occurred[,]" 652 F.Supp.2d at 212, and although it was within the court's discretion under *Pearson*, its decision to omit analysis of the constitutional issue effectively permits police officers, in the absence of a warrant or probable cause, to search the persons and possessions of classrooms or busloads of students for evidence of a crime simply by obtaining the consent of a teacher or other school official. Such a scenario may very well constitute a violation of the Fourth Amendment rights of many innocent students that the law cannot address or deter, because the fundamental constitutional question presented here – whether a public school official has *in loco parentis* authority under the Fourth Amendment to consent to a criminal investigative search of a student's person and personal – is unaddressed and unarticulated.

Because this Court exercises de novo review of qualified immunity determinations, however, *Bergeron v. Cabral,* 560 F.2d 1,7 (1st Cir. 2009), it is not bound by the District Court's sequencing decision and may address the immunity issue by analyzing both aspects of the *Saucier* sequencing protocol. RI ACLU

urges the Court to do so for the benefit of police departments, school officials and public school students alike – particularly since it will reveal both that: 1) the searches violated the Fourth Amendment; and 2) the law was sufficiently established that an objectively reasonable police department should have been aware that they would violate the Fourth Amendment.

III.) With respect to the Fourth Amendment public school officials are state actors exercising state, not *in loco parentis*, authority, and are without standing to consent to a criminal investigative search of a student's person or possessions.

The fundamental question presented under the first prong of the two-step immunity analysis – whether a constitutional violation occurred – is, how can a school official constitutionally give consent to a police officer to conduct a search of a student, that the school official himself could not constitutionally conduct under the Fourth Amendment?

* * *

Since *T.L.O.* courts have uniformly held that law enforcement officers, not associated with a school system, are subject to the probable cause standard when they initiate the search of a student for criminal investigative purposes. *See Myers v. State*, 839 N.E.2d 1154, 1159-60 (Ind. 2005) (and cases cited therein); *R.S.D. v. State*, 245 S.W.3d 356, 368 (Tenn. 2008) (and cases cited therein). Because the defendant police officers were not associated with the Central Falls school

department, and the searches at issue were for criminal investigative purposes and without probable cause, the officers must necessarily rely on an exception to the warrant or probable cause requirement to justify the searches. *See Carasco*, 540 F.3d at 49. In this case they rely on the consent exception. They claim Coach Marchand possessed an *in loco parentis* legal status that permitted him, or that they reasonably believed permitted him, to consent to the search of the players' persons, bags, cell phones and iPods. Neither proposition, however, is supportable.

As a general matter "the Fourth Amendment provides protections to the owner of every container that conceals its contents from plain view," *United States v. Ross*, 456 U.S. 798, 822-23 (1982), and "public school students thus retain a protection against unreasonable searches of their backpacks and purses by school officials." *Doe v. Little Rock School District*, 380 F.3d 349, 353 (8th Cir. 2004). They have a legitimate need to bring items of personal property to school, and that may include highly personal items. *Id.* (citing *T.L.O.*, 469 U.S. at 339). Consequently, "public school students have traditionally been treated as presumptively responsible persons entitled to some modicum of privacy in their personal belongings, at least to the extent that recognition of such privacy interests does not unduly burden the maintenance of security and order in schools." *Id.*

Doe involved a policy of the Little Rock School District that subjected secondary school students to random, suspicionless searches of their persons,

backpacks, purses and other belongings. 380 F.3d at 351. The students would be ordered to place all of these items, as well as all items from their pockets, on their desks, and then leave the room. *Id.* While the students were outside the room school personnel would search the items that were left behind. *Id.* Contraband uncovered in the searches was regularly turned over to law enforcement agencies, *id.* at 355, and the Eighth Circuit held this search practice was unconstitutional.

The searches at issue here were not materially different from those conducted in *Doe*, except that they were conducted by law enforcement officials specifically for criminal investigative purposes – giving them a considerably more intrusive character. The objective of the police search of the Central Falls players was not "the maintenance of security and order in schools," it was to uncover evidence of a crime that neither the police nor school officials had probable cause (or even reasonable suspicion) to believe these players had committed – yet the officers were permitted to search through backpacks, athletic bags, and even the personal content of the students' cell phones and iPods.

To justify the legality of this action the officers claimed Coach Marchand had *in loco parentis* authority over these bags and personal devices, such that he could authorize the invasion of his players' privacy interests in these possessions. The District Court – without determining whether Coach Marchand actually had such authority – determined that belief was reasonable. But both the principles of

the consent exception to the warrant requirement, and *T.L.O.*'s rejection of the *in loco parentis* doctrine in the context of searches of students by public school officials, demonstrate both those conclusions were wrong.

