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Can I Have Some Privacy?: A Look Into the Unfortunate Truth Of Pregnancy Tests Throughout Sports and the Negative Impact on Female Athletes

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"CAN I HAVE SOME PRIVACY?": A LOOK INTO THE UNFORTUNATE TRUTH OF PREGNANCY TESTS THROUGHOUT SPORTS AND THE NEGATIVE IMPACT ON FEMALE ATHLETES

I. "Can You Do that?": Questioning Constitutional Jurisprudence Surrounding Forced Pregnancy Tests

Historically, employers have implemented drug tests to ensure employees are not under the influence of dangerous substances while they are at work.[1] Due to the toll many drugs could take on workplace productivity and safety, courts generally uphold preemployment drug testing.[2] Most notably, in 1989, the Supreme Court affirmed these traditional workplace values in *Skinner v. Railway Labor Executives Ass'n*.[3] In *Skinner*, the Supreme Court found that, while a urine drug test is inherently intrusive, the constitutionality of the test under the Fourth Amendment depends upon the intrusive scope of the testing environment.[4] In holding that the employer's drug test in *Skinner* was constitutional, the Court noted that drug testing, in that employment context, is essential to the safety and function of the job.[5] Since the *Skinner* decision, courts have upheld those urine drug tests that are found to be otherwise reasonable.[6]

1. *See* Lydia DePillis, *Companies Drug Test a Lot Less than They Used to—Because It Doesn't Really Work*, Wash. Post (Mar. 10, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/10/companies-drug-test-a-lot-less-than-they-used-to-because-it-doesnt-really-work/ [https://perma.cc/GQ4K-JML2] (adding drug testing in workplaces became very popular when President Reagan initiated War on Drugs and required all federal employees be drug tested).

2. *See* David Evans, Drug Testing Law, Technology, and Practice § 3.2 (2019) (adding courts will also approve drug testing policies to discourage illegal conduct and to provide "cost effective method to reduce employer costs associated with drug abuse").

3. 489 U.S. 602 (1989) (addressing constitutionality of drug testing in federal employer environment). *But see* Chandler v. Miller, 520 U.S. 305 (1997) (holding state's drug tests were not narrowly tailored to constitutional requirements to sufficiently justify administering random tests).

4. *See Skinner*, 489 U.S. at 626-27 (noting urine drug test is less likely to be found as Fourth Amendment violation when test itself is not so intrusive that test taker is being watched during entire process).

5. *See id.* at 631 (detailing further that requiring employer to have reasonable suspicion before drug testing would unreasonably burden employer).

6. *Compare* Evans, *supra* note 2 (detailing recent case law upholding various employment drug testing policies), *with* Gruenke v. Seip, 225 F.3d 290, 308 (3d

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Similarly, courts allow public schools to conduct drug tests on students when the search is reasonably invasive and has a clear safety purpose.[7] Public schools must adhere to constitutional requirements, both because they act as an arm of the government and because the ideal educational environment fosters free speech and thought.[8] According to the Supreme Court, achieving an effective American education requires protecting free speech:

> [I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice . . . .[9]

Consequently, students have constitutional rights in schools and administrators must abide by those limitations.[10]

Cir. 2000) (striking down forced pregnancy test for single girl on high school swim team).

7. *See, e.g.*, Board of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 838 (2002) (upholding school's drug testing policy where school had legitimate interest in preventing rampant drug use among students); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (providing example of sufficiently narrowly tailored drug test to accommodate both legal and educational considerations); New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (creating two-step test to determine whether search conducted by school was reasonable).

8. *See* Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). *See generally* Justin Driver, *Do Public School Students Have Constitutional Rights?*, N.Y. TIMES (Aug. 31, 2018), https://www.nytimes.com/2018/08/31/opinion/public-school-constitution-rights.html [https://perma.cc/4GWJ-236X] (explaining evolution of Supreme Court treatment of relationship between schools and Constitution).

9. *Shelton*, 364 U.S. at 487 (emphasizing necessity of holding educators accountable for constitutional standards) (quoting Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfuter, J., concurring) (alterations in original)).

10. *See* Stephen Sawchuk, *What Are Students' Constitutional Rights?*, EDUC. WEEK (May 7, 2019), https://www.edweek.org/ew/articles/2019/05/08/what-are-students-constitutional-rights.html [https://perma.cc/R56E-BNCC] (listing specific instances in which students can exercise their inherent constitutional rights); *see, e.g.*, York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995, 1006 (Wash. 2008) (finding school cannot implement suspicion-less drug testing on student-athletes because to do so would violate inherent privacy rights of Washington residents); *see also* Driver, *supra* note 8 (quoting Justice Stevens writing that "[t]he schoolroom is the first opportunity most citizens have to experience the power of government").

For example, in *Vernonia School District 47J v. Acton*,[11] the Supreme Court found that testing student-athletes for drug use constituted a reasonable search because the school had a legitimate interest in knowing whether students were using illegal substances.[12] Further, the school narrowed the search to student-athletes because administrators had evidence that those students were at the center of the drug problem.[13] Therefore, the Court found the drug test to be reasonably related to the school's legitimate safety concerns.[14]

While courts accept school drug tests in a limited capacity, these decisions do not give schools free reign to search their students for personal bodily information.[15] Although urine drug tests and urine pregnancy tests are superficially similar, courts are much more reluctant to find that urine pregnancy tests are reasonable because of the incredible privacy risks associated with a pregnancy test.[16] By revealing pregnancy information, a woman exposes herself to judgment about her age, her sexual history, and how she chooses to handle the pregnancy.[17] On the contrary, drug tests only reveal whether a student is engaging in illegal drug activity;

11. 515 U.S. 646 (explaining inherent constitutional rights of students).

12. *See id.* at 663-64 (finding drug test focused on athletes to be reasonable and constitutional).

13. *See id.* at 658 (describing other limits of drug test, including only testing for drug use, only testing athletes, and only releasing results of drug test to select number of school administrators); *see also York*, 178 P.3d at 1006 (striking down drug testing student-athletes because test was not narrowly tailored to meet legitimate school interests).

14. *See Vernonia*, 515 U.S. at 664-65 (reasserting constitutionality of drug test).

15. *See* Megan A. Lewis, Comment, *Testing Students for Pregnancy: How Far Will the Courts Allow Schools to Go?*, 33 MCGEORGE L. REV. 155, 176-77 (2001) (noting courts have acknowledged great privacy interests in pregnancy information, including sexual history and possible abortions or miscarriages in future).

16. *See* Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260 (9th Cir. 1998) (holding pregnancy is highly private and sensitive piece of medical information); Ascolese v. Se. Pa. Transp. Auth., 925 F. Supp. 351 (E.D. Pa. 1996) (finding pregnancy test to be obvious intrusion of employee privacy). *Compare* Debra Stang & Judith Marcin, M.D., *Urine Drug Test*, HEALTHLINE, https://www.healthline.com/health/urine-drug-screen [https://perma.cc/6QVL-7M5B] (last visited Mar. 3, 2020) (describing drug test as taking urine sample and testing sample in lab for presence of drugs), *with* Anna Giorgi & Carolyn Kay, M.D., *Urine hCG Level Test*, HEALTHLINE PARENTHOOD, https://www.healthline.com/health/hcg-in-urine#TOC_TITLE_HDR_1 [https://perma.cc/F6PV-AZMA] (last visited Mar. 3, 2020) (describing pregnancy test as urine test that searches for certain hormones related to pregnancy). *See generally* Lewis, *supra* note 15, at 175-79 (analyzing similarities between *Ascolese* and *Norman-Bloodsaw*).

17. *See Norman-Bloodsaw*, 135 F.3d at 1269 (finding pregnancy tests carry far-reaching implications that courts must consider in privacy analysis); *see also* Lewis, *supra* note 15, at 180-81 (comparing government interest in testing for pregnancy with government interest in testing for drug use).

thus, policies are properly tailored to maintain the safety of the school.[18]

Pregnancy tests cannot be narrowly tailored to address an issue of illegal activity in schools, however, because a young person's pregnancy status does not indicate that the girl has engaged in illegal activity.[19] In fact, in the few cases that address mandatory pregnancy tests, the courts emphasize the inherent medical and personal privacy contained in a pregnancy test.[20] These courts reason that revealing someone's pregnancy status reveals their sexual history and, if they choose to terminate the pregnancy, opens them up to criticism about their decision.[21]

Additionally, if a school implemented mandatory drug tests, both male and female student would be impacted.[22] When a school implements mandatory pregnancy tests, only female students, primarily female athletes, are impacted.[23] Since courts are reluctant

18. *See* Lewis, *supra* note 15, at 156-168 (describing multiple cases where drug tests were upheld because drug use was large problem in public school arena). *See e.g.,* Board of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 838 (upholding school's drug policy, even though it was not narrowly tailored to just athletes, who represent the population with largest drug use); *Vernonia*, 515 U.S. at 664-65 (finding school's policy of suspicion-less drug testing constitutional).

19. *See* Martha Kempner, *The Lesson of Delhi Charter School: It's Time to Truly Support Pregnant and Parenting Teens*, REWIRE.NEWS (Aug. 13, 2012), https://rewire.news/article/2012/08/13/not-kicking-them-out-is-not-enough-its-time-to-truly-support-pregnant-and-parenti/ [https://perma.cc/LZN5-NNEN] (explaining forced pregnancy test policies inevitably make girls feel like criminals for engaging in perfectly legal activities); *see also* Lewis, *supra* note 15, at 180-81 (explaining that there is little illegal activity, aside from possible statutory rape, that could be gleaned from forced pregnancy test).

20. *See Norman-Bloodsaw*, 135 F.3d at 1269 ("Pregnancy is likewise, for many, an intensely private matter, which also may pertain to one's sexual history and often carries far-reaching societal implications"); *Ascolese*, 902 F. Supp. at 550 (discussing several reasons for keeping pregnancy private, including "fear of disclosure to employees; the desire to avoid disclosing a subsequent miscarriage or abortion; and the desire to avoid possible stigma or discrimination by their employer"). *See generally* Lewis, *supra* note 15, at 175-79 (discussing briefly caselaw relating to employer-mandated and school-mandated pregnancy tests).

21. *See Norman-Bloodsaw*, 135 F.3d at 1269 (finding positive and negative social stigma surround women when pregnancy status is revealed); *Ascolese*, 902 F. Supp. at 550 (acknowledging potential abortion or miscarriage, both very sensitive occurrences, could be revealed to office or school without woman wanting that information to be revealed).

22. *See Vernonia*, 515 U.S. at 658 (addressing mandated and randomized drug tests for both male and female student athletes who were assumed to contribute to rampant drug culture at school). *See generally* Lewis, *supra* note 15, at 162-64 (discussing facts and rationale of *Vernonia*).

23. *See, e.g.,* Tiseme Zegeye, *Get Tested or Get Out: School Forces Pregnancy Tests on Girls, Kicks out Students Who Refuse or are Pregnant*, AM. CIVIL LIBERTIES UNION (Aug. 6, 2012), https://www.aclu.org/blog/speakeasy/get-tested-or-get-out-school-forces-pregnancy-tests-girls-kicks-out-students-who [https://perma.cc/B2UT-XTPN] ("Besides violating Title IX, the policy is also in violation of the Constitu-

to accept an employer-mandated pregnancy test, it should follow that courts will similarly be reluctant to accept a mandatory, school-ordered pregnancy test that is taken by students.[24] Under these mandated policies, female students unwillingly risk unveiling their most personal, private, and potentially embarrassing information to their teachers, administrators, and even their peers.[25] Specifically, female student-athletes are categorically more impacted because school administrators claim they have a right to know pregnancy status for the safety of the athlete and the baby.[26] Contrarily, when a school implements a drug test, both males and females are impacted, putting the sexes on equal footing.[27] Accordingly, in addressing mandatory pregnancy tests for student-athletes, courts should almost always find that a student's Fourth Amendment right to be free from unreasonable searches and seizures outweighs the school's interest in obtaining student pregnancy information.[28] Courts should only find for the school in very rare and special circumstances, for example, when the health of the student is in danger, which will be discussed further later in this Comment.[29]

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tion's due process right to procreate, and equal protection: it treats female students differently from male students and relies on archaic stereotypes linked to sex and pregnancy.").

24. *See* Lewis, *supra* note 15, at 168-84 (discussing case law rationale, specifically from *Gruenke*, in pointing out that even though public school students have lower expectation of privacy than adult employees, high privacy interest in pregnancy information still remains with students).

25. *See id.* at 185 (noting that pregnancy, especially young pregnancy, carries negative societal implications about sexual behavior and, possibly, about subsequent personal decisions regarding whether to terminate pregnancy).

26. *See* Gruenke v. Seip, 225 F.3d 290, 301 (3d Cir. 2000) ("Although student athletes have a very limited expectation of privacy, a school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy. . . . [A]n official cannot, however, require a student to submit to this intrusion merely to satisfy his curiosity."). In most cases, however, exercise is not harmful to the athlete or to the baby. *See Issues Related to Pregnancy & Athletic Participation*, WOMEN'S SPORTS FOUND. 2, https://www.womenssportsfoundation.org/wp-content/uploads/2016/11/issues-related-to-pregnancy-and-athletic-participation-the-foundation-position.pdf [https://perma.cc/59ZJ-SAQ7] (last visited June 4, 2020) (arguing decision to continue athletic participation should be between athlete and physician); *see, e.g., Gruenke*, 225 F.3d at 297 (noting medical official told defendant in this case that plaintiff could continue exercising during her pregnancy).

27. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649-50 (1995) (addressing mandated and randomized drug tests for both male and female student-athletes who were assumed to contribute to rampant drug culture at school). *See generally* Lewis, *supra* note 15, at 162-64 (discussing facts and rationale of *Vernonia*).

28. For further discussion on caselaw trend regarding mandatory student pregnancy tests and how to emphasize that trend in future cases, see *infra* notes 224-251 and accompanying text.

29. For further discussion on circumstances under which courts should find that mandated pregnancy test of student is necessary, see *infra* notes 239-241 and

The Fourth Amendment of the United States Constitution protects Americans from unreasonable searches and seizures by the government.[30] Generally, a search is an invasion of property for the purpose of obtaining information.[31] A search without a warrant is presumptively unreasonable, but the search can still be reasonable if (1) the person subjected to the search has a subjective expectation of privacy, and (2) society is prepared to accept that expectation as reasonable.[32] Otherwise, the search is unreasonable and, thus, unconstitutional.[33] Looking at forced pregnancy tests through a Fourth Amendment lens shifts the conversation to truly understanding whether a pregnancy test is unconstitutional.[34] Consequently, courts can send a stricter message to schools that forcing pregnancy tests has indelible and dangerous constitutional implications.[35]

This Comment explores the intricacies of Fourth Amendment jurisprudence and its relation to forced pregnancy tests in athletics.[36] While the caselaw undoubtedly recognizes that pregnancy tests are a search, the rationale of the caselaw does not adequately emphasize the privacy interests at stake, thus failing to deter schools

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accompanying text. *See, e.g., Gruenke*, 225 F.3d at 301 ("This is not to say that a student, athlete or not, cannot be required to take a pregnancy test. There may be unusual instances where a school nurse or another appropriate school official has legitimate concerns about the health of the student or her unborn child.").

30. *See* U.S. CONST. amend. IV ("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.").

31. *See* United States v. Jones, 565 U.S. 400, 404-05 (2012) ("It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").

32. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (bifurcating issue to find that majority's analysis requires two-step process).

33. *See id.* at 359 (majority opinion) (finding listening to conversation in telephone booth is unreasonable and unconstitutional search).

