St. Mary's Law Journal

Volume 41 | Number 3 Article 2

1-1-2010

Danger or Resort to Underwear: The Safford Unified School District No. 1 v. Redding Standard for Strip Searching Public School Students.

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"DANGER OR RESORT TO UNDERWEAR": THE *SAFFORD UNIFIED SCHOOL DISTRICT NO. 1 V. REDDING* STANDARD FOR STRIP SEARCHING PUBLIC SCHOOL STUDENTS

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I. INTRODUCTION

The Fourth Amendment to the United States Constitution governs the constitutionality of searches and seizures in schools.[1] It states:

The right of the people to be secure in their persons, houses, papers,

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1. New Jersey v. T.L.O., 469 U.S. 325, 333 (1985).

> 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.[2]

While the fifty-four words of this provision appear simple, they are not at all easy to interpret, particularly in the public school context.[3] Complicating this is the fact that, in the public school context, the interests of the school in maintaining order and discipline of children *in loco parentis* must be balanced against the students' Fourth Amendment interests.[4] When students seek to challenge the constitutionality of a school search, they turn to the Fourth Amendment. Yet, as the United States Supreme Court has noted, the Fourth Amendment rights of students are not coextensive with those of adults.[5]

One area of public school searches students have challenged over the years is the strip search.[6] Nevertheless, there was no

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2. U.S. CONST. amend. IV; *see* Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU EDUC. & L.J. 71, 88–114 (discussing the evolution of search and seizure in public schools).

3. *See generally T.L.O.*, 469 U.S. at 325 (considering the appropriate application of the Fourth Amendment to public schools and establishing the proper standards for determining whether searches carried out by public school officials are in accordance with the law).

4. *See id.* at 336–40 (asserting that proper application of the Fourth Amendment in the context of school children requires balancing the competing interests of "the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place").

5. *See id.* at 339–41 (identifying the special needs of the school setting as reason to modify both the level of suspicion and warrant requirements to which traditional searches are ordinarily subject).

6. *See, e.g.*, Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1077 (9th Cir. 2008) (en banc) (claiming that a strip search of a middle school student violated the Fourth Amendment), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009); Phaneuf v. Fraikin, 448 F.3d 591, 592, 594 (2d Cir. 2006) (alleging that school authorities strip searched a student without sufficient cause to do so); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 601 (6th Cir. 2005) (contending that school officials' decision to subject high school students to a strip search was unreasonable and thus unconstitutional); Cuesta v. Sch. Bd. of Miami-Dade County, 285 F.3d 962, 966 (11th Cir. 2002) (contesting a strip search by police officers after being contacted by school officials); Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160, 1162 (11th Cir. 2001) (challenging strip searches of schoolchildren as unconstitutionally infringing on Fourth Amendment rights), *vacated sub nom.* Thomas v. Roberts, 536 U.S. 953 (2002); Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 822–23 (11th Cir. 1997) (asserting violations of the Fourth Amendment after two teachers strip searched two elementary students following a classmate's accusation that they had stolen money); Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1319 (7th Cir. 1993) (arguing that strip searching a

word from the United States Supreme Court on the constitutionality of strip searches of students until 2009.[7] Consequently, lower courts struggled to determine the constitutional parameters of such searches, with conflicting results.[8] For example, in *Phaneuf v. Cipriano*,[9] Kelly Phaneuf was strip searched after a fellow student informed the school that she planned to hide

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student suspected of carrying illegal drugs was unconstitutional); Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 881 (6th Cir. 1991) (seeking reparation and injunctive relief from a strip search of a student by school authorities without a warrant); Doe v. Renfrow, 631 F.2d 91, 92 (7th Cir. 1980) (complaining that a "nude body search . . . made without a finding of reasonable cause" violated a high school student's Fourth Amendment rights); H.Y. *ex rel.* K.Y. v. Russell County Bd. of Educ., 490 F. Supp. 2d 1174, 1178, 1182 (M.D. Ala. 2007) (alleging school officials' strip search of seventh-grade students violated the Fourth Amendment); Carlson *ex rel.* Stuczynski v. Bremen High Sch. Dist. 228, 423 F. Supp. 2d 823, 826 (N.D. Ill. 2006) (challenging as unreasonable a strip search of two students suspected of stealing sixty dollars from a locker room); Watkins v. Millennium Sch., 290 F. Supp. 2d 890, 897, 900 (S.D. Ohio 2003) (contending that a teacher's search requiring a third-grade student to "expose the private areas of her body" in a search that did not rest on individual suspicion was an illegal search); Rudolph *ex rel.* Williams v. Lowndes County Bd. of Educ., 242 F. Supp. 2d 1107, 1115 (M.D. Ala. 2003) (claiming that individual suspicion was lacking for purposes of a strip search where illegal drugs were merely found near the suspects); Fewless *ex rel.* Fewless v. Bd. of Educ. of Wayland Union Schs., 208 F. Supp. 2d 806, 808 (W.D. Mich. 2002) (challenging the strip search of a high school student); Konop *ex rel.* Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1203 (D. S.D. 1998) (challenging a strip search where a teacher pulled underwear away from students' bodies in search of stolen money); Mendiola *ex rel.* Mendiola v. S. S.F. Unified Sch. Dist., No. C-95-2793MHP, 1996 WL 53635, at *1 (N.D. Cal. Jan. 31, 1996) (alleging a Fourth Amendment violation where a student was strip searched on suspicion of stealing thirteen dollars); Oliver *ex rel.* Hines v. McClung, 919 F. Supp. 1206, 1211 (N.D. Ind. 1995) (claiming that school officials' strip search of female students in search of four dollars violated the Fourth Amendment).

7. *See* Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2637 (2009) (considering "whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school").

8. *Compare Fraikin*, 448 F.3d at 592 (providing that the strip search of a high school student based on a "trustworthy" tipper's statement, without evidence of how the teacher formed the basis that the tipper was in fact trustworthy, was unconstitutional), *and Beard*, 402 F.3d at 601 (holding that the school's lack of individualized suspicion—apparent from the school's strip searching of twenty students in search for missing money—rendered the strip searches unconstitutional), *with Cuesta*, 285 F.3d at 964 (showing that a strip search of an adult high school student by police officers on the school's report of suspicious criminal activity was not unconstitutional), *and Williams*, 936 F.2d at 887 (finding a strip search of a high school student, looking for a vial of drugs, was based on credible prior events and was not unreasonable at its inception nor unreasonable in scope).

9. Phaneuf v. Cipriano, 330 F. Supp. 2d 74 (D. Conn. 2004), *rev'd sub nom.* Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006).

marijuana in her pants during a mandatory bag check.[10] Kelly sued the school district, claiming that the strip search violated her constitutional rights.[11] The federal district court for the District of Connecticut found the strip search reasonable and granted the defendants' motion for summary judgment.[12] On appeal, the United States Court of Appeals for the Second Circuit reversed, finding the strip search highly intrusive and unreasonable.[13]

Similarly, in *Beard v. Whitmore Lake School District*,[14] public school students were strip searched after a student reported her prom money stolen.[15] The students filed suit against the school district, contending that the search violated their Fourth Amendment rights.[16] The federal district court for the Eastern District of Michigan denied the defendants' summary judgment motion.[17] On appeal, the Sixth Circuit Court of Appeals found the strip search unconstitutional.[18] Commenting on the state of strip search jurisprudence, the court observed that the law "was not clearly established."[19]

In contrast, in *Cuesta v. School Board of Miami-Dade County*,[20] both the federal district court for the Southern District of Florida and the Eleventh Circuit Court of Appeals found a strip search reasonable and constitutional.[21] In that case, a student was strip searched after anonymously distributing a pamphlet at the school depicting a dart through the principal's head.[22] The pamphlet also included an essay in which the writer wondered what would occur if the principal, teachers, or other students were shot.[23] Likewise,

10. School officials did not find marijuana in the strip search of Kelly. *Id.* at 76.
11. *Id.*
12. *Id.* at 82.
13. *Fraikin*, 448 F.3d at 592.
14. Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005).
15. The money was not found in the strip search. *Id.* at 601.
16. *Id.* at 601–02.
17. *Id.*
18. *Id.* at 602.
19. *Beard*, 402 F.3d at 601; *accord* Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 828 (11th Cir. 1997) ("[A]t the time these events took place, the law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible.").
20. Cuesta v. Sch. Bd. of Miami-Dade County, 285 F.3d 962 (11th Cir. 2002).
21. *Id.* at 964.
22. *Id.* at 965.
23. *Id.* The text of the pamphlet read in pertinent part:

in *Singleton v. Board of Education*,[24] the federal district court for the District of Kansas found the strip search of a student accused of stealing $150 from the front seat of a car reasonable and constitutional.[25] In *Widener v. Frye*,[26] a student was strip searched after the smell of marijuana was detected around his person.[27] The federal district court for the Southern District of Ohio found the strip search reasonable and constitutional.[28] In *Williams v. Ellington*,[29] both the federal district court for the Western District of Kentucky and the Sixth Circuit Court of Appeals upheld the strip search of a student suspected of drug use as reasonable and constitutional.[30]

These are just a few of the many conflicting rulings around the country on the constitutionality of strip searches of students. While some courts generally conceded the intrusive and degrading nature of a strip search,[31] this was usually deemed insufficient to bar the strip search of students.[32] On June 25, 2009, the United States Supreme Court tried to provide perspicuity to the issue in *Safford Unified School District No. 1 v. Redding*.[33] In that case, the Court articulated the standard for public school searches of

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> I have often wondered what would happen if I shot Dawson in the head and other teachers who have pissed me off or shot the fucking bastard who thought I looked at him wrong or the airheaded cheerleader who is more concerned about what added layer of Revlon she's putting on instead of the fact that she's blocking my path or, I would shoot (twice) the fucking freshmen who think they're cool cuz they're in high school.

