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**“IN A CATEGORY OF ITS OWN”:
THE SUPREME COURT IN *SAFFORD V.
REDDING* OFFERS SCHOOLCHILDREN
LITTLE PROTECTION IN PLACING LIMITS
ON STUDENT STRIP SEARCHES**

GEORGE M. DERY III*

I. INTRODUCTION.

The Supreme Court, in *Safford Unified School District # 1 v. Redding*, held that middle school officials, in forcing a 13 year-old girl to partially expose her breasts and pelvic area during a strip search for ibuprofen and naproxen pills, violated the student’s Fourth Amendment rights.¹ Many parents might consider the prospect of school officials strip searching their middle-schooler for prescription-strength Advil and over-the-counter Aleve to be shocking. Where, they might wonder, did a school vice principal ever get the idea that forcing an adolescent to shake her bra and underwear in front of school officials,² with-

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¹ *Safford Unified Sch. Dist. # 1 v. Redding*, 557 U.S. 364, 2637 (2009). The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.

U.S. CONST. amend. IV.

² *Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1075 (9th Cir. 2008).

out giving prior notice to, or receiving permission from, her parents,³ would be considered reasonable?

School officials, the parents might be alarmed to learn, got the notion for such intrusions from interpreting Supreme Court precedent. In a series of cases, beginning with a search of a student's purse for cigarettes, the Court has increasingly broadened school officials' search powers over children.⁴ In cases involving searches of articles students bring on campus, and even of the contents of the children's own bodies, the Court has developed and expanded upon the idea that a public schoolchild has a special relationship to the state. In *New Jersey v. T.L.O.*, the Court has declared that "the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."⁵ In *Vernonia School District 47J v. Acton*, the Court announced that "for many purposes 'school authorities act *in loco parentis*' with the power and indeed the duty to 'inculcate the habits and manners of civility.'"⁶ Finally, in *Board of Education v. Earls*, the Court deemed a school official to be acting as "guardian and tutor," thus making the relevant Fourth Amendment issue "whether the search is one that a reasonable guardian and tutor might undertake."⁷ Thus, in less than three decades, the Court had gone from upholding a vice principal's search of a student's purse⁸ to promoting as reasonable a faculty's monitoring, handling and checking for temperature a schoolchild's urine sample.⁹

³ *Id.* at 1083.

⁴ See generally *New Jersey v. T.L.O.*, 469 U.S. 325 (1984); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

⁵ *T.L.O.*, 469 U.S. at 339.

⁶ *Vernonia*, 515 U.S. at 655.

⁷ *Earls*, 536 U.S. at 830.

⁸ *T.L.O.*, 469 U.S. at 347.

⁹ *Vernonia*, 515 U.S. at 650, 664-65; *Earls*, 536 U.S. at 2566.

This Article begins with a review of the history of special needs doctrine in the context of public schools in Part II. Part III presents *Safford*: its factual background, lower court analysis and Supreme Court decision. Finally, Part IV critically examines the implications of the Court's ruling in *Safford*.

II. REVIEW OF SPECIAL NEEDS SEARCHES OF SCHOOLCHILDREN.

At the outset of its analysis in *Safford*, the Court noted that Fourth Amendment reasonableness "generally requires a law enforcement officer to have probable cause for conducting a search."¹⁰ Such a rule has a long history. In *Carroll v. United States*, a case occurring during the prohibition era, the Court ruled, "On reason and authority the true rule is that if the search and seizure. . .are made upon probable cause. . .the search and seizure are valid."¹¹ *Chambers v. Maroney* employed even stronger language, declaring, "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."¹² *Brinegar v. United States* saw probable cause as a "long-prevailing standard" which sought to "safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while at the same time seeking to "give fair leeway for enforcing the law in the community's protection."¹³ Probable cause thus protected individuals from an "officer's whim or caprice" without unduly hampering police.¹⁴

When it came to schoolchildren smoking in the bathroom, however, the Court no longer trusted in probable cause to strike

¹⁰ *Safford*, 129 S. Ct.at 2639.

¹¹ *Carroll v. United States*, 267 U.S. 132, 149 (1925).

¹² *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

¹³ *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

¹⁴ *Id.*

the proper balance of interests.¹⁵ In *New Jersey v. T.L.O.*, a teacher, catching *T.L.O.*, a 14-year-old, and another girl smoking in the lavatory in violation of school rules, marched the troublemakers to the office of Assistant Vice Principal Theodore Choplick.¹⁶ *T.L.O.* denied ever smoking despite the teacher's accusation and her smoking companion's confession.¹⁷ Mr. Choplick responded by opening *T.L.O.*'s purse and finding cigarettes, the recovery of which led him to discover marijuana and evidence of use and dealing.¹⁸ When the state brought delinquency charges against her, *T.L.O.* unsuccessfully sought to have the evidence found in her purse suppressed as obtained in violation of the Fourth Amendment.¹⁹

Justice White, who authored the Court's opinion, saw the case as presenting the question of how "should we strike a balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place?"²⁰ In answer, *T.L.O.* first dispensed with any requirement that school officials seek a warrant as unduly interfering with the school's need to maintain discipline.²¹ The Court then found the school setting necessitated "some modification of the level of suspicion of illicit activity needed to justify a search."²² Although recognizing that, ordinarily, a search must be based on probable cause, Justice White determined that probable cause was "not an irreducible requirement of a valid search."²³ Instead, when "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of rea-

¹⁵ *T.L.O.*, 469 U.S. at 328, 341.

¹⁶ *Id.* at 328.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 329.

²⁰ *Id.* at 340.

²¹ *Id.*

²² *Id.*

²³ *Id.*

sonableness that stops short of probable cause," the Court has adopted a lesser standard.²⁴ *T.L.O.* therefore concluded that the need "for freedom to maintain order in the schools" required downgrading the standard for searching a student's purse from probable cause to assessing simply the "reasonableness, under all of the circumstances, of the search."²⁵

The reasonableness of school searches involved a two-part inquiry: first, whether the search was "justified at its inception," and second, whether the search was reasonably limited in scope.²⁶ To satisfy the first part of the test, the Court considered whether Mr. Choplick had "reasonable grounds for suspecting" that the search would turn up evidence of a violation of school rules or criminal law.²⁷ The inquiry's second "scope" portion was judged by assessing whether the assistant vice principal's actions were "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."²⁸ The Court found, by carefully sifting through the facts, that Mr. Choplick did indeed possess reasonable suspicion when he searched *T.L.O.*'s purse.²⁹ Likewise, *T.L.O.* methodically retraced each of Mr. Choplick's steps to ensure that his search of the entire purse was reasonable in scope.³⁰ The Court in *T.L.O.*, therefore, even when stripping students of the right to probable cause, still demanded diligent inquiries into individualized suspicion regarding the reason for and scope of school searches.

Justice Blackmun, in his concurrence, noted that the Court had dispensed with probable cause in *T.L.O.* due to a "special law enforcement need for greater flexibility."³¹ A majority of

²⁴ *Id.* at 341.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 341-42.

²⁸ *Id.* at 342.

²⁹ *Id.* at 345-46.

³⁰ *Id.* at 347.

³¹ *Id.* at 351 (Blackmun, J., concurring).

the Court subsequently labeled *T.L.O.* as a “special needs” case.³² Indeed, the Court later cited *T.L.O.* in support of its assertion that it has found “‘special needs’ to exist in the public school context,”³³ and that “‘special needs’ inhere in the public school context.”³⁴ An assistant vice principal’s investigation of smoking in the bathroom thus brought the doctrine of special needs to schools.