The rationale for the consent exception to the probable cause requirement is that a third party has "common authority over the place to be searched," or at least a reasonably apparent common authority over the place. *Carasco*, 540 F.3d at 49; *see also United States v. Maeda*, 408 F.3d 14, 21 (1st Cir. 2005) ("the consent of one who possesses common authority over premises or effects is valid as against the absent nonconsenting person with whom the authority is shared"). Common authority rests "on mutual use of property by persons generally having joint access or control for most purposes[.]" *Id.* (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)).

The Coventry police officers rest their claim that the coach had "common authority" over, and "joint access or control" and the right of "mutual use" of the players' bags and personal devices, such that he could consent to their search, on the *in loco parentis* doctrine. But even if a parent-child relationship would give rise to a presumption of a parent's right to consent to the search of a closed personal item belonging to their child such as a backpack, the existence of an *in loco parentis*-like relationship between a public school official and a student was categorically rejected by *T.L.O.*

In *T.L.O.* the Supreme Court unequivocally held that for purposes of the Fourth Amendment public school officials are representatives of the state, not surrogate parents, with respect to searches conducted against public school students, and because they are state actors exercising state authority, not parental authority under the doctrine of *in loco parentis*, they cannot claim parental immunity from the strictures of the Fourth Amendment. 469 U.S. at 336-37. And just as they cannot claim parental immunity, because they are state actors and not *in loco parentis* surrogate parents, school officials also cannot claim any "common authority," or the right of joint access or control over students' backpacks, athletic bags, pocketbooks or personal technological devices, on the basis of a surrogate parent relationship. As state actors for Fourth Amendment purposes, they lack such authority as a matter of law as a very clear consequence of *T.L.O.*'s rejection of *in loco parentis* immunity for school officials under the Fourth Amendment.[3]

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[3] If there is any doubt that *in loco parentis* authority is inapplicable to the student-teacher relationship for Fourth Amendment purposes, one need look no further than Justice Thomas' dissent in *Safford Unified School District #1 v. Redding*, 129 S.Ct. 2633 (2009). There Justice Thomas expressed the belief that the "deep intrusion into the administration of public schools" reflected in the Court's Fourth Amendment jurisprudence "exemplifies why the Court should *return* to the common-law doctrine of *in loco parentis*[.]" *Id.* at 2646 (emphasis added).

And the Supreme Court's subsequent decisions in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), and *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995), authorizing public school officials to implement suspicionless administrative drug testing of all students voluntarily participating in extra-curricular activities, do not alter the

While *T.L.O.* recognized that "the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence" to the probable cause requirement, and established a less rigorous "reasonable suspicion" authority to search their students under the Fourth Amendment for purposes of maintaining an appropriate educational environment, *id.* at 341-342, that does not alter or affect the fact that, unlike a parent, a school official is a state actor for Fourth Amendment purposes, whose authority to search the personal belongings of students is governed by the Fourth Amendment, and not governed by a legal status akin to a parent-child relationship. From a Fourth Amendment perspective Coach Marchand was a state actor exercising state authority, not a private individual exercising delegated *in loco parentis* authority. And as such he had no legal basis for consenting to a warrantless search by police officers conducting a criminal investigation. It is simply "plain as the nose on your face" fundamental that since, as a state actor and not a surrogate parent, Coach

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import of *T.L.O.* for this case. Neither *Earls* nor *Veronia* involved or addressed criminal investigatory searches by police officers unaffiliated with the school, *see Earls*, 536 U.S. at 829; *Veronia School District*, 515 U.S. at 651, and the searches in *Earls* and *Veronia* were implemented to promote the maintenance of discipline, health and safety in the educational environment, not to detect and prosecute crime, a factor that makes the character of the intrusion here "qualitatively more severe than that in *Veronia* and *Earls*." *Little Rock School District*, 380 F.3d at 353. To the extent a school acts in a "*custodial and tutelary*" role with students, and that role might somewhat echo the *in loco parentis* concept, school officials are still state actors with respect to the Fourth Amendment under those decisions, which are wholly inapplicable to law enforcement searches conducted to ferret out crime.

Marchand lacked reasonable suspicion that the players stole the missing items and could not constitutionally search their personal bags, cell phones and iPods, that he could not constitutionally give the police permission to do so. A school official simply does not possess such authority under *T.L.O.*'s rationale.

As the District Court itself recognized, the language of *T.L.O.* is "rather clear," and "appear[s] to soundly reject the doctrine of *in loco parentis* as a rationale" for the authority of a school official to search a student. 652 F.Supp.2d at 213-14. Amicus asserts *T.L.O.* does soundly reject that doctrine. No school official, including Coach Marchand, has the legal status, *in loco parentis* or otherwise, to consent to a police request to search a student's person or possessions for evidence of a crime in the absence of probable cause, and this Court should so state, in order to, at a minimum, guide the future conduct of local police and school departments, and deter the future use of such an investigatory practice.