Id. at 965.

24. Singleton v. Bd. of Educ., 894 F. Supp. 386, 390 (D. Kan. 1995).

25. *Id.* at 389. The money was not found in the strip search. *Id.*

26. Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992), *aff'd*, 12 F.3d 215 (6th Cir. 1993).

27. *Id.* at 36. No marijuana was found in the strip search. *Id.*

28. *Id.*

29. Williams *ex rel.* Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).

30. *Id.* at 881. No drugs were found in the search. *Id.* at 883.

31. *See, e.g.*, Phaneuf v. Fraikin, 448 F.3d 591, 595–98 (2d Cir. 2006) (discussing the intrusive nature of a strip search); *Williams*, 936 F.2d at 887 (acknowledging that a strip search is personally intrusive in nature).

32. *See, e.g.*, *Williams*, 936 F.2d at 887 (holding that while a strip search is personally intrusive in nature, the search in this case was not unreasonable). *See generally* Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) (remarking that the strip search of two female elementary school students was not intrusive in light of their age and sex).

33. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633 (2009).

students.[34] In *Redding*, the Court found the strip search of Savana Redding, the public school student in the case, unconstitutional under the Fourth Amendment.[35]

This Article examines the Supreme Court's decision in the *Redding* case. Section II presents the facts of the case, the governing precedent, and the lower court rulings. Section III discusses the Supreme Court's decision and the other opinions in the case. The final section identifies implications of the decision for school strip searches of students.

II. THE FACTS, PRECEDENT, AND LOWER COURT DECISIONS

A. *Facts*

Safford Middle School officials strip searched Savana Redding, a 13-year-old student, based on information from another student, Marissa Glines, suggesting that Savana was distributing prescription drugs at the school.[36] The school had a policy which barred students from the "nonmedical use, possession, or sale of drugs on school property or at school events."[37] The term "drugs" as defined by the policy encompassed "prescription or over-the-counter drug[s], except those for which permission to use in school ha[d] been granted."[38]

The incidents that led to the search in this case began in August 2003 during a school dance.[39] School officials observed "unusually rowdy behavior" and smelled alcohol around a group of students that included Savana and Marissa.[40] Additionally, a bottle of alcohol and a pack of cigarettes were found in the female restroom that evening.[41] Despite these events, the school took no action against the students.[42] Approximately six weeks later, Jordan, another student at the school, informed the principal and assistant

34. *Id.* at 2639.
35. *Id.* at 2637.
36. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding I*), 504 F.3d 828, 830 (9th Cir. 2007), *vacated on reh'g en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).
37. *Id.* at 829.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Redding I*, 504 F.3d at 829.
42. *Id.* at 830.

principal that Savana had served alcohol to her classmates at a party before the school dance, an allegation Savana denied.[43] His mother, who was present at the meeting with these administrators, revealed that Jordan had become violent with her and had gotten sick a few nights before the meeting.[44] According to Jordan, this was due to taking pills a classmate gave him.[45] He also told the administrators that students were carrying weapons and drugs to school.[46]

A week later, Jordan informed the assistant principal that some students planned to take pills during lunch.[47] In addition, he gave the assistant principal a white pill which he claimed Marissa had given him.[48] The school nurse identified the pill as 400 mg ibuprofen, which is only obtainable with a prescription.[49] Relying on the information from Jordan, the assistant principal asked Marissa to pack her belongings and follow him to his office.[50] As she proceeded to do so, he noticed a planner on the desk next to her.[51] Because Marissa claimed the planner did not belong to her, the assistant principal asked the teacher to find its owner.[52] Inside the planner were lighters, knives, a permanent marker, and a cigarette.[53]

At his office, the assistant principal, with a female administrative assistant present, required Marissa to "open her wallet" and "turn out her pockets."[54] This search revealed several white pills, a blue pill, and a razor blade.[55] Marissa claimed Savana gave her the

43. *Id.* at 829–30.

44. *Id.* at 830.

45. *Id.*

46. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding I*), 504 F.3d 828, 830 (9th Cir. 2007), *vacated on reh'g en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Redding I*, 504 F.3d at 830.

52. *Id.*

53. *Id.* Marissa also claimed she did not know anything about the contents of the planner. *Id.*

54. *Id.*

55. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding I*), 504 F.3d 828, 830 (9th Cir. 2007), *vacated on reh'g en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

blue pill—200 mg naproxen[56]—and the white pills.[57] The assistant principal asked the administrative assistant to conduct a further search of Marissa's clothing, as well as her person, for more pills.[58] Only the female nurse and the administrative assistant were present for this search, which was conducted behind closed doors.[59] Marissa was asked to take off her socks and shoes, pull up her shirt, "pull out her bra band," and "take off her pants and pull out the elastic of her underwear."[60] The search did not produce any more pills and Marissa was allowed to put on her clothes after the search.[61]

After the assistant principal called Savana to his office, he proceeded to question her and counsel her on the need to be truthful.[62] Savana claimed ownership of the planner, but denied any knowledge of its contents.[63] Savana revealed that she had lent Marissa the planner so Marissa could conceal some items from her parents.[64] The assistant principal asked Savana about the pills and told her that he had learned she was distributing pills at the school.[65] She denied knowledge and distribution of the pills.[66] With her permission to search her belongings, the assistant principal and the administrative assistant searched her backpack.[67] When this search yielded nothing, the assistant principal asked the administrative assistant to conduct a search of Savana's person in the nurse's office.[68] Only the female administrative assistant and the female nurse were present for this fruitless search—the strip

56. Naproxen, which is sold under various brand names such as Aleve and Naprosyn, is "an over-the-counter drug used to treat pain and inflammation." *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Redding I*, 504 F.3d at 830.

61. *Id.* There is no mention of the school's having sought parental permission prior to the search, and parental permission does not appear to have been required by school policy. *Id.* at 829–30.

62. *Id.* at 831.

63. *Id.*

64. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding I*), 504 F.3d 828, 831 (9th Cir. 2007), *vacated on reh'g en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

65. *Id.*

66. *Id.*

67. *Id.* It is important to point out that Savana consented to the search of her belongings, not to a strip search.

68. *Id.*

search challenged in this case.[69] Savana's mother was not contacted prior to the search.[70] The strip search involved asking Savana to:

> (1) remove her jacket, shoes, and socks, (2) remove her pants and shirt, (3) pull her bra out and to the side and shake it, exposing her breasts, and (4) pull her underwear out at the crotch and shake it, exposing her pelvic area.[71]

Savana was not touched during the search, and she was permitted to put on her clothes after the search.[72] She did not willingly consent to this search, and in fact tried to hide her face so the two adults would not see her on the verge of tears.[73] In Savana's words, the search was the "most humiliating experience" and violating.[74] She felt "embarrassed and scared, but felt [she] would be in more trouble if [she] did not do what they asked."[75] The two adults progressed through each stage of the strip search, even though the preceding search of her effects had corroborated Savana's assertion that she possessed no pills.[76]

B. *Precedent:* New Jersey v. T.L.O.

New Jersey v. T.L.O.[77] is the seminal case in public school Fourth Amendment jurisprudence.[78] This case arose after school officials searched a student's personal effects.[79] A teacher found T.L.O., the high school student, smoking with another student in the restroom in violation of a school rule.[80] T.L.O. denied

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69. *Redding I*, 504 F.3d at 831.

