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# Safford Unified School District No. 1 v. Redding and the Future of School Strip Searches

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# *SAFFORD UNIFIED SCHOOL DISTRICT NO. 1 V. REDDING* AND THE FUTURE OF SCHOOL STRIP SEARCHES

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Every year in America, an unknown number of children in primary and secondary schools are strip-searched by teachers or school administrators, forced to remove pants and shirts, and sometimes to expose their breasts and genitals, or even appear naked before school officials. While most strip searches are individual, some students have been compelled to undress in the presence of their peers.[1] In some of these cases, it is not clear whether school officials are searching for contraband—usually drugs, missing money, or stolen items—or seeking to discipline, humiliate,[2] or simply exert authority over the

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[1] *See, e.g.*, LibertarianRock.com, Strip-Searched Students Receive $5000 Each, http://www.libertarianrock.com/topics/stripsearch/5000search.html (last visited Aug. 6, 2009). In May 1997, a student in Green County, Virginia reported $100 missing from his wallet after gym class. School officials "forced about 50 students from three gym classes to strip down to their underwear and then searched their clothes." *Id.* Some of the students sued, and later settled for $5000 each. *Id.*

[2] For example, in rural southeastern Missouri, a teacher who discovered $55 missing from her desk singled out ten girls ranging in age from twelve to fifteen years old. *See District Concedes Strip-Search to Settle Suit*, WORLDNETDAILY.COM, Aug. 28, 2003, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=34318. When the teacher's initial search of bags and outer clothing turned up nothing, the teacher escorted the girls to the school nurse's office for a more intrusive search. *Id.* The girls were required to "pull their shirts or blouses up over their shoulders so the nurse could search under their bras [and then] unzip their jeans or slacks and pull them down so the nurse could search inside . . . the waistband of the girls [sic] panties." *Id.* The humiliating search failed to turn up any of the missing money and had detrimental effects on at least one girl, who had nightmares and subsequently left the school. *Id.* After eight months of wrangling, the district reached a settlement with the girls, wherein each girl received $7,500 plus legal fees. *Id.* For an example of another egregious school strip search, see Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 822–23 (11th Cir. 1997). In this case, after two eight-year-old girls were implicated in the theft of $7 from a classmate, their teacher

students.[3] Strip searches generally come to light only when a student has the courage to tell a parent what happened, and the parent is sufficiently outraged to complain or sue the school. In other cases, strip searches are uncovered because of the particularly egregious factual circumstances surrounding them. Some of these cases will then be reported in the media, but will eventually disappear for lack of follow-up. Some have resulted in federal civil rights lawsuits, many of which are resolved through summary judgment.[4] Others have likely gone unreported.

Only a handful of states prohibit strip searches entirely.[5] Although some states have standards governing school searches generally, most have failed to adopt specific parameters for strip searches.[6] Other

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accompanied them to the restroom where she ordered the girls to enter the stall and come back out with their underwear around their ankles. *Id.* at 822–23. No money was found. *Id.*

[3] On May 2, 2007, Verna Ivey, a principal in Lame Deer, Montana witnessed four seventh-grade boys off campus during lunch. *See* Becky Shay, *Students Tell of Strip Search*, BILLINGS GAZETTE, May 10, 2007, http://www.montanaforum.com/modules.php?op=modload &name=News&file=article&sid=6547&mode=thread&order=0&thold=0. When the boys returned, Ivey called the boys into her office, brought in her secretary as a witness, and read the boys a section from the school disciplinary code. *Id.* Ivey then patted the boys down, asked them to remove their pants, patted them down again, and finally asked the boys to put their thumbs inside the waist of their underwear and jump up and down. *Id.* The entire search occurred directly in front of a window in Ivey's office that looked into the main hall. *Id.* At least one student saw the search transpire because he phoned his parents at home and told them that he had just seen his brother "in his 'skivvies' in the principal's office." In the end, the search turned up nothing more than a wood tick. *Id.* More troubling was that Ivey had been hired the previous July and was suspended and reassigned as a teacher in October of 2006 for reasons that are unclear. *Id.* She was reinstated as principal some time prior to conducting this search. *Id.*

[4] *See, e.g.*, Smart v. Morgillo, No. CIV.300CV1281PCD, 2001 WL 802697 (D. Conn. July 10, 2001) (granting school officials' motion for summery judgment and holding the strip search to be objectively reasonable under the Fourth Amendment standard); Singleton v. Bd. of Educ. U.S.D. 500, 894 F. Supp. 386 (D. Kan. 1995) (same); Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992) (same).

[5] *See, e.g.*, CAL. EDUC. CODE § 49050 (West 1997) (prohibiting school employees from conducting body cavity or strip searches); IOWA CODE ANN. § 808A.2(4)(a)–(b) (West 2002) (same); N.J. STAT. ANN. § 18A:37-6.1 (West 2009) ("Any teaching staff member, principal or other educational personnel shall be prohibited from conducting any strip search or body cavity search of a pupil under any circumstances."); OKLA. STAT. ANN. tit. 70, § 24-102 ¶ 2 (West 2002) (allowing for searches reasonably related to the object of the search, but absolutely prohibiting strip searches); WIS. STAT. ANN §§ 118.32, 939.51(3)(b), 948.50(3) (West 2002 & Supp. 2008) (outlawing school strip searches and classifying them as class B misdemeanors punishable by a fine not exceeding $1000, up to 90 days in jail, or both).

[6] *See, e.g.*, IDAHO CODE ANN. § 18-3302D(3) (2004) (permitting searches of "students or minors, including their belongings and lockers," when school officials reasonably believe a student is violating a school weapons policy, but failing to expressly address strip searches); LA. REV. STAT. ANN. § 17:416.3(A)(2)(a) (2004) (permitting searches of students when the administrator has reasonable grounds to suspect that the search will reveal evidence that the student has violated the law or school rule, but only if the search is conducted in a manner reasonably related to the purpose of search and is not excessively intrusive); MO. ANN. STAT. § 167.166(2) (Supp. 2009) (allowing school employees to strip search students only if "a commissioned law enforcement officer is not immediately available," and when the school

states explicitly leave it to school boards and local schools to develop governing standards.[7] The vast majority, however, have no policy at all.[8]

In *New Jersey v. T.L.O.*,[9] the first school search case heard by the Supreme Court, the Court rejected New Jersey's assertion that schoolchildren do not have Fourth Amendment rights while in school.[10] The Court upheld the warrantless search of a child at school based upon "reasonable suspicion," a lesser standard than the Fourth Amendment requirement of probable cause.[11] The *T.L.O.* reasonableness standard, borrowed from the standard set forth in *Terry v. Ohio*,[12] allows a much more intrusive search of schoolchildren than is allowed under *Terry*, which limits officers to a frisk of the detained subject's outer clothing for weapons.[13]

In a way, *T.L.O.* opened the floodgates for school strip searches. Prior to *T.L.O.*, the law regarding school strip searches appeared fairly clear. Strip searches were invalid without at least "reasonable cause,"[14] and courts made clear that mass strip searches could not be

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reasonably believes that the student has a weapon, explosive, or substance that poses an imminent threat of physical harm to himself or another student); TENN. CODE ANN. § 49-6-4205 (2002) (allowing a physical search of a student based on the result of a student locker search, or based on a tip from "a teacher, staff member, student or other person if such action is reasonable to the principal," and falls within the standards of reasonableness enumerated in the statute).

[7] *See, e.g.*, COLO. REV. STAT. § 22-32-109.1(2)(a)(VIII) (2008) (requiring each district to establish a concisely written discipline code including "[a] written policy concerning searches on school grounds"); MD. CODE ANN., EDUC. § 7-308 (LexisNexis 2008) (allowing administrators to conduct a search if they have a reasonable belief that the student unlawfully possesses an item, and permitting county boards to authorize teachers on school-sponsored trips to conduct a similar search, except that the teacher must be designated in writing by a principal as qualified to conduct a search and must have received training on how to do so); VA. CODE ANN. § 22.1-279.7 (2006) (requiring local boards of education to consult with the state Attorney General's office to develop guidelines for student searches, "including random locker searches, voluntary and mandatory drug testing, and strip searches, consistent with relevant state and federal laws and constitutional principles").

[8] *See supra* notes 5–7 and accompanying text. The remaining thirty-eight states have no policy regarding searches and seizures on school grounds.

[9] 469 U.S. 325 (1985).

[10] *Id.* at 336–37.

[11] *Compare id.* at 337 ("Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."), *with* U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[12] 392 U.S. 1 (1968).

[13] *Id.* at 30.

[14] *See* Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 1022 (1981). In *Renfrow*, the Supreme Court denied certiorari in a case involving two drug-sniffing dogs that had detected the presence of narcotics on two high school students. *Id.* The students were strip-searched, but found not to have any drugs in their possession. *Id.* at 92.

founded on generalized reasonable suspicion, and rather required particularized suspicion with respect to the specific students suspected of violating school rules or policy.[15] After *T.L.O.*, however, some schools and lower courts stopped considering strip searches to be different in kind or more serious intrusions than other school searches of a student's possessions.[16] Compounding the problems caused by the lesser standard was the fallback role of qualified immunity. Courts since *T.L.O.* have generally refused to hold school officials liable for the illegal strip searches because the Supreme Court had not clearly established any prohibition against them.[17]

In *Safford Unified School District No. 1 v. Redding*,[18] the Supreme Court finally directly addressed the issue of school strip searches, and

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Although the district court noted that the drug dogs did create cause to support a search of the students' pockets, it found the nude search based solely on that evidence to be patently unreasonable, even under the less demanding "'reasonable cause to believe' standard." 475 F. Supp. 1012, 1024–25 (N.D. Ind. 1979). The court of appeals affirmed the district court's reasoning on this point, 631 F.2d at 92, stating further that not only was this a constitutional intrusion "of some magnitude" but that it was also "a violation of any known principle of human decency." *Id.* at 92–93.

