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Strip-Search Case Could Reshape Supreme Court's Immunity Doctrine

Tony Mauro

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The case of a Colorado four-year-old girl who was strip-searched by a government social worker could prompt the U.S. Supreme Court to take a new look at its "qualified immunity" doctrine that lets officials off the hook in some circumstances when they violate an individual's civil rights.

At the court's May 16 private conference, the justices will consider whether to grant review in the case of I.B. v. Woodard. The U.S. Court of Appeals for the Tenth Circuit in January **dismissed the girl's claim** that case worker April Woodard violated the Fourth Amendment by stripping and photographing her without a warrant or parental consent. The search came after allegations that the child had been abused.

The **petition on behalf of the girl** has drawn wide support from "cross-ideological groups," as **one amicus brief put it**, including the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund as well as groups like Alliance Defending Freedom, the R Street Institute and the Second Amendment Foundation. Hogan Lovells partner Cate Stetson is counsel of record on the amicus brief.

"I think the fact that the groups are not the types of groups that you typically see joining together—that's going to get some attention," said Baker Botts partner Scott Keller, counsel of record on the girl's petition. Keller described the circumstances as a "tragic case."

The case may also appeal to the Supreme Court, Baker Botts partner Evan Young said, because "it presents qualified immunity in a slightly different context from the traditional case of the police officer doing his best to deal with a fleeing suspect." Young added, "Without saying anything about how to handle those, it's clear that those are harder cases than one in which someone had a series of false allegations that could be readily verified by taking steps that were far short of completely stripping a girl."

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To a degree, the case also mirrors Safford Unified School District v. Redding, a 2009 decision establishing that a similar warrantless school strip search of a girl for pain pills violated the

Fourth Amendment. Before the decision came down, Justice Ruth Bader Ginsburg chided her male colleagues for remarks they made at oral argument. “They have never been a 13-year-old girl,” she said. “It’s a very sensitive age for a girl. I don’t think that my colleagues, some of them, quite understood.”

The Supreme Court’s qualified immunity doctrine developed in the last 50 years as a way to soften punishment for government officials accused of civil rights violations under the 1871 statute 42 U.S.C 1983—better known as Section 1983. Harlow v. Fitzgerald, a 1982 Supreme Court decision, defined that immunity as protecting conduct that “does not violate clearly established statutory or constitutional rights.”

But several justices over the years have questioned the doctrine as an ambiguous, court-invented exemption that was not in the original statute and needs to be re-examined. Justice Ruth Bader Ginsburg has said the doctrine is “an absolute shield” that “gut[s] the deterrent effect of the Fourth Amendment,” and the late Justice Antonin Scalia called it “essentially legislative.”

The criticism of qualified immunity reached a crescendo last year when the Cato Institute launched Unlawful Shield, a campaign aimed at abolishing the doctrine.

Cato has filed numerous briefs at the Supreme Court and lower courts on the subject, including **a brief in the Woodard case**. It also helped recruit parties to join the “cross-ideological” brief and another brief filed on behalf of scholarly experts on qualified immunity in the Woodard case.

“Qualified immunity is really the cornerstone of what we’ve referred to as the near zero accountability policy for law enforcement,” said Clark Neily, Cato’s vice president for criminal justice..

The **brief defending Woodard’s actions** as a case worker urged the Supreme Court not to alter or abolish qualified immunity because it “protects government officials unless they are plainly incompetent or knowingly violate the law.” Raymond Deeny of the Colorado firm Sherman & Howard is counsel of record on the brief in opposition to certiorari.

No law enforcement organizations have filed briefs defending qualified immunity in the case, but Cato policy analyst Jay Schweikert expects there will be pushback eventually.

“It’s an issue that I think is going to bring some controversy, but I think that part of the diversity of this group challenging it recognizes that law enforcement itself stands to benefits if there’s meaningful accountability,” he said.

In the brief on behalf of qualified immunity experts, Debo Adegbile of Wilmer Cutler Pickering Hale and Dorr wrote, “The time has come once again for the court to revisit qualified immunity’s ‘principles’ and ‘real world implementation,’ … and to strike a more durable balance between protection for government officials and redress for those whom they serve.”