70. *Id.*

71. *Id.*

72. *Id.*

73. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1076 (9th Cir. 2008) (en banc), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

74. *Id.* at 1075.

75. *Id.*

76. *Id.*

77. New Jersey v. T.L.O., 469 U.S. 325 (1985).

78. *See generally* Floyd G. Delon & Greg L. Gettings, *The Post-*T.L.O. *Status of Search and Seizure Policies and Practices in Public Schools*, 45 EDUC. L. REP. 461 (1988) (examining the lower courts' school-search jurisprudence after *T.L.O.*).

79. *T.L.O.*, 469 U.S. at 328. Recall, the Fourth Amendment protects "persons, houses, papers, and effects" from unreasonable searches and seizures. U.S. CONST. amend. IV.

80. *T.L.O.*, 469 U.S. at 328.

smoking.[81] Consequently, she was summoned to the assistant vice principal's office, where her purse was searched.[82] The search revealed a pack of cigarettes and cigarette rolling papers.[83] Based on his experience that a high correlation exists between cigarette rolling papers and marijuana use, the assistant vice principal decided to search T.L.O.'s entire purse for drugs.[84] During this search, he found marijuana, empty plastic bags, a pipe, a large number of dollar bills, two letters connecting T.L.O. to drug dealing, and an index card of people owing T.L.O. money.[85] T.L.O.'s mother and the police were informed.[86] At the police station, T.L.O. confessed to dealing marijuana at the school.[87] The State of New Jersey filed delinquency charges against her.[88] In response, T.L.O. claimed that the search violated her Fourth Amendment rights.[89] Finding no Fourth Amendment violation, the state trial court denied her motion to suppress the fruits of the search and her confession under the exclusionary rule.[90] She was ruled a delinquent and sentenced to probation.[91] A divided state appellate court vacated the delinquency judgment but affirmed the trial court ruling that the search was constitutional.[92] On appeal, the Supreme Court of New Jersey reversed the appellate court's Fourth Amendment decision and ordered suppression of the fruits of the search.[93] The United States Supreme Court granted the State's petition for certiorari.[94]

The Supreme Court initially ruled that the Fourth Amendment governs searches by public school officials.[95] After ruling that the vice principal was a state actor for Fourth Amendment purposes, the Court turned to the issue of boundaries of a public school

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *T.L.O.*, 469 U.S. at 328.
86. *Id.*
87. *Id.* at 329.
88. New Jersey v. T.L.O., 469 U.S. 325, 329 (1985).
89. *Id.*
90. *Id.* at 329–30.
91. *Id.*
92. *Id.* at 330.
93. *T.L.O.*, 469 U.S. at 330.
94. New Jersey v. T.L.O., 464 U.S. 991, *granting cert. to* 463 A.2d 934 (N.J. 1983).
95. *T.L.O.*, 469 U.S. at 333.

student's reasonable expectations of privacy while on school grounds.[96] The Court stated that "[a] search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."[97]

The Court declared that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable."[98] According to the Court, the reasonableness of any search must be determined by balancing the "legitimate expectations of privacy and personal security" against the interest of the government in "effective methods to deal with breaches of public order."[99] The Court also ruled that students do have legitimate expectations of privacy in school.[100] Furthermore, the Court noted that, because of the flexibility and special needs of public school discipline,[101] warrants and probable cause are not required for searches conducted by public school officials.[102]

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96. *Id.* at 337–38; *see, e.g.*, R.C.M. v. State, 660 S.W.2d 552, 553 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (discussing the Fourth Amendment's protection of adults and children).

97. *T.L.O.*, 469 U.S. at 337–38.

98. *Id.* at 337 (noting that "what is reasonable depends on the context within which a search takes place"). The word "reasonable" is from the language "unreasonable searches and seizures" in the Fourth Amendment. U.S. CONST. amend. IV. In *T.L.O.*, the Court asserted that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

99. *T.L.O.*, 469 U.S. at 337.

100. *Id.* at 338–39. Specifically, the Court stated:

> Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Id.

101. *Id.* at 333 n.2 (explaining that courts apply a less strict Fourth Amendment analysis when examining school searches).

102. *Id.* at 340–41; *see, e.g.*, Josh Kagan, *Reappraising* T.L.O.*'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291, 297 (2004) (analyzing the special needs discussion in *T.L.O.*).

Instead, school officials need only *reasonable suspicion* to begin a search of a student.[103] This "requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.'"[104]

To help flesh out the requisite balancing for reasonableness identified above, the Court created the two-prong inquiry (the *T.L.O.* test) for the public school context: (1) "whether the . . . [search] was justified at its inception";[105] and (2) if so, "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[106] The first prong will be satisfied if the school has reasonable grounds to suspect that a search will reveal evidence that the student is breaking or has broken school rules or laws.[107] The second prong—permissible scope—will be satisfied if the measures used in the search are (1) reasonably related to the goals of the search[108] and (2) not excessively intrusive in light of (a) the student's age,[109] (b) the student's gender,[110] and (c) the nature of the student's infraction.[111]

Applying this test in *T.L.O.*, the Court found that the assistant vice principal had reasonable grounds to suspect that a search of T.L.O. would reveal cigarettes, given her denial of smoking after a teacher observed her smoking at the school.[112] Furthermore, the assistant vice principal's experiences justified the expanded search

103. This refers to reasonable individualized suspicion in contrast to generalized suspicion applicable to cases of, for example, random drug searches. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 837 (2002) (stating that an even more generalized standard than individualized suspicion may be utilized); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (discussing the individualized standard of reasonable suspicion). For more on the reasonable suspicion standard, see generally Joseph R. McKinney, *The Fourth Amendment and the Public Schools: Reasonable Suspicion in the 1990s*, 91 EDUC. L. REP. 455 (1994), which evaluates the reasonable suspicion standard imposed upon school officials by some courts.

104. *T.L.O.*, 469 U.S. at 346 (quoting Hill v. California, 401 U.S. 797, 804 (1971)).

105. *Id.* at 341.

106. *Id.*

107. *Id.* at 342.

108. New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 344–46.

of T.L.O.'s purse.[113] The Court likewise found that the measure adopted—search of T.L.O.'s purse—was reasonably related to the goal of finding the cigarettes and drugs and was not excessively intrusive in light of her age, gender, or the nature of the infraction.[114] The *T.L.O.* test continues to provide the framework for search and seizure in schools as it did in the *Safford* case, as evident in the discussions that follow.[115]

C. *Lower Court Decisions in* Safford Unified School District No. 1 v. Redding

Savana's mother, April Redding, sued the district, the assistant principal, the administrative assistant, and the nurse, claiming that the strip search violated Savana's Fourth Amendment rights.[116] The defendants denied violating Savana's Fourth Amendment rights and moved for summary judgment.[117] They also claimed that, even if her rights were violated, they had qualified immunity since the law was not "clearly established" at the time of the search.[118] The district court granted the motion for summary judgment, finding the search constitutional.[119] April Redding appealed to the Ninth Circuit Court of Appeals.[120] A panel of the court decided the case.[121]

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113. *T.L.O.*, 469 U.S. at 344–46.

114. *Id.*

115. *See, e.g.*, Sunil H. Mansukhani, *School Searches After* New Jersey v. T.L.O.*: Are There Any Limits?*, 34 U. LOUISVILLE J. FAM. L. 345, 351 (1996) (discussing the application of the *T.L.O.* standard by lower courts); Matthew Lynch, Note, *Mere Platitudes: The "Domino Effect" of School-Search Cases on the Fourth Amendment Rights of Every American*, 91 IOWA L. REV. 781, 794–97 (2006) (criticizing the standard set by *T.L.O.*). For a more in-depth discussion of the *T.L.O.* test, see David C. Blickenstaff, *Strip Searches of Public School Students: Can* New Jersey v. T.L.O. *Solve the Problem?*, 99 DICK. L. REV. 1, 16 (1994), which summarizes the standard established by the *T.L.O.* Court.

116. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding I*), 504 F.3d 828, 831 (9th Cir. 2007), *vacated on reh'g en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

117. *Id.*

118. *Id.* The doctrine of qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

119. *Redding I*, 504 F.3d at 831.

120. *Id.*

121. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1078 (9th Cir. 2008) (en banc).