[15] *See, e.g.*, Bellnier v. Lund, 438 F. Supp. 47, 53–54 (N.D.N.Y. 1977). In *Lund*, school officials conducted a strip search on an entire fifth grade class of for $4 reported missing by a student. *Id.* at 50. After an initial search of coats, lockers, shoes and socks found turned nothing up, two female officials escorted the girls, and two male officials escorted the boys, to their respective restrooms. *Id.* Once there, the students were ordered to strip down to their underwear, and the officials searched their clothes. *Id.* The court held:

> [W]hile there need not be a showing of probable cause in a case such as this, there must be demonstrated the existence of some articulable facts which together provided reasonable grounds to search the students . . . . [S]ome factors which warrant consideration are: (1) the child's age; (2) the child's history and record in school; (3) the seriousness and prevalence of the problem to which the search is directed; and (4) the exigency requiring an immediate warrantless search . . . . It is entirely possible that there was reasonable suspicion, and even probable cause, based upon the facts, to believe that *someone* in the classroom has possession of the stolen money. There were no facts, however, which allowed the officials to particularize with respect to which students might possess the money, something which has time and again, with exceptions not relevant to this case, been found to be necessary to a reasonable search under the Fourth Amendment. For this reason, the search must be held to have been invalid under the Fourth Amendment, there being no reasonable suspicion to believe that each student searched possessed contraband or evidence of a crime.

*Id.* at 53–54 (internal citations omitted).

[16] *See, e.g.*, cases cited *infra* notes 113, 120, 128, 138.

[17] *See, e.g.*, Thomas *ex rel.* Thomas, 323 F.3d 950 (11th Cir. 2001) (holding that, although the strip search of a student was unconstitutional because it lacked particularized suspicion, the school officials' conduct was not so egregious that its unconstitutionality would be readily apparent); Williams *ex rel.* Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) (holding that, even assuming the strip search was unreasonable, the school board was entitled to qualified immunity because the unconstitutionality of its actions was not established at the time of the incident).

[18] 129 S. Ct. 2633 (2009).

one of its contributions is to make clear that strip searches are, in fact, different in kind.[19] Savana Redding, a thirteen-year-old eighth grader suspected of bringing prescription-strength Advil to school, was required to strip down to her underwear and shake out her bra and panties, thereby exposing her breasts and genitals to the two female school administrators conducting the search.[20] The administrators found no pills either in Savana's belongings or on her person.[21] Outraged by the incident, Savana's mother sued. The district court and initial Ninth Circuit review found no Fourth Amendment violation.[22] However, the Ninth Circuit reversed its position en banc, holding that the search had violated Savana's Fourth Amendment rights.[23] The Supreme Court agreed.[24] The Court's pronouncement brought the subject of strip searches in schools to the surface, making it clear that a school strip search is at the very least an extraordinary intrusion that should be reserved for extreme and life-threatening situations. Although it subsequently granted the school officials qualified immunity, the majority acknowledged (or at least pretended) that existing law did not previously recognize the extraordinary nature of school strip searches.[25]

Justice Souter, for the eight-Justice majority on the Fourth Amendment issue, wrote in a manner that made the outcome and the law seem strikingly ordinary. The Court merely restated the law already enunciated in *T.L.O.*, and applied it to a search that was far more intrusive than the search that uncovered marijuana in T.L.O.'s purse.[26] The *Redding* decision, however, is far from ordinary. *Redding* recognized a sliding scale for reasonable suspicion: the greater the intrusion, the more factual support school authorities must have.[27] While perhaps this is a standard implicit in *T.L.O.*, it eluded many courts and authorities during the previous two and a half decades. Moreover, in finding the strip search unreasonable, the Supreme Court shed necessary light on, and clarified important Fourth Amendment principles governing, the practice of school searches. While not per se prohibiting strip searches, the Court laid

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[19] *See id.* at 2643.

[20] *Id.* at 2638.

[21] *Id.*

[22] *Id.*

[23] *Id.* (citing Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1081–87 (9th Cir. 2008) (en banc)).

[24] *Id.* at 2643–44.

[25] *See id.* at 2644.

[26] *Cf.* New Jersey v. T.L.O, 469 U.S. 325, 328 (1985).

[27] *See Redding*, 129 S. Ct. at 2642 (noting that "[t]he indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.*").

out Fourth Amendment governing principles, which should, finally, substantially limit the number of strip searches that occur in America's public schools.

This Article builds on the *Redding* Court's recognition that absent an emergency situation where a pre-existing school district policy guides the use of such intrusive measures, strip searches are qualitatively different from other searches and should not be allowed in schools. This Article proposes the following: (1) that strip searches should be governed by strict policy; (2) that school boards specifically authorize or prohibit such searches; (3) that school districts publish system-wide policies governing the conduct of strip searches; and (4) that school districts maintain system-wide records of such searches. Further, this Article recommends that a strip search is presumptively unconstitutional if there is no school district policy in place. Part I of the Article sets forth the facts and procedural history of *Redding*. Part II discusses the Fourth Amendment background through *T.L.O.*, as well as some of the pre-*Redding* lower court cases that applied *T.L.O.* Part III discusses *Redding*'s attempt to rescue *T.L.O.*, and the implications *Redding* holds for all cases using a reasonable suspicion standard. In addition, Part III highlights the implications of the Court's failure to articulate what exactly constitutes a strip search, while leaving the practice available to schools for use in extreme circumstances. Part IV discusses why the Court was wrong to grant qualified immunity to the school officials in *Redding*, and summarizes the likely effects of the ruling on future school searches. Finally, we identify the unresolved issues in this area and discuss why states and school boards must either set forth specific policy guidelines for school strip searches or face continuing litigation and damages.

## I. FACTS AND PROCEDURAL HISTORY

After a Safford Middle School student nearly died from taking pills passed out by another student in 2002,[28] the Safford Unified School District adopted a zero-tolerance drug policy.[29] That policy banned illicit substances and all prescription or over-the-counter drugs, unless a student had prior permission to use them.[30]

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[28] Brief for Petitioners at 4–5, *Redding*, 129 S. Ct. 2633 (2009) (No. 08-479).

[29] *Id.* at 5.

[30] Safford Unified School District Policy J-3050, provides as follows:

> The nonmedical use, possession, or sale of drugs on school property or at school events is prohibited. *Nonmedical* is defined as "a purpose other than the prevention, treatment, or cure of an illness or disabling condition" consistent with accepted

In October 2003, the mother of student Jordan Romero reported to school officials, including Assistant Principal Kerry Wilson, that several nights earlier, Jordan had become violent and sick to his stomach because of pills another student had allegedly given to him at school.[31] Mrs. Romero also conveyed Jordan's further contention that some students, including Marissa Glines and Savana Redding, were bringing drugs and weapons to school.[32] Jordan also described his second-hand knowledge of an incident approximately ten weeks earlier in which Savana allegedly provided alcohol at a party in her family's camper prior to a school dance.[33] At that dance, chaperones described a group of eighth-grade students, including Marissa and

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practices of the medical profession.

Students in violation of the provisions of the above paragraph shall be subject to removal from school property and shall be subject to prosecution in accordance with the provisions of the law. Students attending school in the District who are in violation of the provisions of this policy shall be subject to disciplinary actions in accordance with the provisions of the school rules and/or regulations.

For purposes of this policy, "drugs" shall include, but not be limited to:

- All dangerous controlled substances prohibited by law.
- All alcoholic beverages.
- Any prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.
- Hallucinogenic substances.
- Inhalants.

Any student who violates the above shall be subject to suspension or expulsion, in addition to other civil and criminal prosecution.

*Id.* at 2–3. In addition, Safford Unified School District Policy J-5350 provided further guidance on permissible prescription drug uses:

Under certain circumstances, when it is necessary for a student to take medicine during school hours, the District will cooperate with the family physician and the parents if the following requirements are met:

- There must be a written order from the physician stating the name of the medicine, the dosage, and the time it is to be given.
- There must be written permission from the parent to allow the school or the student to administer the medicine . . . .
- The medicine must come to the school office in the prescription container or, if it is over-the-counter medication, in the original container with all warnings and directions intact.

*Id.* at 3–4.

[31] *Id.* at 5–6.

[32] *Id.* at 6.

[33] *Id.*

Savana, as acting unruly, and leaving in their wake a strong smell of alcohol.[34] Chaperones later found a bottle of liquor and a pack of cigarettes in the girls' bathroom, but they were unable to attribute the contraband or the smell of alcohol to any individual student(s).[35]

On October 8, Jordan handed Assistant Principal Wilson a white pill allegedly given to him by Marissa Glines, and informed Wilson that several students were planning on taking the pills together during lunch.[36] Peggy Schwallier, the school nurse, identified the pill as a 400 mg ibuprofen tablet available by prescription only.[37] Wilson immediately removed Marissa from class.[38] In the process, Wilson asked Marissa about a planner that was on her desk, but Marissa denied ownership or any knowledge of its contents.[39] As Wilson began to escort Marissa from the classroom back to his office, Marissa's teacher opened the planner and discovered several knives and lighters, a cigarette, and a permanent marker.[40] Marissa's teacher brought the planner and its contents to Wilson, who then removed Savana Redding from class and escorted her to his office.[41]

With Marissa in his office, Wilson asked his administrative assistant, Helen Romero, to come in and serve as a witness to the search he was preparing to conduct.[42] Wilson asked Marissa to turn her pockets inside out and open up her wallet.[43] From her pockets, Marissa produced a razor blade, several white pills matching the one Jordan gave to Wilson, and one blue pill later identified as Naprosyn, a prescription strength anti-inflammatory medication.[44] When asked, Marissa asserted that the Naprosyn must have "slipped in when [Savana] gave me the [Ibuprofen]."[45] At that point, Wilson believed that he had enough information to connect the two and immediately stopped questioning Marissa. He did not ask Marissa when Savana allegedly gave her the pills, how many pills Savana allegedly gave her, or where Savana would be hiding additional pills if she had them.[46] Rather, Wilson had Romero escort Marissa to Nurse

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[34] *Id.*

[35] *Id.* at 5.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 7.

