United States Court of Appeals
for the
First Circuit

09-2386

JUAN LOPERA; MARLON GIRALDO; MAURICIO ESPINAL; HECTOR CARDONA; RANDY GIRALDO; STEVEN GIRALDO; WILLIAM RUIZ; PEDRO HERNANDEZ; L.E.A.-L., by and through his parents and next friends, Luis Ardila and Hziel Ardila; B.O., by and through his parent and next friend, Alba Jaramillo; S.P., by and through his parent and next friend, Lilian Giraldo; J.S., by and through his parents and next friends, Youlder Salazar and Martha Duran; M.R., by and through his parents and next friends, Milton Ricuarte, Sr. and Elizabeth Rivera,

Plaintiffs-Appellants,

v.

TOWN OF COVENTRY, by and through its Treasurer, Warren West; KEVIN P. HARRIS, in his individual capacity and in his capacity as a police officer for the Town of Coventry; KEVIN KENNEDY, in his individual capacity and in his capacity as a police officer for the Town of Coventry; DAVID NELSON, in his individual capacity and in his capacity as a police officer for the Town of Coventry; STEPHEN A. MICHAILIDES, in his individual capacity and in his capacity as a police officer for the Town of Coventry; BRIAN O'ROURKE, individually and in his capacity as the former Chief of Police for the Town of Coventry; RONALD E. DASILVA, individually and in his capacity as Chief of Police for the Town of Coventry,

Defendants-Appellees.

On Appeal from the United States District Court of Rhode Island, Providence

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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I. INTRODUCTION

The Appellants file this Reply Brief in response to several of the arguments advanced by the Appellees in support of affirming the judgment of the District Court. As they had done below, the Appellees urge that qualified immunity should attach with respect to the claims involving the search because, in their view, there was a lack of clarity in the law on the point of whether Coach Marchand could have given a valid consent to that search. At this level, the Appellees add that the District Court acted well within its discretion when declining to determine whether, as a matter of law, Coach Marchand, a public school official, possessed that authority. The Appellees also argue that summary judgment of Appellants' claims of racial discrimination was warranted because there was no evidence on the record to support the claim that the Coventry Police officers singled out the Appellants for a public search based upon their race.

The Appellees' argument that the District Court's ruling should remain wholly undisturbed is untenable. The very existence of that decision creates a substantial risk that public school students may suffer diminished Fourth Amendment protections. The Appellees offer no discernable reason why this Court should decline to rule on the question of whether a public school official, as a matter of law, possesses the authority to waive his or her students' Fourth Amendment right to refuse suspicionless searches from outside police officers.

Without a firm decision on this issue, the legal reality is that public school students' Fourth Amendment rights with respect to outside police officers can and likely will be surrendered upon the unconstrained whim of their teachers, and that those students will be left without a remedy. If that student attempts to vindicate his rights later through a § 1983 claim, the District Court's decision can and will be cited in support of a qualified immunity defense, and the offending officers will escape liability. This process will repeat itself until this issue is definitively resolved.

Furthermore, an examination of the issue of Coach Marchand's authority is germane to the purposes of this instant dispute. An actual examination of this question quickly reveals the inherent unreasonableness of the Appellees' plea for qualified immunity. First, the Appellees failed to respond to the case law clearly demonstrating that where student searches are concerned, outside law enforcement officials are held to the same "probable cause" standard that would have applied outside of school. That case law never countenanced the elimination of the "probable cause" standard simply because a youth happened to be in the custody of public school officials at the time the police wished to perform a search.

Second, the Appellees' argument suggests that Coach Marchand possessed an unbridled *in loco parentis* authority that allowed him to consent to outside law enforcement searches. That position garishly clashes with settled law. Appellees

offer no authority demonstrating that a public school officials' authority over their students ever extended to the point where they were permitted to waive their students' Constitutional rights. Even more significantly, the Appellees fail to overcome the U.S. Supreme Court's specific holdings in *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). That decision confirmed that public school officials did not have *in loco parentis* authority with respect to searches, but were instead state actors held to the Fourth Amendment. The Appellees also fail to overcome *T.L.O.'s* specific holding that public school officials are not permitted to search students for disciplinary purposes without reasonable suspicion that the student has broken the law or school rules.