IV.) The Coventry police officers could not, from an objective standpoint, reasonably believe that the probable cause requirement necessary to conduct these searches could be circumvented by obtaining the "consent" of another state actor bound by the strictures of the Fourth Amendment.

Qualified immunity in civil rights litigation has developed "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted).

Consequently, even if a court determines a particular official's search violated the Fourth Amendment the official is still given immunity if, at the time of the search, the law did not clearly establish that the Fourth Amendment prohibited the search. *Pearson*, 129 S.Ct. at 822. The salient question, therefore, is whether the state of the law at the time of the search gave the defendant fair warning that the search was unconstitutional. *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009).

But the standard is an objective one, considering whether the law would give fair warning to an "objectively reasonable official." *Bergeron*, 560 F.3d at 12. And in making that determination courts presume that "a reasonably competent official should know the law governing his conduct." *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). Equally important, for the law to be clearly established it is not necessary that the specific search in question have been previously held unlawful, *Redding*, 129 S.Ct. at 2643 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)) - "officials can still be on notice that their conduct violates established law even in novel . . . circumstances." *Wilson v. City of Boston*, 421 F.3d 45, 46 (1st Cir. 2005) (citing *Hope*, 536 U.S. 741).

The law is considered clearly established if "a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct at issue." *Guillemardo-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 527 (1st Cir. 2009) (internal quotes and brackets omitted). It is enough that the relevant

legal principles are sufficiently particularized in the decisional law so that "a reasonable official can be expected to extrapolate from them and conclude that a certain course of conduct will violate the law." *Savard v. Rhode Island*, 338 F.3d 23, 28 (1st Cir. 2003) (citing *Saucier*, 533 U.S. at 201-02).

In this case there are three relevant legal principles that are clearly established in the decisional law. First, a criminal investigative search of a student by police officials unaffiliated with the student's school ordinarily requires a warrant or probable cause. Second, *T.L.O.* firmly establishes that a school official is a state actor under the Fourth Amendment, not a surrogate parent, for purposes of searching the person and possessions of students.[4] Third, as a state actor, in the absence of his players' consent, Coach Marchand did not have the constitutional authority to search their bags and belongings unsupported by a reasonable suspicion they had stolen the items in question.

The Coventry police officers, at least through their superiors and departmental policies, were presumed to be aware of these principles and it is undisputed that neither probable cause nor reasonable suspicion existed. Based on

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[4] In concluding that the decisional law referred to the *in loco parentis* doctrine "in a way that makes it appear that the doctrine is a viable source of authority to justify a school official's actions[,]" 652 F.Supp.2d at 215, the District Court did not cite a single authority that involved a criminal investigative search of a student by police for evidence of a crime. *Id.* (see citations therein). And although the decisions may have included the phrase "*in loco parentis*," there was no discussion, much less a conclusion, that a school official was not a state actor for purposes of the Fourth Amendment.

these principles it was not objectively reasonable for the police officers to believe that Coach Marchand was akin to a surrogate parent under the doctrine of *in loco parentis*, with common authority and control over the players' backpacks, athletic bags, cell phones and iPods, such that he could consent to a criminal investigative search of those items – particularly where he had no authority to search them himself. He was instead a state actor subject to the Fourth Amendment, and it was not reasonable for the police officers to believe he was otherwise, or that he could authorize a search by police that he himself could not conduct consistent with the Constitution.

Taken together, all these factors demonstrate that the police officers could not reasonably believe that the probable cause requirement necessary to conduct these searches could be circumvented by obtaining the "consent" of another state actor also bound by the strictures of the Fourth Amendment. As a consequence, the searches violated the Fourth Amendment, an objectively reasonable officer should have known that, and the police officer defendants are not entitled to qualified immunity.

Conclusion

For all the above-stated reasons, amicus curiae Rhode Island Affiliate, American Civil Liberties Union, urges this Court to review the District Court's

immunity decision by analyzing both prongs of the two-step test; to determine that the school official did not have the authority to consent to the police search of the plaintiff students' persons and personal possessions; that the searches violated the Fourth Amendment; and that the defendant officers are not entitled to immunity.

Respectfully submitted,

Rhode Island Affiliate,
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CERTIFICATE OF COMPLIANCE UNDER FED, R. APP. P. 32(A)(7)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (1) this brief contains 6,442 words excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a 14 point proportionally spaced typeface using Times New Roman font.

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PROOF OF SERVICE

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