[39] *Id.*

[40] Brief for Respondent at 3, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479); Brief for Petitioners, *supra* note 28, at 7.

[41] Brief for Petitioners, *supra* note 28, at 8.

[42] *Id.* at 7.

[43] *Id.*

[44] *Id.*; *Redding*, 129 S. Ct. at 2640.

[45] Brief for Petitioners, *supra* note 28, at 7.

[46] *Redding*, 129 S. Ct. at 2640; Brief for Respondent, *supra* note 40, at 4.

Schwallier so she could conduct a more thorough search.[47] In the nurse's office, Romero asked Marissa to remove her shirt and pants, and to shake out the elastic of her bra and panties.[48] The search failed to reveal any additional pills.[49]

After pulling her from class, Wilson emphasized to Savana the importance of telling the truth and called her attention to the planner and its contents spread out on his desk.[50] Savana admitted ownership of the planner, but denied that its contents were hers.[51] Savana explained she had lent the planner to Marissa several days earlier.[52] Savana then stated that she had not previously seen the pills that were also on the desk,[53] and told Wilson she had never brought pills to school or distributed pills to her classmates.[54] Wilson asked for consent to search Savana's belongings and, again, found no drugs in Savana's backpack.[55] As he did with Marissa, Wilson had his assistant, Romero, escort Savana to the nurse's office for a more thorough search.[56] Wilson believed that, based on the totality of the circumstances, including information about the earlier dance, he had reasonable suspicion to strip-search Savana Redding.[57]

That particular day, Savana wore a t-shirt and pocketless stretch pants.[58] Once inside the office, Romero asked Savana to remove her shoes and socks, which turned up no indication of drugs.[59] Romero and Nurse Schwallier then asked Savana to remove her shirt and pants and pull her bra and panties to the side, exposing her breasts and genitals to the school officials.[60] Again, they found nothing.[61] Throughout the search, Savana held her head down so Romero and Schwallier would not see her cry.[62] Savana later described the incident as "'the most humiliating experience' of her life."[63]

The search was especially troublesome because the assistant principal conducting the investigation never really questioned the

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47 Brief for Petitioners, *supra* note 28, at 7–8; Brief for Respondent, *supra* note 40, at 4.
48 Brief for Respondent, *supra* note 40, at 4–5.
49 *Id.* at 5.
50 *Id.* at 1.
51 *Id.*
52 *Id.*
53 *Id.* at 1–2.
54 *Id.* at 2.
55 *Id.*
56 *Id.*
57 *See* Brief for Petitioners, *supra* note 28, at 9–10.
58 Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2638 (2009).
59 Brief for Petitioners, *supra* note 28, at 11.
60 Brief for Respondent, *supra* note 40, at 2.
61 *Id.* at 2–3.
62 *Id.* at 3.
63 *Id.*

student who was caught with the drugs and accused Savana of giving them to her.[64] Thus, prior to the strip search, the assistant principal had no information regarding when Savana allegedly provided the drugs or where, if Savana had them with her that day, she would likely be hiding them.[65]

For two and a half hours following the search, Savana was forced to sit outside an assistant principal's office alone, where she witnessed Jordan and another student (Chris Clark), a police officer, Marissa's father and the principal walk in and out of the office.[66] At no time did school officials afford Savana the opportunity to call her mother.[67] Savana finally told her mother about the strip search later that day.[68] During a meeting with the principal the following day, the principal told Savana's mother not to worry because "the strip search was [not] a big deal because they did not find anything."[69]

Redding's mother filed suit in the Superior Court of the State of Arizona, alleging that the search infringed upon Savana's Fourth Amendment rights in violation of 42 U.S.C. § 1983.[70] The school district and all other individually named defendants removed the case to the United States District Court for the District of Arizona and moved for summary judgment, raising a qualified immunity defense for each individual defendant.[71] In granting Safford's motion, the district court held that the search complied with the two-prong standard set forth in *New Jersey v. T.L.O.*, and that the school officials therefore did not violate Savana's Fourth Amendment rights.[72] The Ninth Circuit, in a 2–1 decision, affirmed.[73]

Sitting en banc, the Ninth Circuit reversed the panel decision in a similarly divided opinion.[74] Applying the two-pronged *T.L.O.* standard, the court held that Wilson's search of Savana was "unjustified at its inception,"[75] unreasonable in scope,[76] and therefore in violation of her Fourth Amendment rights.[77] The en banc majority

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[64] Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2642 (2009).

[65] *Id.*

[66] Brief for Respondent, *supra* note 40, at 5.

[67] *Id.* at 7.

[68] *Id.*

[69] *Id.*

[70] Brief for Petitioners, *supra* note 28, at 11.

[71] Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1077 (9th Cir. 2008) (en banc).

[72] *Id.* at 1077–78.

[73] *See* Redding v. Safford Unified Sch. Dist. No. 1, 504 F.3d 828, 836 (9th Cir. 2007), *rev'd en banc*, 531 F.3d 1071 (9th Cir. 2008).

[74] *See Redding*, 531 F.3d at 1089 (6–5 decision).

[75] *Id.* at 1085.

[76] *Id.* at 1087.

[77] *Id.*

also held that Savana's rights were clearly established at the time of the incident and that, as a result, Wilson was not entitled to qualified immunity.[78] The court, however, affirmed summary judgment in favor of Schwallier, the school nurse, and Romero, the administrative assistant because they acted at Wilson's behest.[79] The school district appealed to the Supreme Court of the United States, which granted certiorari.[80]

## II. SCHOOL SEARCHES FROM *T.L.O.* TO *REDDING*

In what now seems a much simpler time, the Supreme Court's Fourth Amendment cases dealt with searches by police looking for evidence to use in criminal prosecutions. Within that context, the Supreme Court could exclaim that warrantless searches were "*per se* unreasonable."[81] That jurisprudence held that exceptions to the warrant requirement are "few[,] specifically established[,] and well delineated."[82] In the period before the all-out "war on drugs," these exceptions to the warrant requirement were "jealously and carefully drawn"[83] by the Court, and "justified by absolute necessity,"[84] which translated generally into real exigency.

In the period after application of the exclusionary rule to the states[85] and commencement of the "war on drugs," the Court's focus on the warrant requirement and the requirement that exigency support warrantless searches faded[86] except in the context of home searches.[87]

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[78] *See id.* at 1088–89 ("[T]hese notions of personal privacy are 'clearly established' in that they inhere all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches." (quoting Brannum v. Overton County Sch. Bd., 516 F.3d 489, 499 (6th Cir. 2008))).

[79] *Id.* at 1089 ("[I]t is clear that the school nurse, Schwallier, and Wilson's assistant, Romero, acted solely pursuant to Wilson's instructions and not as independent decision-makers, and, thus, we affirm summary judgment as to them.").

[80] Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 987 (2009).

[81] Katz v. United States, 389 U.S. 347, 357 (1967).

[82] *Id.*

[83] Jones v. United States, 357 U.S. 493, 499 (1958).

[84] United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting); *see also* McDonald v. United States, 335 U.S. 451, 454 (1948) ("[T]here must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances . . . .").

[85] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court").

[86] *See* California v. Carney, 471 U.S. 386, 390–94 (1985) (holding that a warrantless search of a mobile home parked in a public lot was permitted under the automobile exception, since a mobile home on a public street would be treated no differently than any other vehicle); *see also* California v. Acevedo, 500 U.S. 565, 574 (1991) (holding that police may search a container placed in a car as part of the automobile exception).

[87] *See* Kyllo v. United States, 533 U.S. 27, 40 (2001). The Court noted:

Moreover, the Supreme Court's Fourth Amendment cases became much more catholic, involving more complex cases and exploring Fourth Amendment rights in cases not limited to police searches for evidence.[88] In addition, the Supreme Court has carved out numerous new exceptions to the Fourth Amendment warrant requirement[89] and, in some of these exceptions, has eliminated the Fourth Amendment standard of probable cause, opting for a lesser standard of cause or, in some instances, even sanctioning intrusions without cause.[90]

In *New Jersey v. T.L.O.*,[91] the Court upheld warrantless searches of schoolchildren by teachers and administrators on the lesser standard of "reasonable suspicion."[92] After explaining why schoolchildren

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> We have said that the Fourth Amendment draws "a firm line at the entrance to the house." That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

*Id.* (citation omitted); *see also* Illinois v. Rodriguez, 497 U.S. 177, 183 (1990) (stating that the Fourth Amendment is a guarantee against unreasonable home searches); Payton v. New York, 445 U.S. 573, 586 (1980) (noting that warrantless home searches are presumptively unreasonable).

[88] *See, e.g.*, Camara v. Mun. Court of San Francisco, 387 U.S. 523, 534 (1967). *Camara* held:

> [A]dministrative searches [to confirm compliance with municipal ordinances] are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in [prior cases] for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections.

*Id.*; *see also* Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding that a police officer may stop and frisk a suspect on the street based on "reasonable suspicion"; a lesser threshold than probable cause).

[89] *See, e.g.*, *Acevedo*, 500 U.S. at 582 (Scalia, J. dissenting) ("In 1985, one commentator cataloged nearly 20 such exceptions, including 'searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es] . . . .'" (alterations and omissions in original) (quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985))).

[90] *See, e.g.*, Samson v. California, 547 U.S. 843, 848–49 (2006) (holding that a blanket policy subjecting parolees to suspicionless searches at any time does not violate the Fourth Amendment); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding random, suspicionless drug testing of junior high school athletes); *see also* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 838 (2002) (extending *Veronia* to all students participating in extracurricular activities).

[91] 469 U.S. 325 (1985).