T.L.O.’s requirement for individualized suspicion would not survive the Court’s next special needs school case, *Vernonia School District 47J v. Acton*.³⁵ In *Vernonia*, school officials in a small Oregon town became alarmed at “a sharp increase in drug use” which coincided with disciplinary problems, such as rudeness in class, outbursts of profanity and the glamorizing of drug and alcohol use.³⁶ Student athletes, “admired in their schools,” became “leaders of the drug culture.”³⁷ School coaches witnessed “omissions of safety procedures and misexecutions” by players, some resulting in physical injury.³⁸ The school district implemented a “Student Athlete Drug Policy” in which all students wishing to participate in school sports had to submit to suspicion-less drug testing.³⁹ Officials mandated blanket testing of all students at the beginning of the sport’s season as well as random testing of ten percent of athletes each week.⁴⁰ Each test necessitated that students provide a urine sample while a faculty monitor of the same gender listened for sounds of urination.⁴¹ The student then gave the sample to the teacher, who, after checking for temperature and tampering, transferred it to a vial,

³² *Skinner v. Railway Labor Executive Ass’n*, 489 U.S. 602, 619 (1988); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

³³ *Vernonia*, 515 U.S. at 653.

³⁴ *Earls*, 536 U.S. at 829.

³⁵ *Vernonia*, 515 U.S. 646 (1995).

³⁶ *Id.* at 648-49.

³⁷ *Id.* at 648, 649.

³⁸ *Id.* at 649.

³⁹ *Id.* at 650.

⁴⁰ *Id.*

⁴¹ *Id.*

which was sent out for drug testing.⁴² James Acton, in the seventh grade at one of the District's grade schools, was denied participation in football when he and his parents refused to sign the drug test consent forms.⁴³ He filed suit, claiming the testing scheme violated the Fourth Amendment.⁴⁴

The Court, in an opinion written by Justice Scalia, readily recognized *Vernonia* as presenting a situation of "special needs, beyond the normal need for law enforcement."⁴⁵ Thus, as it had in its prior special needs case, *T.L.O.*, the Court in *Vernonia* dispensed with the warrant and probable cause requirements as "impracticable."⁴⁶ *Vernonia*, however, went beyond *T.L.O.*, for it disposed not only of probable cause, but also of any individualized suspicion whatsoever. In upholding drug urinalysis of all students based on no factual justification, Justice Scalia saw the Court as doing individual students a favor. Suspicion-less testing of children avoided the "badge of shame" that came with testing based on individualized suspicion.⁴⁷ Furthermore, drug testing every student prevented teachers from abusing the tests by imposing it arbitrarily "upon troublesome but not drug-likely students."⁴⁸

In place of the traditional measures, *Vernonia* assessed reasonableness "by balancing [the drug test's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."⁴⁹ Balancing in the school context, however, became rather complex. On the individual student's side of the balance, the Court weighed the school-child's "decreased expectation of privacy" and "the relative un-

⁴² *Id.*

⁴³ *Id.* at 651.

⁴⁴ *Id.*

⁴⁵ *Id.* at 653.

⁴⁶ *Id.*

⁴⁷ *Id.* at 663.

⁴⁸ *Id.*

⁴⁹ *Id.* at 652-53.

obtrusiveness of the search.”⁵⁰ On the government’s side of the scales, the Court considered the “severity of need met by the search.”⁵¹ Also included in the mix was the “most significant element” of the government’s role as “guardian and tutor of children entrusted to its care.”⁵²

When considering student interests, Justice Scalia found any invasion of privacy to be insignificant.⁵³ School authorities exercised a “tutelary responsibility for children,” and thus routinely intruded on privacy by subjecting students to such invasions as physical exams and vaccinations.⁵⁴ Further, declaring that, “school sports are not for the bashful,” *Vernonia* noted that student athletes, undressing in locker rooms, enjoyed even less privacy expectations.⁵⁵ The Court then considered the character of intrusion imposed by urinalysis. Finding the process of providing the sample to be “identical to those typically encountered in public restrooms,” *Vernonia* deemed any privacy interests compromised to be “negligible.”⁵⁶

The Court viewed the government’s interests quite differently. The “severity of the need met by the search”⁵⁷ was itself broken down into three components: 1) the nature of the government concern; 2) the immediacy of the government concern; and 3) the efficacy of the government means for meeting the concern.⁵⁸ For the first component regarding the “nature” of the government concern, Justice Scalia deemed “detering drug use by our Nation’s schoolchildren” to be at least as important as enforcing laws against drug importation and deterring drug use by train engineers, government concerns previously accepted by

⁵⁰ *Id.* at 664.

⁵¹ *Id.* at 664-65.

⁵² *Id.* at 665.

⁵³ *Id.* at 660.

⁵⁴ *Id.* at 656.

⁵⁵ *Id.* at 657.

⁵⁶ *Id.* at 658.

⁵⁷ *Id.* at 664-65.

⁵⁸ *Id.* at 660.

the Court.⁵⁹ As for the second element pertaining to the "immediacy" of the government's concern, *Vernonia* was satisfied by the District's assertion that "a large segment of the student body" was in "a state of rebellion."⁶⁰ Regarding the third element, the program's efficacy, the Court found it "self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use. . . is effectively addressed by making sure that athletes do not use drugs."⁶¹ Thus, the government interests outweighed the individual privacy intrusions, leading the Court to find suspicion-less drug testing of schoolchildren to be reasonable under the Fourth Amendment.⁶²

The Court expanded special needs searches of students even further in *Board of Education v. Earls*.⁶³ In *Earls*, the Tecumseh School District adopted a "Student Activities Drug Testing Policy," which required urinalysis of any student wishing to participate "in any extracurricular activity."⁶⁴ Activities covered by the mandate included "the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pon, cheerleading and athletics."⁶⁵ Students Lindsay Earls and Daniel James sued the school district, contending that the drug policy violated the Fourth Amendment.⁶⁶

In an opinion written by Justice Thomas, the Court in *Earls* explicitly followed *Vernonia's* guidelines to find the Tecumseh School District's drug testing reasonable under the Fourth Amendment.⁶⁷ In balancing "the intrusion on the children's Fourth Amendment rights against the promotion of legitimate

⁵⁹ *Id.* at 661.

⁶⁰ *Id.* at 662-63.

⁶¹ *Id.* at 663.

⁶² *Id.* at 664-65.

⁶³ *Earls*, 536 U.S. at 822.

⁶⁴ *Id.* at 825, 826.

⁶⁵ *Id.* at 826.

⁶⁶ *Id.*

⁶⁷ *Id.* at 830. Indeed, by the time of *Earls*, special needs had become so accepted that Justice Thomas pigeonholed "the probable cause standard" as "peculiarly related to criminal investigations." *Id.*

governmental interests,” the *Earls* Court emphasized that “the context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake.”⁶⁸ Since the drug tests’ “subjects” were children who had been “committed to the temporary custody of the State as schoolmaster,” Justice Thomas deemed the privacy interest as “limited.”⁶⁹ The fact that the children in non-athletic extracurricular activities did not participate in *Vernonia’s* “regular physicals and communal undress” did not affect the Court’s calculus, because such a distinction was deemed “not essential.”⁷⁰

After concluding that the students had a limited expectation of privacy, *Earls* considered the “character of intrusion” imposed by mandatory urinalysis of students.⁷¹ Finding the testing procedure to be “virtually identical” to the one approved in *Vernonia*, the *Earls* Court deemed the intrusion to be “negligible”⁷² and “not significant.”⁷³ On the school’s side of the scales, Justice Thomas found the government’s concerns important because “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”⁷⁴ Upon balancing the interests, *Earls* concluded that the mandatory suspicion-less urinalysis was “entirely reasonable.”⁷⁵ Thus, the case law on the eve of *Safford* consistently supported searches of students that extended to required collection of biological samples. Further, the precedent had repeatedly found that the danger of drugs to the nation’s youth allowed searches even in the absence of suspicion of wrongdoing.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 831.

⁷¹ *Id.* at 832.

⁷² *Id.* at 832, 833.

⁷³ *Id.* at 834.

⁷⁴ *Id.*

⁷⁵ *Id.* at 836.