When one takes these clear legal standards into account, it becomes immediately apparent that the Appellees wish this Court to allow a logically flawed view of the law to prevail. It is undisputed that neither probable cause nor reasonable suspicion of the boys ever existed for either Coach Marchand or the Coventry Police. The Coventry Police therefore could not conduct the search. Coach Marchand, without the requisite reasonable suspicion to conduct a search of his students, was similarly forbidden to conduct a search of the boys. Nevertheless, the Appellees suggest that Coach Marchand could somehow magically confer upon outside law enforcement officers the ability to conduct a search forbidden to *both* himself and the Coventry Police. Appellees ask that this

Court accept that a reasonable police officer could believe that Coach Marchand could so expand their authority in this way. The Appellees, in other words, ask that a patently unreasonable legal argument grant them qualified immunity.

The Appellees similarly offer an implausible argument with respect to the racial discrimination claims. The Appellees offer no credible reasons for the differential treatment between the Hispanic students of Central Falls, and their white Coventry counterparts. The Appellees accept that the Coventry Police could be found liable had they singled out the Central Falls students for the pleasure of the racist mob surrounding the bus that day. However, the Appellees then attempt to escape liability by asking this Court to make factual findings on the point of the Coventry Police's motives. This Court of course, does not make such factual findings.

In short, the Appellees offer little justification for the position that the District Court's decision should be left utterly untouched. At very least, this Court can and should resolve the underlying Fourth Amendment question. Once that question is resolved, the qualified immunity defense collapses because the Appellees' position regarding *in loco parentis* is hopelessly outdated. Furthermore, the Appellees cannot overcome the evidence creating a triable issue with respect to the discrimination claims. Accordingly, this Court should reverse the District Court's decision.

II. ARGUMENT

A. THIS COURT SHOULD DETERMINE THE UNDERLYING QUESTION OF WHETHER AN OUTSIDE LAW ENFORCEMENT OFFICER MAY RELY SOLELY UPON THE CONSENT OF PUBLIC SCHOOL OFFICIALS TO PERFORM A SEARCH OF A STUDENT.

The Appellees devote a substantial amount of their brief supporting the District Court's declining to determine the underlying Constitutional question in this case: whether an outside law enforcement officer may rely upon the consent of a public school official to perform a search. The Appellees' reluctance to have this question fully illuminated is puzzling, to say the least. More to the point, the failure to address this question risks the evisceration of public school students' Fourth Amendment rights.

The District Court , when declining to decide this question, relied upon the recent case of *Pearson v. Callahan*, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Before *Pearson*, the U.S. Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) had mandated a two-step analysis of qualified immunity issues. *Saucier* had required that when analyzing a claim of qualified immunity, courts must first determine whether the facts alleged supported a claim that a Constitutional right had been violated. *Id*. at 201. The court would then

determine whether the law clearly established that the defendant's conduct was violative of the Constitution.[1] *Id*.

On re-visitation of the *Saucier* test, the *Pearson* Court held that the two-step approach was not always warranted. *Pearson* noted that in some cases, a two-step analysis was a waste of time because the underlying factual allegations made it apparent that there could have been no Constitutional violation. In such instances, an analysis of the "clearly established prong" obviously served no purpose. *Id*. at 818. The *Pearson* Court also observed that there would be instances in which the facts were not sufficiently developed, and therefore the Court would be unable to provide any meaningful Constitutional precedent. *Id*. at 819, *quoting Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006). The *Pearson* Court identified other instances in which analysis of the underlying Constitutional question would be of little or no utility, such as when a higher court was poised to decide the point, or when the Constitutional question hinged on the interpretation of a state law, or even when the briefing of the case had poorly illuminated the Constitutional questions. *Id*. at 819-20. The *Pearson* Court also held that the two-step analysis

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[1] Previously, this Court had added a third prong, that is, whether it would have been clear to an objectively reasonable official, situated similarly to that official, that his actions violated the clearly established right. *Bergeron v. Cabral*, 560 F.3d 1, 12-13 (1st Cir. 2009). More recently, since *Pearson*, this Court has abandoned the third step. *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009).

ran afoul of the long-established rule of avoiding Constitutional questions where a case could be decided upon other grounds. *Id*. at 821.

Nevertheless, the *Pearson* Court continued to recognize that there were many instances in which the *Saucier* two-step analysis remained a valuable endeavor. The *Pearson* Court was careful to point out that the *Saucier* Court ". . . was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id*. at 818. The *Pearson* Court also emphasized that there was nothing preventing the lower courts from following the *Saucier* procedure where it was worthwhile. *Id*. at 822.

The instant case presents none of the circumstances in which the *Pearson* Court had deemed determination of the Constitutional question to be unfruitful or inadvisable. The facts are sufficiently developed with respect to this particular question. We are presented with none of the more intensely factually-driven questions that generally accompany cases involving apparent authority to consent to a search. It is not disputed that Coach Marchand was a public school official. We are thus faced with two very basic questions of law: 1) whether Coach Marchand, a public school official, did as a matter of law have the authority to

consent to a search of his students; and 2) whether the law on his authority -- or lack of that authority -- was clearly established as of the date of the search.