34. *See, e.g.,* Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269-70 (9th Cir. 1998) (finding undoubtedly pregnancy tests are searches that have Fourth Amendment implications); Ascolese v. Se. Pa. Transp. Auth., 925 F. Supp. 351, 354-64 (E.D. Pa. 1996) (balancing interests of government in forced pregnancy testing against privacy interests of tested employee in Fourth Amendment analysis).

35. For further discussion on how to eliminate forced pregnancy tests by enforcing the Constitution, see *infra* notes 224-292 and accompanying text.

36. For further discussion on the connections between Fourth Amendment and forced pregnancy tests, see *infra* notes 246-251 and accompanying text.

and employers from implementing forced tests.[37] Part Two provides a brief background on the evolution of legal protection in the movement for gender equality.[38] A brief overview of the female athlete's struggle to be paid or treated equally to their male counterparts provides a foundation that highlights the necessity of finding that forced pregnancy tests are inherently unconstitutional and discriminatory.[39] Part Three includes an in-depth analysis of cases dealing with Fourth Amendment searches, particularly pregnancy tests, in both athletic and non-athletic contexts.[40] Analyzing both the athletic and non-athletic jurisprudence forces the conclusion that interests in maintaining privacy before, during, and after a pregnancy are extremely high, regardless of whether the test is given to an athlete, student, or employee.[41] Finally, Part Four discusses the negative emotional and social implications of forcing young females to submit to pregnancy tests.[42] Courts must acknowledge the negative social and psychological impacts of allowing forced pregnancy policies to fully grasp the associated privacy violation.[43]

Overall, this Comment emphasizes how looking at the pregnancy tests through a Fourth Amendment lens not only highlights gender disparities in sports, but also implicates traditional privacy values.[44] With gender equality at the forefront of the news cycle, now is the most opportune time to correct all systemic and intentional gender inequalities, in all aspects.[45] If courts continuously

37. *See* Lewis, *supra* note 15, at 168-69 (critiquing Third Circuit in *Gruenke* for putting too little emphasis on privacy interests at stake for young athlete being forced to take pregnancy test).

38. For further discussion on strides taken for equality in the past century alone, see *infra* notes 80-118 and accompanying text.

39. For further discussion on the importance of finding that pregnancy information has too high of privacy interest to be intruded upon by government, see *infra* notes 252-292 and accompanying text.

40. For further discussion on caselaw and scholarship surrounding pregnancy tests and the Fourth Amendment, see *infra* notes 170-245 and accompanying text.

41. For further discussion on jurisprudence regarding athletic and non-athletic forced pregnancy tests, see *infra* notes 197-245 and accompanying text.

42. For further discussion on the dangers of invading into such private information, see *infra* notes 252-302 and accompanying text.

43. For further discussion on the societal impacts of forced pregnancy tests, see *infra* notes 252-302 and accompanying text.

44. For further discussion on main tenets of this Comment, see *infra* notes 128-187 and accompanying text.

45. *See* Associated Press, *U.N. Chief: Gender Inequality Biggest Human Rights Challenge*, POLITICO (Mar. 8, 2020), https://www.politico.com/news/2020/03/08/un-chief-gender-inequality-biggest-human-rights-challenge-123536 [https://perma.cc/2L4B-E66M] (demonstrating necessity for tangible and immediate change in gender disparities).

choose not to protect young females' privacy rights, women will automatically be at a disadvantage when compared to men, both in school and in the workplace.[46] The courts can no longer acceptably bypass these obvious disadvantages.[47] Therefore, this Comment argues forced pregnancy tests should not be allowed in athletics because allowing otherwise would contravene the Constitution and unfairly disadvantage young females.[48]

II. EVOLUTION OF EQUALITY IN SPORTS

This section discusses the evolution of legal prohibitions on gender discrimination.[49] Unfortunately, despite the wide array of laws that have been implemented in the past century, female athletes continue to struggle to find true equality.[50] By comparing the legal progressions with the continued struggle of female athletes, the gaps between expected protection and actual implementation become stark.[51] Therefore, this context is essential for understanding future steps that must be taken to protect female athletes.[52] Namely, this section touches on the female athlete's struggle for pay equality and for the termination of discrimination because of pregnancy or the ability to become pregnant.[53]

A. Yes, Gender Discrimination Still Exists

Female athletes have experienced and continue to experience unfortunate and consistent disadvantages in athletics, especially when compared to their male counterparts.[54] Namely, female ath-

46. *See* Kempner, *supra* note 19 (explaining that forced pregnancy tests put girls at disadvantage because they are being punished for behavior that men and boys also engage in).

47. For further discussion on negative impact of forced pregnancy tests, see *infra* notes 252-292 and accompanying text. *See* Kempner, *supra* note 19 (detailing all disadvantages that girls face when they are forced to take pregnancy tests).

48. For further discussion on the intricacies of argument presented in this Comment, see *infra* notes 128-187 and accompanying text.

49. For further discussion on the legal development of anti-discrimination law, see *infra* note 80-118 and accompanying text.

50. For further discussion on modern equality struggles, see *infra* note 93-118 and accompanying text.

51. For further discussion on the differences between legal progression and practical implementation, see *infra* notes 54-118 and accompanying text.

52. For further discussion on how to better equality between female and male athletes, see *infra* notes 252-302 and accompanying text.

53. For further discussion on struggle for pay equality and ending pregnancy discrimination, see *infra* notes 54-118 and accompanying text.

54. *See* Sarah Mervosh & Christina Caron, *8 Times Women in Sports Fought for Equality*, N. Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/sports/women-sports-equality.html [https://perma.cc/VF96-RFVL] (demonstrat-

letes, despite their success, are consistently paid less than less-successful male athletes.[55] For example, in a recent WNBA season, the average salary was $117,500, compared to the $6.4 million average salary in the NBA.[56] Additionally, female soccer players on the United States Women's National Team are paid approximately a third of the salary paid to male soccer players on the United States Men's National Team.[57] Despite the historical mistreatment in athletics, the evolution of gender equality in general provides female athletes with the foundations to argue for better treatment.[58] More and more, the sports realm sees female athletes come forward to fight equality on a legal basis.[59]

Most notably, the passage of the Equal Pay Act in 1963 contributed the modern women's rights movement.[60] The Equal Pay Act prohibits wages to employees at a lower rate than other employees "of the opposite sex in such establishment for equal work on jobs

ing decades-long fight for athletic equality by detailing male attempts to physically eject woman from Boston Marathon in 1967).

55. *See* Olivia Abrams, *Why Female Athletes Earn Less than Men across Most Sports*, FORBES (June 23, 2019), https://www.forbes.com/sites/oliviaabrams/2019/06/23/why-female-athletes-earn-less-than-men-across-most-sports/#4bc8ac8040fb [https://perma.cc/FV2T-BBNT] (identifying only sport that does not have such evident pay gap between men and women is tennis).

56. *See id.* (noting National Pro Fastpitch softball league has salary cap of $175,000 while Boston Red Sox allotted $227 million alone to players' salaries); Tom Huddleston Jr., *These are the Highest Paid Players in the NBA Right Now*, CNBC (Oct. 22, 2019), https://www.cnbc.com/2019/10/22/highest-paid-players-in-the-nba-right-now.html [https://perma.cc/W6TA-C3CH] (noting current season of NBA would increase average player salary to $7.7 million).

57. *See* Graham Hays, *USWNT Lawsuit: What We Know and What it Means Going Forward*, ESPN (Mar. 8, 2019), https://www.espn.com/espnw/sports/story/_/id/26196105/uswnt-files-lawsuit-us-soccer-federation-means-women-world-cup [https://perma.cc/E2V7-QTLW] (demonstrating gross disparity between male and female pay in United States soccer). For further discussion on the United States Women's National Team and their struggle for pay equality, see *infra* notes 63-79 and accompanying text.

58. *See generally* Sarah Kanoy, Comment, *Pregnancy Clauses in Female Athletic Contracts: Discriminatory, or Just the Industry Standard?*, 85 UMKC L. REV. 1033, 1034-38 (2017) (setting foundation to demonstrate parallel between evolving gender equality standards in general and evolving equality standards in sports).

59. *See, e.g.*, Rachel Bachman, *In 2019, Women Insisted that Sports Pay Up*, WALL STREET J. (Dec. 27, 2019), https://www.wsj.com/articles/in-2019-women-insisted-that-sports-pay-up-11577448001 [https://perma.cc/GE4C-JBUJ] (noting in 2019 alone, at least three major athletic entities, including United States Women's National Team and Simone Biles, have demanded more equality in sports).

60. *See* Kanoy, *supra* note 58, at 1035 (stating another monumental moment for women's rights movement in 1960s came when Food and Drug Administration approved use of birth control pills). *See generally* 29 U.S.C. § 206 (2016) (prohibiting pay differences on basis of gender); *The Equal Pay Act of 1963*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/statutes/epa.cfm [https://perma.cc/7S7B-TTHU] (last visited Jan. 25, 2020) (providing relevant and pertinent excerpts of Equal Pay Act).

the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[61] In short, an employer may not use gender as a basis for paying an employee of one gender less than an employee of a another gender, even though those employees have substantially similar occupations.[62]

Today, the Equal Pay Act remains a focus of athletic litigation, especially in the United States Women's National Team's (USWNT) suit against the United States Soccer Federation (U.S. Soccer) for equal pay.[63] Currently, female players, despite their great success, are paid $4,950 per game ($99,000 per year), whereas male players are paid $13,166 per game ($263,320 per year).[64] The women argue a violation of the Equal Pay Act, which prohibits disparity in pay for people of different genders performing substantially similar jobs.[65] While their employer argues that the teams had different collective bargaining agreements, the suit itself exemplifies the recent megaphone that the Equal Pay Act can give to women.[66]

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61. 29 U.S.C. § 206(d)(1) (listing exceptions to discrimination as seniority system; merit system; system based on quality or quantity of production; or pay difference based on any factor other than sex).

62. *See Facts about Equal Pay and Compensation Discrimination*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-epa.cfm [https://perma.cc/35CF-VZQ7] (last visited Feb. 13, 2020) (describing five factors considered in deciding if two jobs are substantially similar as skill, effort, responsibility, working conditions, and establishment). *See generally* 29 U.S.C. § 206(d)(1) (codifying federal prohibition on wage differences because of gender discrimination).

63. *See* Morgan v. U.S. Soccer Fed'n, No. 2:19-cv-01717-RGK-AGR, 2019 WL 7166978, at *1 (C.D. Cal. Nov. 8, 2019) (alleging violations of Equal Pay Act); *see also* Hays, *supra* note 57 (stating complaint came after long history of women's team demanding equal pay, compensation, and treatment). *But see* Associated Press, *U.S. Soccer Formally Denies Claims of Gender Discrimination in Response to USWNT*, SPORTS ILLUSTRATED (May 7, 2019), https://www.si.com/soccer/2019/05/07/us-soccer-uswnt-lawsuit-gender-discrimination-equal-pay-response [https://perma.cc/8M7A-MZ3Z] (listing U.S. Soccer's defense arguments that they were acting in accordance with differences in two collective bargaining agreements and that differences in salary are due to differences in viewership and revenue).

64. *See* Hays, *supra* note 57 (contrasting relatively low pay with team's vast success, including three World Cup titles, four gold medals, enthusiastic popular American support, and number one rank in world for ten of past eleven years); *see also* Abrams, *supra* note 55 (noting complaint also included counts of discrimination relating to where and how often women play, how they train, and medical and coaching treatment they receive).

65. *See* 29 U.S.C. § 206(d)(1) (prohibiting pay disparities unless those disparities arise in very specific circumstances); *Morgan*, No. 2:19-CV-01717 at *1 (alleging employer paid women's team significantly less than men's team, but for similar jobs).

66. *See* Associated Press, *U.S. Soccer Formally Denies Claims of Gender Discrimination in Response to USWNT*, *supra* note 63 (detailing employer's allegations were that

Recently, however, Judge R. Gary Klausner of the United States District Court for the Central District of California ruled that no triable issue of fact regarding pay disparity existed in the USWNT case.[67] Even though the women on the team claimed they received less money, Judge Klausner ruled with U.S. Soccer to find that women, in fact, made more per game and in total than men.[68] According to U.S. Soccer and the court, from 2015 to 2019, the women's national team averaged $220,747 per game (in total), for a total payment of $24.5 million for the season.[69] On the other hand, the men's national team averaged $212,639 per game (in total), for a total payment of $18.5 million.[70] However, Judge Klausner noted that if the women had shown that their total compensation was larger solely, or in material part, because the women's team works more than the men's team, he may have ruled on a triable issue of fact.[71] Consequently, Judge Klausner ruled that the reason for the alleged pay discrepancy is the collective bargaining agreement that the women knowingly signed, not gender discrimination.[72] USWNT plans to appeal the decision.[73]

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they treat female team differently for legitimate business reasons and not for any discriminatory purpose).

67. *See* Graham Hays, *Judge Sides with U.S. Soccer in the USWNT's Equal Pay Lawsuit*, ESPN (May 1, 2020), https://www.espn.com/espnw/sports/story/_/id/29125363/judge-sides-us-soccer-uswnt-equal-pay-lawsuit [https://perma.cc/7WHJ-P9MP] (explaining Judge Klausner originally sided with women's team when they certified as class action, but found law did not support their claim in long run).

68. *See id.* (adding players at issue failed to bring forth evidence that proved any differently); *see also Morgan*, No. 2:19-cv-01717 at *11-*13 (highlighting how while women's team gets paid less in particular bonus category, women get more bonuses in general, offsetting that particular disparity).

69. *See* Hays, *supra* note 67 (noting these figures do not include compensation female players receive from U.S. Soccer for playing in National Women's Soccer League).

70. *See id.* (noting these numbers are cited as undisputed facts in Judge Klausner's opinion).

71. *See* Morgan v. United States Soccer Fed'n., 445 F. Supp. 3d 635, 654 (C.D. Cal. 2020) ("Based on this evidence [salary numbers], it appears that the WNT did not make more money than the MNT [Men's National Team] solely because they played more games. Rather, the WNT [Women's National Team] both played more games and made more money than the MNT per game."); *see also* Hays, *supra* note 67 (noting how holding stated plaintiffs failed to show that discrimination could have contributed to pay disparity).

72. *See Morgan*, 445 F. Supp. 3d at 654 ("Accordingly, Plaintiffs cannot now retroactively deem their CBA worse than the MNT CBA by reference to what they *would have made* had they been paid under the MNT's pay-to-play structure when they themselves rejected such a structure.") (emphasis in original); *see also* Hays, *supra* note 67 (explaining opinion went through detailed explanation of negotiations that led to players' current collective bargaining agreement).

73. *See USWNT Lawsuit versus U.S. Soccer Explained: Defining the Pay Gaps, What's at Stake for Both Sides*, ESPN (Jun. 3, 2020), https://www.espn.com/football/united-states-usaw/story/4071258/uswnt-lawsuit-versus-us-soccer-explained-defining-the-

Despite the negative outcome, many players vowed to keep fighting for equality.[74] Primarily, Megan Rapinoe argues that while the male and female contracts are different, the two sides were never offered the same money:

> The men's contract was never offered to us. And certainly not the same amount of money. So to say that we negotiated for a contract and that's what we agreed to, I think so many women can understand what this feeling is going to a negotiation, knowing equal pay is not on the table. Knowing anywhere close to your male counterparts is not on the table.[75]

Rapinoe is not the only USWNT player avidly speaking out against the court's decision.[76] Namely, Alex Morgan tweeted "Although disappointing to hear this news, this will not discourage us in our fight for equality."[77] Additionally, Becky Sauerbrunn tweeted: "If you know this team at all you know we have a lot of fight left in us. We knew this wasn't going to be easy, change never

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pay-gapswhats-at-stake-for-both-sides [https://perma.cc/47PB-YMGZ] (adding that players are starting process to seek permission to appeal court's decision).