III. *SAFFORD V. REDDING.*

A. *Facts.*

In *Safford*, school officials, believing that 13-year-old Savana Redding had brought "forbidden prescription and over-the-counter drugs to school," subjected her to a strip search.⁷⁶ Safford was "a small community of slightly under 10,000 residents. . . nestled next to the Pinaleno Mountains in southeastern Arizona."⁷⁷ Despite its bucolic setting, Safford Unified School District found "itself on the front lines of a decades-long war against drug abuse among students."⁷⁸ The assistant principal of Safford Middle School, Kerry Wilson, stated in an affidavit that "a couple of years" prior to Savana's strip search, "a student brought a prescription drug to school and began handing the pills out to several of her classmates."⁷⁹ The student had an adverse reaction to the drug that was almost fatal and had to be airlifted to Tucson for intensive care.⁸⁰ School officials therefore developed a policy which strictly prohibited "the nonmedical use, possession, or sale of any drug on school grounds, including 'any prescription or over-the-counter drug.'"⁸¹

School officials first became concerned about Savana in particular at an August 22, 2003 school dance held to celebrate the start of the academic year.⁸² Staff at the dance noticed "some unusually rowdy behavior from a small group of students, including Marissa Glines and Savana Redding, and detected the

⁷⁶ *Safford*, 129 S. Ct. at 2637.

⁷⁷ *Redding*, 531 F.3d at 1074.

⁷⁸ Brief for Petitioner at 4, *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009)(No. 08-479)[hereinafter *Petitioner's Brief*].

⁷⁹ Brief for Petitioner Joint Appendix at 10a. The gender of this student is not clear from the record, for Wilson referred to the schoolchild as both "her" and "he." *Id.*

⁸⁰ *Id.*

⁸¹ *Safford*, S. Ct. . at 2639-40.

⁸² *Redding*, 531 F.3d at 1075.

smell of alcohol among them.”⁸³ Before the dance was over, staff discovered alcohol and cigarettes in the girls’ bathroom.⁸⁴ Some weeks after the dance, another student, Jordan Romero,⁸⁵ told Principal Robert Beeman and Assistant Principal Wilson that “certain students were bringing drugs and weapons on campus.”⁸⁶ Jordan’s mother reported that her son had ingested pills he had received from a classmate and later became “violent and gotten sick to his stomach.”⁸⁷ Jordan said that Savana had “hosted a party at her camper trailer before the August 22 dance,” at which “Savana served alcohol—Jack Daniels, Black Velvet, vodka, and tequila,” bought by Savana’s mother from Thrifty’s Food and Drug.⁸⁸

A week later, on October 8, 2003, Jordan handed Assistant Principal Wilson a white pill he said he had received from Marissa Glines⁸⁹ and said that “a group of students was planning on taking the pills at lunch.”⁹⁰ School nurse Peggy Schwallier identified the pill as prescription strength Ibuprofen 400mg.⁹¹ Wilson then called Marissa out of class.⁹² Just outside of class, Mr. Johnson, Marissa’s teacher, handed Wilson a black day

⁸³ Brief for Petitioner Joint Appendix at 10a.

⁸⁴ *Id.*

⁸⁵ As noted by the *Safford* Court, there was “no relation” between the student, Jordan Romero, and the administrative assistant, Ms. Romero. *Safford*, 129 S. Ct. at 2640.

⁸⁶ *Id.*

⁸⁷ *Redding*, 531 F.3d at 1076.

⁸⁸ Brief for Petitioner Joint Appendix at 8a. The facts conflict regarding Principal Beeman’s follow up on these revelations. Beeman asserted that, “Within a day or two, I had contacted all the students’ parents. In Savana’s case, her mom simply dismissed the account by saying that Savana would not have been involved.” *Id.* In contrast, Savana contended that, in a meeting after the strip search, “Mr. Beeman raised some events and stories he had heard about me. My mother asked why she had not been called regarding the alleged prior incidents. Mr. Beeman said he could not reach her.” *Id.* at 26a.

⁸⁹ *Safford*, 129 S. Ct. at 2640.

⁹⁰ Brief for Petitioner Joint Appendix at 11a.

⁹¹ *Id.* at 12a.

⁹² *Safford*, 129 S. Ct. at 2640.

planner, which contained such contraband as knives, a cigarette, and lighters.⁹³ In the presence of administrative assistant Helen Romero, Wilson asked Marissa to empty her pockets and wallet, recovering a blue pill, several white pills and a razor blade.⁹⁴ Nurse Schwallier learned from the poison control hotline that the blue pill was "a 200 mg dose of an anti-inflammatory drug, generically called naproxen, available over the counter."⁹⁵ When Wilson questioned Marissa about the source of the blue pill, she responded, "I guess it slipped in when *she* gave me the IBU 400s." When asked who "she" was, Marissa replied, "Savana Redding."⁹⁶ Further, Marissa denied knowing anything about the contents of the day planner recovered from the desk next to her.⁹⁷ No follow up questions were asked about when Marissa obtained the pills from Savana, the likelihood that Savana currently possessed pills or where she might be hiding them.⁹⁸ Wilson had Schwallier and Romero search Marissa's bra and underpants; this search recovered no more pills.⁹⁹

At about this time, Wilson called Savana out of class and confronted her with the contents of the day planner.¹⁰⁰ Although Savana confirmed that the planner was hers, she denied knowing anything about its contents, having loaned it to Marissa a few days earlier.¹⁰¹ Wilson then showed Savana the pills she had received from Jordan and Marissa and asked her if she knew anything about them.¹⁰² When Savana answered that she did not, Wilson told her she had heard that Savana was "giving these pills to fellow students."¹⁰³ Savana denied this accusation

⁹³ Brief for Petitioner Joint Appendix at 12a.

⁹⁴ *Safford*, 129 S. Ct. at 2640; Brief for Petitioner Joint Appendix at 18a.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*; Brief for Petitioner Joint Appendix at 12a.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2640-41; Brief for Petitioner Joint Appendix at 13a.

¹⁰¹ *Id.* at 2641; Brief for Petitioner Joint Appendix at 14a.

¹⁰² *Id.* at 2638; *Id.*

¹⁰³ *Id.*

and agreed to have her belongings searched.¹⁰⁴ A search of Savana's backpack uncovered nothing.¹⁰⁵ Savana described the subsequent strip search of her as follows:

I went to the nurse's office. Mrs. Romero asked me to remove my jacket, socks, and shoes. The school nurse, Mrs. Schwallier was in the bathroom washing her hands. When the (sic) Mrs. Schwallier came out they told me to remove my pants and shirt. . . I took off my clothes while they both watched. Mrs. Romero searched the pants and shirt and found nothing. . . Then they asked me to pull my bra out and to the side and shake it, exposing my breasts. Then they asked me to pull out my underwear and shake it. They also told me to pull the underwear out at the crotch and shake it, exposing my pelvic area.¹⁰⁶

No pills were found in the search.¹⁰⁷

Savana, an honor role student who, prior to this incident, had never been disciplined while at Safford, asserted that "[t]he strip search was the most humiliating experience I have ever had."¹⁰⁸ Savana reported that "Mrs. Romero and Mrs. Schwallier did not look away while I was taking off my clothes," and "did nothing to respect my privacy."¹⁰⁹ Savana explained, "I was embarrassed and scared, but I felt I would be in more trouble if I did not do what they asked. I held my head down so that they could not see that I was about to cry."¹¹⁰ Savana's mother sued the Safford Unified School District, "for conducting a strip search in violation of Savana's Fourth Amendment rights."¹¹¹

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Brief for Petitioner Joint Appendix at 23a.

¹⁰⁷ *Safford*, 129 S. Ct. at 2638.

¹⁰⁸ Brief for Petitioner Joint Appendix at 21a, 25a.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* 24a.

¹¹¹ *Safford*, 129 S. Ct. at 2638.