This Court reviews the District Court's grant of qualified immunity on summary judgment *de novo*. *Bergeron v. Cabral,* 560 F.3d 1 (1st Cir. 2009.) Accordingly, this Court has the ability to determine the underlying Constitutional question of Coach Marchand's authority despite the District Court's declining to do so. Furthermore, resolution of this specific Constitutional question regarding Coach Marchand's authority is highly desirable, in that it presents the opportunity for public school officials and law enforcement officials alike to gain a full comprehension of the limits of public school official authority under the Constitution. This is not an opportunity which this Court should pass up lightly, given the substantial public interest in this matter. Young people, after all, spend a substantial amount of their waking hours in the custody of public school officials. The amount of time spent in school custody renders it virtually inevitable that another youthful citizen will find himself in a situation in which his teacher is being prevailed upon to surrender his Constitutional rights.

Further weighing in favor of deciding this question is the disturbance in the law created by the District Court's decision. Before this decision, it had been well-established that where outside law enforcement officers were concerned, public school students continued to possess the same Fourth Amendment protections that

they had enjoyed outside of school, that is, they were free from such searches in absence of probable cause. *See State v. Tywane H.*, 123 N.M. 42, 46, 933 P.2d 251, 255 (N.M. App. 1997); *M.J. v. State*, 399 So.2d 996, 998 (Fla.App. 1981); *Waters v. United States*, 311 A.2d 835, 837-38 (D.C. App. 1973); *In the Interest of Thomas B.D.*, 326 S.C. 614, 629, 486 S.E.2d 498, 505-06 (S.C. App. 1997); *F.P. v. State*, 528 So.2d 1253, 1254 (Fla. App. 1 Dist. 1988). Prior to this time, there had never been any valid case law positing that their enjoyment of that right was dependent upon the will of other state actors, specifically, their teachers. With the District Court's decision, there is now case law that suggests that there is at least some lack of clarity on the point of whether a public school teacher may waive a student's Fourth Amendment rights. Other officers are now free to engage in the same conduct as the Coventry officers – and then point to the District Court's decision to support a qualified immunity defense and escape accountability for incursions upon the rights of students.

Determining the underlying question of Coach Marchand's authority, then, is far from an unproductive use of this Court's time. There may be some time before this issue is presented to this Court again. In the interim, the District Court's failure to resolve the issue of Coach Marchand's authority created a real risk that public school students' Fourth Amendment rights will be substantially

impaired, and that there will be no remedy for them. The opportunity to resolve this issue should be taken now.

B. THE APPELLEES SHOULD NOT HAVE BEEN GRANTED QUALIFIED IMMUNITY BECAUSE THE ESTABLISHED CASE LAW CLEARLY DEMONSTRATED THAT COACH MARCHAND COULD NOT CONSENT TO A SUSPICIONLESS SEARCH BY OUTSIDE LAW ENFORCEMENT.

The Appellees strenuously argue that they should be granted qualified immunity because the law was not sufficiently clear on whether or not the Coventry Police could have reasonably relied upon the consent of Coach Marchand to conduct the search of the students. Appellees hew to the argument that Coach Marchand possessed some residual *in loco parentis* authority that, at very least, would give a reasonable officer the impression that Coach Marchand possessed the same right to consent to a suspicionless search that the students' parents would have possessed. This view of the law is completely without merit, and is fundamentally flawed. As such, no qualified immunity should have been granted. First, the case law, particularly *T.L.O.*, makes it very clear that *in loco parentis* authority to consent to police searches no longer exists – if indeed a public school official's authority ever did extend to that point. Second, the Appellees also fail to show any case law undermining the basic proposition that outside law enforcement officials have always been held to the same "probable cause" standard that would have applied if they encountered the students outside of school.

Additionally, an examination of the Appellees' position demonstrates its fundamental unreasonableness. Essentially, the Appellees ask this Court to consider that a public school teacher possesses an unrestrained authority to give away a student's Constitutional rights to a law enforcement official. The notion that a state actor possesses the authority to waive a citizen's Fourth Amendment rights is unprecedented, and threatens the very existence of the Fourth Amendment right. As such, the Appellees' position is inherently unreasonable. For that reason, it does not merit the grant of qualified immunity.