The panel applied the *T.L.O.* test to the case.[122] First, the court found the search justified at its inception.[123] Specifically, the court found that the school officials had reasonable grounds to suspect that searching Savana's person would reveal evidence that she was violating or had violated school rules or the law.[124] These "reasonable grounds" included what the court characterized as "*several key* pieces of information tying [Savana] to the possession and distribution of pills in violation of school policy."[125]

The court identified the following pieces of information to support its conclusion that the search was justified at its inception: (1) Jordan's statement to the assistant principal that Marissa had pills in her possession and had distributed pills to Jordan, along with Jordan's disclosure that students planned to ingest pills during lunch;[126] (2) the assistant principal's discovery of pills on Marissa during his search of her wallet and pockets;[127] (3) Marissa's statement that Savana gave her the pills;[128] (4) Savana's admission that she owned the planner;[129] (5) Savana's friendship with Marissa;[130] (6) Savana's statement that she had lent Marissa the planner to help Marissa hide contraband from her parents;[131] (7) the veracity of Jordan's statements corroborated by the assistant principal finding pills on Marissa;[132] (8) the veracity of Marissa's statements;[133] and (9) Jordan's statement to the assistant principal

122. *Redding I*, 504 F.3d at 832.

123. *Id.*

124. *Id.*

125. *Id.* (emphasis added).

126. *Id.*

127. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding I*), 504 F.3d 828, 832 (9th Cir. 2007), *vacated on reh'g en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

128. *Id.*

129. *Id.* at 834.

130. *Id.*

131. *Id.*

132. *Redding I*, 504 F.3d at 834.

133. Specifically, the court noted:

> Ample facts supported Marissa's veracity as an informant, as well. It is undisputed that school employees had witnessed Redding and Marissa socializing with the same group of friends, and presumably with each other, at the August school dance. Redding also acknowledged a friendship between Marissa and herself during her interview with Wilson. Finally, and perhaps most significantly, during that same interview, Redding conceded to Wilson that she had lent Marissa her planner to help Marissa conceal contraband from her parents. The girls' friendship and prior interactions made Marissa's accusations against Redding credible, and Wilson acted

that Savana had served her classmates alcohol at her house.[134]

Under the second prong of the *T.L.O.* test, the Ninth Circuit panel found the search permissible in scope.[135] In making this determination, the court considered two factors: (1) "the importance of the governmental interest at stake"[136] and (2) the contraband's size.[137] According to the court, the governmental interest at stake here—prohibiting students from use of unauthorized prescription drugs at school—was so important that it warranted an intrusive search of Savana's person.[138] This was especially so because of the grave dangers posed by inappropriate use of prescription drugs.[139]

With respect to the contraband size, the court ruled that the defendants' search was for "something small: pills."[140] Consequently, when a search of the backpack failed to reveal pills, and since Savana's clothes had no pockets, the defendants had reasonable grounds to expand the search to her person.[141] The court also found the scope of the search permissible because it was conducted behind closed doors by two females.[142] Likewise, Savana was not required to take off her bra and underwear, nor was she touched during the search.[143] The court rejected Savana's argument that the school officials failed to use the least restrictive means.[144] The court stated that "[t]he Supreme Court has

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reasonably in relying upon those accusations in justifying his further investigation, and ultimate search, of Redding.

Id.

134. *Id.* Because this appeal was a review of summary judgment, the court accepted as true Savana's statement that she did not serve alcohol. However, the court also stated that the school officials at the time of the search had reasonable grounds to rely on Jordan's statement: "[I]t was a relevant factor which the school officials were entitled to take into account." *Id.*

135. *Id.*

136. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding I*), 504 F.3d 828, 832 (9th Cir. 2007), *vacated on reh'g en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Redding I*, 504 F.3d 828, 835.

142. *Id.* at 835–36.

143. *Id.* at 836.

144. *See id.* (noting that the United States Supreme Court had already held that a search need not be limited to the least restrictive means available to be reasonable).

repeatedly held . . . that 'reasonableness' under the Fourth Amendment does not require adherence to the least restrictive means."[145] Accordingly, the court found that Savana's Fourth Amendment rights were not violated.[146] A majority of the Ninth Circuit judges voted to rehear the case en banc.[147]

On reconsideration en banc, the question presented to the court was "whether the strip search violated Savana's Fourth Amendment rights, and, if so, whether those rights were clearly established" at the time of the strip search.[148] The court held in the affirmative on both questions.[149]

The *T.L.O.* test provided the framework for the Ninth Circuit's decision.[150] Pursuant to the first prong of the test, the court inquired as to whether the strip search was justified at its inception.[151] The court iterated various principles from *T.L.O.* discussed above and added that the requisite reasonable suspicion in cases must vary with the intrusiveness of the search.[152] In consonance with this, the court dichotomized the search in the *Safford* case as follows: (1) the search of Savana's pockets and backpack, and (2) the strip search.[153] The court concluded that while there was reasonable suspicion to justify inception of the first search, reasonable suspicion was lacking for the second.[154] This was especially so because the first search failed to create a causal link of reasonable suspicion to justify the second search.[155] According to the court, the main link between Savana and the

145. *Id.* at 836 ("[R]easonableness under the Fourth Amendment does not require employing the least intrusive means, because 'the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.'" (quoting Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002))).

146. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding I*), 504 F.3d 828, 836 (9th Cir. 2007), *vacated on reh'g en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

147. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1078 (9th Cir. 2008), *vacating en banc*, 504 F.3d 828 (9th Cir. 2007).

148. *Id.*

149. *Id.* at 1081–89.

150. *Id.*

151. *Id.* at 1081.

152. *Redding II*, 531 F.3d at 1081.

153. *Id.*

154. *Id.* The search of Savana's backpack and pockets was not an issue in this appeal.

155. *Id.* at 1082 ("[T]he initial search of Savana revealed nothing to suggest she possessed pills or that she was anything less than truthful when she emphatically stated she had never brought pills into the school.").

pills—Marissa's statement implicating Savana—was a "self-serving statement"[156] that should have been given little credence,[157] particularly because the court is "most suspicious of those self-exculpatory tips that might unload potential punishment on a third party."[158] Additionally, the assistant principal had no information indicating that Savana possessed pills at the time of the search, or that she was concealing pills in a place that warranted a strip search.[159] The court emphasized that the assistant principal should have conducted further investigations before proceeding to a search as intrusive as a strip search.[160] The court dismissed the suggestion that Savana's friendship with Marissa provided reasonable grounds for the strip search, observing that "[t]his is nothing more than 'guilt-by-association,' certainly too thin of a

156. *Id.* ("[T]he primary purported justification for the strip search was Marissa's statement that Savana had given her the ibuprofen that she was caught with in violation of the school's rule. This self-serving statement, which shifted the culpability for bringing the pills to school from Marissa to Savana, does not justify initiating a highly invasive strip search of a student who bore no other connection to the pills in question.").

157. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1084 (9th Cir. 2008) (en banc) ("Marissa's compounding number of school rule violations should reasonably have cast more suspicion on her own culpability, further undermining the reliability of her accusation of Savana. Further, Savana's mother had denied the family's involvement in providing alcohol to any student before the August school dance. Nevertheless, even if Savana had provided alcohol to students in August, that event does not make it more likely that an October strip search would reveal ibuprofen pills hidden in Savana's underwear."), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009). Further, "the source [Marissa] of the tip, the content of the tip (including no information that Savana currently possessed pills in a place where a strip search would reveal them) and the history of the student in question [i.e., Savana had no history of disciplinary problems at the school]" should have informed the school officials that there were inadequate grounds for reasonable suspicion to initiate a strip search. *Id.* at 1085.

158. *Id.* at 1082 ("Our concerns are heightened when the informant is a frightened eighth grader caught red-handed by a principal. This is particularly so when the student implicates another who has not previously been tied to the contraband and, more generally, has no disciplinary history whatsoever at the school. More succinctly, the self-serving statement of a cornered teenager facing significant punishment does not meet the heavy burden necessary to justify a search accurately described by the Seventh Circuit as 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing.'" (citing Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983))).

159. *Id.* at 1083.