B. The Lower Courts.

In district court, the defendants filed a motion for summary judgment, relying “solely on the arguments that the strip search did not violate Savana’s Fourth Amendment rights, and because there was no constitutional violation, no further inquiry is necessary.”¹¹² The district court found no Fourth Amendment violation, because it determined that the search was both justified at its inception and reasonably related in scope to its objectives.¹¹³ Savana’s loan to Marissa of her day planner “provided a sufficient nexus between the two girls to corroborate Marissa’s tip,” thus providing school officials with reasonable grounds for suspecting “that a strip search of Savana would turn up ibuprofen.”¹¹⁴ As for the intrusiveness of the search, the “need to locate the ibuprofen was sufficiently urgent that the strip search was ‘reasonably related’ to the search’s objective and was not ‘excessively intrusive.’”¹¹⁵ The district court therefore determined that the strip search satisfied *T.L.O.*’s two-pronged test.

A divided Court of Appeals upheld the grant of summary judgment, finding “ample facts” justifying the search at the outset and a “‘strong interest’ in protecting students from prescription drugs” supporting the scope of the strip search.¹¹⁶ When the case was reheard en banc, however, the court assessed the balance of interests dramatically differently, concluding, “The public school officials who strip searched Savana acted contrary to all reason and common sense as they trampled over her legitimate and substantial interests in privacy and security of her person.”¹¹⁷ Justice Wardlaw, who wrote the court’s opinion, noted that, “Nowhere does the *T.L.O.* Court tell us to accord school officials’ judgments unblinking deference” nor would a “genera-

¹¹² *Redding*, 531 F.3d at 1077.

¹¹³ *Id.* at 1077-78.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1078.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1080, 1081-87.

lized drug problem” provide “blanket approval of strip searches of thirteen-year-olds.”¹¹⁸ *Redding* also emphasized the degree of the intrusion, declaring, “Let there be no doubt: the Safford school officials conducted a strip search of Savana.”¹¹⁹ Finally, acknowledging that “reasonableness, of course, depends on context,” Justice Wardlaw set up a novel sliding scale for determining “reasonable suspicion.”¹²⁰ *Redding* explained:

T.L.O. requires that “as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search.”¹²¹

Redding then turned to *T.L.O.*’s first inquiry—whether the search was justified at its inception—and found the evidence for such justification wanting.¹²² In contrast to *T.L.O.*, where further intrusion inside the student’s purse was based on the “physical evidence” of cigarettes and rolling papers, no such “causal link” existed in *Redding*, where “the initial search of Savana revealed nothing to suggest she possessed pills or that she was anything less than truthful when she emphatically stated she had never brought pills into the school.”¹²³ Instead, the “primary purported justification” for Savana’s strip search was Marissa’s “self serving statement, which shifted the culpability for bringing the pills to school from Marissa to Savana.”¹²⁴ Courts, which typically give such accomplice statements little weight, should be particularly suspicious of an assertion made by “a frightened

¹¹⁸ *Id.* at 1080.

¹¹⁹ *Id.* The Court clarified that “Savana did not have to be completely naked for the school officials to have strip searched her.” *Id.* Several state statutes defining strip searches consider a strip search to have occurred when “*some or all*” of the clothing is removed. *Id.* (emphasis in original).

¹²⁰ *Id.* at 1081.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1082.

¹²⁴ *Id.*

eighth grader caught red-handed by a principal."¹²⁵ More doubt should have been raised when the accused neither was previously tied to contraband nor suffered any "disciplinary history whatsoever at the school."¹²⁶ Basing the search on Savana's admission that she had loaned the day planner to Marissa was "nothing more than guilt-by-association."¹²⁷ Instead of conducting additional investigation, such as speaking with Savana's teachers, parents or fellow students, school officials subjected Savana to a "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing" search.¹²⁸ The *Redding* Court therefore held that "the strip search of Savana was unjustified at its inception."¹²⁹

Redding next considered whether the strip search was reasonable in scope, keeping in mind *T.L.O.*'s requirement that the search be "*not excessively intrusive in light of the age and sex of the student and the nature of the infraction.*"¹³⁰ The Court determined that "school authorities adopted a disproportionately extreme measure to search a thirteen-year-old girl" for over-the-counter drugs.¹³¹ The strip search was not reasonably related to finding ibuprofen, for the "most logical" places had already been searched to no avail and nothing indicated the pills would be "hidden under [Savana's] panties or bra."¹³² Further, strip searches, forcing persons to disrobe and expose themselves "for

¹²⁵ *Id.* at 1082-83.

¹²⁶ *Id.* at 1083.

¹²⁷ *Id.* at 1084.

¹²⁸ *Id.* at 1083.

¹²⁹ *Id.* at 1085. The Court characterized the evidence for the search as based on "an unsubstantiated tip from Marissa, a student seeking to shift blame from herself to Savana. Other facts marshaled by the school district—allegations of alcohol use months earlier, Jordan's tip that Marissa provided him with a pill, and Marissa's hidden contraband in a planner Savana lent her—are logically unrelated to a reasonable belief that Savana was hiding pills on her person." *Id.*

¹³⁰ *Id.* at 1085. (emphasis in original).

¹³¹ *Id.*

¹³² *Id.* The Court even questioned whether "classmates would be willing to ingest pills previously stored in [Savana's] underwear." *Id.*

visual inspection by a stranger clothed with the uniform and authority of the state,” create “psychological trauma” even for adults, let alone a schoolchild.¹³³ Justice Wardlaw wondered aloud, “all this to find prescription-strength ibuprofen pills.”¹³⁴ Possession of ibuprofen, “an infraction that poses an imminent danger to no one,” could have been handled simply by keeping Savana in the principal’s office or sending her home.¹³⁵ The Court therefore concluded that “the strip search was impermissible in scope” and the school had violated Savana’s Fourth Amendment rights.¹³⁶

C. *The Safford Case.*

Justice Souter, writing for the *Safford* Court, began his analysis by returning to the Fourth Amendment fundamental of probable cause, noting, “The Fourth Amendment ‘right of the people to be secure in their persons. . . against unreasonable searches and seizures’ generally requires a law enforcement officer to have probable cause for conducting a search.”¹³⁷ *Safford* troubled itself to define probable cause,¹³⁸ going so far as to flesh out the factors to be considered in assessing its “knowledge component.”¹³⁹ *Safford* even compared the probable cause’s level of

¹³³ *Id.* at 1085-86.

¹³⁴ *Id.* at 1086.

¹³⁵ *Id.* at 1085, 1087.

¹³⁶ *Id.* at 1087.

¹³⁷ *Safford*, 129 S. Ct. at 2639.

¹³⁸ Justice Souter noted that probable cause occurred when “the facts and circumstances within [an officer’s] knowledge and of which [he] has reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Id.*

¹³⁹ *Safford* determined that the “knowledge component” of probable cause included an assessment of “the degree to which known facts imply prohibited conduct,” consideration of the “specificity of the information received,” and the “reliability of its source.” *Id.*

certainty ("substantial chance") with that of reasonable suspicion ("moderate chance.")¹⁴⁰

The Court's extended discussion of probable cause was remarkable, particularly in light of the fact that it was ultimately not the test employed in the case. Instead, the standard actually applied to the search of Savana's backpack, outer clothing and underwear was reasonable suspicion.¹⁴¹ *Safford* determined that reasonable suspicion did indeed exist to justify a search of the backpack and outer clothing, because if "a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today."¹⁴²

The second intrusion, which involved "Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed breasts and pelvic area to some degree"—essentially a strip search—raised entirely different concerns.¹⁴³ A strip search required "distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings."¹⁴⁴ This stricter standard was due to the uniqueness of a strip search. The Court repeatedly distinguished a strip search as "categorically distinct,"¹⁴⁵ "categorically extreme,"¹⁴⁶ and "in a category of its own demanding its own specific suspicions."¹⁴⁷ *Safford* deemed strip searches as "embarrassing, frightening, and humiliating" as well as "degrading" and "reserved for wrongdoers."¹⁴⁸ As bad as it was in general, a strip search could be even worse for vulnera-

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2641.