1. **The Established Case Law Restricts the *In Loco Parentis* Authority of Public School Officials to Those Matters Reasonably Related to the Students' Education and the Operation of the Schools, and This Suspicionless Search Did Not Involve Either.**

The Appellees' assertion of qualified immunity is legally infirm because it asks this Court to extend school officials' *in loco parentis* authority well past its bounds. Even if there had been some vague *in loco parentis* authority clinging to Coach Marchand at the time of the search, that authority has never at any point in time had the breadth that the Appellees would claim. Appellees fail to provide any response to the substantial authority presented to this Court that plainly demonstrates that a public school official's *in loco parentis* authority from its very inception has been confined to those actions which are necessary to permit the public school officials to fulfill their duties to the students and otherwise operate the schools. The act of attempting to waive a student's Constitutional rights vis-à-

vis an outside police officer, seeking to perform a search for purely law enforcement purposes, falls far outside of the bounds of those duties.

Additionally, the cases relied upon by the Appellees in their Brief do nothing to broaden the limits of the *in loco parentis* authority of public school officials. The actions described in those cases instead clearly were within that established authority. For example, in the case of *Wojcik v. Town of North Smithfield*, 76 F.3d 1 (1st Cir. 1996), the issue had been whether school officials had violated a fifth-grade child's right to freedom from unreasonable seizure under the Fourth Amendment when they transported the child from one school to another, over her apparent reluctance. *Id.* at 3. The school officials had done so because an investigator from the State of Rhode Island's Department of Children and Youth needed to speak to the child about allegations that she was suffering physical abuse at home. *Id.* The school officials felt that the child would be more comfortable discussing the matter in the presence of her sister, who was at another school in the district. *Id.* This Court did find that there was no unreasonable seizure in that instance, and thus rejected the action on both Fourth Amendment and qualified immunity grounds. *Id.*

This Court noted that it was not unreasonable for the school, acting *in loco parentis*, to transport the child in this instance. *Id.* This Court did not fully explain the application of the *in loco parentis* doctrine and the extent of its breadth and

scope. However, it is significant that in *Wojcik*, there was absolutely no suggestion that the school officials were attempting to investigate any allegation of wrongdoing on the part of the student or to facilitate such an investigation on the part of a law enforcement agency. Instead, the school officials were acting in furtherance of an investigation of possible child abuse.

That action could reasonably be construed so to fall within the traditional bounds of the *in loco parentis* doctrine. The *in loco parentis* doctrine certainly extends to taking reasonable steps to ensure the physical safety of a child in one's custody. *See Edson v. Barre Supervisory Union*, 182 Vt. 157, 162, 933 A.2d 200, 205 (2007). The *in loco parentis* doctrine could thus colorably authorize a school official to take reasonable steps to ensure that a child will not face violence when it is time for him to go home. Indeed, a public school teacher's unique relationship with his or her charges arguably places that teacher in a better position than anybody else in the community to detect potential abuse, and ensure that appropriate action is taken.

The Appellees similarly misplace their reliance upon the case of *Hampton v. Oktibbeha County Sheriff Dept.*, 480 F.3d 358 (5th Cir. 2007). That case involved a § 1983 claim brought by a Mississippi school administrator against various members of the local sheriff's department. The sheriff's department had reported to the school with an arrest warrant and demanded that the administrator produce

one of his students. The administrator refused to do so until he was shown the warrant. Once he was able to see that the student's name was actually on the warrant, the administrator produced the student. The sheriff's department, in turn, arrested the administrator and charged him with obstruction of the arrest under Mississippi law. *Id*. at 361-62.

Although initially convicted, the administrator prevailed on appeal before the county circuit court. *Id*. at 362. When directing a verdict for the administrator, the county circuit judge noted that perhaps the sheriff's office may have misconstrued Mississippi law restricting access to juvenile records, and thus believed that they could not show the warrant to the administrator. However, Mississippi law did allow a parent or guardian the right to review a warrant. Because the administrator acted *in loco parentis*, the court reasoned, he qualified as a "guardian." *Id*. For that reason, charges were without any merit, and, as the *Hampton* Court ruled, could form the basis of § 1983 claim for a false arrest.