74. *See* Cassandra Negley, *Megan Rapinoe, Alex Morgan Call Equal Pay Ruling "Shocking":"We Really Do Believe in this Case"*, YAHOO SPORTS (May 4, 2020), https://sports.yahoo.com/megan-rapinoe-alex-morgan-call-equal-pay-ruling-shocking-we-really-do-believe-in-this-case-140407943.html?guccounter=1&guce_referrer=AHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAK4G7mFWm-GRYBzo75mMsiYrCnKfySoqG3Vlb4nh1oNkADogeDPg7YDKzQ1LQFrlrf_wXF20v8JCtMFCN20jssQCwQU9sLD2tR8y4GYuZLC-xEd6c8Tr9TFaqnCcmbc5GsrA67Z8qXlLCDlFcjECy5xWv3iKHgYiMSrXEwVTlvF- [https://perma.cc/Q8HZ-Z4HQ] (adding Rapinoe emphasized that issue is rate of pay, not total compensation).

75. *See id.* (stating judge in case incorrectly concluded that women's team only wanted to go to men's contract because they regretted their own collective bargaining agreement).

76. *See* Jason Owens, *Megan Rapinoe, USWNT Vow to Move Forward after Losing Equal Pay Ruling: "We Will Never Stop Fighting"*, YAHOO SPORTS (May 1, 2020), https://sports.yahoo.com/megan-rapinoe-on-judges-ruling-against-uswnt-on-equal-pay-we-will-never-stop-fighting-005317673.html [https://perma.cc/CR22-DRPP] (listing several players who spoke out against court's ruling).

77. Alex Morgan (@alexmorgan13), TWITTER (May 1, 2020, 11:35 PM), https://twitter.com/alexmorgan13/status/1256427039302848512?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1256427039302848512&ref_url=https%3A%2F%2Fsports.yahoo.com%2Fmegan-rapinoe-on-judges-ruling-against-uswnt-on-equal-pay-we-will-never-stop-fighting-005317673.html [https://perma.cc/PL4U-L97X] (reposting her team representative's statement about disappointment of court ruling).

is."[78] Clearly, the U.S. Women's National Team has no intention of idly accepting Judge Klausner's ruling.[79]

B. Yes, Laws Exist to Prevent Gender Discrimination

In addition to the Equal Pay Act, Congress has enacted two other laws essential to the equal treatment of female athletes.[80] In 1964, Congress passed the Civil Rights Act, including Title VII, which prohibits an employer to commit an adverse action against an employee "because of such individual's race, color, religion, sex, or national origin . . . ."[81] Additionally, in 1972, Congress passed the Education Amendments, which clarify the Civil Rights Act.[82] Title IX prohibits public educational institutions from limiting stu-

78. Becky Sauerbrunn (@beckysauerbrunn), TWITTER (May 1, 2020), https://twitter.com/beckysauerbrunn/status/1256371988999766017?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1256371988999766017&ref_url=https%3A%2F%2Fsports.yahoo.com%2Fmegan-rapinoe-on-judges-ruling-against-uswnt-on-equal-pay-we-will-never-stop-fighting-005317673.html [https://perma.cc/7VBS-FCGS] (demonstrating women's team resolve in solving gender disparity issues).

79. *See, e.g.*, Ali Krieger (@alikrieger), TWITTER (May 1, 2020), https://twitter.com/alikrieger/status/1256382566027927553?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1256382566027927553&ref_url=https%3A%2F%2Fsports.yahoo.com%2Fmegan-rapinoe-on-judges-ruling-against-uswnt-on-equal-pay-we-will-never-stop-fighting-005317673.html [https://perma.cc/SUS8-KRZQ] ("We will continue to fight like hell and get what we deserve."); Christen Press (@ChristenPress), TWITTER (May 1, 2020), https://twitter.com/ChristenPress/status/1256370741483720704?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1256370741483720704&ref_url=https%3A%2F%2Fsports.yahoo.com%2Fmegan-rapinoe-on-judges-ruling-against-uswnt-on-equal-pay-we-will-never-stop-fighting-005317673.html [W8W-UQVG] ("We will continue on in the fight for equal pay."); Megan Rapinoe (@mPinoe), TWITTER (May 1, 2020), https://twitter.com/mPinoe/status/1256373201283809281?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1256373201283809281&ref_url=https%3A%2F%2Fsports.yahoo.com%2Fmegan-rapinoe-on-judges-ruling-against-uswnt-on-equal-pay-we-will-never-stop-fighting-005317673.html ("We will never stop fighting for EQUALITY.") (emphasis in original); Tobin Heath (@TobinHeath), TWITTER (May 1, 2020), https://twitter.com/TobinHeath/status/1256371739799416832?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1256371739799416832&ref_url=https%3A%2F%2Fsports.yahoo.com%2Fmegan-rapinoe-on-judges-ruling-against-uswnt-on-equal-pay-we-will-never-stop-fighting-005317673.html ("This team never gives up and we're not going to start now.").

80. *See* 42 U.S.C. § 2000e-2(a)(1) (1991) (noting prohibitions on gender discrimination in workplace); 20 U.S.C. § 1681(a) (1986) (setting guidelines for prohibition on gender discrimination within federally funded institutions).

81. 20 U.S.C. § 1981(a) (prohibiting employer from depriving employee of employment opportunities because of race, color, religion, sex, or national origin); *see* Kanoy, *supra* note 58, at 1035-36 (noting Congress added Title IX to education legislation to expand Title VII's workplace gender protections to students in schools receiving federal funding).

82. *See Overview of Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681 et. seq.*, U.S. DEP'T OF JUSTICE (Aug. 7, 2015), https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq [https://

dents' participation, based on sex, in federally funded activities.[83] The regulations state that equal opportunity is defined by several factors, including accommodating both sexes, the provision of equipment, the assignment and compensation of coaches and tutors, and the provision of medical and housing services.[84] Even though Title IX has a broad scope, the statute is often applied in an athletic context.[85]

For example, in 2018, two female athletes sued Eastern Michigan University for cutting the female softball and tennis teams that same year.[86] In 2016 to 2017, Eastern Michigan reported that while sixty percent of enrolled undergraduate students are women, they comprise only forty-five percent of athletic program participation.[87] In the original suit, Judge George Caram Steeh of the United States District Court for the Eastern District of Michigan concluded that the plaintiffs could likely succeed on the merits of their claim that Eastern Michigan University's funding for athletics was substantially disproportionate.[88] Ultimately, after a denied appeal, Judge Steeh

perma.cc/B87E-B5XK] (explaining fundamental purpose of Title IX is to prevent discrimination based on sex by federally funded institutions).

83. *See* 20 U.S.C. § 1681(a) (listing exceptions to rule, such as religious institutions with contrary tenets and sororities and fraternities that are exempt from taxation).

84. *See* 34 C.F.R. § 106.41(c) (West 2020) (including other factors, such as: "scheduling of games and practice time; travel and per diem allowance, opportunities to receive coaching and academic tutoring; the provision of locker rooms, practice, and competitive facilities; and publicity."); *see also* Mayerova v. E. Mich. Univ., 346 F. Supp. 3d 983, 988 (E.D. Mich. 2018) (setting foundation for following legal analysis on whether Title IX violation existed).

85. *See Equal Access to Education: Forty Years of Title IX*, UNITED STATES DEP'T OF JUSTICE 1, 10 (2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [https://perma.cc/L586-QDZ7] (listing various cases in early 2000s that upheld educational institutions' Title IX obligations to provide equal numbers of women's and men's sports teams); *see, e.g.*, Cmtys. for Equity v. Mich. High School Athletic Ass'n, 459 F.3d 676 (6th Cir. 2006) (ordering institutional compliance to change female sports schedule to their advantage instead of scheduling their sports at time that was disadvantageous to their potential for national ranking).

86. *See Mayerova*, 346 F. Supp. 3d at 986 (explaining school eliminated men's wrestling team, men's swimming and diving team, women's tennis team, and women's softball team); *see also Eastern Michigan Pays $125,000 to Settle Title IX Lawsuit*, ASS'D PRESS (Jan. 22, 2020), https://apnews.com/939aff803930dcfd9a4de3941666fc37 [https://perma.cc/3YTJ-ZW43] (stating tennis team will be reinstated while softball team will not exist for foreseeable future).

87. *See Eastern Michigan Pays $125,000 to Settle Title IX Lawsuit*, *supra* note 86 (demonstrating discrepancy in numbers between male and female athletic participation).

88. *See Mayerova*, 346 F. Supp. 3d at 997 (noting defendants did not meet their burden to show they complied with Title IX requirements).

approved a settlement agreement for $125,000 in total.[89] Further, the school has since hired a Title IX consultant, Anika Awai Williams.[90] The school also agreed to appoint a third party monitor to ensure that Title IX requirements are met.[91] Without Title IX, plaintiffs like those in the Eastern Michigan University case would have no legal remedy.[92]

C. Yes, Pregnant Women Get Little Benefits

Additionally, and most importantly to this Comment, in 1978, Congress passed the Pregnancy Discrimination Act (PDA), which amended Title VII to prohibit employers from discriminating against women who are, have been, or may be pregnant.[93] The PDA provides, in pertinent part:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . .[94]

Simply put, a pregnant employee may not be treated differently, in any sense of employment, than any other employee with a sickness or disability.[95] Similarly, the Family Medical Leave Act

89. *See* Consent Decree, Mayerova v. E. Mich. Univ. (No. 18-CV-11909-GCS-RSW, E.D. Mich., Jan. 21, 2020), available at https://www.michiganradio.org/sites/michigan/files/202001/show_temp__2_.pdf [https://perma.cc/7ET9-PNZ8] (adding also that the university defendants will be paying attorneys' fees for plaintiffs); *see also Eastern Michigan Pays $125,000 to Settle Title IX Lawsuit*, *supra* note 86 (noting $100,000 of settlement went to softball player while $25,000 of settlement went to tennis player).

90. *See Title IX*, E. MICH. UNIV., https://www.emich.edu/title-nine/ [https://perma.cc/4W8X-LDTP] (last visited Sept. 19, 2020) (outlining Title IX policies at school).

91. *See* Consent Decree, *Mayerova* (appointing "referee" to ensure compliance with conditions of consent decree); *see also Eastern Michigan Pays $125,000 to Settle Title IX Lawsuit*, *supra* note 86 (highlighting school will put $2 million towards women's sports over next three years).

92. *See generally Equal Access to Education: Forty Years of Title IX*, *supra* note 85, at 9-10 (listing many important cases where athletes used Title IX to seek relief).

93. *See* 42 U.S.C. § 2000e(k) (1991) (defining officially that pregnancy is considered sex-linked classification for Title VII liability purposes). *See generally* Kanoy, *supra* note 58, at 1036 (analyzing that because pregnancy is capability unique to females, Congress implemented Pregnancy Discrimination Act to ensure that women would not be discriminated against because of this capability).

94. 42 U.S.C. § 2000e(k) (creating non-exhaustive list of characteristics of pregnancy that are prohibited bases for adverse employment decisions).

95. *See Pregnancy Discrimination*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-preg.cfm [https://perma.cc/2KK4-5U9N]

(FMLA) provides eligible employees with the opportunity to take job-protected leave for family and medical reasons, including pregnancy.[96] Accordingly, employers must hold open a job for a pregnancy-related absence for the same amount of time that jobs are held open for other employees who have been on leave due to sickness or disability.[97]

Unfortunately, despite the laws created in advancement of gender equality and equality for pregnant women, several issues still remain regarding how employees who may become pregnant, are pregnant, or have been pregnant are treated when compared to their male colleagues.[98] Not only are women treated differently because they could be pregnant, but they are forced to engage in employment activities that are not safe for their pregnancies.[99] For example, in 2018, a Verizon warehouse employer knew of an employee's pregnancy, yet forced her to continue lifting heavy

(last visited Jan. 25, 2020) (stating that health insurance for pregnancy conditions must be covered in same manner as other conditions).

96. *See* 29 U.S.C. § 2612(a)(1) (2009) (detailing specific requirements of leave and employment that constitute eligible employee); *see also Fact Sheet #28A: Employee Protections under the Family Medical Leave Act*, U.S. DEP'T OF LABOR 1, 1, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28a.pdf [https://perma.cc/CGB5-HKV3] (last visited Jan. 24, 2020) (explaining employee on leave is not entitled to exact job they left behind, but equivalent job).

97. *See* 29 U.S.C. § 2614(a) (2008) ("[A]ny eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."); *see also Pregnancy Discrimination*, *supra* note 95 (noting employer may not subject pregnant women to different insurance or medical procedures than other employees).

98. *See* Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html [https://perma.cc/KDM4-UH58] ("Pregnancy discrimination is widespread in corporate America. Some employers deny expecting mothers promotions or pay raises; others fire them before they can take maternity leave. But for women who work in physically demanding jobs, pregnancy discrimination often can come with even higher stakes."); *see also* Liz Elting, *Why Pregnancy Discrimination Still Matters*, FORBES MAGAZINE (Oct. 30, 2018), https://www.forbes.com/sites/lizelting/2018/10/30/why-pregnancy-discrimination-still-matters/#3a807c7563c1 [https://perma.cc/BGQ9-7ZJ2] (discussing sad reality that since passage of PDA, pregnancy discrimination is only more subtle).

99. *See* Silver-Greenberg & Kitroeff, *supra* note 98 (detailing story that Verizon forced their pregnant workers to hoist heavy boxes all day until one employee eventually lost her baby).

boxes.[100] Consequently, the employee tragically and graphically lost her baby due to the forced physical exercise.[101]

More specifically, athletics, both professional and amateur, have struggled to treat female athletes fairly with respect to potential or existing pregnancies.[102] For example, Nike recently denounced their own pregnancy policy when track and field Olympians Alysia Montaño, Kara Goucher, and Allyson Felix revealed that Nike did not guarantee employee protection for pregnant athletes or new mothers.[103] Originally, Nike would reduce

100. *See id.* (stating multiple other women suffered from miscarriages); *see also* Natalie Kitroeff, *Senators Ask Verizon and XPO about Pregnancy Discrimination*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/business/xpo-verizon-pregnancy-discrimination-miscarriages.html [https://perma.cc/SAA6-GFK9] (discussing nine senators who demanded explanation for several women who experienced miscarriage at workplace).

101. *See* Silver-Greenberg & Kitroeff, *supra* note 98 (noting this tragic story is small part of large issue of pregnancy discrimination); *see also* Kitroeff, *supra* note 100 (explaining XPO and Verizon claimed causes of miscarriages were unsubstantiated and were not related to warehouse operations). Further, unlike the female athletes discussed earlier, who made an informed decision to continue exercising, Verizon and XPO blatantly ignored their employees' doctors' notes imploring for shorter and less strenuous shifts. *See generally* Maggie Mertens, *Maternity Leave—Not Higher Pay—Is the WNBA's Real Win*, THE ATLANTIC (Feb. 1, 2020), https://www.theatlantic.com/culture/archive/2020/02/why-wnbas-new-maternity-leave-policy-revolutionary/605944/ [https://perma.cc/ZQB9-9NB6] (noting some physiological effects of being pregnant could have positive impact on athletic performance). *Compare* New York Times, *What Nike Told Me When I Wanted to Have a Baby*, YOUTUBE (May 13, 2019), https://www.youtube.com/watch?v=vyvhKDHsWRE [https://perma.cc/JY49-GYBJ] (noting health benefits, both for baby and mother, of exercising through pregnancy), *with* Silver-Greenberg & Kitroeff, *supra* note 98 (describing how employers blatantly ignored doctors' notes demanding less taxing tasks at work).