¹⁴² *Id.*

¹⁴³ *Id.* Justice Souter opined, "The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it." *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2642.

¹⁴⁷ *Id.* at 2643.

¹⁴⁸ *Id.* at 2641-42.

ble adolescents, who could suffer “serious emotional damage.”¹⁴⁹

The “indignity” of a strip search affected *T.L.O.’s* inquiry measuring the reasonableness of an intrusion’s scope.¹⁵⁰ *Safford* reiterated *T.L.O.’s* requirement that a search would be permissible only when it was “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹⁵¹ The nature of Savana’s supposed infraction, possessing “common pain relievers equivalent to two Advil, or one Aleve,” failed to support the “degree of intrusion.”¹⁵² School officials knew “the limited threat of the specific drugs” for which they searched.¹⁵³ Furthermore, authorities could not have reasonably suspected that the “common painkillers [were] in her underwear,” because the only basis for such a search was the asserted generality that “students. . . hid[e] contraband in or under their clothing.”¹⁵⁴ *Safford* refused to allow such “general background possibilities” to support such an extensive search; instead it mandated that officials have a suspicion that the search “will pay off.” This was lacking, because “nondangerous 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.”¹⁵⁵ School administrators did not obtain information from either Jordan or Marissa that Savana stored pills in her underwear, and the search of Marissa’s underwear yielded nothing.¹⁵⁶ The school simply lacked the “reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing” required before a search “can reasonably make the quantum leap

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2642.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2643.

from outer clothes and backpacks to exposure of intimate parts."¹⁵⁷ The strip search of Savana Redding was therefore "unreasonable and a violation of the Fourth Amendment."¹⁵⁸

IV. FOURTH AMENDMENT ISSUES RAISED BY *SAFFORD*.

A. *Safford Applied Special Needs in a Fundamentally Different Way from Prior Special Needs Cases.*

1. The *Safford* Court Realistically Weighed Student Privacy Interests Rather than Minimizing them.

The Court in *Safford* assessed student privacy interests in a dramatically different fashion than it had in previous special needs cases. In *Safford*, Justice Souter first considered Savana's subjective experience of the search, noting that it was "embarrassing, frightening, and humiliating."¹⁵⁹ He found her privacy expectations reasonable by noting the "consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent offensiveness of the exposure."¹⁶⁰ This "common reaction" demonstrated the "obvious" difference between a strip search and the "experience of nakedness or near undress in other school circumstances."¹⁶¹ Indeed, strip searches are so degrading that some communities have simply banned them, "no matter what the facts may be."¹⁶²

¹⁵⁷ *Id.* at 2643. The Court's subsequent discussion of qualified immunity for school officials is beyond the scope of this Article.

¹⁵⁸ *Id.* at 2644.

¹⁵⁹ *Id.* at 2642.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* The Court might not have come by this realization easily. During oral arguments, "some. . . justices minimized the girl's lasting humiliation." Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY at 1, <http://usatoday.printhis.clickability.com/pt/cpt?action=cpt&title=Ginsburg%3A+Court+needs+another=woman>. Justice Ginsburg had to alert her fellow justices to the concerns raised by the situation. "'They have never been a 13-year-old girl,' she told USA TODAY later when asked about her colleagues'

The seriousness which *Safford* gave to student privacy concerns contrasted sharply with the Court's prior attitude in special needs precedent. In *Vernonia*, the Court declared that "students within the school environment have a lesser expectation of privacy than members of the population generally."¹⁶³ When weighing schoolchildren's privacy expectations, Justice Scalia considered the criminal probationer's "relationship with the State" to be a relevant analogue.¹⁶⁴ He noted, "Although a 'probationer's home, like anyone else's, is protected by the Fourth Amendment,' the supervisory relationship between probationer and State justifies 'a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large."¹⁶⁵ Likewise, *Vernonia* involved "subjects" who had been "committed to the temporary custody of the State."¹⁶⁶ *Vernonia* considered school authorities to act *in loco parentis*, duty bound to instill in students certain habits and manners.¹⁶⁷ For support, he approvingly cited cases that upheld censorship of school-sponsored publications and permitted limitation of restraints on corporal punishment.¹⁶⁸ "For their own good," students continually surrendered privacy, whether for hearing or scoliosis screening or dental and dermatological checks.¹⁶⁹ *Vernonia's* bottom line was that Fourth Amendment rights were simply "different in public schools than elsewhere."¹⁷⁰

Vernonia, in examining urinalysis—the "nature of intrusion that is complained of"—found the conditions under which the samples were taken to be "nearly identical to those typically en-

comments during the arguments. 'It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood.'" *Id.*

¹⁶³ *Vernonia*, 515 U.S. at 657.

¹⁶⁴ *Id.* at 654.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 655.

¹⁶⁸ *Id.* at 656.

¹⁶⁹ *Id.* at 656.

¹⁷⁰ *Id.*

countered in public restrooms, which men, women, and school children use daily."¹⁷¹ Likening the tests to "routine school physicals and vaccinations,"¹⁷² Justice Scalia thus trivialized the privacy interests implicated by them as "negligible."¹⁷³

Earls was equally dismissive of students' privacy concerns. Indeed, Justice Thomas seemed less than certain that any privacy interest was even implicated, for he described the drug test intrusion as only "*allegedly* compromis[ing]" privacy interests.¹⁷⁴ Echoing *Vernonia*, *Earls* noted it was assessing privacy in the context of children who were subjects "committed to the temporary custody of the State."¹⁷⁵ The need to secure "order in the school environment" required that "students be subjected to greater controls than those appropriate for adults," thus limiting the student's privacy interest.¹⁷⁶

As for the drug test itself, Justice Thomas conceded that, "[u]rination is 'an execratory function traditionally shielded by great privacy.'"¹⁷⁷ The Court determined, however, that the urinalysis in *Earls* was "virtually identical" to the one found to cause merely a "negligible intrusion" in *Vernonia*.¹⁷⁸ The invasion on students' privacy was again "not significant."¹⁷⁹

2. *Safford* Pursued a Genuine Assessment of the Government Interests, Rather than Accepting Unsupported Conclusions Outright.

The *Safford* Court more closely scrutinized the government's contentions about the need to search than it had in prior case

¹⁷¹ *Id.* at 658.

¹⁷² *Id.* at 658, n. 2.

¹⁷³ *Id.* at 658.

¹⁷⁴ *Earls*, 536 U.S. at 830 (emphasis added).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 831.

¹⁷⁷ *Id.* at 2566.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 832.

law. Specifically, Justice Souter considered the particular danger the school faced in Savana possessing ibuprofen and naproxen.¹⁸⁰ He assessed both the nature of the drugs (“common pain relievers”) as well as the quantity of the substances (“equivalent to two Advil, or one Aleve”).¹⁸¹ Although recognizing that “just about anything can be taken in quantities that will do real harm,” *Safford* weighed the actual probability of such large doses being involved in the case, noting, “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.”¹⁸²

Safford also examined whether the government’s interests would support an intrusion as severe as a strip search. Justice Souter noted that such “categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts.”¹⁸³ He concluded that “nondangerous school contraband does not raise the specter of stashes in intimate places,” and the record offered no evidence of such a general practice.¹⁸⁴ When, instead of facts, the government offered, as “a truth universally acknowledged,” that students hide contraband under their clothes, *Safford* explicitly rejected any such justification based only on “general background possibilities” as falling short.¹⁸⁵

Safford’s critical assessment of government assertions about its interests contrasted sharply with prior student search cases. In *Vernonia*, the Court considered the nature of the government concern in the broadest terms, casting the stakes as involving the deterrence of “drug use by our Nation’s schoolchildren.”¹⁸⁶ The school’s side of the balance was therefore as important as

¹⁸⁰ *Safford*, 129 S. Ct. at 2642.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Vernonia*, 515 U.S. at 661.

preventing the importation of drugs into the nation and deterring drug use by "engineers and trainmen."¹⁸⁷ Government interest in train safety, in turn, had been seen by the Court as on a par with that of nuclear power facilities.¹⁸⁸ Thus, when presented with drug use at a *high* school, rather than assessing the particular danger posed by the individual student at a *grade* school,¹⁸⁹ *Vernonia* leapt to the national drug problem, a concern equated with nuclear safety.