160. *Id.* ("Several avenues were available for Wilson to follow up on Savana's general statement, including discussions with Savana's teachers, conversations with Savana's parents, or further questioning of other students. Certainly, the only 'corroboration' Wilson received—Savana's adamant denial of possessing ibuprofen and a fruitless search of her backpack—did not serve to bolster the tip's reliability to a degree sufficient to justify a further and more intrusive search.").

reed for such a substantial intrusion into Savana's expectations of privacy."[161] Everything considered, the court ruled that the search did not satisfy the requirements of the first prong of the *T.L.O.* test.[162]

Under the second prong, the court concluded that the strip search was not permissible in scope.[163] The court characterized the strip search as "a disproportionately extreme measure to search a thirteen-year-old girl" for prescription drugs.[164] The court found persuasive against a strip search the absence of evidence indicating that Savana's classmates would take pills that came from her underwear.[165] Moreover, the court reasoned, "the most logical places" for Savana to hide the pills were her pockets and backpack, and these turned up nothing.[166] In all, and since "no information pointed to the conclusion that the pills were hidden under her panties or bra," the court concluded:

> Common sense informs us that directing a thirteen-year-old girl to remove her clothes, partially revealing her breasts and pelvic area, for allegedly possessing ibuprofen, an infraction that poses an imminent danger to no one, and which could be handled by keeping her in the principal's office until a parent arrived or simply sending her home, was excessively intrusive.[167]

Bolstering the court's conclusion was the fact that "feelings of humiliation and degradation" attend strip searches.[168] These "pressing and legitimate" concerns "are magnified when strip searches are performed on school children."[169] The court observed that the Ninth Circuit, as well as other circuit courts, had "long recognized the psychological trauma intrinsic to a strip search."[170] The court also relied on research[171] which revealed

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161. *Redding II*, 531 F.3d at 1084 (internal quotation marks omitted).

162. *Id.* at 1085.

163. *Id.*

164. *Id.*

165. *Id.*

166. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1085 (9th Cir. 2008) (en banc).

167. *Id.*

168. *Id.* at 1085–86. This would also play a key role in the United States Supreme Court decision, discussed *infra* Section III.

169. *Id.* at 1086.

170. *Id.* at 1085; *see also id.* at 1086 (adding that "'no one would seriously dispute that a nude search of a child is traumatic'" (quoting Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1321 (7th Cir. 1993))). Furthermore, the court noted

the negative impact of strip searches: "Psychological experts have also testified that victims often suffered post-search symptoms including sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions, and that some victims have been moved to attempt suicide."[172] The trauma and humiliation were not mitigated by the fact that Savana's gender was the same as that of the school officials who strip searched her.[173] "Moreover, that the student is 'viewed rather than touched, do[es] not diminish the trauma experienced by the child.'"[174] To sum up the damaging nature of a strip search, the court rhetorically declared: "The overzealousness of school administrators in efforts to protect students has the tragic impact of traumatizing those they claim to serve. And all this to find prescription-strength ibuprofen pills."[175]

The scope of the search was also impermissible because the pills sought in the case posed no immediate danger, thus minimizing the nature of the infraction.[176] The court reasoned:

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that "'[t]he experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state . . . can only be seen as thoroughly degrading and frightening.'" *Id.* (quoting Chapman v. Nichols, 989 F.2d 393, 396 (10th Cir. 1993)).

171. *Id.* (noting that "psychological research supports these judicial observations" of the traumatic effects of strip searches conducted on school children).

172. *Id.*

173. *Id.* (citing Stephen F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991) (internal quotation marks omitted), and Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998)).

174. Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1086 (9th Cir. 2008) (en banc) (citing Jesse Ann White, A Study of Strip Searching in Pennsylvania Public Schools and an Analysis of the Knowledge, Attitudes, and Beliefs of Pennsylvania Public School Administrators Regarding Strip Searching 37 (Aug. 2000) (unpublished Ph.D. dissertation, Temple University) (on file with the Temple University Graduate Board)).

175. *Id.* at 1086. Likewise, the court stated that "[a] reasonable school official, seeking to protect the students in his charge, does not subject a thirteen-year-old girl to a traumatic search to 'protect' her from the danger of Advil." *Id.* at 1088.

176. *See id.* at 1087 ("[C]ontrary to any suggestion that finding the ibuprofen was an urgent matter to avoid a parade of horribles, even if Savana had possessed the ibuprofen pills, any danger they posed was neutralized once school officials seized Savana and held her in the assistant principal's office. Savana had no means at that point to distribute the pills, and whatever immediately threatening activity the school may have perceived by the alleged possession of prescription-strength ibuprofen had been thwarted. The school officials had only to send Savana home for the afternoon to prevent the rumored

> [A] highly intrusive search in response to a minor infraction would . . . not comport with the sliding scale advocated by the Supreme Court in *T.L.O.* Here, we have exactly such a scenario with the important additional variable that the subject of the search was a thirteen-year-old pubescent girl.[177]

In addressing the qualified immunity question, the court applied the two-part test the Supreme Court had created for the analysis.[178] This test requires courts to inquire whether: (1) the facts, when viewed in the light most favorable to the party claiming injury, demonstrate that the conduct of the school official violated a constitutional right,[179] and (2) if so, whether the right was clearly established at the time.[180] The court framed the question presented narrowly, tied to the facts of the particular case before the court: "Was the Right of a Thirteen-Year-Old Girl to Be Free from Strip Searches on Suspicion of Possessing Ibuprofen Clearly

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lunchtime distribution from taking place—assuming she in fact possessed the pills on her person. The lack of any immediate danger to students only further diminishes the initial minimal nature of the alleged infraction of bringing ibuprofen onto campus.").

177. *Id.* at 1087 (internal citation and quotation marks omitted) (quoting Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1320 (7th Cir. 1993)).

178. *Redding II*, 531 F.3d at 1087. This two-part test is no longer a mandatory sequential step. Pearson v. Callahan, 129 S. Ct. 808, 818 (2009). In *Pearson*, the Court explained:

> On reconsidering the procedure required in *Saucier* [i.e., the two-part test for qualified immunity established in *Saucier v. Katz*, 533 U.S. 194 (2001)], we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

Id. at 818. The Court further noted that

> [t]his flexibility properly reflects our respect for the lower federal courts that bear the brunt of adjudicating these cases. Because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.

Id. at 821. The Court added that "[a]ny misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted. Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases." *Id.* For the Court's rationale for this change see *id.* at 818–22.

179. *Redding II*, 531 F.3d at 1078.

180. *Id.* This is to ensure that school officials have reasonable notice that their conduct could constitute a constitutional infringement.

Established in 2003?"[181] Yet, even the court itself admitted that the fact "[t]hat there is no case precisely on all fours does not preclude the conclusion that the Fourth Amendment right at issue was clearly established when the school officials stripped and searched Savana."[182]

The court ruled that *T.L.O.*—the government framework for searches of public school students—clearly established the law on public school searches, beginning in 1985 when the Supreme Court decided the case.[183] Accordingly, for twenty years, as of the time of Savana's strip search, the public school officials had the *T.L.O.* test, which they should have referred to in determining whether to conduct a strip search.[184] The court reasoned that if the assistant principal had simply applied the test, he would have concluded, as the court did, that the strip search was neither justified at its inception nor permissible in scope.[185] The court's finding that the law was so clearly established at the time of the search led it to conclude that "the school officials' actions here were so *patently* in defiance of the considered approach *T.L.O.* dictates that it is little wonder that we can find no case presenting identical facts."[186] The court further reasoned that, even if *T.L.O.* had not clearly established the law, common sense would have dictated the same conclusion: the strip search was unconstitutional.[187] Considering

181. *Id.* at 1087. If a right was clearly established at the time of the search, the school officials are not entitled to qualified immunity. In other words, in order to have qualified immunity, it must be proven that the right was not clearly established at the time of the search.

182. *Id.* (citing Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1060–61 (9th Cir. 2003)). Furthermore, "[t]here need not be judicial unanimity for [the court] to conclude that a right was clearly established to a reasonable officer. Indeed, majorities on the Supreme Court and the various circuits have declared a right clearly established over the dissents of their colleagues." Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1060–61 (9th Cir. 2008) (en banc) (citing Groh v. Ramirez, 540 U.S. 551 (2004); Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 428 F.3d 223 (6th Cir. 2005); Johnson v. Hawe, 388 F.3d 676 (9th Cir. 2004)).

183. *Id.* at 1088.

184. *Id.*

185. *Id.*

186. *Id.* (emphasis added). To drive this point home further, the court declared that "[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity." *Redding II*, 531 F.3d at 1088 (citing Calabretta v. Floyd, 189 F.3d 808, 819 (9th Cir. 1999)).

187. *Id.* (remarking that "some safeguards on government intrusion remain self-evident and do not require a case on point to prevent government officials from hiding

all these points, the court held that the assistant principal was not entitled to qualified immunity, reversing the district court's grant of summary judgment.[188] The court affirmed the district court's summary judgment as to the nurse and the administrative assistant, however, ruling that they were protected by qualified immunity because they were simply complying with the assistant principal's directives.[189]

III. THE SUPREME COURT DECISION

A. *Majority Opinion*

The Supreme Court granted certiorari to review the same two questions the Ninth Circuit addressed.[190] The first question the Court addressed was "whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school."[191] Justice Souter, in the opinion for the Court, began by reaffirming the reasonable suspicion standard and the *T.L.O.* two-part test for school searches of students.[192] He then explicitly interposed a "reliable knowledge" requirement as an element of reasonable suspicion.[193] According to the Court, analysis of this knowledge component requires consideration of a

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behind the cloak of qualified immunity" (citing Brannum v. Overton County Sch. Bd., 516 F.3d 489 (6th Cir. 2008))), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

188. *Id.* at 1089.