[92] *Id.* at 333; *cf. Terry*, 392 U.S. at 37 (Douglas, J., dissenting). In *Terry*, Justice Douglas expressed concern with the less demanding "reasonable suspicion" standard:

need privacy protection in school, the Court recognized that a school environment creates a "special circumstance" to excuse the warrant requirement and allow a lesser standard of cause.[93] The Court based its "special circumstance" finding on the school's need to maintain order and a positive learning environment, and balanced this need with the students' privacy interest.[94]

Reasonable suspicion was an odd choice to justify a full search of a child and her possessions. The reasonable suspicion that supports a *Terry* stop and frisk on the street by a police officer is not a search for evidence, but rather only a limited pat-down search for weapons to protect the officer's safety.[95] Only after the suspicion deepens because the officer feels an object that may be a weapon, may the officer even reach into the suspect's clothing to retrieve that particular object.[96] *T.L.O.*, however, sanctioned a full search of a child for evidence of a crime or of a school-rule violation whenever a school official has reasonable suspicion.[97] In *T.L.O.*, the Court held:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," [and] second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."[98]

Justice White, writing for the majority, continued:

> Under ordinary circumstances, a search of a student by a [school official] will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn

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> [P]olice officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*. At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion."

*Id.*

[93] *T.L.O.*, 469 U.S. at 340.

[94] *Id.* at 339–40.

[95] *Terry*, 392 U.S. at 27.

[96] *See id.* at 29–30.

[97] *See T.L.O.*, 469 U.S. at 341.

[98] *Id.* (alteration in original) (citation omitted) (quoting *Terry*, 392 U.S. at 20).

> up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[99]

The Court claimed the two-pronged standard would "neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren."[100]

Justice White's standard was opaque until distilled in *Redding*. As originally written, the standard seemed to allow a full search, possibly even a strip search, of a schoolchild based upon the minimal standard of reasonable suspicion. After all, the general Fourth Amendment principle is that a search supported by probable cause may extend to any place where the sought object could be secreted.[101] Moreover, in a critical footnote in Justice White's majority opinion, the Court left open "whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities."[102] Justice White's vacillation on the issue of individualized suspicion probably opened the door for courts to view searches (or even strip searches) conducted on seemingly random groups of students as no less reasonable than those conducted on a student (or students) whom the school official has particularized suspicion and evidence to target as the suspect of an investigation.

*T.L.O.* substituted reasonable suspicion for probable cause in the school setting, and, as the dissenters noted, there was no reason to believe that it was tinkering with the general principle governing the scope of a search. Justice Brennan predicted that:

> Today's decision sanctions school officials to conduct full-scale searches on a "reasonableness" standard whose

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[99] *Id.* at 341–42 (footnotes omitted).

[100] *Id.* at 342–43.

[101] *See* Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The scope of a search is generally defined by its expressed object."); *see also* Horton v. California, 496 U.S. 128, 140 (1990) ("The scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." (quoting United States v. Ross, 456 U.S. 798, 824 (1982))); *Ross*, 456 U.S. at 820 ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found . . . .").

[102] *T.L.O.*, 469 U.S. at 342 n.8. The Court also noted that it was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." *Id.* at 342 n.9.

> only definite content is that it is *not* the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems.[103]

Moreover, Justice Stevens feared the standard set by the majority would open a Pandora's box, allowing school administrators to search students for any object school rules prohibited them from possessing.[104] He also questioned whether the standard was strong enough "to prohibit obviously unreasonable intrusions of young adults' privacy . . . ."[105] However, Justice Stevens did not think that the authority granted in *T.L.O.* extended to strip searches. He asserted:

> One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse. To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm.[106]

Justice Stevens's caveat about strip searches may have reflected the view of all the Justices, including those in the majority, or it may have been just wishful thinking.

With *T.L.O.*, the Court attempted to establish a standard that was "at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults' privacy . . . ."[107] Justice Stevens feared the Court's standard was too broad and would turn the schoolhouse into a police state.[108] Litigation involving school searches in the years following *T.L.O.* seemed to validate the fears of Justices Brennan and Stevens.[109] The majority opinion was thus unsuccessful at guiding

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[103] *Id.* at 354 (Brennan, J., dissenting).

[104] *See id.* at 371 (Stevens, J., dissenting) ("I fear that the concerns that motivated the Court's activism have produced a holding that will permit school administrators to search students suspected of violating only the most trivial school regulations and guidelines for behavior.").

[105] *Id.* at 381.

[106] *Id.* at 382 n.25 (citations omitted).

[107] *Id.* at 381.

[108] *See supra* note 104 and accompanying text.

[109] *See infra* notes 113, 120, 128, 138 and accompanying text.

both lower courts and school administrators,[110] in part, because it failed to stress its analysis of the facts under the two-pronged standard, including the two separate searches (one for cigarettes and one for marijuana) and the existence of additional information to support the factual predicate underlying the second search for marijuana.[111] Not surprisingly, lower federal courts applying *T.L.O.* to strip searches failed to grasp the *T.L.O.* process.

The early strip-search cases following *T.L.O.* resulted in qualified immunity for teachers and administrators. Some of those cases—especially those involving strip searches for small amounts of missing money—were patently outrageous, yet none of the courts referenced Justice Stevens' certainty that the *T.L.O.* rules pertaining to searches of schoolchildren were never intended to apply to strip searches. Moreover, federal circuit court decisions generally upheld the strip searches, or, more often, concluded that the searches were illegal but granted qualified immunity.[112]

In *Beard v. Whitmore Lake School District*,[113] for example, teachers performed strip searches on both boys and girls in their

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[110] *See* Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU Educ. & L.J. 71, 103–04 ("Under the new criteria [the Court set forth in *T.L.O.*], a mistaken observation or a faulty report could still be reasonable grounds to conduct a search if the circumstances were convincing. Without the requirement of either probable cause and with only a reference to 'reasonable scope' to substitute for individualized suspicion, broad and random searches could be upheld based on little more than a perception of a serious but general problem which might be effectively regulated by general searches.").

[111] *T.L.O.*, 469 U.S. at 343–47. The case arose from the following facts. A faculty member caught T.L.O. smoking in the restroom in violation of school rules. *Id.* at 345. Because T.L.O. denied she had been smoking, school officials searched her purse for cigarettes. *Id.* at 345–46. The Court held that T.L.O.'s denial provided the officials with reasonable suspicion to search her purse. *Id.* at 346. In the course of that search, the school principal discovered rolling papers, indicating potential possession or distribution of marijuana. *Id.* at 347. This discovery prompted the principal to continue rifling through T.L.O.'s purse in search of contraband. *Id.* The Court held:

> The suspicion upon which the search for marihuana was founded was provided when [the principal] observed a package of rolling papers . . . [which] gave rise to a reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags . . . a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify [the principal] in examining the letters to determine whether they contained any further evidence.

*Id.*

[112] *See* Heder, *supra* note 110, at 104–06; *see also infra* notes 119–42 and accompanying text.

[113] 402 F.3d 598 (6th Cir. 2005).

respective locker rooms to recover a student's money that had disappeared during a gym class.[114] Teachers started with the boys, searching each of them individually in the locker room shower.[115] Each boy had to lower his pants and underwear and remove his shirt.[116] A police officer, who arrived after about half of the boys had been searched, encouraged the teachers to continue searching the students, stating that teachers "ha[ve] 'a lot more leeway' than police officers when it [comes] to searching students."[117] Later, teachers searched the girls in the same manner.[118] The United States Court of Appeals for the Sixth Circuit held the actions of the school personnel to have violated the Fourth Amendment, but reversed the district court's denial of qualified immunity.[119]

In *Jenkins ex rel. Hall v. Talladega City Board of Education*,[120] two eight-year-old girls were implicated in the theft of seven dollars from one of their classmates.[121] After an initial search of the girls' backpacks, shoes, and socks turned up nothing, their teacher accompanied them to the restroom where she told the girls to enter the stalls and come out with their underwear around their ankles.[122] After the strip search turned up nothing, the teacher escorted the girls to the principal's office for questioning.[123] Before the ordeal was over, the girls were ordered to remove their clothing once more before they were allowed to return to class.[124] The United States Court of Appeals for the Eleventh Circuit determined that, because the girls in this case were so young, they were less likely to be personally impacted by a strip search, and they therefore had a diminished need for privacy.[125] The court then concluded that "at the time these events took place, the law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent

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[114] *Id.* at 601.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 602.

[119] *Id.* ("The searches performed on the students in this case were unconstitutional. However, at the time the searches were performed, the law did not clearly establish that the searches were unconstitutional under these circumstances. The denial of summary judgment is accordingly reversed.").

[120] 115 F.3d 821 (11th Cir. 1997).

[121] *See id.* at 822.

[122] *Id.*

[123] *Id.* at 822–23.

[124] *Id.* at 823.