Although the *Hampton* case references the term *in loco parentis*, it is similarly unhelpful to the Appellees. *Hampton* in no way can be read to stretch the *in loco parentis* authority to allow school teachers to consent to law enforcement searches on behalf of their students. Far from waiving the student's own rights, the administrator was fulfilling the duties that the *in loco parentis* doctrine imposes upon school officials. Nobody would seriously question that the *in loco parentis*

doctrine includes custodial and supervisory responsibility over the students during the school day or during school activities. *See, e.g., Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir. 1999); *Versprill v. Sch. Bd. of Orange County*, 641 So.2d 883, 886 (Fla. App. 1994). At very least, school officials must exercise the care of reasonable parents. *A. Doe v. Cedar Rapids Community Sch. Dist.*, 652 N.W.2d 439, 446 (Iowa 2002). The established bounds of a school official's *in loco parentis* authority thus inherently include the duty to exercise some level of care in examining the *bona fides* of an individual asking that school officials yield custody to them – whether those making the request are police officers or otherwise:

> . . . common sense dictates that schools are the protectors of students during school hours. The school must be careful with whom they allow students to leave their custody. In most public schools, a parent is required to sign a document to take custody of their children from school officials. . . . Therefore, the Court finds that the average person and especially police officers should know that documentation will be required to extract a student from school custody. The Court also finds that since the school acts *in loco parentis*, then a senior school official, such as the Plaintiff, can request to see a warrant before releasing a student to law enforcement officials.

See Hampton v. Oktibbeha County Sheriffs Department, 2006 WL 270258 (N.D. Miss.) (overturned on other grounds). *See also Haney v. Bradley County Bd. of Educ.*, 160 S.W.3d 886 (Tenn.App. 2005) (finding that duty to exercise reasonable care for student's safety entailed duty to read even a parent's explanation for signing out children). *But see Snider v. Snider*, 855 S.W.2d 588 (Tenn.App. 1993) (holding school not liable where uncle signed ill child out of school and

subsequently raped her, despite violation of school policy that children not be released early without parent's permission). As such, the traditional bounds of the *in loco parentis* doctrine would certainly include verifying a police officer's authority to remove the child from school.

Wojcik and Hampton, then, involved the school officials' fulfillment of their duties to the student, specifically, those of providing for the reasonable safety and security of their students. In other words, the very cases cited by the Appellees do nothing more than to underscore the position stated in our initial Brief -- that the *in loco parentis* doctrine works to the extent that the school officials need to fulfill their educational duties. However, as the cases cited by the Appellees also demonstrate, the *in loco parentis* doctrine has not extended to public school officials who undertake searches to fulfill some interest of their own, outside of their duties. *See especially Gruenke v. Seip*, 225 F.3d 290, 302 (3d Cir. 2000) (holding that actions of public school swim coach in requiring team member to undergo pregnancy test outside the bounds of his duties). Most notably, the Appellees cite to no cases which permit the exercise of an *in loco parentis* authority to fulfill the agenda of third parties for their own purposes.

The instant case clearly falls into the category of cases in which the school official acted beyond what was necessary to fulfill his educational duties. The instant case involves a school official who purportedly waived his students'

Constitutional rights to decline to consent to a search by outside law enforcement officials. That school official's action fulfilled absolutely no interest of the students that could warrant the exercise of the *in loco parentis* authority by a school official. There was no disciplinary or tutelary purpose to the police search, because Coach Marchand had already satisfied himself that the boys had done nothing wrong. (App. 58, 23:4-8.) The search in no way contributed to the boys' well-being or safety. That goal could have been fulfilled by simply asking that the police disperse the crowd and allow the bus to be on its way – as was the students' right. Instead, the consent fulfilled only the agenda of third parties, the Coventry Police.

As such, Coach Marchand's actions in authorizing the search exceeded the bounds of the *in loco parentis* doctrine, as illustrated in the cases upon which the Appellees place heavy reliance. The Appellees have produced no cases that even suggest that Coach Marchand's *in loco parentis* authority ever extended to waivers of his students' Constitutional rights. On that basis alone, their legal argument fails.

2. Because the Established Case Law Removed Public School Officials' *In Loco Parentis* Authority from Public School Officials for the Purposes of Investigating Student Wrongdoing, and Held Them to a "Reasonable Suspicion" Standard, It Cannot Be Held that Coach Marchand Had the Authority to Consent to a Suspicionless Search by Outside Law Enforcement.

The Appellees' brief also fails to explain away one crucial point: the fact that the case of *T.L.O.* unequivocally affirmed that public school officials do not have *in loco parentis* authority with respect to student searches. Instead, *T.L.O.* made it exquisitely clear that public school officials are state actors whose authority is limited by the Constitution, including the Fourth Amendment. *Id. at* 336. Once that point is acknowledged, qualified immunity could not attach because there is no reasonable way for the case law to be interpreted so as to give Coach Marchand authority to the police to conduct searches of his students, especially in the absence of even reasonable suspicion. Furthermore, *T.L.O.*'s strictures on Coach Marchand's authority have not been disturbed by later case law.