189. *Id.* The case was also remanded for proceedings consistent with the court's decision.

190. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 987 (2009), *granting cert. to* 531 F.3d 1071 (9th Cir. 2008).

191. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2637 (2009).

192. *Id.* at 2639.

193. *Id.* This knowledge component comes from the requirement of "reasonably trustworthy information" in Supreme Court precedent on probable cause:

> Probable cause exists where the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed and that evidence bearing on that offense will be found in the place to be searched.

Id. (internal quotation marks omitted) (citing Brinegar v. United States, 338 U.S. 160, 175–76 (1949).

number of factors, based on the specific contexts of each case,[194] including: (1) "the degree to which known facts imply prohibited conduct";[195] (2) "the specificity of the information received";[196] and (3) "the reliability of its source."[197]

To contextualize its new standard for school searches, the Court iterated the knowledge component for probable cause: knowledge relied on by law enforcement officers must have a "'fair probability' or a 'substantial chance' of discovering evidence of criminal activity."[198] On the other hand, to satisfy the knowledge component for school searches other than strip searches, school officials only need to show that the knowledge relied on for the search has a "*moderate* chance of finding evidence of wrongdoing."[199] Other than this laconic statement of the standard, the Court failed to spell out what a "moderate chance" entails. It does read like a relatively lenient standard, however, and evidently, it is a "lesser standard" than the "fair probability" or "substantial chance" standard for probable cause.[200]

Examining the facts, the Supreme Court, like the Ninth Circuit, indicated that before strip searching Savana, the assistant principal should have asked Marissa "followup questions to determine whether there was any likelihood that Savana *presently* had pills."[201] The Court also stated that Marissa should have been asked to reveal when she got the pills from Savana and the places Savana hid pills.[202] Unlike the Ninth Circuit, however, the Court found the friendship of Savana and Marissa part of the cumulative

194. *Id.* ("At the end of the day, however, we have realized that these factors cannot rigidly control . . . and we have come back to saying that the standards are 'fluid concepts that take their substantive content from the particular contexts' in which they are being assessed." (citing Illinois v. Gates, 462 U.S. 213, 230 (1983); Ornelas v. United States, 517 U.S. 690, 696 (1996))).

195. *Redding III*, 129 S. Ct. at 2639 (citing Adams v. Williams, 407 U.S. 143, 148, 160 n.9 (1972) (Marshall, J., dissenting)).

196. *Id.* (citing Spinelli v. United States, 393 U.S. 410, 416–17 (1969)).

197. *Id.* (citing Aguilar v. Texas, 378 U.S. 108, 114 (1964)).

198. *Id.* (quoting *Gates*, 462 U.S. at 238, 244 n.13).

199. *Id.* (emphasis added).

200. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2639 (2009).

201. *Id.* at 2640 (emphasis added).

202. *Id.*; *see also id.* at 2642 ("[The assistant principal] never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.").

evidence justifying the initial search of Savana—the search of the backpack and outer clothing.[203] Other evidence the Court found justified the inception of the first search included: (1) Marissa's statement identifying Savana as her source of the pills;[204] (2) Jordan's statements to the administrators;[205] and (3) Savana's participation in "an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom."[206] The Court likewise concluded that the initial search was not excessively intrusive, given that it was conducted (1) in Savana's presence[207] and (2) in the "relative privacy" of the assistant principal's office.[208]

To start off its analysis of the strip search, the Court described the nature of the search: Savana was required to "remove her clothes down to her underwear, and then pull out her bra and the elastic band on her underpants."[209] The Court dismissed the school district's arguments that, since the school officials who strip searched Savana did not see any of her private body parts, the search was not questionable.[210] According to the Court, the Fourth Amendment import of strip searches is not based on "who was looking and how much was seen."[211] Instead, the Court ruled that:

> The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both *subjective* and *reasonable* [objective] societal expectations of personal privacy support the treatment of such a search as

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203. *Id.* at 2641.

204. *Redding III*, 129 S. Ct. at 2640. Indeed, the Court concluded that "Marissa's statement that the pills came from Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution." *Id.* at 2641. Additionally, if the assistant principal's "reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making." *Id.*

205. *Id.* These statements were identified *supra*, Section II.A.

206. *Id.* (adding that the assistant principal had reasonable grounds to tie the girls to the contraband, given Jordan's statement that Savana served her classmates alcohol at her house).

207. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2641 (2009).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

> *categorically distinct*, requiring *distinct* elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.[212]

The Court's use of the terms "categorically distinct" and "distinct elements" was the first indication that it would treat strip searches completely differently than other searches of students in public schools.[213] Indeed, the Court characterized a student strip search as "the categorically extreme intrusiveness of a search down to the body of an adolescent."[214]

As evinced by the quote above, the Court viewed both subjective as well as objective expectations of privacy as justifications for treating a strip search as "categorically distinct."[215] Like the Ninth Circuit, the Court also emphasized the "embarrassing, frightening, and humiliating" nature of a strip search to rationalize treating it differently from other searches.[216] For example, the Court noted that Savana's accounts of fright, humiliation, and embarrassment inherently established a subjective expectation of privacy against a strip search.[217]

The Court is willing to accept research evidence to establish objective expectations of student privacy against strip searches.[218] Such evidence must research "the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[219] In this case, the Court relied on Hyman and Perone's *Journal of School Psychology* research on the "serious emotional damage" of strip searches[220] and other evidence in the amicus brief of the National

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212. *Redding III*, 129 S. Ct. at 2641 (emphasis added).

213. *See id.* (determining that a strip search must be treated as "categorically distinct, requiring distinct elements of justification" as opposed to a search of a purse or backpack).

214. *Id.* at 2642.

215. *See id.* at 2641 (arguing that "both subjective and reasonable societal expectations of personal privacy" demand a higher level of justification for strip searches than for other kinds of searches).

216. *Id.*

217. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2641 (2009).

218. *Id.* at 2641–42.

219. *Id.* at 2641.

220. *Id.* at 2642 (citing Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998)).

Association of Social Workers.[221]

According to the Court, there is an accusatory element in strip searches that distinguishes them from other student undress at school and, *a fortiori*, makes a student strip search an "extreme intrusi[on]."[222] Particularly, the Court noted that "[c]hanging for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading . . . ."[223] The Court acknowledged that, while the degrading nature of strip searches helps establish the subjective and objective expectations of privacy, the degradation is insufficient in itself to make strip searches unconstitutional.[224] Instead, the indignity implicates the reasonableness requirement in the second prong of the *T.L.O.* test: "'the search as actually conducted [must be] *reasonably* related in scope to the circumstances which justified the interference in the first place.' The scope will be permissible, that is, when it is not 'excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[225] The Court also ruled that reasonable suspicion that a student is "carrying [drugs] *on her person*" does not justify a search beyond the outer clothing to a strip search.[226]

In what appears to be a restatement of an aspect of the *T.LO.* test's second prong—that a search not be excessively intrusive in light of the nature of the infraction—the Court indicated that "the content of the suspicion" for a search must "match the degree of intrusion."[227] The strip search conducted on Savana failed to satisfy this requirement because the assistant principal knew, *prior to* the search, that the contents of the suspicion were merely

221. *Id.* at 2641–42.

222. *Redding III*, 129 S. Ct. at 2642.

223. *Id.*

224. *Id.*

225. *Id.* (emphasis added) (citations omitted) (quoting New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985)). It also implicates the reasonableness of the suspicion to justify inception of the search. *Id.*

226. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2641 (2009) (emphasis added); *see also id.* at 2649 (Thomas, J., concurring in part and dissenting in part) (condemning the majority's view that "although the school officials had reasonable suspicion to believe that Redding had the pills on her person, they needed some greater level of particularized suspicion to conduct this strip search") (internal quotation marks and citation omitted).

227. *Id.* at 2642 (majority opinion); *see also T.L.O.*, 469 U.S. at 342 (discussing what constitutes a justifiable search).

"prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve."[228] Additionally, the Court reasoned that the assistant principal reasonably should have known that the specific drugs searched for presented a "limited threat"[229] and were not being distributed in large quantities at his school, given the information relied on for the strip search.[230] Furthermore, the assistant principal had no reasonable grounds to suspect that Savana was hiding drugs specifically in her underwear.[231]

The defendants argued that the scope of the search was permissible since students universally conceal contraband "in or under their clothing."[232] The Court rejected this argument, declaring that "when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off."[233] Besides, there was no evidence that Safford Middle School students had "any general practice" of hiding pills in their underwear.[234]

The Court then set forth the strip search requirement for a "permissible scope" analysis under the second prong of the *T.L.O.*

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228. *See Redding III*, 129 S. Ct. at 2642 (2009) (indicating that the *nature* of the specific drugs sought would be one of the factors considered in its analysis under the second prong of the *T.L.O.* test in strip search cases). It is in application of this factor that the Court noted that the assistant principal "knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve" as opposed to some other illegal substance. *Id.*

229. The Court actually characterized the pills here as "nondangerous school contraband." *Id.*

230. *See id.* at 2642 ("He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, [the assistant principal] had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.").

231. *Id.*

232. *Redding III*, 129 S. Ct. at 2642.

233. *Id.* This "pay off" standard for strip searches is a relatively stricter one, in contrast to the "moderate chance" standard the Court presented as applicable to inception of school searches in general. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2639 (2009). In other words, while "a moderate chance of finding evidence of wrongdoing" would suffice for initiating searches of students, it would not suffice for strip searches. *Cf. id.* at 2639 (setting forth the "moderate chance" standard); *id.* at 2642 (setting forth the "pay off" standard).

234. *Id.* at 2642.

test. The Court reasoned that a new test was required for strip searches because "[t]he meaning of such a search [exposure of intimate parts], and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions."[235] The test—the *Redding* test for strip searches—provides:

> [T]he *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion [1] of *danger* [to the students from the power of the drugs or their quantity][236] or [2] of *resort to underwear* for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.[237]

The Court concluded that the search of Savana did not satisfy this test, making any claim of reasonableness of the search "fatal."[238] The *Redding* test also seems to intersect with the first prong of the *T.L.O.* test which requires that searches be justified at inception.[239] Effectively, the Court warned school officials that a strip search would not be justified at its inception unless school officials have reasonable grounds for suspecting danger is presented to students or that the particular student is hiding contraband specifically in her underwear.

With respect to the second question presented in the appeal, the Court ruled that the nurse and the administrative assistant, as well as the assistant principal, were entitled to qualified immunity because the law on strip searches was not clearly established at the time of the search.[240] The Court reaffirmed the rule that school officials are entitled to qualified immunity if the applicable law is not clearly established at the time of a challenged action.[241] As

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235. *Id.* at 2643.

236. *Redding III*, 129 S. Ct. at 2643 (emphasis added).

237. *Id.* (emphasis added).

238. *Id.* at 2642–43 ("In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.").

239. *See supra*, Section II.B (discussing the *T.L.O.* case).

240. *Redding III*, 129 S. Ct. at 2643.

241. *Id.* With respect to when laws are clearly established so that they provide notice to government officials, the Court opined that "[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that '[t]he easiest cases don't even arise.' But even as to action less than an outrage,

did the Ninth Circuit, Justice Souter in his opinion for the Court emphasized that qualified immunity does not require the "*very action* in question" to have been ruled unlawful by a court prior to the time of the action.[242] He was quick to add, however, that "the lower courts have reached divergent conclusions regarding how the *T.L.O.* standard applies to [strip] searches."[243]

The Court acknowledged that qualified immunity is not a guaranteed result of divergence in lower court decisions.[244] However, Justice Souter pointed out that various lower courts in strip search cases had "read *T.L.O.* as a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other."[245] This, the Court concluded, "made it impossible to establish clearly the contours of a Fourth Amendment right . . . [in] the wide variety of possible school settings different from those involved in *T.L.O.* itself."[246] The Court characterized the divergent interpretations of the lower courts of *T.L.O.* as "differences of opinion from our own."[247] Consequently, the Court ruled that the law governing strip searches was not clearly established at the time Savana was strip

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'officials can still be on notice that their conduct violates established law . . . in novel factual circumstances.'" Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2643 (2009) (internal citations omitted) (citing K.H. *ex rel.* v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990); Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

242. *Id.* (emphasis added) (quoting Wilson v. Layne, 526 U.S. 603, 615 (1999)). Recall that the Ninth Circuit ruled that the fact "[t]hat there is no case *precisely on all fours* does not preclude the conclusion that the Fourth Amendment right at issue was clearly established when the school officials stripped and searched Savana." Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1087 (9th Cir. 2008) (en banc) (emphasis added).

243. *Redding III*, 129 S. Ct. at 2643.

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

245. *Id.* at 2643 (citing Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 828 (11th Cir. 1997); Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003); Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 882–83, 887 (6th Cir. 1991)).

246. *Id.*

247. *Id.* at 2644 ("[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.").

searched.[248] It reasoned that the divergence was "substantial enough" to warrant qualified immunity for the school officials in this case, shielding them from liability for the strip search.[249] The Court, however, remanded the case to the Ninth Circuit for decision on whether the school district itself was protected from liability—a question the Ninth Circuit did not consider prior to the Supreme Court review.[250]

B. *Justice Stevens's Opinion, Concurring in Part and Dissenting in Part*

Justice Stevens wrote a separate opinion, joined by Justice Ginsburg, to emphasize that the Court's decision in this case was made under *T.L.O.*'s two-prong test, and that this test remains the framework for analyzing school searches.[251] In other words, he agreed with the Court's decision that the strip search was unconstitutional under the *T.L.O.* test.[252] Unlike the Court, however, he believed that the strip search here was "clearly outrageous conduct" and that the law governing strip searches was "clearly established" at the time of Savana's search.[253] He pointed out that he had "long believed that [i]t does not require a

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248. *Redding III*, 129 S. Ct. at 2643–44.

249. *Id.* at 2644.

250. *Id.* The Court required the liability of the school district to be determined pursuant to *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), which held that

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

251. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2644 (2009) (Stevens, J., concurring in part and dissenting in part) ("Nothing the Court decides today alters this basic framework. It simply applies *T.L.O.* to declare unconstitutional a strip search of a 13-year-old honors student that was based on a groundless suspicion that she might be hiding medicine in her underwear.").

252. *Id.*

253. *Id.* ("This is, in essence, a case in which clearly established law meets clearly outrageous conduct."); *cf. id.* at 2643 (majority opinion) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that '[t]he easiest cases don't even arise.' But even as to action less than an outrage, officials can still be on notice that their conduct violates established law . . . in novel factual circumstances." (internal citations omitted)).

constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude."[254] He concluded, as the Court effectively did, that there was relatively lesser justification and greater intrusiveness with the strip search of Savana than the search of T.L.O.'s purse.[255]

Additionally, he wrote to express his agreement with the Ninth Circuit that the assistant principal was not entitled to qualified immunity for the strip search of Savana.[256] He found the Court's "divergence in lower courts" rationale for granting the assistant principal qualified immunity unpersuasive.[257] In no uncertain terms, he quipped that "the clarity of a well-established right should not depend on whether jurists have misread our precedents."[258] He indicated that he would have granted qualified immunity to the assistant principal if there had been evidence in the Court's precedent (*T.L.O.*) suggesting that the Court, in the future, intended to map out a "new constitutional path" for the law (the *T.L.O.* test) governing strip searches.[259] He reasoned that, even then, qualified immunity should merely be available to

254. *Id.* (internal quotation marks omitted) (citing New Jersey v. T.L.O., 469 U.S. 325, 382 n.25 (1985) (Stevens, J., concurring in part and dissenting in part)).

255. *Redding III*, 129 S. Ct. at 2643.

256. *Id.*

257. *Id.* at 2644–45. Justice Stevens noted that the "divergence in lower courts" rationale has only been a factor (not a dispositive one) in the Court's qualified immunity analysis "to spare officials from having to predict the *future course* of constitutional law," when there is evidence that the Court is going to create a "new constitutional path" on the law governing the challenged action. *Id.* at 2645 (citing Wilson v. Layne, 526 U.S. 603, 617 (1999)). He underscored the fact that the "divergence in lower courts" rationale was merely a factor and not a dispositive one, by pointing out that the rationale had merely been "noted" in the Court's precedent. *See Redding III*, 129 S. Ct. at 2645 (recognizing that "while our cases have previously noted the 'divergence of views' among courts in deciding whether to extend qualified immunity," that consideration is not dispositive).

258. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2645 (2009).