[125] *See id.* at 827 n.5 (noting that "it is a matter of common experience that teachers frequently assist students of that age in the bathroom, e.g., in the event of an accidental wetting").

that educators were on notice that their conduct was constitutionally impermissible."[126] As a result, the Eleventh Circuit granted the defendants qualified immunity.[127]

In *Cornfield ex rel. Lewis v. Consolidated High School District No. 230*,[128] Brian Cornfield, a sixteen-year-old student in a behavioral disorder program, was strip-searched by his teacher and a school administrator who suspected Cornfield was concealing drugs in the crotch of his pants.[129] School officials became suspicious of Cornfield when a teacher's aide noticed that Cornfield was "too well-endowed," suggesting that the student "was 'crotching' drugs."[130] The teacher's aide informed Cornfield's teacher and the dean of the school, and two other women (another teacher and another teacher's aide) confirmed to the dean that Cornfield was, indeed, "too well-endowed."[131] Information obtained by the dean from third parties, including a student's report that Cornfield had previously brought drugs onto campus, supplemented the dean's own observations.[132] There were also reports from a teacher that Cornfield had dealt drugs in the past, as well as additional reports from third parties, one of which suggested that Cornfield had "crotched" drugs during a police raid at his mother's home.[133] On top of the independent tips from teachers and fellow students, local police reported to the school that they had received information that Cornfield was dealing drugs to other students.[134] Though the initial suspicion leading to the search of Cornfield may have been based on, inter alia, the curiosity of a young female teacher, the United States Court of Appeals for the Seventh Circuit held that the dean did not violate Cornfield's Fourth Amendment rights when he asked Cornfield to strip.[135] The corroborating information from other teachers, students, and the police provided Cornfield's teacher and dean with sufficient information to give rise to a reasonable suspicion that Cornfield could be hiding drugs in the crotch of his pants—a suspicion that proved

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[126] *Id.* at 828.
[127] *Id.*
[128] 991 F.2d 1316 (7th Cir. 1993).
[129] *Id.* at 1319.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 1322.
[134] *See id.*
[135] *See id.* at 1322–23.

wrong.[136] As a result, the Seventh Circuit granted the teacher and dean qualified immunity.[137]

Finally, in *Phaneuf v. Fraiken*,[138] school officials received a student tip that Phaneuf, an eighteen-year-old student with a history of disciplinary problems, was planning to stuff marijuana down her pants for use at a class picnic.[139] The school officials, relying on "(1) the tip from a fellow student, (2) Phaneuf's past disciplinary problems, (3) the suspicious manner of her denial, and (4) the discovery of cigarettes in her purse,"[140] called Phaneuf's mother in to conduct a strip search because the tip indicated that the drugs were allegedly hidden where only a strip search would discover them.[141] Though the circumstances in *Phaneuf* weighed heavily in favor of the school district, the United States Court of Appeals for the Second Circuit concluded that the search violated the Fourth Amendment.[142] Reconsideration of *Phaneuf* following the decision in *Redding* may lead to the conclusion that the search was, in fact, legal under the new standards.

In *Safford Unified School District No. 1 v. Redding*, the Court transformed the *T.L.O.* standard, stating that reasonable suspicion is a sliding scale.[143] The greater the intrusion on the child's privacy, the more factual support is needed to justify the intrusion by teachers or administrators.[144] *Redding* stressed that *T.L.O.* set forth a two-pronged test for determining the reasonableness of a school search, and provides much needed clarification of the reasonable suspicion standard originally articulated in *T.L.O.* Moreover, the Court's exposition of reasonable suspicion in the school setting may impact other searches where reasonable suspicion serves as the standard.

## III. *REDDING* RESCUES *T.L.O.*, BUT NOT ENTIRELY

*Redding* was Justice David Souter's valedictory opinion. In keeping with his style, he wrote the opinion modestly—as it turns out, perhaps too modestly. Justice Souter claimed that the opinion merely

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[136] *See id.* at 1323 (affirming the district court's grant of summary judgment in favor of the teacher and dean).

[137] *See id.* at 1323–28.

[138] 448 F.3d 591 (2d Cir. 2006).

[139] *Id.* at 593.

[140] *Id.* at 597.

[141] *See id.* at 594.

[142] *See id.* at 600 (holding that the search was not sufficiently justified at its inception, and remanding for further consideration of the applicability of qualified immunity).

[143] 129 S. Ct. 2633, 2642–43 (2009).

[144] *Id.*

restates the law in *T.L.O.*,[145] but it does much more and, despite Justice Souter's modesty, will have lasting effects that extend well beyond the subject of school strip searches. The Court rescued the reasonable suspicion standard from the amorphous statement that emerged from *Terry v. Ohio*, which has often justified *Terry*-intrusions on baseless hunches.[146] Its exposition on reasonable suspicion should therefore impact all applications of the reasonable suspicion standard.

*Redding* also explained that the *T.L.O.* analysis applies to all school searches.[147] These standards were not obvious from Justice White's 1985 opinion. The Court, however, failed to definitively articulate the technical threshold of a strip search, a defect that may well lead to future litigation in this area. Even so, the Court made clear that a strip search of a student is an extraordinary intrusion that, while available in the arsenal of school tools, ought to be used only for the most serious of matters and reserved for searches to uncover items that could cause serious harm to students.[148]

### *A. Reasonable Suspicion Has Been an Ambiguous Standard*

In *Redding*, Justice Souter noted that both *T.L.O.* and subsequent decisions applying it use "a standard of reasonable suspicion to determine the legality of a school administrator's search of a student . . . ."[149] Further, he reiterated *T.L.O.*, stating that "a school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[150] The Court, however, went far beyond merely echoing the *T.L.O.* standard. Justice Souter provided some teeth to the reasonable suspicion standard by comparing it to probable cause. Probable cause, he said, requires a "fair probability" or a "substantial chance" of discovering evidence of criminal activity, while reasonable suspicion requires only "a moderate chance of finding evidence of wrongdoing."[151] That little kernel—"a moderate

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[145] *Id.*

[146] *See* Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (permitting the police to exercise a brief seizure of a person for investigative purposes where there are facts and circumstances (as opposed to inarticulate hunches) giving rise to reasonable suspicion that the suspect has committed or is about to commit a crime).

[147] *Redding*, 129 S. Ct. at 2643.

[148] *Id.* at 2643.

[149] *Id.* at 2639 (citing New Jersey v. T.L.O, 469 U.S. 325, 342, 345 (1985)).

[150] *Id.* (quoting *T.L.O.*, 469 U.S. at 342).

[151] *Id.*

chance"—is probably more substantive guidance than the Supreme Court has ever offered on reasonable suspicion.

The doctrine of "reasonable suspicion" emerged in *Terry* as a lesser predicate standard than probable cause, a standard intended to govern brief street seizures that fall short of full arrests.[152] Such intrusions, which constitute a restraint on a citizen's freedom to walk away, implicate a person's right to be free from unreasonable seizures.[153] A *Terry* stop, while less than an arrest, involves police compulsion to the extent that a reasonable person would not feel free to ignore the police request and walk away.[154] When the necessary compulsion exists and the person complies with the police demand,[155] that stop must be supported by "reasonable suspicion."[156]

The reasonableness of the intrusion is determined "by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[157] When "justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[158] "Anything less would invite intrusions . . . based on nothing more substantial than inarticulate hunches[.]"[159] The intrusion must be objectively evaluated and subject "to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."[160] Reasonable suspicion must be based upon the totality of the circumstances.[161] Chief Justice Warren offered

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[152] *See* Terry v. Ohio, 392 U.S. 1, 19–25 (1968).

[153] *See id.*

[154] *See id.* at 19 n.16 ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."); *see also* Florida v. Bostick, 501 U.S. 429, 434 (1991) ("So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." (citation omitted)).

[155] *See* California v. Hodari D., 499 U.S. 621, 626 (1991) ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . It does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee.").

[156] *Terry*, 392 U.S. at 27.

[157] *Id.* at 21 (alterations in original) (quoting Camara v. Mun. Ct. of San Francisco, 387 U.S. 523, 537 (1967)).

[158] *Id.*

[159] *Id.* at 22.

[160] *Id.* at 21–22 ("[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?").

[161] *See* United States v. Cortez, 449 U.S. 411, 417–18 (1981); *see also* United States v. Arvizu, 534 U.S. 266, 277–78 (2002) (holding that lower court erred in considering the facts in isolation from each other when deciding whether the officer had reasonable suspicion to conduct a traffic stop).

no clue to lower courts evaluating an officer's decision to make a forcible stop as to how to measure the likelihood that a crime is about to be committed or has been committed. After all, the facts in *Terry* were bare (although overstated in Warren's opinion[162]), and the seizures were powered by the officer's judgment (or hunch) that the suspects were up to no good.[163] Thus, *Terry*, itself, stood for the proposition that the "reasonable suspicion" standard was not very substantial.

The softness of the reasonable suspicion standard was even acknowledged by the Supreme Court in *United States v. Cortez*:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.[164]

However, the *Cortez* Court did little to help clarify the standard by emphasizing that a court's determination of the reasonableness of a stop must take into consideration the inferences and deductions drawn by a trained law enforcement officer, "inferences and deductions that might well elude an untrained person."[165] Nonetheless, the reviewing court must make an independent judgment about the legality of the seizure: whether the facts and circumstances known to the officer just prior to the seizure, along with the reasonable inferences and deductions drawn by the police officer, rose to the level of reasonable suspicion.[166] The reviewing court is not supposed to be a rubber stamp for police discretion. Yet, too often it becomes a rubber stamp when inferences drawn from very meager facts are bolstered by factors such as time of day and locale—often proxies for race—

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[162] *See* Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 430–32 (2004).

[163] *See id.* at 429 (arguing that the Court in *Terry* "failed to achieve its stated purpose of tying the [stop-and-frisk] practice to the Fourth Amendment reasonableness standard").

[164] *Cortez*, 449 U.S. at 417–18.

[165] *Id.* at 418.

[166] *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

allowing for seizures in one context that a court would simply not countenance in other contexts.

### *B. Probabilities*

Justice Souter's opinion in *Redding* attempts to put flesh on the reasonable suspicion standard. For the first time, the Supreme Court discussed reasonable suspicion in the language of probabilities. We are accustomed to the Supreme Court discussing, albeit generally, probable cause in terms of probabilities—but never reasonable suspicion. Quoting *Illinois v. Gates*,[167] Justice Souter points out that probable cause requires the facts supporting issuance of a search warrant, or an officer's decision to search without a warrant, to rise to a "fair probability" or a "'substantial chance' of discovering evidence of criminal activity."[168] In contrast, Justice Souter says that "[t]he lesser standard [of reasonable suspicion] for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing."[169]

We do not suggest that Justice Souter's "moderate chance of finding evidence of wrongdoing" language clothes the reasonable suspicion inquiry in an easily transferable standard that will be readily understood and applied similarly by all judges. On the other hand, "moderate chance" *does* provide the beginnings of a benchmark where none existed before. The application of the standard to the school's decision to strip-search Savana Redding demonstrates not only that it has substance, but also that it is not intended as a makeweight that effectively hides total deferral to unfettered discretion of school administrators.