T.L.O. explicitly stated that for the purposes of the Fourth Amendment, Coach Marchand did not stand in the place of the students' parents. *Id.* For that reason, the Appellees cannot claim, as a matter of law, that he possessed *in loco parentis* authority to conduct a search. Because *T.L.O.* was extremely clear on that point, a police officer could not claim a reasonable reliance upon that purported authority.

The Appellees attempt to escape the natural consequences of the *T.L.O.* case by attempting to suggest that later cases somehow undermined *T.L.O.* This claim is simply false. It is true, as Appellees claim, that the disciplinary and educational responsibilities possessed by public school officials are factored into an analysis of the reasonableness of a particular search by school officials. That factoring certainly took place in the *T.L.O* decision itself.

The *T.L.O.* case dealt with the issue of whether a school official could search a student's belongings in order to investigate a suspected violation of school rules. *Id.* 328. When determining the circumstances under which school officials could perform such a search, the *T.L.O.* Court applied the classic "balancing" test, that is, it balanced the need to search against the nature of the intrusion. *Id.* at 337, *citing Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). The *T.L.O.* Court recognized that a search of a student and his possessions was a substantial intrusion upon that student's legitimate privacy interests. *Id*. at 339. At the same time, the *T.L.O.* Court also recognized that school officials had a substantial degree of interest in maintaining order and discipline in the schools, and in being able to deal with misconduct quickly. *Id*. at 340-41. Therefore, the *T.L.O.* Court did not require school officials to obtain a warrant, nor did it require a finding of probable cause. The *T.L.O.* Court instead determined that the "reasonable suspicion" standard would balance both the

interests of students and public school officials: "This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren." *Id*. at 342-43.

Under *T.L.O.*, then, the responsibilities that the school officials had with respect to their students defined the precise contours of the Fourth Amendment rights that students possessed vis-à-vis school officials. However, *T.L.O.* made it very clear that students were not in the thrall of their teachers with respect to the Fourth Amendment. *T.L.O.* even reinforced the premise that had guided the preceding line of cases involving student rights with respect to other Constitutional rights, that is, that public school students possessed Constitutional rights that were not shed at the schoolhouse door. *Id*. at 336, *citing Tinker v. Des Moines Ind. Community Sch. Dist*., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

Furthermore, contrary to the position of the Appellees, the cases of *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) and *Bd. of Educ. of Indep. Sch. Dist. No 92 of Pottawatome Cty. v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2000) did not, and were never intended to, overturn *T.L.O.*' s holdings or otherwise reinstate an *in loco parentis* regime. Instead, the *Vernonia* and *Earls* case applied virtually the same analysis as did the

T.L.O. case. These cases dealt with random, suspicionless drug tests of students engaging in athletics and extracurricular activities. The Court again balanced the privacy interests against the interest in the search. *Vernonia* and *Earls* did reference the term *in loco parentis* when discussing the school officials' responsibilities towards their students, and the consequent need to ensure their safety, particularly when those students engage in potentially hazardous activities for which an unimpaired head is needed. *Vernonia*, at 661-63; *Earls*, at 836-838. That interest in student safety was factored into the balancing test, and held to be sufficient to justify the relatively minimal intrusion of a random drug test for students engaged in athletics and other extracurriculars. *Vernonia*, at 665; *Earls* at 838.

However, neither *Vernonia* nor *Earls* ever held that school officials were no longer deemed state actors. Furthermore, neither *Vernonia* nor *Earls* granted school officials the right to conduct random searches to find evidence of student wrongdoing for disciplinary or law enforcement purposes. In both cases, it was noted as a mark in favor of permitting the tests that the students who failed received no discipline, nor were the tests results revealed to law enforcement. *Vernonia,*at 658; *Earls,* at 833-34. *T.L.O.* thus remained undisturbed where investigations of student wrongdoing were at issue.

Moreover, not a single lower court case cited by the Appellees even remotely suggests that any court in this nation is contemplating a retreat from the principles of *T.L.O.* The Appellees cite to no case that signifies a retreat from the principle that for Fourth Amendment purposes, public school officials lack *in loco parentis* authority, but are government actors whose actions are Constitutionally restricted. Instead, the lower court cases cited by the Appellees that deal with student searches reiterate and apply *T.L.O.'s* basic holdings. Those cases continue to hold that a public school official is a state actor with respect to the Fourth Amendment. *Gruenke*, at 300; *Rhodes v. Guarricino*, 54 F.Supp.2d 186 (S.D.N.Y. 1999). They also continue to hold that although students are not granted the full panoply of Fourth Amendment rights with respect to their teachers, neither do their teachers have the unbridled right to search where it is not necessary to fulfill any tutelary, disciplinary, or custodial responsibility. *Gruenke*, at 302. Teachers are still held to a "reasonable suspicion" standard when undertaking searches to investigate wrongdoing for disciplinary purposes. *Rhodes*, at 189.