102. *See, e.g.*, Jenna West, *Athletes Speak out against Nike's Lack of Maternity Leave Protection, Other Companies Make Change*, SPORTS ILLUSTRATED (May 24, 2019), https://www.si.com/olympics/2019/05/24/nike-maternity-protection-sponsorships-contract-allyson-felix-alysia-montano [https://perma.cc/7L2T-Y4K6] (discussing Nike's unattainable standards regarding pregnant athletes, including utter lack of paid maternity leave). *See generally Issues Related to Pregnancy & Athletic Participation*, *supra* note 26 (addressing questions related to pregnancy discrimination in athletics, such as, "Should a coach or an athletic trainer prohibit a pregnant female athlete from competing out of concern for her safety?").

103. *See* Chris Chavez, *Nike Removes Contract Reductions for Pregnant Athletes after Backlash*, SPORTS ILLUSTRATED (Aug. 16, 2019), https://www.si.com/olympics/2019/08/16/nike-contract-reduction-pregnancy-protection-athlete-maternity-leave [https://perma.cc/LNP4-Z54J] (discussing Felix left her relationship with Nike to work for Athleta, company that guaranteed compensation during pregnancy and pregnancy recovery); *see also* Jenna West, *Allyson Felix: Nike Contract Talks at 'Standstill' after Request for Maternity Protections*, SPORTS ILLUSTRATED (May 22, 2019), https://www.si.com/olympics/2019/05/22/allyson-felix-nike-contract-maternity-protection [https://perma.cc/EH72-GSCR] ("Last year we [Nike] standardized our approach across all sports to support our female athlete during pregnancy, but we recognize we can go even further. . . . [M]oving forward, our contracts for female athletes will include written terms that reinforce our policy."); West, *supra*

pay—seventy percent less, in Felix's case—or even completely stop pay because female athletes could not perform to Nike's standards during their pregnancies.[104] Nike's stance only perpetuated the notion that a female athlete cannot be both a mother and a competitive athlete.[105] Montaño, an Olympic track athlete, released an opinion piece with *The New York Times*, exposing Nike for failure to balance a woman's role as pregnant, a professional athlete, and an engaged mother.[106] When Montaño told Nike that she was pregnant, they told her that they would simply pause her contract and stop paying her as long as she could not compete due to pregnancy.[107] This is especially problematic for track and field athletes whose careers depend on athletic sponsorships.[108] Montaño

note 102 (adding disclosure of this information violated arguably problematic nondisclosure agreement).

104. *See* Cassandra Brumback, *'Just Do It': Allyson Felix, Nike, and the Path towards Ending Pregnancy Discrimination in Professional Athletic Contracts*, UNIV. OF BALT. L. REV.: BLOG (Oct. 18, 2019), https://ubaltlawreview.com/2019/10/18/just-do-it-allyson-felix-nike-and-the-path-towards-ending-pregnancy-discrimination-in-professional-athletic-contracts/ [https://perma.cc/SP5S-DHR8] (adding that Nike's offer to pay Felix 70% less of her current salary caused her to leave company and join sponsorship with Athleta); *see also* New York Times, *supra* note 101 (highlighting Nike's contracts contained clause stating Nike reserved right to eliminate pay at any time if athlete did not meet certain performance threshold, with no exceptions for childbirth, nursing, or pregnancy); Nick Turner & Eben Novy-Williams, *Nike to Limit Pay Cuts for Women Athletes who have Children*, BLOOMBERG (May 24, 2019), https://www.bloomberg.com/news/articles/2019-05-24/nike-to-limit-pay-cuts-for-women-athletes-who-have-children [https://perma.cc/JH4F-WFGD] (noting another Olympic athlete, Phoebe Wright, said getting pregnant while working for Nike was "kiss of death."). *See generally* Suzanne Wrack, *Alex Morgan Shows Pregnancy Does Not End a Playing Career*, GUARDIAN (Feb. 10, 2020), https://www.theguardian.com/football/2020/feb/10/alex-morgan-pregnancy-usa-womens-football [https://perma.cc/A9XC-PHKL] (listing other pregnant athletes who performed through their pregnancies, like Ingrid Kristiansen, who won Houston Marathon while pregnant and Paula Radcliffe, who won New York marathon nine months after giving birth); Alex Morgan (@alexmorgan13), TWITTER (Feb. 3, 2020, 7:05 PM), https://twitter.com/alexmorgan13/status/1224484038770999296?s=20%20training (tweeting video of Alex Morgan after scoring goal while seven months pregnant).

105. *See* Kanoy, *supra* note 58, at 1042 (stating how putting this idea into public eye promotes public misconception that professional female athletes must give up everything to attain their employment dreams).

106. *See* New York Times, *supra* note 101 ("The sports industry allows for men to have a full career. And when a woman decides to have a baby, it pushes them out at their prime."); *see also* West, *supra* note 102 (celebrating Montaño for bringing to light prominent issue that people should know and care about, but did not before Montaño used her voice).

107. *See* New York Times, *supra* note 101 (adding United States Olympic Committee will strip athletes of their health insurance if they do not stay "at the top of [their] game" during their pregnancy).

108. *See* West, *supra* note 102 (emphasizing Olympic track athletes' reliance on checks from sponsors like Nike and Asics); Mary Pilon, *Cash-Strapped Track and Field Athletes Still Fighting to Unionize*, VICE (July 15, 2016), https://www.vice.com/

promptly proved the doubters wrong by competing while seven to eight months pregnant and returning to peak form almost immediately after giving birth.[109] Her maternal skills did not suffer either; during the World Championships in Beijing, she shipped breastmilk off to the states.[110] More importantly, Montaño's story enlightened many on the issues surrounding athletes who are not associated with a team.[111] For Montaño, her moderate popularity, compounded with pregnancy discrimination, ultimately punished her for wanting to get pregnant, since she was not paid while she gave birth and recovered.[112]

The tide grew stronger when, about one month later, Felix bravely broke her own nondisclosure agreement and wrote an opinion editorial piece for *The New York Times*.[113] Despite her decorated athletic and Olympic history, Felix felt pressured to return to peak form shortly after she gave birth, even though she underwent an emergency and premature C-section due to dangerous pre-eclampsia.[114] With such an outcry, Congressional Representatives Jaime Herrera Beutler of Washington and Lucille Roybal-Allard of Cali-

en_us/article/yp8pwg/the-continuing-fight-of-track-and-field-athletes-to-unionize [https://perma.cc/MAY2-GCZN] (discussing lack of lucrative gain in track and field stems from no track and field union and from low amounts of television revenue in sport).

109. *See* West, *supra* note 102 (adding after Montaño threatened to leave Nike for Asics, Asics could not guarantee pay protection during Montaño's pregnancy either); *see also* New York Times, *supra* note 101 (coining Montaño's nickname as "pregnant runner").

110. *See* New York Times, *supra* note 101 (showing no indication of failing in either maternal respect or athletic respect of Montaño's life); *see, e.g.*, Wrack, *supra* note 104 ("The Morgan phenomenon - the celebrating of the pregnant athlete, is a new thing and it has taken global poster-woman such as Morgan, an eight-weeks pregnant Serena Williams revealing her pregnancy after winning the 2017 Australian Open and images of five-and-a-half-month pregnant Orlando Pride forward Sydney Leroux training, coupled with a much greater awareness of the benefits of exercise during pregnancy in society generally, to break the stigma."); *see also* West, *supra* note 107 (noting how Montaño, to meet demands of her contract, had to tape her abs together to compete).

111. *See* West, *supra* note 107 (epitomizing issue with statement by Phoebe Wright, Olympian, stating that she would never tell Nike if she was pregnant).

112. *See id.* (summarizing importance of Montaño stepping forward to bring light to unknown issues in track and field); *see also* New York Times, *supra* note 101 (outlining difficulties and barriers female athletes face when they want to become pregnant).

113. *See* Allyson Felix, *Allyson Felix: My Own Nike Pregnancy Story*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/opinion/allyson-felix-pregnancy-nike.html [https://perma.cc/8J2J-QSH5] ("I've always known that expressing myself could hurt my career. I've tried not to show emotion, to anticipate what people can expect from me and to do it. I don't like to let people down. But you can't change anything with silence.").

114. *See id.* (adding that she is one of most decorated athletes in history with six Olympic gold medals and eleven world championships).

fornia wrote a bipartisan letter to Mark Parker, chairman, president, and CEO of Nike, imploring him to hold himself and his company accountable.[115] Two months later, Nike eliminated the pay reduction policy to implement a new policy that would protect female athletes' pay for twelve months during the pregnancy experience.[116] The new contract states:

> If ATHLETE becomes pregnant, NIKE may not apply any performance-related reductions (if any) for a consecutive period of 18 [sic] months, beginning eight months prior to ATHLETE's due date. During such period NIKE may not apply any right of termination (if any) as a result of ATHLETE not competing due to pregnancy.[117]

Despite the ostensible progress on the contractual front, both professional and amateur athletes struggle to protect themselves from another discriminatory violation: the forced pregnancy test.[118]

III. "HOW CAN THIS CHANGE?": A FOURTH AMENDMENT ANALYSIS OF PREGNANCY TESTS

Since discrimination laws fail to adequately protect female athletes from employer intrusion, the Fourth Amendment's protection against unreasonable searches and seizures presents another reme-

115. *See* Letter from Rep. Jaime Herrera Beutler and Rep. Lucille Roybal-Allard, United States Congress, to Mark Parker, Chairman, President, CEO, Nike, Inc. (May 17, 2019), https://herrerabeutler.house.gov/uploadedfiles/05_17_19_letter_to_nike.pdf ("[W]e strongly urge you to hold Nike accountable to its own self-proclaimed principles of integrity and fair treatment of female athletes at every stage of their careers—from the time they are young girls to the time they choose to simultaneously bear the title of athlete and mother.").

116. *See* Turner & Novy-Williams, *supra* note 104 (noting Nike's executive administration is aiming to get these policies in writing for athletic contracts); *see also* Charlotte Carroll, *Nike to End Financial Penalties for Pregnant Athletes after Backlash on Contract Protections*, SPORTS ILLUSTRATED (May 25, 2019), https://www.si.com/olympics/2019/05/25/nike-end-financial-penalties-pregnant-athletes-contracts-maternity-protection [https://perma.cc/BSV6-CYUF] (noting that after changes were made, Nike issued statement that interactions with Olympic athletes were "humbling moment[s]").

117. Emmanuel Acho (@thEMANacho), TWITTER, (Aug. 16, 2019, 10:27 AM), https://twitter.com/thEMANacho/status/1162370385461043211 (adding "Wow. HUGE progress for female athletes, and quality in general! @Nike, officially eliminating wage deductions due to pregnancy (for track & field athletes). Effective immediately!"); *see also* Chavez, *supra* note 103 (noting Nike has yet to decide whether suspension based on not competing for certain period of time will still apply).

118. For further discussion on legal and social context surrounding forced pregnancy tests, see *infra* notes 188-245 and accompanying text.

dial avenue for women.[119] The Fourth Amendment of the United States Constitution states:

> 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 search, and the persons or things to be seized.[120]

Pregnancy tests are undoubtedly searches under the Fourth Amendment.[121] Consequently, courts must take it upon themselves to find forced pregnancy tests unreasonable searches and thus, unconstitutional.[122]

This section discusses the development of caselaw regarding forced pregnancy tests in the workplace and in school and how those tests are correctly or incorrectly analyzed under the Fourth Amendment.[123] First, this section discusses the applicability of constitutional privacy rights to the private employee.[124] Then, this section provides a background on Fourth Amendment jurisprudence, specifically regarding the caselaw analysis towards unreasonable searches.[125] Next, the section discusses a series of cases that have addressed forced pregnancy tests under the Fourth Amendment

119. *See generally What Does the Fourth Amendment Mean?*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0 [https://perma.cc/DD46-63PK] (last visited Sept. 21, 2020) (demonstrating environments impacted by Fourth Amendment's far-reaching jurisdictions).

120. U.S. CONST. amend. IV (emphasis added) (protecting American citizens from unnecessary government intrusion).

121. *See* Gruenke v. Seip, 225 F.3d 290, 300 (3d Cir. 2000) (agreeing with district court's finding that pregnancy test is clearly search); *see also* John T. Wolohan, *Testing Students Athletes for Drugs Remains a Challenge*, ATHLETIC BUS. (Feb. 2001), https://www.athleticbusiness.com/testing-student-athletes-for-drugs-remains-a-challenge.html [https://perma.cc/ABL3-D9DR] (reiterating "reasonableness" under Fourth Amendment depends on privacy expectations of student, nature of intrusion, and legitimacy of government's concern).

122. *See, e.g., Gruenke*, 225 F.3d (demonstrating courts' capacity to eliminate unnecessary pregnancy tests in high schools). For further discussion on Fourth Amendment analysis surrounding forced pregnancy tests, see *infra* notes 188-245 and accompanying text.

123. For further discussion on caselaw addressing forced pregnancy tests, see *infra* notes 188-245 and accompanying text.

124. For further discussion on interplay of U.S. Constitution, state constitutions, and public and private employees, see *infra* notes 128-145 and accompanying text.

125. For further discussion on caselaw addressing broader implications of Fourth Amendment analysis, see *infra* notes 146-251 and accompanying text.

analysis, with a focus on the workplace and high school athletics.[126] Finally, this section addresses how courts can use Fourth Amendment analysis to ban forced pregnancy tests in athletics, unless there are stringent circumstances at hand.[127]

A. Are Privacy Rights Only for Public Employees?

Public schools and government employers are undoubtedly subject to constitutional privacy requirements because the Constitution is intended to protect citizens from the government violating their civil rights.[128] Generally, private employees do not have constitutional rights to privacy when they feel an invasion on personal property.[129] However, when a private employer invades an employee's privacy by violating a state constitution, the violated employee may have a cause of action.[130]

For example, in *Hill v. Nat'l Collegiate Athletic Ass'n*,[131] the Supreme Court of California compared the National Collegiate Athletic Association's (NCAA) drug testing policy against the established privacy right in the California Constitution.[132] After acknowledging that the NCAA is a nongovernmental, private entity,

126. For further discussion on Fourth Amendment jurisprudence regarding forced pregnancy tests in workplace and in high school athletics, see *infra* notes 188-245 and accompanying text.

127. For further discussion on need to use Fourth Amendment analysis to eliminate forced pregnancy tests, see *infra* notes 246-302 and accompanying text.

128. *See* Shelton v. Tucker, 364 U.S. 479, 487 (1960) (emphasizing importance of holding public schools constitutionally accountable); *see, e.g.*, Ascolese v. Se. Pa. Transp. Auth., 925 F. Supp. 351, 355 (E.D. Pa. 1996) (engaging in constitutional analysis regarding government-run public transportation business). *See generally Can Bosses Do That? As It Turns Out, Yes They Can*, NAT'L PUB. RADIO (Jan. 29, 2010), https://www.npr.org/templates/story/story.php?storyId=123024596 [https://perma.cc/88D6-QEDH] (noting free speech constitutional law is only applicable when government is involved); *Our Government: The Constitution*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/the-constitution/ [https://perma.cc/GG2R-6Q2D] (last visited June 10, 2020) (explaining fundamental purpose of United States Constitution).

129. *See generally Can Bosses Do That? As It Turns Out, Yes They Can*, *supra* note 128 (quoting author Lewis Maltby in saying that Constitution does not apply to private corporations at all).

130. *See* WILLIAM E. HARTSFIELD, INVESTIGATING EMPLOYEE CONDUCT §13:3, Westlaw (databased updated Sept. 2020) (providing violation of privacy as example for when private employer may violate state constitution).

131. 865 P.2d 633 (Cal. 1994) (emphasizing athletes' inherent state-given rights).