Even though the opinion and standard were crafted in response to a school strip search, the Court's general statements about reasonable suspicion appear equally applicable to a review of reasonable suspicion in a criminal case, adding substance to the standard where there historically has not been any. A court need not add a percentage of likely success to "moderate chance" for it to have a braking effect upon police discretion. While it might seem unusual for the Court to use a civil action arising out of a school search to transform and add substance to a term usually used in the context of a criminal case, the principles announced in the majority opinion apply to reasonable suspicion, rather than simply to the school search context. *Redding*

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[167] 462 U.S. 213 (1983).

[168] Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (citations omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 244 n.13 (1983)).

[169] *Id.*

could signal an upcoming reconsideration of reasonable suspicion in *all* contexts, as well as a willingness to stop deferring entirely to police judgments. Such a wholesale reconsideration of reasonable suspicion, however, could be slowed by the recent retirement of Justice Souter.

### *C. Reasonable Suspicion Is a Sliding Scale*

The *Redding* majority clarified the *T.L.O.* standard governing the scope of a school search. Justice Souter recognized that reasonable suspicion in the context of school searches is a sliding scale, and that the factual predicate to support a strip search must be greater than that needed to support a less intrusive search. The search must be "reasonably related in scope to the circumstances which justified the interference in the first place."[170] The Court concluded that "the content of the suspicion [that Savana Redding possessed drugs] failed to match the degree of the intrusion [a strip search]."[171]

The Court in *Redding* found the sliding scale implicit in the *T.L.O.* Court's application of the two-pronged standard to the facts of the earlier case. The *T.L.O.* Court determined that school officials had subjected T.L.O. to two distinct searches and concluded that the school principal in *T.L.O.* had a greater factual basis for reasonable suspicion to justify the second, more intrusive search of T.L.O.'s purse.[172] The *Redding* Court was not the first judicial body to find the sliding scale implicit in *T.L.O.*[173] Nevertheless, the Court's conclusion should provide much needed guidance to lower courts and, more importantly, to school teachers and administrators.

The *Redding* analysis treats reasonable suspicion as an imperfect arithmetic formula, rather than an amorphous, meaningless phrase prone to subjective judicial and administrative interpretation. In reaching its conclusion, the Court recognizes the seriousness of the intrusion and concludes that the school had insufficient facts to justify a strip search because of (1) "the nature and limited threat" of the objects sought and (2) the absence of any information to suspect that the objects sought were, at the time of the search, on the child's

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[170] *Id.* at 2642 (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

[171] *Id.*

[172] *See T.L.O.*, 469 U.S. at 347.

[173] Both the Second and Seventh Circuits have acknowledged *T.L.O.*'s sliding scale. *See* Phaneuf v. Fraikin, 448 F.3d 591, 596 (2d Cir. 2006) ("Although *T.L.O.* held that reasonable suspicion is the governing standard, the reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion." (citation omitted)); Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1320 (7th Cir. 1993) ("[A] highly intrusive search in response to a minor infraction would . . . not comport with the sliding scale advocated by the Supreme Court in *T.L.O.*").

person or hidden in her underwear.[174] Recognition of a sliding scale would allow for a more intrusive search in some cases than was allowed in this case. If the search was for dangerous, as opposed to nondangerous, contraband, a lesser factual predicate might suffice.[175]

*Redding* also modified the scope of a search conducted pursuant to reasonable suspicion. A search based on probable cause allows for a complete search of a person or object—even a strip search—because the scope of the search extends to any place where the object sought could be hidden.[176] In the schoolhouse, the lower standard of reasonable suspicion is substituted for probable cause because of the special need to ensure a safe learning environment.[177] It does not necessarily follow, however, that a search on a lower standard of suspicion in a school automatically supports as extensive a search as would be allowed on probable cause. The scope of the search will be limited by the nature of the object sought and the factual predicate supporting the search.[178] Reasonable suspicion to justify a strip search after *Redding* is not the same as reasonable suspicion to justify a search of a child's outer clothing or her possessions. There must be a factual basis to conduct the greater, more intrusive search, and there must be reasonable cause to believe the object is where the searcher wants to look. This limitation is a fair inference from *T.L.O.*, but one the Court never fully developed in the original decision, perhaps because the search was only of T.L.O.'s purse.[179] It is also possible that Justice White never contemplated that the lesser standard of reasonable suspicion would be used to justify a strip search, though it was certainly a fear held by Justice Stevens.[180]

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[174] *Redding*, 129 S. Ct. at 2642.

[175] *Cf. id.* (noting that the absence of any indication that the alleged drugs were dangerous to students made the more intrusive search unreasonable).

[176] *See* United States v. Ross, 456 U.S. 798, 820–21 (1982) ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found." (footnote omitted)); *see also* Florida v. Jimeno, 500 U.S. 248, 251 (1991) (holding that a suspect's consent to a search of his car for contraband included consent to examine a paper bag lying on the floor of the car because the contraband could have been hidden in that bag). The Court generalized this principle by stating that "[t]he scope of a search is generally defined by its expressed object." *Id.* (citing *Ross*, 456 U.S. at 824).

[177] *See T.L.O.*, 469 U.S. at 341.

[178] *See Redding*, 129 S. Ct. at 2642.

[179] *See T.L.O.*, 469 U.S. at 347.

[180] *See id.* at 382 n.25 (Stevens, J., concurring in part and dissenting in part) ("One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse.").

### *D.* Redding *Fails to Articulate the Threshold of a Strip Search*

The eight Justices in the *Redding* majority failed to resolve once and for all what constitutes a strip search. The majority stumbled to the conclusion that the search of Savana Redding was a strip search, since she was required to "remove her clothes down to her underwear and then 'pull out' her bra and the elastic band on her underpants."[181] The Court said that it did not want to define strip search in a way that guarantees litigation "about who was looking and how much was seen."[182] Nonetheless, the critical fact leading to the Court's conclusion that a strip search took place was "[t]he very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree . . . ."[183] Thus, the critical fact that established a strip search in Redding seems to be that Savana's breasts and genital area were exposed to view.[184] Only Justice Thomas thought that the term, and thus the stricter rules governing strip searches, should be reserved for cases of total nudity.[185] Justice Thomas, however, based his definition on case law that was entirely divorced from the school search context.[186]

One remarkable aspect of the majority's conclusion is that it will do exactly what the Court hoped it would not: guarantee further litigation. Justice Souter's opinion fails to distinguish between a search that requires a child to strip to her underwear and a search that involves some exposure of breasts and genitalia. It is impossible to conclude whether Justice Souter limited the stricter standard enunciated in *Redding* to just the latter, or whether it includes any search that requires a child to strip to her underwear. This uncertainty

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[181] *Redding*, 129 S. Ct. at 2641.

[182] *Id.*

[183] *Id.*

[184] *See id.* ("[S]ubjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.").

[185] *See id.* at 2649 n.2 (Thomas, J., concurring in part and dissenting in part).

[186] *See id.* Justice Thomas based his opposition to such a definition on cases that are inapplicable to the circumstances surrounding *Redding*: *Sandin v. Conner*, 515 U.S. 472, 475 (1995), and *Bell v. Wolfish*, 441 U.S. 520, 558 & n.39 (1979). Both cases involved searches acknowledged by the Court as more intrusive than a general strip search. In *Sandin*, the Court implied that the rectal search of a prison inmate by corrections officers went beyond the scope of the traditional strip search. *See Sandin*, 515 U.S. at 487. The Court in *Wolfish* described a cavity inspection as "part of a strip search," meaning simply that when a cavity inspection is performed, the person being searched has, by definition, already stripped nude, and thus the more intrusive cavity search becomes an additional part of a strip search. *See Wolfish*, 441 U.S. at 558. The statement does not indicate that a strip search has *not* occurred without a cavity search.

foreshadows additional litigation, notwithstanding the Court's intention to provide adequate guidance to eliminate litigation on this issue.

While the *Redding* Court may have intended to subscribe to this broader definition, its discussion of the issue was far from clear. In that regard, the opinion fails to provide clear guidance for those trying to determine the parameters of a school search. Moreover, even the broader rule, defining a strip search as any situation in which a child is forced to expose his or her underwear, leaves some room for maneuvering.[187]

The broader definition also leaves some questions regarding whether the threshold test might differ depending upon the age and gender of the student searched. The *T.L.O.* Court said that the appropriateness of a school search depends upon the age and gender of the student.[188] Clearly, the broader definition applies any time a female student is required to remove her shirt and expose her bra. Even though boys may be less sensitive to exposing their upper bodies during a search, a rule distinguishing boys and girls could be problematic,[189] and any generality that provides less protection to a boy than a girl would fail to take into consideration a particular male student's sensitivity to his body image.

Nonetheless, searches of male students are less cut-and-dry. Obviously, asking a boy to remove his shirt, and even his undershirt, exposing the upper half of his body usually does not implicate the same sensitivity and privacy concerns implicated if a girl is asked to expose the upper half of her body. However, courts will have to define what a strip search is for a boy and determine whether a boy is entitled to less protection. Clearly, school officials cannot ask a male

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[187] The First, Fourth, and Eleventh Circuits have all adopted this definition. *See* Wood v. Hancock County Sheriff's Dep't, 354 F.3d 57, 63 n.10 (1st Cir. 2003) (recognizing that "a strip search may occur even when [the subject] is not fully disrobed"); Amaechi v. West, 237 F.3d 356, 363 (4th Cir. 2001) (adopting a prior court's determination that the act of pulling down a suspect's trousers, but not his boxer shorts, was a strip search) (citing United States v. Dorlouis, 107 F.3d 248, 256 (4th Cir. 1997)); Justice v. City of Peachtree City, 961 F.2d 188, 190 (11th Cir. 1992) (finding that a strip search occurred when police stripped the subject to her underwear).

[188] *See* New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (noting that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction").