We thus come to the inherent problems with the Appellees' plea for qualified immunity. The Appellees fail to address the basic flaws of their argument that Coach Marchand could reasonably be understood as a substitute parent who could give the Coventry Police permission to perform a search. This argument fails in part because *T.L.O.* explicitly held that where the Fourth

Amendment was concerned, Coach Marchand was not a substitute parent to the boys. The Appellees produce no case law to the contrary.

The Appellees' argument also fails because it is logically flawed. Under *T.L.O.*, Coach Marchand was required to have reasonable suspicion that a student has broken school rules or the law before he could conduct a search of a student. *Id.*, at 341-42. On its face, it defies logic to declare that Coach Marchand could give another individual permission to perform an act that he himself was plainly forbidden. However, that is the very premise that the Appellees ultimately ask this Court to accept.

Coach Marchand did not have reasonable suspicion, and the Coventry officers were aware of that lack. Many individuals other than the Central Falls players had been able to access the locker room, and both Coach Marchand and the Coventry Police knew that the boys had been watched in the locker room and therefore had no opportunity to steal. (App. 27-28, 12:7-20:2-13; App. 35, 57:18-14; App. 69-70, 69:25-70:7; App. 76, 47:4-6; App. 83, 46:2-5.) Because Coach Marchand had no reasonable suspicion, he had no authority to search the students -- and the Coventry officers were aware of the facts demonstrating that lack. Accordingly, the Appellees cannot reasonably be permitted to hide behind any consent from Coach Marchand. To declare otherwise is to declare that Coach Marchand could expand the police

officer's authority beyond what even he himself possessed, and it was reasonable for the police to believe that he could do so.

Further underscoring the basic unreasonableness of Appellees' position regarding Coach Marchand's authority is the fact that they were unable to cite to a single case that supports the position that an outside law enforcement official's ability to initiate a search expands simply because a child is in school custody. The Appellees did not even respond to the lengthy case law demonstrating that outside law officials continue to be held to a "probable cause" standard when initiating searches of students. Appellees also made no response to the case of *Picha v. Wielgos*, 410 F.Supp. 1214 (N.D. Ill. 1976). That case, cited in Appellant's principal Brief, clearly held that public school students' Fourth Amendment rights against outside law enforcement officials were not to be diminished by that child's presence in school – despite the school officials' consent to that search. *Id.* at 1218.

The Appellees instead apparently ask this Court to accept the notion that a public school official may be construed to have the unrestrained authority to waive a student's Fourth Amendment rights vis-à-vis outside law enforcement officials. This position is tantamount to suggesting that a public school student indeed surrenders his Constitutional rights at the schoolhouse door. The United States Supreme Court long rejected the notion that public school students stood in abject

lack of Constitutional rights while at school. The Appellees, however, invite that very result by urging this Court to accept the argument that public school teachers may simply give away a student's Fourth Amendment rights to an outside police officer without even reasonable suspicion.

In short, the Appellees' interpretation of the case law regarding Coach Marchand's authority was not only wrong, but unreasonable. The clear case law held that Coventry Police, as outside officers, would have to satisfy a "probable cause" standard if they wanted to conduct a nonconsensual search of the boys – even if they were at school. *See Tywane H.*, 933 P.2d at 255; *M.J.,*, 399 So.2d at 998; *Waters*, 311 at 837-38; *Thomas B.D.*, 486 S.E.2d at 505-06; *F.P. ,* 528 So.2d at 1254. They could not look to Coach Marchand to grant them greater power to search than they would have otherwise possessed. *T.L.O.* had clearly stripped Coach Marchand of *in loco parentis* authority for Fourth Amendment purposes. Furthermore, because the Coventry Police were seeking to conduct a search with no reasonable suspicion, the Coventry Police officers were asking for authority to search that exceeded even that possessed by Coach Marchand himself. This is not a reasonable construction of the case law. Accordingly, qualified immunity cannot apply here.

C. SUFFICIENT EVIDENCE EXISTED ON THE RECORD TO CREATE A MATERIAL ISSUE OF FACT AS TO WHETHER THE COVENTRY POLICE ACTED OUT OF RACIAL ANIMUS.