The Court followed *Vernonia's* analysis in *Earls*, noting that the "drug abuse problem among our Nation's youth has hardly abated since *Vernonia* [and] has only grown worse."¹⁹⁰ Continuing to frame the government interests on a national scale, *Earls* intoned, "The nationwide drug epidemic makes the war against drugs a pressing concern in every school."¹⁹¹ *Earls* offered statistics for 12th graders in general, quoting a federal report indicating that "the number of 12th graders using any illicit drug increased from 48.4 percent in 1995 to 53.9 percent in 2001."¹⁹² *Earls* was unfazed by the contention that no "real and immediate interest" existed to justify the drug testing policy, declaring, "A demonstrated problem of drug abuse. . . [is] not in all cases necessary to the validity of a testing regime."¹⁹³

B. The Dramatic Change in the Court's Special Needs Analysis Contrasted Sharply with Justice Thomas's Consistent Special Needs Approach in his Dissent.

The significance of the Court's changing interpretation of special needs was recognized by Justice Thomas, the only member of the Court who apparently failed to get the memo about the

¹⁸⁷ *Id.*

¹⁸⁸ *Skinner*, 489 U.S. at 628.

¹⁸⁹ *Vernonia*, 515 U.S. at 651.

¹⁹⁰ *Earls*, 536 U.S. at 834.

¹⁹¹ *Id.*

¹⁹² *Id.* at 834, n.5.

¹⁹³ *Id.* at 835.

new direction. He reminded the Court of its previous focus on a search's context, citing *Vernonia* to note that "the 'reasonableness' inquiry cannot disregard the school's custodial and tutelary responsibility for children."¹⁹⁴ He harkened back to the Court's earlier worries that "[m]aintaining order in the classroom has never been easy"¹⁹⁵ and further maintained that "in more recent years, school disorder has taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."¹⁹⁶

Moreover, Justice Thomas viewed student privacy interests in the tradition established by *Vernonia* and *Earls*. First he attempted, however feebly, to minimize the privacy intrusion by taking issue with the majority's description of what happened to Savana as a "strip search."¹⁹⁷ Justice Thomas instead would have reserved "the term 'strip search' for a search that required its subject to fully disrobe in view of officials."¹⁹⁸ Under this definition, the fact that Savana only pulled out and shook her bra and underpants rather than completely removing them prevented her from suffering an actual strip search. Justice Thomas preferred descriptions of strip searches that included mention of "inspection of the rectal area" or "inspection of body cavities."¹⁹⁹ Since Romero and Schwallier failed to perform a cavity search, Justice Thomas would conclude that Savana was technically spared a strip search.

Justice Thomas aimed to shrink students' Fourth Amendment privacy interests still further by calling for "the complete restoration" of *in loco parentis*,²⁰⁰ the doctrine approvingly men-

¹⁹⁴ *Safford*, 129 S. Ct. at 2646 (Thomas, J., concurring and dissenting); *Vernonia*, 515 U.S. at 656.

¹⁹⁵ *Id.* at 2646, citing *T.L.O.* 469 U.S. at 339.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2649, n. 2.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2655.

tioned in *Vernonia*²⁰¹ and alluded to in *Earls*.²⁰² In the "early years of public schooling," noted Justice Thomas, "courts applied the doctrine of *in loco parentis* to transfer to teachers the authority of a parent to 'command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.'"²⁰³ Justice Thomas speculated, "If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand" because "there would be no doubt that a parent would have had the authority to conduct the search at issue in this case."²⁰⁴

Justice Thomas also followed the well-trodden path of *Vernonia* and *Earls* when assessing the government interests implicated in the case. Instead of considering the danger posed by Savana having ibuprofen or naproxen in her underpants, Justice Thomas adhered to the Court's prior framing of government concerns in terms of the entire country, noting, "Teenage abuse of over-the-counter and prescription drugs poses an increasingly alarming national crisis."²⁰⁵ Again, looking to the nation as a whole, Justice Thomas warned, "more young people ages 12-17 abuse prescription drugs than any illicit drug except marijuana—more than cocaine, heroin, and methamphetamine combined."²⁰⁶ Consistent with his reasoning in *Earls*, Justice Thomas again cited the Department of Health and Human Services, noting that nationally, "[i]n 2008, 15.4 percent of 12th graders reported using a prescription drug nonmedically within the past year."²⁰⁷ The countrywide scope enabled Justice Thomas to con-

²⁰¹ *Vernonia*, 515 U.S. at 654.

²⁰² In *Earls*, the Court considered its "most significant element" to be the fact that the public school acted "as guardian and tutor of children entrusted to its care." *Earls*, 536 U.S. at 830.

²⁰³ *Safford*, 129 S. Ct. at 2655 (Thomas, J., concurring and dissenting).

²⁰⁴ *Id.* at 2656.

²⁰⁵ *Safford*, 129 S. Ct. at 2653.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

clude, “The risks posed by the abuse of these drugs are every bit as serious as the dangers of using typical street drugs.”²⁰⁸ The big-picture consideration of government interests caused Justice Thomas to oversell his case. He offered, “In 2002, abuse of controlled prescription drugs was implicated in at least 23 percent of drug-related emergency department admissions and 20.4 percent of all single drug-related emergency department deaths.”²⁰⁹ The size of such numbers would probably decrease dramatically, though, if the drugs involved were limited to only ibuprofen and naproxen. Justice Thomas himself admitted as much by acknowledging that the “Ibuprofen and Naproxen at issue in this case are not the prescription painkillers at the forefront of the prescription-drug-abuse problem.”²¹⁰ Rather, “Vicodin and OxyContin are the prescription drugs most commonly abused by teens.”²¹¹ Thus, national concerns about powerful prescription drugs being abused by some students were used to justify a strip search of a particular adolescent for “run-of-the-mill anti-inflammatory pills.”²¹²

Even when Justice Thomas focused on the middle school in particular, he tended to keep the scale of his analysis larger than that of Savana’s actions. To support reasonable grounds for suspecting Savana of possessing pills, he noted initially that a few years earlier, a student at the school had become “seriously ill” due to ingesting prescription medication obtained from a fellow classmate.²¹³ Thus, the middle school “had a history of problems with students using and distributing prohibited and illegal substances on campus.”²¹⁴ At a school dance, alcohol and cigarettes had been found in the girls’ bathroom and a “group of stu-

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2654.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Redding*, 531 F.3d at 1086.

²¹³ *Safford*, 129 S. Ct. at 2647-48.

²¹⁴ *Id.* at 2648.

dents," which included Savana, had smelled of alcohol.²¹⁵ Another student, Jordan Romero, had become violent and ill due to ingestion of pills he had received from a classmate.²¹⁶ Further, "certain students were bringing drugs and weapons on campus," others were "planning on taking the pills at lunch," and Marissa Glines had given Jordan a white pill.²¹⁷ Moreover, Justice Thomas opined, "Redding would not have been the first person to conceal pills in her undergarments."²¹⁸ Very little of this information involved action taken by Savana herself; basically, because a student was sent to the ICU some years ago, Jordan became violent and suffered a stomach ache at home, some students had brought contraband on campus, and Marisa handed Jordan a pill, school officials were allowed to look into Savana's underwear. Justice Thomas thus thought in terms of group guilt, or as he termed it, "general background possibilities."²¹⁹ Since some of Savana's fellow classmates suffered problems with drugs and since people in places as far away from Arizona as Memphis, Fort Wayne and Vero Beach had stored contraband in their underwear, a strip search of this schoolchild upon Marissa Gline's accusation was reasonable.²²⁰

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 2650.