132. *See id.* at 641 (adding that article I, section 1 of California Constitution states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*") (emphasis in original).

the court stated that the California Constitution protects citizens from all invasions of privacy.[133] In fact, during the public argument over whether to include a privacy right in the constitution, one commenter posited that "[t]he right of privacy . . . prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us."[134] However, the court did point out that the legal analysis may be different when comparing a private actor violation to a governmental violation.[135] Regardless, while the court did not ultimately find that the athletes' privacy rights were violated, the opinion makes clear that the California Constitution provides a right to privacy against private entities.[136]

Additionally, in *York v. Wahkiakum Sch. Dist. No. 200*,[137] the Supreme Court of Washington found a school's suspicion-less drug testing of student-athletes to be unconstitutional.[138] Even though the school district at issue in *York* is a public district, the court focused on article I, section 7 of the Washington State Constitution, which provides that no resident's privacy shall be invaded.[139] The court underwent a state constitutional analysis because "[i]t is well established that in some areas, article I, section 7 provides greater protection than its federal counterpart—the Fourth Amend-

133. *See id.* (highlighting how constitution does not only protect against government actions).

134. *Id.* at 642 (alteration in original) (noting privacy initiative was directed at preventing businesses and governments alike from collecting too much unnecessary information).

135. *See id.* at 656 (stating largest differences between private employees and public employers are (1) government is inherently more coercive than private corporation, and (2) individual has more choices when dealing with private actor than when dealing with government entity); *see also* Sheehan v. S.F. 49ers, Ltd., 201 P.3d 472, 477 (Cal. 2009) (acknowledging ultimately private right of action available to California state residents who feel that their state constitutional rights have been violated).

136. *See Hill*, 865 P.2d at 669 (reversing court of appeals' permanent injunction against NCAA's drug testing policy); *see also Sheehan*, 201 P.3d at 477 (explaining that, similar to U.S. Constitution argument, defendant can prevail in state constitution case by showing invasion of privacy furthers more important interests). *But see* Miller v. Safeway, Inc., 102 P.3d 282, 296 (Alaska 2002) (finding claimant does not have constitutional rights unless state action was involved).

137. 178 P.3d 995 (Wash. 2008) (reversing lower court's decision that drug test was constitutional).

138. *See id.* at 1006 (emphasizing privacy rights Washington State Constitution gives to Washington residents).

139. *See* WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); *York*, 178 P.3d at 1001 (choosing to undergo Washington State Constitution analysis rather than analysis under Fourth Amendment).

ment."[140] After engaging in the *Katz* constitutional analysis, the court found that the school at issue had no legitimate interest in randomly implementing suspicion-less drug testing on athletes.[141] The court ultimately found the Washington State Constitution protected student-athletes from random drug testing.[142]

Unfortunately, only eleven states have a right to privacy, and those states do not specify whether state action must be involved for a citizen to have that right to privacy.[143] Therefore, for employees like Alysia Montaño and Allyson Felix, rights can only be vindicated by the rare and applicable state constitution or by the Pregnancy Discrimination Act.[144] Hopefully, momentum on privacy rights against private actors builds throughout the country and violated employees can find remedy in those laws.[145]

B. Yes, the Fourth Amendment is More than Criminal Law

On a broader scale, a Fourth Amendment search involves both an invasion of property and an attempt to glean information from that invasion.[146] With the growth of technology, the idea of what constitutes a "physical intrusion" has more broadly evolved.[147] In

140. *York*, 178 P.3d at 1001 (citing State v. McKinney, 60 P.3d 46 (2002); State v. Myrick, 688 P.2d 151 (1984)) (adding court will look to prior interpretations of state constitution in particular context to decide whether state constitution does afford greater protection than Fourth Amendment).

141. *See id.* at 1003 (finding state constitution does not authorize school to conduct suspicion-less testing).

142. *See id.* at 1005 (noting school cannot conduct drug tests unless they have at least reasonable suspicion).

143. *See Privacy Protections in State Constitutions*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 11, 2020), https://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx [https://perma.cc/S6FK-ANVF] (listing states that have explicit right to privacy as Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New Hampshire, South Carolina, and Washington).

144. For further discussion on issues facing employees who are forced to have pregnancy tests or who are treated differently because of their pregnancy status, see *infra* notes 188-223 and accompanying text.

145. *See* Mitchell Noordyke, *US State Comprehensive Privacy Law Comparison*, INT'L ASS'N. FOR PRIVACY PROF'LS., https://iapp.org/resources/article/state-comparison-table/ [https://perma.cc/L33Y-VXHJ] (last visited June 10, 2020) (noting state momentum for passing larger privacy bills is at "all-time high").

146. *See, e.g.,* United States v. Jones, 565 U.S. 400, 404-11 (2012) (finding attaching GPS to government vehicle constituted search under Fourth Amendment); Kyllo v. United States, 533 U.S. 27, 40 (2001) (finding thermal imaging of home is considered search under Fourth Amendment).

147. *See Jones*, 565 U.S. at 405-07 (quoting United States v. Knotts, 460 U.S. 276, 286 (1983)) (analyzing that while Fourth Amendment analysis originally relied on presence of literal physical intrusion, *Katz*'s finding that Fourth Amendment "protects people, not places" evinces expansion of such strict interpretation); Peter Winn, *Katz and the Origins of the "Reasonable Expectation of Privacy" Test*, Com-

fact, *Katz v. United States*[148] effectively overturned the strict "trespass doctrine" presented in *Olmstead v. United States*,[149] which required penetration of a physical area to have a Fourth Amendment violation.[150] The Supreme Court further defined the contours of this expansion in *Kyllo v. United States*,[151] where the Court contemplated the constitutional implications of police officers using a thermal imaging tool to gain information about the defendant's home.[152] In *Kyllo*, the Court posited that the Fourth Amendment can only logically evolve in parallel with twentieth century technology.[153] Consequently, the new rule is "that obtaining by sense-enhancing technology *any information* regarding the interior of the home that *could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,'* constitutes a search."[154] The caveat to this rule is that the Court only vaguely limited the rule to circumstances where "the technology in question is not in general public use."[155]

The rules solidified in 1967, with two seminal Supreme Court cases on the Fourth Amendment.[156] First, *Camara v. Mun. Court of*

ment, 40 MCGEORGE L. REV. 1, 9 (2009) ("By explicitly basing the protections of the Fourth Amendment on a right of privacy, the test gave courts more flexibility to protect a broader concept of human dignity at a time when information technology had outstripped what property rights alone could protect."); *see also* Nicandro Iannacci, *Katz v. United States: The Fourth Amendment Adapts to New Technology*, CONSTITUTION CENTER (Dec. 18, 2018), https://constitutioncenter.org/blog/katz-v-united-states-the-fourth-amendment-adapts-to-new-technology [https://perma.cc/B6DU-DYUV] (discussing modern technological implications of *Katz* explicitly overturning stricter "trespass doctrine").

148. 389 U.S. 347, 350 (1967) (clarifying right to be free from unreasonable searches and seizures should not be considered general right to privacy).

149. 277 U.S. 438 (1928) (holding Fourth Amendment does not protect against placement of telephone wires and calls that occur over these wires).

150. *See Katz*, 389 U.S. at 353 ("We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").

151. 533 U.S. 27 (2001) (finding use of sense-enhancing technology to gain information about defendant's home is search under Fourth Amendment).

152. *See id.* at 29-30 (detailing facts of case where police officers used thermal imaging to try to confirm their suspicions that defendant was growing marijuana with heat lamps inside his home).

153. *See id.* at 35 (finding law needs to fall in line with technological developments).

154. *Id.* (emphasis added) ("To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment." (citing Silverman v. United States, 365 U.S. 505, 512 (1961))).

155. *See id.* at 35 (discussing limiting definition of search to obtaining personal details is inconsistent with purpose of Fourth Amendment).

156. *See* Camara v. Mun. Court of San Francisco, 387 U.S. 523 (1967) (holding routine administrative searches in non-criminal context cannot be conducted

San Francisco[157] explored the constitutionality of a routine administrative search by the Division of Housing Inspection in San Francisco.[158] The Supreme Court found that, even in routine searches, the right to be free from unreasonable government invasions remained essential to American freedom.[159] Second, *Katz* developed a two-part test for determining whether a search or seizure is reasonable under the Fourth Amendment.[160]

The Court builds a foundation for its new test by simply stating: "[t]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection."[161] While the majority holds that listening to someone's conversation without their consent violates the Constitution, the definitive "unreasonable search" test originated in Justice Harlan's concurrence.[162] According to Justice Harlan, the unreasonable search test has "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[163] Thus, the test employs both subjective and objective elements of privacy expectations.[164]

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without consent or warrant); Katz v. United States, 389 U.S. 347 (1967) (holding recording oral statement constitutes unreasonable search and/or seizure under Fourth Amendment).

157. 387 U.S. at 528 (finding purpose of Fourth Amendment is to protect Americans from unreasonable invasions by government).

158. *See id.* (indicating Fourth Amendment provides protection that is fundamental to free society).

159. *See id.* (finding few exceptions to Fourth Amendment's baseline warrant requirement).

160. *See Katz*, 389 U.S. at 351-52 (reframing constitutional test to focus on constitutional rights of petitioner, rather than constitutional rights attached to certain location).

161. *Id.* at 351 (citing Lewis v. United States, 385 U.S. 206, 210 (1966)) (noting what someone seeks to be protected may be subject to constitutional safeguards).

162. *See, e.g.,* Florida v. Jardines, 569 U.S. 1, 12 (2013) (Kagan, J., concurring) (demonstrating majority and concurrence's reliance on test presented in *Katz*); United States v. Jones, 565 U.S. 400, 405-08 (2012) (finding *Katz* test is guiding principle, but not exclusive test for deciding reasonableness of governmental intrusions); Kyllo v. United States, 533 U.S. 27, 32-33 (2001) (using *Katz* test as guiding framework, but not strict analytical formula, for deciding on reasonableness of search).

163. *Katz*, 389 U.S. at 361 ("Thus a man's home is, for most purposes, a place where he expects privacy. . . . [O]n the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.").

164. *See* Winn, *supra* note 147, at 11 (dissecting litigious viability of subjective and objective prongs presented in Justice Harlan's concurrence); *see also Katz*, 389 U.S. at 361 (implying, through analysis, that prongs presented were both objective

Even though *Katz* and subsequent cases primarily encounter issues of governmental intrusion on physical property, little caselaw and scholarship indicates that the *Katz* test only applies to property.[165] In fact, the Court in *United States v. Jones*[166] explicitly stated that "*Katz* did not narrow the Fourth Amendment's scope."[167] In her concurrence, Justice Sotomayor commented: "Of course, the Fourth Amendment is *not concerned only with trespassory intrusions on property*. Rather, even in the *absence* of a trespass, 'a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.'"[168] Additionally, lower courts have applied Justice Harlan's "unreasonable search" test.[169]

C. Yes, Student-Athletes are Forced to Take Pregnancy Tests

Despite the recent strides taken in the athletic field for female equality, there is no definitive rule on the constitutionality of requiring student-athletes to take pregnancy tests.[170] As a baseline, courts have overwhelmingly found that a pregnancy test constitutes

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and subjective); Iannacci, *supra* note 147 (interpreting Justice Harlan's concurrence to articulate two part test, including both subjective and objective prong).

165. *See Jones*, 565 U.S. at 408 (finding while expectations of privacy could rely on real property principles, Fourth Amendment is not limited to those principles and privacy can be defined in any manner that society sees fit).

166. 565 U.S. 400 (finding warrantless placement of GPS on government car constituted unreasonable search under Fourth Amendment).

167. *Id.* at 408-09 (explaining other evolutionary steps Fourth Amendment analysis has taken in twenty first century). *See generally* Daniel T. Pesciotta, Comment, *I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century*, 63 CASE W. L. REV. 187, 289 n.4 (2012) (noting *Katz* Court explicitly stated that *Katz* test was expansion, not limitation, of Fourth Amendment, by reasoning that Fourth Amendment protects people, not particular places).

168. *Jones*, 565 U.S. at 414 (emphasis added) (discussing Court in *Katz* noted that there does not need to be physical intrusion to find Fourth Amendment violation).

169. *See* Brian H. Bornstein, *Pregnancy, Drug Testing, and the Fourth Amendment: Legal and Behavioral Implications*, 17 J. FAM. PSYCHOL. 188, 221 (2003) (exemplifying Justice Harlan's two-part analysis through Ferguson v. City of Charleston, 532 U.S. 67 (2001)); Pesciotta, *supra* note 167, at 210 (discussing lower court's application of Justice Harlan's request); *see, e.g.,* Ferguson, 532 U.S. at 78 (describing balancing test that is necessary to decide Fourth Amendment cases); United States v. Nerber, 222 F.3d 597 (9th Cir. 2000) (using "unreasonable search" test to find that installing video cameras in someone's hotel room is violation of their reasonable expectations of privacy); United States v. Torres, 751 F.2d 875 (7th Cir. 1984) (using "unreasonable search" test to determine constitutionality of installing surveillance cameras in apartment of several terrorist suspects).

170. For further discussion on constitutionality of requiring pregnancy tests, both in athletic and non-athletic settings, see *infra* notes 246-251 and accompanying text.

a search under the Fourth Amendment.[171] Moving forward, the reasonableness of the search is essential in determining its constitutionality.[172]

Reasonableness, in the context of a school-mandated pregnancy test, is determined by balancing the nature of the student's privacy interest with that of the government's interest in conducting the search, all while taking into account the nature of the intrusion.[173] Often, a high school student's subjective expectation of privacy is considered to be lower than the average adult.[174] Students are subjected to multiple physical examinations, some locker or backpack searches, and various other medical tests.[175] More specifically, student-athletes have an even lower expectation of privacy because, by going out for the team, they agree to interactions in public locker rooms and additional physical and personal exams.[176] Because these athletes volunteer to participate on school teams, their expectations of privacy are lower than the average person.[177]

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171. *See, e.g.,* Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) (holding pregnancy test constitutes search under Fourth Amendment); Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269 (9th Cir. 1998) (finding pregnancy tests are searches and, therefore, have Fourth Amendment implications); Ascolese v. Se. Pa. Transp. Auth., 925 F. Supp. 351, 364 (E.D. Pa. 1996) (upholding plaintiff's argument that pregnancy test is search under Fourth Amendment).

172. *See, e.g., Gruenke*, 225 F.3d at 300 (outlining reasoning by noting since pregnancy test is clearly search, the next step in inquiry is to decide whether search was reasonable).

173. *See id.* at 301 (following three-part analysis where expectations of privacy, nature of intrusion, and interests of government are considered); *see, e.g.,* Del. v. Prouse, 440 U.S. 648, 654 (1979) ("Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests."); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995) (holding "ultimate measure" of constitutionality of governmental search is reasonableness).

174. *See Vernonia*, 515 U.S. at 654-57 (discussing jurisprudence behind finding that high school students have lower expectation of privacy); New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) ("In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally.").

175. *See Vernonia*, 515 U.S. at 656 (adding also that some of these examinations and vaccinations are mandated by school); *see, e.g.,* Mary Ellen Flannery, *The High Cost of Random Student Searches*, NEA TODAY (Dec. 14, 2017), http://neatoday.org/2017/12/14/the-high-cost-of-random-student-searches/ [https://perma.cc/M84L-H6JL] (explaining random searches for weapons in urban schools contribute to school-to-prison pipeline).

176. *See Vernonia*, 515 U.S. at 657 ("Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.").

177. *See id.* (detailing students' lowered expectations of privacy).