The Appellees also strenuously argue that there is no evidence on the record to demonstrate that the Coventry Police in any way acted out of any racial animus when determining to perform the search. The Appellees continue to argue that there is no evidence of any bias on behalf of the Coventry Police themselves. The Appellees also argue that there is no evidence that the Coventry Police acted so as to give effect to the racial animus of the crowd. The Appellees, however, cannot escape the great amount of evidence creating at least a triable issue of whether the Coventry Police acted out of racial bias, whether their own or that of the crowd.

The Appellees still fail to provide a single plausible explanation of why they singled out the Hispanic Central Falls students for the search, without ever demanding a search of their peers from the predominately-white Coventry. That gross disparity in treatment between individuals of different races, who are otherwise similarly situated, without any other reasonable explanation, is sufficient to support a finding of racial discrimination. *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597 (1976).

The Appellees would have this Court believe that the differential treatment of the Central Falls students was justifiable solely because the Central Falls students had been accused of the theft when the Coventry students had not. Under

the particular facts of this case, the mere fact of the accusation does not render the differential treatment justifiable. As set out in our principal Brief, the Coventry Police officers knew perfectly well that there was even less reason to suspect the Central Falls players than anybody else on the field that day. That included evidence that the Coventry Police knew that the boys had been watched while they were in the locker room. (App. 35, 57:18-14.) The Appellees utterly fail to address that evidence.

In addition, the Appellees try to foreclose the claim that the Coventry Police acted at the behest of a racist mob by arguing that the Coventry Police did not know of the Coventry mob's racist animus. This argument is presented for the first time on appeal. In support of their position, they point to the testimony of the Coventry Police and Coach Marchand that they themselves heard no racist remarks. (Appellee Br., p. 44.) The Appellees also assert that Coach Marchand testified that at the time the police arrived, the crowd had not made racist remarks, and that the Coventry Police had repeatedly told the crowd to be quiet. (Appellee Br., p. 45.)

This testimony simply does not work to resolve the issue of whether or not the Coventry Police were aware of the crowd's racist sentiments. At the summary judgment stage, the court does not attempt to resolve factual issues. All that the court does is to determine whether there is evidence on the record that would

create a factual issue, but does not attempt to resolve it. *Morelli v. Webster*, 552 F.3d 12, 15 (1st Cir. 2009).

There is evidence on the record to show that the specific racial harassment continued throughout the entire event, without substantial abatement. As Coach Marchand also testified, before the police arrived, the crowd was declaring that the Central Falls players were "from the ghetto" and therefore knew how to hide things. Coach Marchand also testified to hearing the Coventry mob declare that "those people" knew how to "lie good," and could not be trusted. (App. 58-59, 24:15-25:25.) Those themselves are racially charged statements. Even worse, Steven Giraldo, who was sitting on the bus, heard members of the crowd making racial slurs, including one woman who called the team "spics." (App. 46, 27:13-28:5.)

The police arrived at some time after that remark. However, even with police presence, the crowd continued to declare that Central Falls students were "good at hiding things, they're sneaky you know it, search the coach." (App. 56, 15:14-16:3.) During the search itself, Steven Giraldo testified to having repeatedly been called a "spic" by the crowd several times after he and the other players had been ordered off the bus. (App. 50, 41:13-42:5.) M.R. similarly recalled racist remarks during the search. (App. 33-34, 50:11-53:2) Furthermore, Coach Marchand's testimony indicated that the Coventry Police took no effective action

to stop the harassment. As Coach Marchand testified: "You know, it was one of those things where you tell the class okay you cut it out and you don't really do anything and then two seconds later they're talking again, you know." (App. 56, 16:3-7; App. 59, 27:5-9; App. 62, 45:8-13.) This evidence is enough for a reasonable jury to conclude that the Coventry Police were perhaps being less than candid about what they had or had not heard that day.

In short, there is sufficient evidence on the record to create a triable issue as to whether the Coventry Police acted out of racial animus, whether their own or that of their constituents. The Appellees cannot ask that this Court ignore that evidence and grant summary disposition in their favor.

III. CONCLUSION

For each and all of the foregoing reasons as well as the ones argued in Appellants' Opening Brief, Appellant respectfully submits that the judgment and decision from which they appeal should be reversed and the action remanded to the District Court for further proceedings not inconsistent with the directions and mandate of this Court.

Respectfully Submitted,

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Dated: April 12, 2010

CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify pursuant to Fed. R. App. P. 25(d) that, on April 12, 2010, the foregoing Reply Brief for Plaintiffs-Appellants was filed through the CM/ECF system and served electronically on the individual listed below:

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