²¹⁹ *Id.*

²²⁰ For support of his assertion that "Redding would not have been the first person to conceal pills in her undergarments," Justice Thomas offered the following articles:

Hicks, Man Gets 17-Year Drug Sentence [Corbin, KY] Times-Tribune, Oct. 7, 2008, p. 1 (Drug courier "told officials she had the [Oxycontin] pills concealed in her crotch"); Conley, Whitehaven: Traffic Stop Yields Hydrocodone Pills, [Memphis] Commercial Appeal, Aug. 3, 2007, p. B3 ("An additional 40 hydrocodone pills were found in her pants"); Caywood, Police Vehicle Chase Leads to Drug Arrests, [Worcester] Telegram & Gazette, June 7, 2008, p. A7 (25-year-old "allegedly had a cigar tube stuffed with pills tucked into the waistband of his pants"); Hubbard, 23-Year-Old Charged With Dealing Ecstasy. The [Fort Wayne] Journal Gazette, Aug. 8, 2007, p. C2

C. Given Safford's Striking Change in Direction, Questions Arise As to How Lasting the Court's Alteration of Special Needs Will Be.

Safford presented schoolchildren with their first victory after three increasingly resounding defeats. This dramatic switch in course raises a question about the endurance of *Safford's* interpretation of special needs doctrine. The Court's own opinion offered indications that its reform of special needs balancing might be fleeting. True, by one measure, the Court seemed to have signaled a genuine change in attitude toward the Fourth Amendment fundamental, individualized suspicion. In stark contrast to the opening in *Earls*,²²¹ the Court's most recent precedent, *Safford* highlighted probable cause as the general requirement in Fourth Amendment analysis.²²² The Court troubled to define probable cause, consider its constituent parts and distinguish it from the other Fourth Amendment standard, reasonable suspicion.²²³ *Safford* even resurrected language from *Aguillar v. Texas*²²⁴ and *Spinelli v. United States*,²²⁵ cases creating such a rigorous probable cause test that the Court subsequently limited them in the seminal case, *Illinois v. Gates*.²²⁶ *Safford's* emphasis of probable cause might signify little, however, since it was not the standard ultimately used in the case.²²⁷ The very fact that probable cause was not part of the holding reduces it to

("While he was being put into a squad car, his pants fell down and a plastic bag containing pink and orange pills fell on the ground"); Sebastian Residents Arrested in Drug Sting, Vero Beach Press Journal, Sept. 16, 2006, p. B2 (Arrestee "told them he had more pills 'down my pants'"). *Id.*

²²¹ The Court in *Earls* marginalized probable cause as "peculiarly related to criminal investigations." *Earls*, 536 U.S. at 828.

²²² *Safford*, 129 S. Ct. at 2639.

²²³ *Id.*

²²⁴ *Aguillar v. Texas*, 378 U.S. 108 (1964).

²²⁵ *Spinelli v. United States*, 393 U.S. 410 (1969).

²²⁶ *Safford*, 129 S. Ct. at 2639; *Illinois v. Gates*, 462 U.S. 213 (1983).

²²⁷ *Safford* applied the "reasonable suspicion" standard to the case. *Id.* at 2643.

nothing more than dicta, undermining its precedential value. Thus, *Safford's* enthusiastic discussion of probable cause might not signal any great prospect of lasting change in special needs litigation.

Moreover, the Court's first condemnation of a school search was further limited by *Safford's* own language. The Court's change from upholding government searches in *Vernonia* and *Earls* to its forbidding them in *Safford* might hinge on the single fact that *Safford* involved a strip search. Appalled by the prospect that school officials undressed a 13-year-old girl, *Safford* stumbled over itself in finding ways to describe the severity of the intrusion Savana suffered. Justice Souter deemed the search "categorically distinct,"²²⁸ "categorically extreme"²²⁹ and "in a category of its own demanding its own specific suspicions."²³⁰ This very language could marginalize the case as one limited to only strip searches, offering no insight on any other intrusions school officials might pursue. *Safford* might therefore represent little change in special needs precedent.

Ironically, the most serious attack on the usual approach to special needs searches of schoolchildren came from an unexpected quarter—Justice Thomas. Irked by the Court's dismissal of the dangers posed by over-the-counter and prescription drugs,²³¹ Justice Thomas took the Court to task for departing from a "basic principle of the Fourth Amendment: that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules."²³² Perhaps self-conscious about supporting the disrobing of a thirteen-year-old for anti-inflammatories, Justice Thomas defensively declared that officers were "entitled to

²²⁸ *Id.* at 2641.

²²⁹ *Id.* at 2642.

²³⁰ *Id.* at 2643.

²³¹ The Court had commented on what it saw as the "limited threat of the specific drugs" that were the target of the search. *Id.* at 2650.

²³² *Id.* at 2651.

search regardless of the perceived triviality of the underlying law.”²³³ Since school officials watched over “a large number of students who are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly,” even “something as simple as a water pistol or a peashooter can wreak [havoc] until it is taken away.”²³⁴ If schools were threatened by water pistols and peashooters, the “unchecked distribution and consumption of prescription pills by students certainly needs no elaboration.”²³⁵ The equating of pills to water pistols hardly helped Justice Thomas’s argument; the implication of his logic is that the Fourth Amendment would support strip searches for peashooters.

Seemingly unconvinced by his own argument, Justice Thomas contended that possession of over-the-counter drugs and prescription drugs was anything but trivial; in fact, it was criminal. He noted that “[i]t is a crime to possess or use prescription-strength Ibuprofen without a prescription.”²³⁶ He then went on to quote Arizona’s criminal statute: “A person shall not knowingly. . .[p]ossess or use a prescription-only drug unless the person obtains the prescription-only drug pursuant to a valid prescription.”²³⁷ He concluded:

By prohibiting unauthorized prescription drugs on school grounds—and conducting a search to ensure students abide by that prohibition—the school rule here was consistent with a routine provision of the state criminal code. It hardly seems unreasonable for school officials to enforce a rule that, in effect, proscribes conduct that amounts to a crime.²³⁸

²³³ *Id.*

²³⁴ *Id.* at 2652.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 2653.

²³⁸ *Id.*

This line of reasoning led Justice Thomas onto some very thin ice. If school officials are doing nothing more than forbidding conduct that amounts to a crime, then they are in the crime fighting business. If, pursuant to the goal of stopping crime, the school performs a search to recover criminal evidence, it does not differ from the police. The school thus has lost the entire "special needs" rationale that enabled it to act without probable cause, and, for that matter, a warrant, in the first place. In *T.L.O.*, the case that first applied special needs doctrine to students, Justice Blackmun carefully explained that special needs balancing was permitted, "rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with a special law enforcement need for greater flexibility."²³⁹ *Vernonia* explicitly noted, "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant."²⁴⁰ Even *Earls* acknowledged the need for probable cause in criminal investigations.²⁴¹ The prospect of Justice Thomas applying special needs analysis to criminal cases, thus freeing officials from the warrant and probable cause mandates in the Fourth Amendment's last bastion of traditional protections, will undermine the special quality of special needs.

Even more daunting was Justice Thomas's view of the scope of searches permitted by special needs doctrine. In this regard, he voiced frustration that the *Safford* Court refused to "grant [the] considerable leeway to school officials" that it had in prior cases.²⁴² He viewed the school system as involving a struggle for power; school teachers needed to be "empowered" with "almost complete discretion to establish and enforce rules. . .to maintain

²³⁹ *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

²⁴⁰ *Vernonia*, 515 U.S. at 653.

²⁴¹ *Earls*, 536 U.S. at 828.