When considering the reasonableness of the intrusion, however, the fact that athletes have a lower expectation of privacy does not mean that they have *no* expectation of privacy.[178] At the very least, students have a Fourth Amendment right to be free from unreasonable searches, just as every other American has this right.[179] However, when a school is attempting to maintain a consistently safe environment, getting a warrant or having probable cause is an unrealistic expectation of schools.[180] The Supreme Court and lower courts have decided on a general rule that when searches are performed as part of a regulatory program, courts will decide on the constitutionality of the search by conducting a "special needs" analysis.[181] The special needs analysis balances the needs of the government in conducting the search with the privacy interests of the person subject to the search.[182] More specifically, the original intent of the special needs exception is to apply it in "[o]nly . . . those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement [of the Fourth Amendment] impracticable . . . a court [is then] entitled to substitute its balancing of interests for that of the Framers."[183]

In most cases where students are tested for drugs or searched without warning, the court acknowledges the evident need for schools to maintain a safe environment.[184] On the contrary, when

178. *See T.L.O.*, 469 U.S. at 338 (noting there are few situations so dire that could completely eliminate student's legitimate expectation of privacy).

179. *See* Kate R. Ehlenberger, *The Right to Search Students*, EDUCATIONAL LEADERSHIP, Dec. 2001/Jan. 2002, at 31, http://www.ascd.org/publications/educational-leadership/dec01/vol59/num04/The-Right-to-Search-Students.aspx [https://perma.cc/W6S5-U6JH] (informing parents and students that children in schools cannot be subject to unreasonable searches, despite dangerous incidents that have recently occurred in schools).

180. *See T.L.O.*, 469 U.S. at 352 (arguing safety is of utmost importance because, at very least, unsafe environment prevents teachers from effectively teaching); *Vernonia*, 515 U.S. at 653 (noting how requiring probable cause in schools is impracticable and does not meet government's legitimate need to maintain safety).

181. *See* Ascolese v. Se. Pa. Transp. Auth., 925 F. Supp. 351, 355 (E.D. Pa. 1996) (citing *T.L.O.*) (indicating there were permissible special needs present in this case).

182. *See id.* (deciding eventually that plaintiff's individual privacy interests outweighed government's interests); *see also* Lewis, *supra* note 15, at 160-61 (citing *T.L.O.*) (discussing development of "special needs" exception at presented by Justice Blackmun in *T.L.O.*).

183. *T.L.O.*, 469 U.S. at 351 (adding public schools provide exact intended setting for special needs exception); *see also* Lewis, *supra* note 15, at 160 (translating Framer's intent into Fourth Amendment's requirement for probable cause).

184. *See, e.g., Vernonia*, 515 U.S. at 656 (finding school's policy to drug test athletes is constitutional to meet legitimate safety policy of school).

schools force students to take a pregnancy test, there is little safety impetus behind the policy.[185] Even though there are limited circumstances in which a school nurse needs to administer a test for the safety of the student or the unborn child, in most circumstances, "a school official's alleged administration to a student-athlete of the pregnancy test would constitute an unreasonable search under the Fourth Amendment."[186] Therefore, courts must take this rule and apply it more strictly to prevent unfettered intrusion of a young woman's privacy and to prevent the gender discrimination inherent in forced pregnancy testing.[187]

D. Key Cases: The Lineage of Forced Pregnancy Tests and the Impact on Athletics

While limited caselaw exists on the specific constitutionality of forced pregnancy tests in school athletics, a plethora of analogous cases present a strong legal foundation for continuing to ban forced pregnancy tests.[188] First, this section discusses *Ascolese v. Se. Pa. Transp. Auth.*,[189] where the Eastern District of Pennsylvania emphasizes that a government entity may only test for pregnancy when essential public safety interests are at stake.[190] Next, this section analyzes *Norman-Bloodsaw v. Lawrence Berkeley Lab.*,[191] where the Ninth Circuit amends the lower court's rationale, which found that women have very little privacy interest in their pregnancy status.[192]

185. *See* Gruenke v. Seip, 225 F.3d 290, 301 (3d Cir. 2000) (finding defendant in this case was also not entitled to qualified immunity because his conduct was not reasonable); Lewis, *supra* note 15, at 183 (questioning what safety precautions would be behind forcing young female athlete to take forced pregnancy test).

186. *Gruenke*, 225 F.3d at 301 (establishing baseline rule that forced pregnancy tests are unreasonable unless narrow and serious health concern does exist).

187. For further discussion on need for courts to strictly implement this rule, see *infra* notes 252-302 and accompanying text.

188. For further discussion on analogous caselaw setting foundation for banning forced pregnancy tests, see *infra* notes 197-223 and accompanying text.

189. 925 F. Supp. 351 (E.D. Pa. 1996) (holding no-notice pregnancy test of employee could run afoul of Fourth Amendment).

190. *See id.* at 357 (adding Ascolese's employer did not have legitimate public safety interest in testing her for pregnancy).

191. 135 F.3d 1260 (9th Cir. 1998) (finding district court erred in granting summary judgment to defendants regarding constitutional claim against pregnancy tests); *see also* Elizabeth Pendo, *Race, Sex, and Genes at Work: Uncovering the Lessons of Norman-Bloodsaw*, Comment, 10 HOUS. J. HEALTH L. & POL'Y 227, 228 (2010) (discussing Congress' acknowledgement *Norman-Bloodsaw* is seminal case in upholding privacy interests in pregnancy testing).

192. *See Norman-Bloodsaw*, 135 F.3d at 1269 (asserting privacy involved with pregnancy tests implicates Fourth and Fifth Amendment rights).

Finally, this section ends with an analysis of *Gruenke v. Seip*,[193] where the Third Circuit directly addressed a young athlete's forced pregnancy test and found the school's actions to violate the plaintiff's Fourth Amendment right to privacy.[194] In all of these cases, the courts highlight the privacy interest in pregnancy status, thus emphasizing the needs for future courts to follow suit.[195] Consequently, future courts must heed the warnings of these cases and implement a bright line rule prohibiting forcing young athletes to take pregnancy tests.[196]

1. *Unnecessary Pregnancy Testing: Ascolese*

In *Ascolese*, the Southeastern Pennsylvania Transportation Authority (SEPTA) forced its employee, an adult female police officer, Lisa Ascolese, to take a pregnancy test as a part of her fitness test.[197] Originally, the district court found that Ascolese's Fourth Amendment rights were not violated.[198] Because the district court only granted the defendant's summary judgment in some matters, but not in others, the defendants filed a motion for reconsideration.[199] One year later, when Justice Pollak reconsidered the case, he fully granted all parts of the defendant's motion for summary judgment.[200] This section focuses on the reconsideration of *Ascolese*.[201]

193. 225 F.3d 290 (3d Cir. 2000) (holding pregnancy test constituted search under Fourth Amendment and pregnancy test in this case was unreasonable). *See generally* Lewis, *supra* note 15, at 166-69 (presenting facts of *Gruenke* and discussing implications of decision).

194. *See Gruenke*, 225 F.3d at 308 (reversing and remanding lower court's decision to grant defendant's summary judgment).

195. For further discussion on privacy interests discussed in each of aforementioned cases, see *infra* notes 197-245 and accompanying text.

196. For further discussion on importance of implementing bright line rule, see *infra* notes 246-302 and accompanying text.

197. *See* Ascolese v. Se. Pa. Transp. Auth., 925 F. Supp. 351, 354 (E.D. Pa. 1996) (noting pregnancy test was to be urine test that would be administered to all female employees who needed to undergo fitness program). *See generally* Lewis, *supra* note 15, at 169 (comparing analysis in *Ascolese* to analysis in another notable case, *Gruenke*).

198. *See* Ascolese v. Se. Pa. Transp. Auth., 902 F. Supp. 533, 554 (E.D. Pa. 1995) (denying summary judgment for defendants regarding Fourth Amendment claim against pregnancy tests).

199. *See Ascolese*, 925 F. Supp. at 365 (treating defendant's motion for reconsideration as renewed motion for summary judgment).

200. *See id.* (noting SEPTA's argument that its interest in having Ascolese take pregnancy test is greater than her interest in privacy); *see also* Lewis, *supra* note 15, at 170 (discussing court's reasoning in finding that Ascolese's privacy interests were overcome by governmental interests).

201. For further discussion on legal analysis in *Ascolese*, see *infra* notes 197-210 and accompanying text.

The district court conducted their analysis of the Plaintiff's Fourth Amendment claim by balancing SEPTA's interest in forcing their employees to take a pregnancy test and the Plaintiff's reasonable expectations of privacy.[202] Originally, the court found that SEPTA did have a strong interest in testing female employees for pregnancy, but that SEPTA could not produce evidence demonstrating that they could not have made their fitness tests any less rigorous to accommodate pregnant women.[203] Generally, under the Fourth Amendment, the government agency administering the test has the burden of demonstrating that the test is necessarily tailored to the job at hand.[204] However, in the reconsideration, the court notes that SEPTA did fulfill that burden by submitting an expert witness' affidavit, stating that SEPTA could not have made its fitness program less rigorous.[205] Despite the court's hesitation in using the affidavit as dispositive proof of necessity, the court still found that SEPTA met its burden by changing their policy.[206]

Next, the court found that the Plaintiff's reasonable expectations of privacy were diminished by work circumstances.[207] The court did acknowledge that the Plaintiff had a strong and pointed privacy interest in keeping her pregnancy status private.[208] How-

202. *See Ascolese*, 925 F. Supp. at 356-57 (finding eventually that SEPTA's interests did not outweigh those of Ascolese).

203. *See* Ascolese v. Se. Pa. Transp. Auth., 902 F. Supp. 533, 550-51 (E.D. Pa. 1995) (citing Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402, 417 (N.D. Ohio 1991)) (adding it is defendant's burden of proof to show that disputed test is necessary).

204. *See, e.g.*, Skinner v. Ry. Labor Execs. Ass'n., 489 U.S. 602, 633 (1989) (exemplifying when mandatory test is reasonable, as when employees are handing dangerous equipment and could be putting themselves in danger if under influence of any substance); Holton v. Dep't of the Navy, 884 F.3d 1142, 1146 (D.C. Cir. 2018) (holding mandatory drug testing is Fourth Amendment search that must past "constitutional muster" to be reasonable"); *Anonymous Fireman*, 779 F. Supp. at 417 (finding burden is on government agency administering test to demonstrate constitutional necessity of test).

205. *See Ascolese*, 925 F. Supp. at 355 (noting remaining skepticism with necessity of SEPTA administering pregnancy tests to female employees).

206. *See id.* (accepting SEPTA's new policy because the policy strongly advises women to take pregnancy test before undergoing fitness exam instead of requiring them to take test); *see also* W.E. Shipley, Annotation, *Requiring Submission to Physical Examination or Test as Violation of Constitutional Rights*, 25 A.L.R. 2d 1407 (1952) (noting SEPTA's interest would have been more valid had they only *strongly encouraged* female employees to take pregnancy test).

207. *See Ascolese*, 925 F. Supp. at 355 (admitting while district court originally thought Ascolese's expectations were not diminished by work circumstances, SEPTA's affidavit explaining work conditions did diminish Ascolese's privacy expectations).

208. *See* Ascolese v. Se. Pa. Transp. Auth., 902 F. Supp. 533, 549-51 (E.D. Pa. 1995) (finding Ascolese's right to privacy of pregnancy status was strong enough to require that SEPTA has compelling interest in mandating pregnancy test); *see also*

ever, SEPTA's working conditions lowered the Plaintiff's privacy expectations because *all* SEPTA police officers share one locker and shower facility, must undergo frequent fitness and medical examinations, and must participate in CPR, first aid, and firearms trainings.[209] Despite the lowered expectation, the court found the test to be unreasonable because SEPTA did not present a sufficiently compelling interest for mandated pregnancy tests.[210]

2. *No-Consent Pregnancy Testing: Norman-Bloodsaw*

The issue in this case is whether an employee who undergoes an employee health exam can be tested for pregnancy without her knowledge.[211] The district court granted the defendant's motion for dismissal on all claims, including the constitutional privacy claims.[212] The plaintiffs appealed.[213]

As a condition of employment, the plaintiffs had to submit blood and urine samples, some of which were tested for pregnancy, some were tested for syphilis, and some were tested for the sickle

Ascolese, 925 F. Supp. at 356 (acknowledging court's original opinion found interest in privacy protections for pregnancy status is very strong); L. CAMILLE HÉBERT, EMPLOYEE PRIVACY LAW § 10:6, Westlaw (database updated 2019) (noting in *Ascolese*, the court found that "there should be little doubt that the collection of bodily fluid in order to determine if an employee is pregnant violates both subjective and objective expectations of privacy; information about pregnancy is personal information of a very intimate kind"). *See generally* Lewis, *supra* note 15, at 176 (connecting privacy interest in *Ascolese* to recognized body privacy interest in Griswold v. Connecticut, 381 U.S. 479 (1965)).

209. *See Ascolese*, 925 F. Supp. at 356 (stating overarching goal in implementing these regulatory policies is to promote public safety); *see also* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 627 (1989) (noting privacy expectations "are diminished by reason of their [employees'] participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees"); Lewis, *supra* note 15, at 169-70 (comparing "diminished level of privacy" analysis in *Ascolese* to diminished expectation of privacy courts place on athletes, both student and professional).

210. *See Ascolese*, 925 F. Supp. at 356 (denying defendant's motion for summary judgment); *see also* Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1264 (9th Cir. 1998) (finding pregnancy information is "highly private and sensitive medical . . . information . . . ."); Lewis, *supra* note 15, at 176 (discussing court's acknowledgment that employees have many reasons not to want to reveal pregnancy status to employee, including not wanting to disclose miscarriage or abortion); Hébert, *supra* note 208 ("Even if an employer is able to make such a showing [of a valid interest in pregnancy testing], the considerable interests of employees in such private information should outweigh any legitimate interest of the employer in that information.").

211. *See Norman-Bloodsaw*, 135 F.3d at 1264 (describing issue on appeal and noting test also involved results for syphilis and sickle cell trait).

212. *See id.* (discussing procedural history of case at hand).

213. *See id.* (noting claim also involved violation of Title VII and Americans with Disabilities Act).

cell trait.[214] The plaintiffs claim that their blood and urine samples were tested for pregnancy without their knowledge or consent.[215] Further, the plaintiffs allege that their employer did not take the proper safeguards to prevent the results from spreading to other departments throughout Lawrence Berkeley Laboratories.[216]

Even though the privacy aspect of this case primarily addresses due process rights, the Ninth Circuit acknowledges the very high Fourth Amendment and due process privacy interests that are violated by forced testing.[217] In this analysis, the Ninth Circuit points out that the district court erred in finding that the pregnancy tests were minimally intrusive under the Fourth Amendment because "[o]ne can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up."[218] Further, the Ninth Circuit has held in several circumstances that the Constitution does not allow for unregulated inquiries into sexual matters that are completely unrelated to job performance.[219] This rule is especially implicated when the employer is testing for a part of a woman's health that carries the highest expectation of privacy.[220]

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214. *See id.* at 1265 (adding these tests were discontinued, but that plaintiffs were still affected by tests).

215. *See id.* (alleging only women were tested for pregnancy, analogous to how only African Americans were tested for sickle cell trait).

216. *See id.* (noting even though no safeguards were implemented, there are no allegations that results were disseminated to other parties). *See also* Cristina E. Echevarria, Case Note, *Norman-Bloodsaw v. Lawrence Berkeley Laboratory 135 F.3d 1260 (9th Cir. 1998)*, 29 GOLDEN GATE U. L. REV. 71, 72-73 (1999) (providing succinct description of *Norman-Bloodsaw* facts).

217. *See Norman-Bloodsaw*, 135 F.3d at 1269 ("[I]t goes without saying that the *most basic violation* possible involves the performance of unauthorized tests—that is, the non-consensual retrieval of previously unrevealed medical information that may be unknown even to plaintiffs.").