[189] *Cf.* United States v. Virginia, 518 U.S. 515, 524 (1996) ("[A] party seeking to uphold government [discrimination] based on sex must establish an 'exceedingly persuasive justification' for the classification . . . [by showing] 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))).

student to remove his pants under the broader definition if doing so would expose his underwear to the view of those conducting the search. Some may argue that the threshold should permit school officials to ask a male student to remove his shirt because the image of a shirtless male (regardless of age) is socially acceptable. Whether this would constitute an impermissible double standard is uncertain because even though there are many contexts in which a young boy or a man would appear shirtless—even in gym classes where students playing basketball play shirts against skins—those contexts never include a visual inspection of the male student's exposed body under circumstances that can be both intimidating and humiliating.[190]

Common sense dictates that we establish rules that vary somewhat for boys and girls. *Redding*'s strict standard for cause therefore should define a "strip search" as any search of a girl that requires her to strip to her bra and underwear or that requires a boy to strip to his undershorts. Requiring a child to remove his or her outer clothing to the underwear is qualitatively different than the search of a child's outer clothing, which the Court recognized.[191] Coupled with the *Redding* Court's rule that a strip search must be supported by individualized, particularized suspicion,[192] strip searches will be conducted individually and privately, and students will not be humiliated by being forced to strip in front of other students.[193] Moreover, such a strict definition helps strike an important balance between personal privacy and school safety. The standard advocated

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[190] *See Redding*, 129 S. Ct. at 2642. As the Court noted:

> Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be . . . .

*Id.*; *see also* WASH. REV. CODE ANN. § 10.79.070(1) (West 2002) (defining a strip search as "having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person").

[191] *Redding*, 129 S. Ct. at 2641–42.

[192] *See id.* at 2643.

[193] *See, e.g.*, Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003) (reinstating Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002)). In *Thomas*, an envelope containing $26 disappeared from a teacher's desk. 261 F.3d at 1163. After none of the students admitted to having taken the envelope, the vice principal authorized the school's DARE officer to conduct a search of the children in order to locate the missing money. *Id.* The teacher accompanied the girls to the restroom, and the officer did the same with the boys. *Id.* at 1164. Once in the restroom, the officer pulled his pants and underwear down to his ankles to demonstrate what he wanted the boys to do. *Id.* All of the boys dropped their pants, and some dropped their underwear as well, all in full view of each other and anyone walking by the open restroom door. *Id.* The teacher searched the girls similarly, though she kept the groups to between two and five students. *Id.* The envelope was not located as a result of the searches. *Id.*

here protects both the constitutional rights and personal privacy of prepubescent and adolescent students, while providing school officials with enough investigative flexibility to utilize searches beyond a pat-down of the suspect's outer clothing when looking for dangerous contraband.

### *E. A Strip Search Is an Extraordinary Intrusion, Reserved Only for the Most Serious Circumstances*

A strip search is an extreme intrusion into the privacy of an individual and must be reserved for the most serious of circumstances.[194] The Supreme Court rejected the strip search in *Redding* without entirely removing it from the arsenal of investigative tools that school officials possess.[195] The Court put a strip search in its own class, demanding its own specific set of suspicions.[196] Without a doubt, Wilson had a right to investigate Savana Redding based on the tip he received from Marissa Glines.[197] However, Wilson's substandard investigation failed to provide him with enough reasonable suspicion to justify subjecting Redding to the more intrusive strip search.[198] Therefore, Wilson's actions were unjustified at their inception and excessively intrusive in scope.[199]

Wilson's initial investigation of Savana satisfied the two-pronged *T.L.O.* standard. The Court first determined that Wilson had enough suspicion to "justify a search of Savana's backpack and outer clothing."[200] Moreover, Wilson's initial actions were reasonable in

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[194] *See, e.g.*, Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.").

[195] *See Redding*, 129 S. Ct. at 2642.

[196] *Id.* at 2463 ("The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.").

[197] *See id.* at 2641.

[198] *See id.* at 2642–43.

[199] *Id.* at 2642 (citing New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

[200] *Id.* at 2641. As the Court noted:

> Wilson called Savana into his office and showed her the day planner. Their conversation established that Savana and Marissa were on friendly terms: while she denied knowledge of the contraband, Savana admitted that the day planner was hers and that she had lent it to Marissa. Wilson had other reports of their friendship from staff members, who had identified Savana and Marissa as part of an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom. Wilson had reason to connect the girls with this contraband, for Wilson knew that Jordan Romero had told the principal that before the dance, he had been at a party at Savana's house where alcohol was served. Marissa's statement that the pills came from Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.

scope: "the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing."[201]

Wilson's unsatisfactory investigation, however, failed to generate adequate suspicion to justify any further intrusion. The Court stated unequivocally that officials should reserve strip searches for only the most serious of circumstances.[202] Redding's strip search was unjustified because "the content of the suspicion failed to match the degree of intrusion."[203] Had Wilson been unsure of the drug Savana allegedly possessed, had he feared that it was a dangerous substance, or had any of the student tips indicated Savana was hiding pills in her underwear, the more intrusive strip search may have been justified.[204] Thus, Wilson's strip search of Savana Redding was unreasonable in scope because Wilson did not adopt measures reasonably related to the objectives of his search.[205]

The procedures Wilson initiated were not thought through in advance. There was no regimen in place. The school was prepared to do the same thing whether the suspected drug was aspirin or a

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*Id.* at 2640–41.

[201] *Id.* at 2641.

[202] *Id.* ("[B]oth subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.").

[203] *Id.* at 2642. The Court reasoned:

> Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers . . . . He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

*Id.*

[204] *See id.* at 2642–43. Justice Souter put it this way:

> In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

*Id.*

[205] *Id* at 2642. As the Court stated:

> [N]ondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing.

*Id.*

dangerous substance. Nor was there any attempt to learn how recently Savana had possessed the substance or where on her person she was likely to hide it. The school's procedure was totally devoid of any sense of proportionality.

## IV. *REDDING* WAS AN INAPPROPRIATE CASE FOR QUALIFIED IMMUNITY

Qualified immunity developed through the common law as a protection for government officials performing discretionary functions.[206] It is available as a defense to damage claims asserted under 42 U.S.C. § 1983 against government officials in their individual capacities.[207] A school official searching a student is "entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment."[208] For the right to be "clearly established," the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[209] However, "there is no need that 'the very action in question [have] previously been held unlawful,"[210] and the facts of the previous case neither have to be "fundamentally similar" nor "materially similar" to a case at issue in order to find that the law had been "clearly established."[211] Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[212]

Six Justices in the *Redding* majority granted qualified immunity to the school officials.[213] Justice Souter wrote that, because lower courts

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[206] *Private Party Immunity from Section 1983 Suits*, 123 HARV. L. REV. 1266, 1267 (2010) ("[T]he Supreme Court has afforded government officials qualified or absolute immunity if there was a "tradition of immunity . . . so firmly rooted in the common law and . . . supported by such strong policy reasons" that Congress would not have silently abolished it upon § 1983's adoption in 1871." (quoting Wyatt v. Cole 504 U.S. 158, 164 (1992)).

[207] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

[208] *Redding*, 129 S. Ct. at 2643 (quoting Pearson v. Callahan, 129 S. Ct. 808, 822 (2009) (internal quotation marks omitted)).

[209] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[210] *See Redding*, 129 S. Ct. at 2643 (alteration in original) (quoting Wilson v. Layne, 526 U.S. 603, 615 (1999)); *Anderson*, 483 U.S. at 640 (noting that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," but asserting that the action in question need not have been explicitly held unlawful—its unlawfulness simply must have been apparent "in the light of pre-existing law").

[211] *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002).

[212] *Id.*

[213] *See Redding*, 129 S. Ct. at 2643. Justices Stevens and Ginsburg dissented from the grant of qualified immunity to the school officials. *See id.* at 2644–45 (Stevens, J., concurring in part and dissenting in part). Justice Ginsburg also wrote separately to emphasize her objection to Wilson's abusive and unreasonable treatment of Redding and her resulting opposition to the Court's grant of qualified immunity. *See id.* at 2645–46 (Ginsburg, J., concurring in part and dissenting in part).

have applied the *T.L.O.* standard inconsistently to school searches, the law was sufficiently unclear.[214] Though varying interpretations of the law in the lower courts by no means guarantee a litigant qualified immunity, Justice Souter reasoned that dissenting opinions in strip-search cases in these courts provided enough well-reasoned, valid interpretations of strip search policy for the Court to determine that *T.L.O.* was ambiguous.[215]

Justices Stevens and Ginsburg, however, would not have granted the Safford officials qualified immunity.[216] As mentioned above, Justice Stevens, even as a *T.L.O.* dissenter, never believed the Court intended the two-pronged *T.L.O.* standard to apply to strip searches.[217] Thus, while Justices Stevens and Ginsburg concurred with the majority's conclusion that Savana's strip search went beyond the scope of reasonableness, they would have affirmed the Ninth Circuit's decision to deny qualified immunity.[218] In their eyes, the clarity of the law should not depend on a lower court's misinterpretation of Supreme Court precedent.[219] Justice Stevens argued that Wilson and the other Safford officials were dealing with circumstances that already had a developed body of Supreme Court case law, rather than a situation with future constitutional

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[214] *Id.* at 2643–44 ("[W]e realize that the lower courts have reached divergent conclusions regarding how the *T.L.O.* standard applies to [school] searches. . . . [T]hese differences of opinion from our own are substantial enough to require immunity for the school officials in this case.").

[215] *Id* at 2644. The Court asserted:

> We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law.

*Id.*

[216] *See id.* at 2644–45 (Stevens, J., concurring in part and dissenting in part).

[217] *See* New Jersey v. T.L.O., 469 U.S. 325, 382 n.25 (1985) (Stevens, J., concurring in part and dissenting in part) ("It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude." (quoting Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980))).

[218] *See Redding*, 129 S. Ct. at 2644–45 (Stevens, J., concurring in part and dissenting in part).