²⁴² *Safford*, 129 S. Ct. at 2649.

control over their classrooms.”²⁴³ Justice Thomas favored the *in loco parentis* doctrine because it would invest teachers and administrators with parental “immunity from the strictures of the Fourth Amendment” when searching children.²⁴⁴ By finding Savana’s strip search unreasonable, “the majority ha[d] surrend[ed] control of the American public school system to public school students.”²⁴⁵ Because he viewed education in public schools as a contest for power, Justice Thomas endorsed alarmingly broad government search rights. He declared that, since “school officials searched in a location where the pills could have been hidden, the search was reasonable in scope under *T.L.O.*”²⁴⁶ To remove any doubt about his test, Justice Thomas repeated his physical-ability-to-hide criterion by declaring, “Reasonable suspicion that Redding was in possession of drugs in violation of school policies, therefore, justified a search extending to any area where small pills could be concealed.”²⁴⁷ The force of Justice Thomas’s logic, particularly in light of the power dynamics he believed existed at schools, would seem to permit body cavity searches of students. Such a concern is reinforced by Justice Thomas’s perception of students as opportunists; he saw the Court’s ruling in *Safford* as an “announce[ment]” to schoolchildren about “the safest place to secrete contraband in school.”²⁴⁸ By woefully predicting that Savana would “not be the last” to conceal pills in her undergarments, he seemed to foresee an epidemic of pills in pants,²⁴⁹ a worry made all the more curious in light of the fact that no pills were ever found in Savana’s underwear in the first place.

Perhaps watching Justice Thomas’s slide down the slippery slope proved to be too much for the Court in *Safford*. Whether

²⁴³ *Id.* at 2655.

²⁴⁴ *Id.* at 2656.

²⁴⁵ *Id.* at 2655.

²⁴⁶ *Id.* at 2649.

²⁴⁷ *Id.* at 2655.

²⁴⁸ *Id.* at 2650.

²⁴⁹ *Id.*

it was his blurring of special needs justifications with criminal law enforcement interests, his logic that would enable body cavity searches for any item deemed by school officials to be contraband, or his apocalyptic view of our educational system, Justice Thomas's arguments seemed to have caused the rest of the Court to draw back from special needs' brink. Concerns about the logical extremes of special needs balancing might make *Safford* have a more enduring impact on the Fourth Amendment rights of schoolchildren.

Yet, *Safford's* admirable caution in avoiding special needs' logical extremes had little impact on the Court's recent case involving strip searches, *Florence v. Board of Chosen Freeholders*, in which the Court upheld suspicion-less strip searches of inmates entering the general population of jails.²⁵⁰ *Florence* deemed strip searches to be reasonable even though the jail's intrusions were clearly more severe than those in *Safford*.²⁵¹ *Florence* recognized that the term, "strip search," was hardly precise, noting that:

It may refer simply to the intrusion to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position.²⁵²

Still, *Florence's* discussion of spreading the buttocks or moving the genitals offered a more alarming picture than that of a person pulling out and shaking her bra.²⁵³

²⁵⁰ *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1514, 1523 (2012).

²⁵¹ *Id.* at 1515.

²⁵² *Id.*

²⁵³ *Safford*, 129 S. Ct. at 2638.

The government's concerns in the balance of interests, however, were also greater in *Florence*, for, despite Justice Thomas' "ugly" vision of schools as plagued by drug use and violent crime, maintenance of order in jails and prisons present a much greater challenge to officials than misbehaving schoolchildren.²⁵⁴ In jails, arrestees have been known to conceal "knives, scissors, razor blades, glass shards, and other prohibited items on their person, including in their body cavities."²⁵⁵ In such "crowded, unsanitary, and dangerous places" as jails, it could be argued that government needs greater search powers than in schools.²⁵⁶

Perhaps more troubling for the long-term prospects of *Safford* than *Florence's* conclusion were the rationales in support of its holding. Although *Florence* paid lip service to balancing the need to search against the "resulting invasion of personal rights," one searches the majority opinion in vain for any serious consideration of the intrusion strip searches place upon the privacy and dignity of the individual.²⁵⁷ The Court in *Florence* has forgotten *Safford's* lesson that privacy interests must be realistically weighed rather than minimized.²⁵⁸ Indeed, the explicit reference in *Florence's* dissent to *Safford's* declaration that a strip search is so degrading that it is "in a category of its own demanding its own specific suspicions," seemingly fell on deaf ears.²⁵⁹

Further, the Court in *Florence* uncritically accepted the government's assertions regarding its interests in performing strip searches of all arrestees, priding itself on the deference it showed "to the judgment of correctional officials."²⁶⁰ As noted by the dissent, *Florence* failed to critically assess whether the official invasion of interests was "reasonably related" to the gov-

²⁵⁴ *Id.* at 2646 (Thomas, J., concurring and dissenting).

²⁵⁵ *Florence*, 132 S. Ct. at 1519.

²⁵⁶ *Id.* at 1520.

²⁵⁷ *Id.* at 1516.

²⁵⁸ *Safford*, 129 S. Ct. at 2642, 2644.

²⁵⁹ *Florence*, 132 S. Ct. at 1526 (Breyer, J., dissenting).

²⁶⁰ *Id.* at 1513-14.

ernment's penological interests.²⁶¹ Such blanket acceptance of government interests ignored *Safford*, returning the Court to the earlier days of special needs.²⁶² *Florence*, of course, took place in a context quite different from Savana's school. Still, the fact that *Florence* fell back into the old bad habits of earlier special needs litigation might not bode well for *Safford's* potential to protect schoolchildren from intrusions in the future.

V. CONCLUSION.

When the Court in *T.L.O.* abandoned the probable cause standard for school searches of student possessions, it trusted that the new test would "neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children."²⁶³ The Court took comfort in believing that its "reasonableness standard" would "ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools."²⁶⁴ Less than twenty five years later, the Court found itself confronted with two school officials strip searching a 13-year-old girl for "run-of-the-mill anti-inflammatory pills."²⁶⁵

This leap, of course, did not occur in a vacuum. School officials have taken to heart the Court's warnings of a "nationwide epidemic of drug use"²⁶⁶ and of "the importance of the governmental concern in preventing drug use by schoolchildren."²⁶⁷ The Court has described drugs in schools in the starkest terms, speaking of "an immediate crisis" and a "state of rebellion."²⁶⁸

²⁶¹ *Id.* at 1528 (Breyer, J., dissenting).

²⁶² *Safford*, 129 S. Ct. at 2642.

²⁶³ *T.L.O.*, 469 U.S. at 342-43.

²⁶⁴ *Id.* at 343.

²⁶⁵ *Redding*, 531 F.3d at 1086.

²⁶⁶ *Earls*, 536 U.S. at 836.

²⁶⁷ *Id.* at 834.

²⁶⁸ *Vernonia*, 515 U.S. at 663.

The Court has not minced words about the schools' enormous responsibilities toward those in their charge, asserting that "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction."²⁶⁹²⁷⁰ School officials have learned that they are caring for an especially vulnerable class of persons, declaring, "We know all too well that drug use carries a variety of health risks for children, including death from overdose."²⁷¹ The Court has detailed the dangers, warning that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe,"²⁷² and even describing "irregular blood pressure," "reduction in the oxygen carrying-capacity of the blood," and of "possible artery spasms and myocardial infarction."²⁷³

Decades of such dire judicial declarations, combined with the Court's continual erosion of children's privacy interests in school, has robbed school officials of any perspective. The Court has placed teachers and administrators, "in every school," on the front lines of "the war against drugs."²⁷⁴ In this war, the weapon of special needs has been employed without restraint, and one of the casualties has been reason itself.

²⁶⁹ *Earls*, 536 U.S. at 834.

²⁷⁰ *Florence* echoed this focus on government responsibility to preserve the safety of persons by noting, "Detecting contraband concealed by new detainees, furthermore, is a most serious responsibility." *Florence*, 132 S. Ct. at 1519. *Florence* urged that the government's obligation to preserve safety was in the individual's interest as well, because the searches in question were meant to guard against "danger to everyone in the facility, including the less serious offenders themselves." *Id.* at 1522.

²⁷¹ *Earls*, 536 U.S. at 836-837.

²⁷² *Vernonia*, 515 U.S. at 661.

²⁷³ *Id.* at 662.

²⁷⁴ *Earls*, 536 U.S. at 834.