218. *Id.* (adding pregnancy test will only be found reasonable when governmental interests outweigh personal privacy interests); *see also* Pendo, *supra* note 191, at 234 (emphasizing negative psychological impact that forced pregnancy testing has on women by quoting plaintiff, saying "'I felt so violated,' says Ellis [plaintiff]. 'I thought, 'Oh, my god. Do they think all black women are nasty and sleep around?'").

219. *See Norman-Bloodsaw*, 135 F.3d at 1269 (citing Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1336 (9th Cir. 1987)) (noting both syphilis and pregnancy can carry negative implications about sexual history and activity). *See generally* ROBERT D. LINKS, CAL. CIVIL PRACTICE CIVIL RIGHTS LITIG. § 6.25, Westlaw (database updated 2019) (acknowledging what employer did in *Norman-Bloodsaw* implicated "basic privacy problem—a party obtaining knowledge of private medical facts that may be unknown even to the plaintiffs without their consent or knowledge").

220. *See Norman-Bloodsaw*, 135 F.3d at 1269 (discussing high privacy interests at stake when employer tests unknowing employee for pregnancy); Lewis, *supra*

The Ninth Circuit, in emphasizing the highly intrusive nature of a pregnancy test, also points out that the intrusiveness of the test does not disappear if the person taking the test is personally willing to discuss their condition.[221] Regardless, unauthorized and unregulated testing puts employees in an uncomfortable, intrusive, and unconstitutional position that has nothing to do with their ability to perform on the job.[222] Due to the privacy interests at stake, the Ninth Circuit rejected the summary judgment decision to discover whether the tests were truly not consented to by the plaintiffs.[223]

3. *High School Athletics: Gruenke*

The plaintiff, Leah Gruenke was a seventeen-year-old high school student and athlete on her school's swim team, and the defendant, Michael Seip, was the varsity swim coach for Gruenke's team.[224] Seip noticed that Gruenke was nauseated and tired and that her body was changing rapidly, so he asked his assistant swim coach, a female, to discuss the possibility of pregnancy with Gruenke.[225] During that conversation, and in subsequent conversations with other members of the swim team, Gruenke refused to admit to a possibility of pregnancy, especially because "she felt that her condition was nobody's business."[226] Some team mothers even noticed Gruenke's changing body, bought a pregnancy test, and gave the pregnancy test to Seip to figure out a way to administer the test to Gruenke.[227] Seip recruited two girls to convince Gruenke to take the test, but Gruenke continuously denied ever having sexual intercourse and refused to take a test unless everyone on the team

note 15, at 177 (bolstering privacy interests at stake by comparing this case to *Ascolese*).

221. *See Norman-Bloodsaw*, 135 F.3d at 1270 (adding that, due to privacy interests involved, testing is not de minimis intrusion, by any means).

222. *See id.* (noting how consenting to general medical examination is not equivalent of consenting to being tested for pregnancy of syphilis); *see also* Pendo, *supra* note 191, at 251 (noting while employer claimed to test for pregnancy to protect employees from reproductive harms, there was no indication that women were actually faced with any reproductive harms).

223. *See Norman-Bloodsaw*, 135 F.3d at 1270 (reversing district court's disposition on privacy interests issue of case at hand).

224. *See* Gruenke v. Seip, 225 F.3d 290, 295 (3d Cir. 2000) (presenting facts surrounding Fourth Amendment case on forced pregnancy tests).

225. *See id.* at 295-96 (stating exact context of conversation is unclear, but it is clear that conversation did happen).

226. *See id.* at 296 (stating Gruenke was approached by school nurse and school counselor, but Gruenke still emphatically denied any possibility of getting pregnant).

227. *See id.* (discussing conflict in stories surrounding pregnancy test Gruenke eventually took).

was subjected to a pregnancy test as well.[228] Eventually, Gruenke volunteered to take the test and found out that she was pregnant.[229] Unfortunately, the negative interactions did not stop there:

> [A]fter [Gruenke's] baby was born, Seip tried to alienate [Gruenke] from her peers. Specifically, [Gruenke] testified that after she quit the private swim team that Seip also coached, Seip told members of his team not to sit with [Gruenke] during swim meets. Moreover, [Gruenke] asserts that during her last year of high school, Seip refused to speak to her and retaliated against her by taking her out of several swim meets.[230]

This suit was brought under 42 U.S.C. § 1983, primarily under the claim that a mandated pregnancy test by the plaintiff's swim coach constituted an illegal search in violation of the Fourth Amendment.[231] Undoubtedly, the Fourth Amendment's prohibition of unreasonable government searches extends to public schools.[232] The district court granted summary judgment for the defendant on qualified immunity grounds.[233] The Gruenkes appealed.[234]

In the Third Circuit's analysis, the court set a baseline that the constitutionality of a Fourth Amendment search relies on the reasonableness of the search.[235] While probable cause is often the standard, there are "special needs" circumstances where the obtainment of probable cause for each search and seizure is unrealistic.[236] Under the special needs exception, the probable cause require-

228. *See id.* (adding Gruenke wrote letter to Seip that he never read, "stating that Seip had no right to make her take a pregnancy test, that she was not showing any symptoms of being pregnant, and that she had never had sexual intercourse").

229. *See id.* at 297 (noting Seip did not share information about Gruenke's pregnancy with any other administrators).

230. *See id.* (demonstrating unfortunate and negative consequences pregnant teenagers often face before and after their pregnancies).

231. *See id.* at 297-98 (adding claims of interference with right to familial privacy, privacy in personal matters, and First Amendment rights to free speech and association).

232. *See* New Jersey v. T.L.O., 469 U.S. 325, 347-48 (1985) (holding students clearly have Fourth Amendment rights in school context). *See generally* Ehlenberger, *supra* note 179, at 31 (explaining students have constitutional rights in schools, but that their expectations of privacy are lowered in this context).

233. *See Gruenke*, 225 F.3d at 295 (adding state law claims were dismissed without prejudice).

234. *See id.* (discussing procedural history of case at hand).

235. *See id.* at 300 (stating this reasonableness is often defined by probable cause, except in those situations where probable cause is not effective).

236. *See id.* at 300-301 (using *T.L.O.* as demonstrative example of special needs exception to Fourth Amendment baseline requirement for probable cause).

ment is ignored and courts analyze whether the government's interest in conducting the search outweighed the individual's expectation of privacy *in the public school setting*.[237] In considering this balancing act, the Third Circuit emphasizes that public school students, especially athletes, generally have a lower expectation of privacy because they are submitting themselves to inherently more public environments.[238] Additionally, the government's interest must be "'important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.'"[239]

Despite the somewhat complex legal foundation laid by the Third Circuit, the holding is quite clear:

> [A] school official's alleged administration to a student athlete of the pregnancy tests would constitute an unreasonable search under the Fourth Amendment. Although student athletes have a very limited expectation of privacy, a school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy and the exercise of some discretion. . . . [A]n official cannot, however, require a student to submit to this intrusion merely to satisfy his curiosity.[240]

Effectively, while the court acknowledged students' lower privacy expectations, the court also explicitly limits how a school can glean information.[241] Consequently, the precedent, as based on Supreme Court precedent, is quite clear that a mandatory pregnancy test is unreasonable under the Fourth Amendment, absent exigent circumstances.[242]

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237. *See id.* at 301 (laying foundations for analysis surrounding Fourth Amendment search case).

238. *See id.* (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656-57 (1995)) (discussing public school athletes have lower expectation of privacy because they agree to follow even more regulations than average public school students).

239. *Id.* (quoting *Vernonia*, 515 U.S. at 660) (discussing United States Supreme Court precedent allowing for governmental interests to outweigh privacy interests in Fourth Amendment context). *See generally* MICHAEL I. LEVIN, PA. SCHOOL PERSONNEL ACTIONS § 15:7, Westlaw (database updated 2019) (citing *Gruenke* and Fraternal Order of Police v. Phila, 812 F.2d 105, 112-13 (3d Cir. 1987)) (stating more personal information creates more legitimate expectations that information will not be unwillingly disclosed to other parties).

240. *Gruenke*, 225 F.3d at 301 (noting pregnancy test might be more reasonable under special and urgent health circumstances that are not present here).

241. *See id.* (acknowledging possibility of schools having legitimate reasons to test for pregnancy).

242. *See* MCQUILLEN THE LAW OF MUNICIPAL CORPS. § 46:105, Westlaw (database updated 2019) (reiterating holding in *Gruenke*). For further discussion

However, one of the consequential issues presented in the Third Circuit's rationale of this case is how little interest the government has in testing for pregnancy, not how highly sensitive a pregnancy test is.[243] Even though the court noted that the government must have a strong interest in administering the pregnancy test, the court failed to properly acknowledge that the government will seldom have a strong enough interest in pregnancy test results.[244] If a high federal court refuses to acknowledge the almost-insurmountable privacy interest in keeping pregnancy test results personal, students and government employees alike are left vulnerable to embarrassing and intrusive situations in a public setting.[245]

E. Yes, Pregnancy Tests in Athletics are Unreasonable Searches

Regarding *Kyllo*, even though pregnancy tests are procedures that anyone can purchase at a drugstore, the *results* from those tests are often not information the female wants to make public.[246] Therefore, both the female's expectation of privacy beyond that of more freely shared information and the likelihood that the mandatory pregnancy test is an unreasonable search are heightened.[247] The pregnancy test being accessible does not necessarily yield an assumption that the results are willingly public informa-

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on rationale of Third Circuit in *Gruenke*, see *supra* notes 224-245 and accompanying text.

243. *See Gruenke*, 225 F.3d at 301 (emphasizing student's privacy interest is very low in public school context); Lewis, *supra* note 15, at 167-68 (noting this reasoning is evident from court pointing out there may be circumstances in which school or government employer can test for pregnancy).

244. *See* Lewis, *supra* note 15, at 168 (calling court's focus on government interest "misplaced").

245. *See id.* at 183 (finding court will not take away individual's personal decision by forcing her reveal her pregnancy). For further discussion on negative implications of forced pregnancy tests, see *supra* notes 252-292 and accompanying text.

246. *See* Kyllo v. United States, 533 U.S. 27, 35 (2001) (hinting that privacy at issue corresponds with results of search, not necessarily search itself).

247. *See* California v. Greenwood, 486 U.S. 35, 40-41 (1988) (citing United States v. Reicherter, 647 F.2d 397 (3d Cir. 1981)) (holding searching through someone's discarded trash is reasonable because petitioners, placing their garbage "'in an area particularly suited for public inspection in a manner of speaking, public consumption, for the express purpose of having strangers take it,' could not have had a reasonable expectation of privacy" (quoting United States v. Reicherter, 647 F.2d 397 (3d Cir. 1981))); Hoffa v. United States, 385 U.S. 293 (1966) (finding there was not search when petitioner revealed information to friend, thus demonstrating his careless attitude about exposing certain information to public).

tion.[248] Additionally, the Supreme Court, in *Florida v. Riley*,[249] suggested that their holding against finding an unreasonable search might have been different had the police obtained intimate details about the respondent's life.[250] While the obtainment of intimate details is not the standard for deciding on the reasonableness of a search, the unwilling exposure of intimate details surely contributes to an individual's reasonable expectation of privacy.[251]

IV. "WHY DO I CARE?": HOW DISCRIMINATION IN SPORTS IMPLICATES A LARGER ISSUE

This section takes the discussion of forced pregnancy tests beyond the legal analysis, and more into the social and psychological implications of being forced to take a pregnancy test and experiencing negative treatment when the results are positive.[252] Unfortunately, there are several examples from around the world that tell a sad story of a girl who had a promising future but was unsupported by her school when she became pregnant.[253] Consequently, public schools forcing young girls to submit to pregnancy tests carries much greater implications beyond a Fourth Amend-

248. *See* Florida v. Riley, 488 U.S. 445, 456-60 (1989) (Brennan, J., dissenting) ("But I cannot agree that one knowingly exposes an area to the public solely because a helicopter may legally fly above it. Under the plurality's exceedingly grudging Fourth Amendment theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal.").

249. *See id.* (holding a helicopter flying 400 feet over respondent's yard did not constitute unreasonable search because helicopter was in public airspace).

250. *See id.* at 452 (majority opinion) (implying lack of intimate details obtained supported Court's finding against unreasonable search).

251. *See id.* at 463 (Brennan, J., dissenting) (questioning where Fourth Amendment requires that intimate details must be obtained for there to be Fourth Amendment intrusion). *See, e.g.*, Gruenke v. Seip, 225 F.3d 290, 301 (2000) ("The nature of the intrusion must also be considered when determining whether the search is unreasonable. A urinalysis test, like the one conducted for drugs in *Vernonia*, is clearly intrusive because it reveals personal information but can be made less so by having the student take it in private, tailoring it so that it tests only for drugs, and limiting the disclosure of the information it reveals.").

252. For further discussion on the implications of forced pregnancy tests and a positive pregnancy result at a young age, see *supra* notes 253-292 and accompanying text.

253. *See, e.g.*, Ivana Kottasová, *They Failed Mandatory Pregnancy Tests at School. Then They were Expelled*, CNN, https://www.cnn.com/2018/10/11/health/tanzania-pregnancy-test-asequals-intl/index.html [https://perma.cc/QD9Q-H6G6] (last visited Feb. 20, 2020) (detailing story of young Tanzanian girls who could no longer get education because they were pregnant); Zegeye, *supra* note 23 (discussing school that actively excluded pregnant students from leading normal educational life).

ment violation.[254] Due to the demands of motherhood and other complicated social pressures, young mothers are less likely to continue their education.[255] Specifically, many young women in this situation will not even have the opportunity to finish high school.[256] Because she does not have a high school diploma, the young mother is then forced to take a low-paying job to support herself and her child.[257] The already-low motivation to finish school as a young mother is even further hindered when the young mother's school is actively unwelcoming to the mother.[258]

One prominent example of a school's negative response to even the possibility of teenage pregnancy is evinced in the Delhi Charter School in Louisiana.[259] In 2012, a Louisiana charter school was under scrutiny because of a strict policy requiring female students who are suspected to be pregnant to submit to pregnancy tests.[260] The school's pregnancy policy holds that "the school has a right to . . . force testing upon girls. . . . [A] positive test result, or failure to take the test at all, means administrators can force her to pursue a course of home study if she wishes to continue her education with the school."[261] Unfortunately, a school's harsh and negative actions about pregnancy create a discriminatory environment

254. *See generally* Rebekah Levine Coley & P. Lindsay Chase-Lansdale, *Adolescent Pregnancy and Parenthood: Recent Evidence and Future Directions*, 53 AM. PSYCHOLOGIST 152 (Feb. 1988) (2011), https://pdfs.semanticscholar.org/a4a4/f985e399f347651d82f6b115f89bba7fd98e.pdf [https://perma.cc/5PEV-ND9Z] (discussing both causes and impacts of teenage pregnancy).

255. *See About Teen Pregnancy*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/teenpregnancy/about/index.htm [https://perma.cc/6XP9-23A6] (last visited Sept. 22, 2020) (finding only fifty percent of teenage mothers receive high school diploma by age twenty-two).

256. *See* Levine Coley & Chase-Lansdale, *supra* note 254, at 155-56 (denoting clearly that educational attainment is one of largest barriers teenage mothers face).

257. *See id.* at 156 (highlighting early marriage rates and low educational attainment as causes of future low economic attainment in future).

258. *See, e.g.,* Kottasová, *supra* note 253 (discussing international case where young girls could no longer attend school because of societal implications associated with teen pregnancy); Zegeye, *supra* note 23 (evincing school in Louisiana would not allow pregnant mothers to attend school).