[219] *See id.* at 2645. Justice Stevens explained:

> [T]he clarity of a well-established right should not depend on whether jurists have misread our precedents. And while our cases have previously noted the "divergence of views" among courts in deciding whether to extend qualified immunity, we have relied on that consideration only to spare officials from having "to predict the *future course* of constitutional law . . . ."

*Id.* (citations omitted).

considerations, and they were therefore not entitled to the shield of qualified immunity.[220] Justice Ginsburg joined Justice Stevens's opinion, but wrote separately to assert that Wilson abused his power during the entire course of his substandard investigation.[221]

Classifying Wilson's actions as abuse was bold and correct, but Justice Ginsburg should have expanded upon her conclusion. The Court should not have granted Wilson qualified immunity because his actions defied the realm of common sense one would associate with a seasoned school administrator. While school administrators are generally not well versed in Fourth Amendment jurisprudence or the ideological back and forth that lower courts have engaged in regarding the *T.L.O.* doctrine, one would expect an experienced school administrator to conduct, at the very least, a consistent investigation of all students allegedly involved in a given situation.[222] Wilson's ignorance of the law would be plausible for a qualified immunity defense—even palatable—if he had conducted his investigation and searches intelligently and consistently. Without any semblance of uniformity, however, the grant of qualified immunity seems an untenable result.

Wilson ordered searches of at least three students.[223] The record reveals very little about Chris Clark's involvement in the investigation—other than Redding's averments that he was only required to shake out his shirt and empty his pockets[224]—but we need only look at the differences between the searches Wilson ordered of Savana and Marissa. Wilson ordered Schwallier, the school nurse, to conduct individual searches of each girl, but Marissa was subjected to a less intrusive search, even though that very day Wilson discovered

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[220] *See id.* ("[W]e chart no new constitutional path. We merely decide whether the decision to strip search Savana Redding, on these facts, was prohibited under *T.L.O.*").

[221] *See id.* at 2645–46 (Ginsburg, J., concurring in part and dissenting in part). As Justice Ginsburg explained:

> Wilson did not release Redding, to return to class or to go home, after the search. Instead, he made her sit on a chair outside his office for over two hours. At no point did he attempt to call her parent. Abuse of authority of that order should not be shielded by official immunity. . . . Wilson's treatment of Redding was abusive and it was not reasonable for him to believe that the law permitted it.

*Id.*

[222] *See, e.g.*, Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 602 (6th Cir. 2005). The police officer involved in *Beard* informed the teacher conducting the search that "the teachers needed to check the girls in the same way [as the boys] so as to prevent any claims of gender discrimination." *Id.*

[223] *See* Brief for Respondent, *supra* note 40, at 5 ("[S]chool officials searched Chris [Clark] later that morning by asking him to empty his pockets and shake out his shirt and pants; they did not ask Chris to remove any of his clothing.").

[224] *Id.*

pills in her possession.[225] Marissa was not forced to pull her bra and panties aside, and none of Marissa's private areas were exposed, as was the case in the search of Savana.[226] Moreover, Wilson never permitted Savana to call her mother before or after the ordeal, although Marissa's father eventually came to the school.[227] Most chilling, however, is that Wilson honestly believed he did nothing wrong by conducting two different searches because, as he told Savana's mother, the search of Savana turned up nothing and Savana faced no disciplinary action.[228]

Clearly, Wilson was not acting as if he were following any established protocol. Rather, Wilson conducted a haphazard, off-the-cuff investigation with little to no understanding of how his actions would affect the parties involved. A school administrator who acts in such an egregiously reckless manner should not be entitled to qualified immunity, even if the law is not "clearly established." Even before *Redding*, the law of *T.L.O.* was sufficiently clear that the reasonableness of a student search depended on the scope of the search.[229] Moreover, *T.L.O.* made clear that the more intrusive the search, the clearer the justification must be.[230] Here, Wilson's ad hoc, disparate search methods should have precluded his qualified immunity, as his search methods were based on neither facts nor logic.

*Redding* instructs us that a school's strip search will be subject to a close analysis of its Fourth Amendment reasonableness. The Court failed to follow through in a logical analysis, which would require, as an initial prerequisite to a grant of qualified immunity, that the school district anticipate such incidents and adopt a policy governing strip searches. Absent such a policy, the procedures will, as in *Redding*, always be ad hoc and not subject to advance planning, giving rise to further outrages. Absent a preexisting policy, qualified immunity should not even be on the table. Taking immunity from money damages out of these lawsuits will likely have a greater effect on school boards and administrators than any other aspect of the *Redding* decision.

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[225] *See id.* at 4–5.

[226] *Compare id.* at 2–3 (observing that Romero and Schwallier directed Savana to remove her pants and shirt, pull out her panties and bra, and move them to the side), *with id.* at 4–5 (noting that while "Romero, aided by Schwallier, asked Marissa to remove her socks and shoes, raise up her shirt and pull out the band of her bra, take off her pants, and stretch the elastic on her underwear," they did not ask Marissa to take off her shirt).

[227] *See id.* at 5.

[228] *Id.* at 7.

[229] *See* New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

[230] *Id.*

## CONCLUSION

*Safford Unified School District No. 1 v. Redding* rescued *New Jersey v. T.L.O.*'s two-pronged standard controlling school searches. However, the Supreme Court left unanswered some key questions regarding strip searches that will not only lead to uncertainty among both school administrators and lower courts but also guarantee future litigation. Although the Court was very critical of the assistant principal's investigation, its criticism was terribly understated. The process that ultimately culminated in Savana Redding's strip search was inadequate from start to finish.

Justice Souter's opinion defined the "reasonable suspicion" standard as a "moderate chance" that evidence will be discovered where the teacher searches.[231] While the "moderate chance" language provides some teeth to what is otherwise a highly unstructured standard, the Court's language is strikingly ordinary, especially when one understands that this more substantive definition may well extend beyond school searches and have a significant effect on the untold numbers of *Terry* stops.

The Court clarified *T.L.O.* by acknowledging that "reasonable suspicion" is a sliding scale.[232] Reasonable suspicion in school strip searches requires a reasonable belief that the child has the object sought when the search is conducted, and the reasonableness inquiry limits the scope of the search to the places where the object may be located. In other words, there must be individualized suspicion to suspect that the child has concealed the evidence sought in his underwear or against his body.[233] *Redding*, however, did not address the reasonableness of conducting a strip search when officials fail to find the object in the course of a less intrusive search. This will be one potential aspect of future litigation.

The Court was also not clear enough to forestall future questions about what actually constitutes a strip search. Is it a search down to underwear, or does it require exposure of breasts and/or genitals? In this regard, the Court failed to provide guidance that could prevent future litigation by not providing a clearer definition. In light of this failure, we have suggested that the definition of a strip search necessarily differs between a boy and a girl. The definition for a girl is clear: a girl is strip searched when she is required to remove her outer clothing and appear before a teacher or administrator for visual or physical inspection in a bra and panties. Savana Redding was

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[231] Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009).

[232] *See id.* at 2642.

[233] *Id.*

required to partially expose her breasts and genitals,[234] but under the broad definition we advocate, the strip search occurred even before she reached that point.

The definition for a boy, on the other hand, is less clear. Since removing a shirt is a lesser invasion of privacy, searches of male students should not be considered strip searches until an administrator asks a boy to remove his pants and expose his underwear. The Court's failure to adopt this, or any other definition of strip search, however, will undoubtedly lead to future litigation. That possibility again raises the question whether there is sufficient uncertainty in the law to give rise to qualified immunity for school officials who conduct intrusive searches, perhaps even after incidents as egregious as that in *Redding*.

The Supreme Court recognized that strip searches remain a tool available to schools.[235] Absent other facts that would create a heightened necessity to conduct a more intrusive search, even a school's drug-free policy does not justify a search for a relatively harmless substance, such as prescription-strength ibuprofen.[236] Schools may only use strip searches when they seek an item that threatens serious harm to students and others in the building.[237] Whether a small quantity of a more dangerous illegal substance would warrant a strip search remains unclear.

The Court's decision to grant Wilson qualified immunity in *Redding* was also misguided, and could lead to significant confusion as to when qualified immunity is warranted. Wilson's actions defied the common sense one would expect in an experienced administrator. Though the Safford Unified School District did not have a stated policy regarding school searches and seizures, Wilson's ad hoc investigation was inconsistent at the most basic level: he conducted qualitatively different searches on students suspected of violating the same school rules. That he conducted a less intrusive search of Marissa Glines, the student caught actually possessing the contraband school officials sought, is, at best, evidence of a simple oversight resulting from the lack of an established policy. At worst, however, it demonstrates that Wilson failed to reflect on the situation as it developed, and instead relied on post-hoc justifications to explain otherwise unjustified searches. The problem in *Redding* occurred because the investigation was ad hoc and not pursuant to an established policy. The absence of an established process should make a strip search presumptively unreasonable, and subject the

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[234] *Id.* at 2638.

[235] *See id.* at 2642 ("The indignity of the [strip] search does not, of course, outlaw it . . . .").

[236] *See id.*

[237] *See id.* at 2642–43.

school district and school administrators to civil liability. The existence of such a policy would serve to guide teachers and administrators at every step of the process of a strip search. It would also provide guidance as to when a strip search may be permissible, and the amount and type of evidence needed to justify it, and it would dictate the procedures to be followed during an actual search. Absent such established procedures, a strip search simply should not be a tool in the school's disciplinary arsenal.

*Redding* was a step in the right direction, clarifying *T.L.O.* and instructing that school strip searches are to be treated as extraordinary intrusions supported by individualized reasonable suspicion and subject to the proportionality standard. It is amazing that it took fifteen years to clarify and apply the law of *T.L.O.* School children spend a third of their lives in school in an environment with ever-shrinking Fourth Amendment rights. If it takes another fifteen years to enforce *Redding*, there is the danger that the Fourth Amendment will totally disappear from our schools, and a new generation will grow up with no understanding of their fundamental rights.