259. *See* Zegeye, *supra* note 23 (discussing Louisiana charter school's policy to kick out female students who were either pregnant or who refused to take mandatory pregnancy test); *see also School Policy Forces Students to Take Pregnancy Tests, Bans Pregnant Teens*, FOX NEWS (Oct. 27, 2015), https://www.foxnews.com/health/school-policy-forces-students-to-take-pregnancy-tests-bans-pregnant-teens [https://perma.cc/AUU6-A4L9] (describing Delhi Charter School's policy and attesting to constitutional illegality of discrimination).

260. *See* Zegeye, *supra* note 23 (taking strong stance on Delhi Charter School's strict pregnancy policy).

261. *Id.* (emphasizing heavy and unacceptable discriminatory toll that this policy takes on young female students).

that forces pregnant girls out of receiving an education.[262] The American Civil Liberties Union (ACLU) almost immediately pointed out that this policy is in direct violation of Title IX, which prohibits any sex discrimination in a federally funded school.[263] Shortly after the ACLU's involvement, Delhi Charter School changed its policy.[264] However, the incident sent a clear and indelible message about the negative treatment of young pregnant women.[265]

Whether the school forces students to take pregnancy tests or encourages pregnant students to leave, the school sends a message that pregnant students should be ashamed of themselves.[266] When a school tests students for drugs or searches them for weapons, the school is searching for evidence of illegal and unsafe activity.[267] However, when a school tests for pregnancy, the school implies that sexual, behavior and pregnancy is criminal as well, even though it is surely not.[268] Consequently, young women forced to undergo pregnancy tests are treated as if they have engaged in criminal and deplorable behavior.[269] This exclusion is well evinced in *Gruenke*, where the defendant swim coach discouraged students from sitting

262. *See Pregnant and Parenting Teens*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/pregnant-and-parenting-teens?redirect=womens-rights/pregnant-and-parenting-teens [https://perma.cc/7F4T-6JKR] (last visited Feb. 20, 2020) (noting this discrimination is illegal under Title IX because schools who treat pregnant students poorly are inherently treating male and female students differently); *see also* Linda Mangel, *Teen Pregnancy, Discrimination, and the Dropout Rate*, AM. CIVIL LIBERTIES UNION OF WASH. (Oct. 25, 2010), https://www.aclu-wa.org/blog/teen-pregnancy-discrimination-and-dropout-rate [https://perma.cc/ADX4-46JX] (emphasizing "[d]iscrimination against pregnant students is strictly prohibited by Title IX—the federal law banning sex discrimination in public schools—but it is widespread nonetheless").

263. *See* 20 U.S.C. § 1681(a) (1986) (listing exceptions to general rule against discrimination); *see also Pregnant and Parenting Teens*, *supra* note 262 (describing illegal implications of school's discriminatory policy).

264. *See* Kempner, *supra* note 19 (adding that even though policy was quickly changed, it was not challenged by anyone for six years).

265. *See id.* (noting Delhi Charter School's policy presents appropriate time for country to consider how pregnant teenagers are being treated).

266. *See id.* (discussing overly traditional values that are incorrectly implemented in schools do not treat pregnant students equally).

267. *See* Lewis, *supra* note 15, at 182-83 (comparing governmental interest in testing for drugs with governmental interest in testing for pregnancy); *see, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (finding school's drug testing policy is constitutional under Fourth Amendment).

268. *See* Lewis, *supra* note 15, at 182 (noting only criminal behavior regarding sexual activity could be rape, but that is not often what tests are seeking to discover).

269. *See* Kempner, *supra* note 19 (discussing how mandatory pregnancy testing can imply to young girl that she is criminal because she is being treated as one when she is forced to submit to pregnancy testing).

near the plaintiff after discovering (forcibly) that she was pregnant.[270] In forcing a pregnancy test, the school also usurps young students' decisions to participate in school activities and to reveal their pregnancy status in whatever manner they see fit, if at all.[271] Additionally, they are treated as if their pregnancy is negatively influencing the rest of the students.[272] While administrators disguise this message as a protection for the baby and the mother, the real impetus is to uphold the "image" of the school.[273] For example, in *Hicks v. Wingate Elementary School*[274] a young student who learned of her pregnancy was kicked out of school because she would be a "bad example" for other students.[275] After New Mexico's ACLU requested that the plaintiff be returned to school, the administration agreed, but retaliated by announcing to an assembly of students that the plaintiff was pregnant.[276] The case was ultimately dismissed in favor of the defendants.[277] By ushering pregnant students out of schools, the ultimate result is to wrongfully and continuously bolster the idea that women and men should be treated differently.[278] For example, Louisiana's policy "treats a male and a female engaging in the same behavior differently and forces the female to suffer public humiliation and disruption to her

270. *See* Gruenke v. Seip, 225 F.3d 290, 297 (3d Cir. 2000) (noting defendant refused to speak to her and did not allow her to participate in certain swim meets, even after plaintiff's baby was born).

271. *See* Lewis, *supra* note 15, at 183 (noting control over student contributes to discriminatory environment).

272. *See id.* ("Drug users create a potential risk for other students and at the very least are distractions. In contrast, a pregnant student does not have this same effect upon the educational environment. A pregnant student does not pose a risk to other students. A pregnant student is not the same type of a distraction as a student on drugs. Overall, there is less of a need to deter pregnancy in order to maintain a productive educational environment than there is to deter drug use.").

273. *See* Kempner, *supra* note 19 ("Schools, especially schools like Delhi Charter which clearly prides itself on academic excellence, have an image to uphold and they fear that pregnant teens taint their reputations. As Greene explains: 'The presence of pregnant girls in the building changes the image of the school—people think, if you've made that kind of decision you probably aren't the kind of person we want walking through the halls.'").

274. CV 12-0231, 2013 WL 12328884 (D.N.M. Sept. 13, 2013) (discussing legal implications of public school humiliating female pregnant student).

275. *See id.* at *2 (adding plaintiff was not allowed in school or in school dormitories following disclosure of her pregnancy).

276. *See id.* at *3 (noting specifically plaintiff was summoned from her classroom to attend this assembly and have her pregnancy announced without her permission).

277. *See id.* at *7 (stating it is Congress' responsibility to find remedy for plaintiff).

278. *See* Kempner, *supra* note 19 (emphasizing inherent inequality in punishing young girls for getting pregnant, especially when young boys equally contributed to pregnancy).

education."[279] Even though Louisiana's policy is the most blatant evidence of forced pregnancy policies, the negative message rings true through all schools with a hostile environment towards potentially pregnant students.[280]

Even in professional athletics, these negative impacts are rampant.[281] For example, as explained earlier in this Comment, Alysia Montaño, an American track and field Olympian, lost her sponsorship and Olympic health insurance when she revealed her pregnancy.[282] Because of the immediate negative impact the athletes face, both Nike and the Olympics create a very negative environment surrounding pregnancy.[283]

Until recently, the Women's National Basketball Association (WNBA) also pushed athletes away from pregnancy.[284] In 2018, Skylar Diggins-Smith played pregnant throughout her entire season with the Dallas Wings.[285] She did not tell a single person on her

279. *See id.* (noting shaming pregnant teenagers sends bad message to entire student population about how horrible one girl's personal sexual behavior is).

280. *See id.* (analyzing several poor messages associated with pregnancy discrimination in schools).

281. *See, e.g.*, Maggie Mertens, *supra* note 101 (explaining anti-pregnancy culture within the WNBA before historic collective bargaining agreement); New York Times, *supra* note 101 (describing stresses associated with getting pregnant as professional athlete).

282. *See* New York Times, *supra* note 101 (describing Montaño not only lost her sponsorship with Nike while pregnant, but also that United States Olympic Committee stripped her of health insurance during pregnancy); *see also Olympic Track Star Rebukes Sponsorship Pay Penalties for Pregnant Athletes*, NAT'L PUBLIC RADIO (May 26, 2019), https://www.npr.org/2019/05/26/727190926/olympic-track-star-rebukes-sponsorship-pay-penalties-for-pregnant-athletes [https://perma.cc/MRE6-G94B] (interviewing Montaño and finding that unless athlete falls within specific tier system, she will not receive any health insurance during her pregnancy); Alysia Montaño, *Nike Told Me to Dream Crazy, Until I Wanted a Baby*, N.Y. TIMES (May 12, 2019), https://www.nytimes.com/2019/05/12/opinion/nike-maternity-leave.html [https://perma.cc/U8Q8-CQSM] (quoting Phoebe Wright, another Olympic athlete, in saying "Some people think women are racing pregnant for themselves. . . . [I]t sometimes is, but it's also because there's a baby to feed.").

283. *See* Montaño, *supra* note 282 (quoting Phoebe Wright in saying that getting pregnant while competing is "kiss of death").

284. *See WNBA and WNBPA Reach Tentative Agreement on Groundbreaking Eight-Year Collective Bargaining Agreement*, WOMEN'S NAT'L BASKETBALL ASSOC. (Jan. 14, 2020), https://www.wnba.com/news/wnba-and-wnbpa-reach-tentative-agreement-on-groundbreaking-eight-year-collective-bargaining-agreement/ [https://perma.cc/C78T-2QPA] (describing details of collective bargaining agreement resulting from years of fighting for equality).

285. *See* Mechelle Voepel, *Skylar Diggins-Smith Says She Played 2018 Pregnant; Expresses Lack of Team Support*, ESPN (Oct. 19, 2019), https://www.espn.com/wnba/story/_/id/27882225/skylar-diggins-smith-says-played-2018-pregnant-expresses-lack-team-support [https://perma.cc/Z82P-ZZYL] (quoting Diggins-Smith in saying that she "didn't tell a soul" about her pregnancy); *see also* Skylar Diggins-Smith (@SkyDigg4), TWITTER (Oct. 19, 2019), https://twitter.com/skydigg4/sta-

team about her pregnancy or her severe, two-month post-partum depression.[286] After feeling no support from the WNBA, Diggins-Smith vowed to bring her maternal experience to the negotiations to ensure that motherhood is normalized, not penalized, in female sports.[287] Finally, in early 2020, the WNBA released a new collective bargaining agreement, guaranteeing full maternity leave pay to athletes.[288] With this decision, the WNBA sent a message to other female sports organizations that pregnancy is to be celebrated and respected, not hidden.[289]

If employers can create a negative culture surrounding professional female athlete pregnancies, a high school can likely do no better with young students.[290] In both circumstances, the negative psychological effects of having to hide a pregnancy or having to unwillingly reveal a pregnancy could be easily avoided.[291] Therefore, in line with steps exemplified by the WNBA, courts must strictly enforce the Fourth Amendment to protect young girls from revealing the most personal and life-changing information.[292]

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tus/1185598787177373697?lang=en ("I played the ENTIRE season pregnant last year! All star, and led league (top 3-5) in MPG . . . didn't tell a soul.").

286. *See* Voepel, *supra* note 285 (quoting Diggins-Smith in saying that she had "limited resources to help me be successful mentally/physically."); *see also* Skylar Diggins-Smith (@SkyDigg4), TWITTER (Oct. 18, 2019, 7:39 PM), https://twitter.com/SkyDigg4/status/1185339648748470273 ("Having no support from your own organization is unfortunate.").

287. *See* Mertens, *supra* note 101 (highlighting how before recent collective bargaining agreement, WNBA players on maternity leave made at least half of their salaries, which were nearly a tenth of male salaries to start).

288. *See WNBA and WNBPA Reach Tentative Agreement on Groundbreaking Eight-Year Collective Bargaining Agreement*, *supra* note 284 (noting also that collective bargaining agreement includes annual childcare stipend of $5,000, two-bedroom apartment, and planning family benefits for fertility and infertility). *See generally* Mertens, *supra* note 101 (marking collective bargaining agreement as first time any professional athletes are guaranteed full pay on maternity leave).

289. *See WNBA and WNBPA Reach Tentative Agreement on Groundbreaking Eight-Year Collective Bargaining Agreement*, *supra* note 284 (quoting Sue Bird, member of WNBA Players Association executive committee in saying "When you look at things like what we're able to do with maternity leave and family planning. . . . [W]e're going to be looked at as—I think—pioneers in the sports world").

290. For further discussion on the negative culture surrounding pregnancy in both professional and high school athletics, see *supra* notes 54-118 and accompanying text.

291. For further discussion on the impact of a toxic environment surrounding pregnancy, see *supra* notes 252-290 and accompanying text.

292. For further discussion on why courts must strictly follow the Fourth Amendment to protect young female athletes from forced pregnancy tests, see *supra* notes 246-291 and accompanying text.

V. YES, COURTS HAVE THE POWER TO CHANGE

As citizens of the United States, all women, including student and professional athletes, have the Fourth Amendment right to be free from unreasonable searches and seizures by the government.[293] However, public school students still, given the nature of their relationship as minors in a public school system, have lower expectations of privacy.[294] These lowered expectations sometimes result in schools implementing certain policies that infringe upon the privacy rights of students.[295] For example, in *Vernonia*, the Supreme Court found that the school district at issue implemented a valid policy of drug testing athletes, especially since athletes were at the center of illegal drug use in the high school.[296] Contrarily, when a school is forcing female athletes to take a pregnancy test, seldom do courts find a legitimate safety reason behind the action.[297]

Professional employers likewise do not have legitimate safety concerns in testing athletes.[298] When women are forced to take a pregnancy test, they are subjected to having superiors and colleagues discover very private and personal information.[299] Further, forcing females to take pregnancy tests inherently puts females in a position "less than" their male counterparts, who obviously are not

293. For further discussion on the Fourth Amendment rights inherent to public school students, see *supra* notes 224-292 and accompanying text.

294. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656-58 (1995) (detailing inherent characteristics of school environment that lower students', specifically athletes', expectation of privacy); *see also* New Jersey v. T.L.O., 469 U.S. 325, 338 (1985) (acknowledging school's legitimate interest in maintaining school discipline, but holding school students to still have right to privacy).

295. For further discussion on the lower expectation of privacy that school students have, see *supra* notes 7-21 and accompanying text.

296. *See Vernonia*, 515 U.S. at 665-66 (concluding school's policy, while intrusive, is reasonable because it is for safety of school).

297. *See* Lewis, *supra* note 15, at 183 (questioning whether there are any legitimate safety reasons behind school administrator forcing student to take pregnancy test); *see, e.g.*, Gruenke v. Seip, 225 F.3d 290, 308 (2000) (finding student's Fourth Amendment privacy rights were undoubtedly violated when her swim team coach pressured her into taking pregnancy test).

298. For further discussion on rampant pregnancy and gender discrimination in professional athletics, see *supra* notes 54-118 and accompanying text.

299. *See* Ascolese v. Se. Pa. Transp. Auth., 902 F. Supp. 533, 550 (E.D. Pa. 1995) (listing private issues could be revealed by forcing pregnancy test, including subsequent miscarriage or abortion and parts of sexual history). *See generally Vernonia*, 515 U.S. at 658 ("The other privacy aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is *significant* that the tests at issue here look *only for drugs*, and not for whether the student is, for example, epileptic, *pregnant*, or diabetic.") (emphasis added).

experiencing such a privacy intrusion.[300] Consequently, females feel like social pariahs in the very places where they are meant to be embraced.[301] To prevent this privacy invasion and inevitable discrimination, courts must utilize the Fourth Amendment to emphasize the privacy interests at stake and deter school administrators from forcing female athletes to take pregnancy tests.[302]

*Hannah Rogers**

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300. *See* Lewis, *supra* note 15, at 183 (noting discrimination in this manner is violation of Title IX).

301. *See generally* Kempner, *supra* note 19 (describing consequences of forced pregnancy tests, including girls feeling like they should be ashamed of themselves and feeling equal to their peers who engaged in illegal activity of ingesting drugs).

302. For further discussion on the steps courts must take to protect young women, see *supra* notes 252-301 and accompanying text.

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