259. *Id.* ("In this case, by contrast, we chart no new constitutional path. We merely decide whether the decision to strip search Savana Redding, on these facts, was prohibited under *T.L.O.* Our conclusion leaves the boundaries of the law undisturbed."). Justice Stevens observed that the Court had, in fact, approvingly cited a Ninth Circuit court case that found a strip search similar to that conducted on Savana unconstitutional. *See id.* n.* (noting that in *T.L.O.* the Court cited *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984), with approval, suggesting that even in 1985 the Court appreciated the constitutional problems posed by the strip search of public school students). Justice Stevens suggested that the approving citation of this case in *T.L.O.* should have indicated that the Court would "chart no new constitutional path" with respect to strip searches in the future. *Id.*

excuse school officials from the need to forecast the future direction of constitutional law.[260]

C. *Justice Ginsburg's Opinion, Concurring in Part and Dissenting in Part*

Justice Ginsburg wrote a separate opinion to express her agreement with Justice Stevens that the law governing strip searches was clearly established by *T.L.O.* at the time Savana was strip searched.[261] In her view, the clearly established law, "plainly stated" in *T.L.O.*, provides that "[a] search ordered by a school official, even if 'justified at its inception,' crosses the constitutional boundary if it becomes 'excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[262] The strip search here did not satisfy this established law, since the assistant principal only had a "*slim* basis for suspecting Savana."[263]

In her relatively brief opinion, she concurred with the Court's admonition that the assistant principal should have taken the time to further investigate Marissa's statement.[264] According to Justice Ginsburg, this investigation should have included asking Marissa where and when Savana gave her the pills and "for what purpose."[265] She reasoned that, unlike the assistant vice principal in *T.L.O.*, nothing in the assistant principal's prior experience in this case provided grounds for reasonable suspicion that Savana was hiding pills in her underwear.[266] Justice Ginsburg also asserted that under the established law, Savana's age and sex

260. *Id.* (quoting *Wilson*, 526 U.S. at 617).

261. *Redding III*, 129 S. Ct. at 2645 (Ginsburg, J., concurring in part and dissenting in part).

262. *Id.* at 2646 (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

263. *Id.* (emphasis added).

264. *Id.* at 2645. In fact, Justice Ginsburg characterized Marissa's statement to the assistant principal as a "bare accusation . . . whose reliability the Assistant Principal had no reason to trust." *Id.* at 2645–46. Justice Thomas, on the other hand, opined that the Constitution does not require "followup questions" after reasonable suspicion had been created. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2652 n.4 (2009) (Thomas, J., concurring in part and dissenting in part). However, he seemed to have misconceived the purpose of requiring "followup questions." In fact, the Court and Justice Ginsburg indicated that "followup questions" were integral to establishing reasonable suspicion. *Id.* at 2640–42 (majority opinion), 2645–46 (Ginsburg, J., concurring in part and dissenting in part).

265. *Id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

266. *Id.* at 2645–46.

dictated that a strip search was unreasonable.[267] Justice Ginsburg opined that "[a]ny *reasonable* search for the pills would have ended when inspection of Redding's backpack and jacket pockets yielded nothing."[268] Her opinion underscored her belief that the assistant principal's decision to strip search Savana was an "abuse of authority" not entitled to qualified immunity.[269]

D. *Justice Thomas's Opinion, Concurring in Part and Dissenting in Part*

Justice Thomas's opinion—the longest in the case—was designed to express his disagreement with the Court's judgment that the strip search of Savana was unconstitutional.[270] He concurred, however, with the Court's judgment that the school officials were not entitled to qualified immunity.[271] According to Justice Thomas, even under *T.L.O.* the Court should have granted judgment as a matter of law to all the defendants, including the district.[272] He argued that the Court overreached and unjustifiably expanded the *T.L.O.* test by creating the *Redding* test.[273] He rebuked the Court for requiring the *Redding* test even after school officials have reasonable suspicion that the student has

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267. *Id.* at 2646.

268. *Redding III*, 129 S. Ct. at 2645 (emphasis added).

269. *Id.* In fact, Justice Ginsburg also found it unacceptable that the assistant principal failed to contact Savana's parents prior to the search. She also found it objectionable that after the strip search, the assistant principal failed to permit Savana to go home or back to her class. She observed that the assistant principal had her sit "outside his office for over two hours." *Id.* at 2645. She opined that "[a]buse of authority of that order should not be shielded by official immunity." *Id.* She went on to conclude that the assistant principal's "treatment of Redding was abusive and it was not reasonable for him to believe that the law permitted it." *Id.* at 2646. Justice Thomas correctly argued, however, that the Constitution did not require the assistant principal to call Redding's parents before conducting the search: "[R]easonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2651–52 & n.4 (2009) (internal quotation marks omitted) (Thomas, J., concurring in part and dissenting in part) (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 837 (2002)).

270. *Id.* at 2646 (Thomas, J., concurring in part and dissenting in part).

271. *Id.*

272. *Id.*

273. *See id.* at 2649 ("Each of these additional requirements is an unjustifiable departure from bedrock Fourth Amendment law in the school setting, where this Court has heretofore read the Fourth Amendment to grant considerable leeway to school officials.").

contraband "on her person."[274] He characterized this as a "contortion of the Fourth Amendment" and argued that there was no constitutional basis for it.[275] He further reasoned that the *Redding* test was *a fortiori* unnecessary since the search here, in his view, did not constitute a strip search.[276] To Justice Thomas, the term "strip search" only applies when students are required to "fully disrobe in view of officials."[277]

The crux of his dissent called for a restoration of carte blanche *in loco parentis* authority to school officials.[278] Justice Thomas opined that the *Redding* test for strip searches was "a vague and amorphous standard" that would seriously handicap the discretion of school officials in administering discipline and order in schools.[279] The standard, he believed, also provides an opening for courts to "second-guess" decisions and measures of school officials regarding discipline, safety, and health at schools.[280] In fact, he characterized it as a "deep intrusion" by the judiciary into school administration matters.[281] It is highly curious, however, to

274. *Redding III*, 129 S. Ct. at 2649; *cf. id.* at 2641 (majority opinion) (requiring "distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings").

275. *Id.* at 2649 (Thomas, J., concurring in part and dissenting in part).

276. *Id.*

277. *Id.* at 2649 n.2.

278. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2646–58 (2009); *see also id.* at 2646 ("[T]he Court should return to the common-law doctrine of *in loco parentis* under which 'the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order.'" (quoting Morse v. Frederick, 551 U.S. 393, 414 (2007) (Thomas, J., concurring))); *id.* at 2655 ("[T]he most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the *complete* restoration of the common-law doctrine of *in loco parentis*." (emphasis added)). Justice Thomas suggested that under an *in loco parentis* system, the only limitations on the power of schools would be parental redress through the political process or relocation from the applicable school or district. *See id.* at 2656 ("Restoring the common-law doctrine of *in loco parentis* would not, however, leave public schools entirely free to impose any rule they choose. 'If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move.'" (quoting *Morse*, 551 U.S. at 419 (Thomas, J., concurring))); *see also id.* at 2657 ("[T]he majority has confirmed that a return to the doctrine of *in loco parentis* is required to keep the judiciary from essentially seizing control of public schools."). Justice Thomas concluded that "[i]f the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand." *Redding III*, 129 S. Ct. at 2656.

279. *Id.*

280. *Id.*

281. *Id.* at 2645.

characterize the *Redding* test as "vague and amorphous" as the test appears quite straightforward: under the *Redding* Court's interpretation of the second prong of the *T.L.O.* test, school officials should not strip search a student unless they have reasonable grounds to suspect either that there is danger presented to the school or that the specific student being searched is hiding contraband in his underwear.[282] Indeed, even Justice Thomas himself conceded that the reasonableness of searches is context-dependent, thus making it challenging to draw categorically precise lines.[283]

Justice Thomas noted that school discipline and order requires flexibility and immediate responses, especially with the rise in violence and drug use at schools.[284] Consequently, he reasoned that any reasonableness requirement on schools must account for the "custodial and tutelary responsibility" of schools for students.[285] He added that, because "[s]chool officials have a specialized understanding of the school environment, the habits of the students, and the concerns of the community,"[286] they should have leeway to make "common-sense conclusions" about their students.[287]

Applying the *T.L.O.* test, Justice Thomas concluded that the strip search was justified at its inception.[288] He stated that he was in agreement with the Court on this point.[289] The Court, however, merely found the *initial* search of Savana—the search of her backpack and outer clothing—justified at its inception.[290] Indeed, he saw the Court's emphasis on the humiliating and degrading nature of the strip search as a statement of the Court's view that the strip search was not justified at its inception.[291]

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282. *Id.* at 2643 (majority opinion).

283. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2646–47 (2009) (Thomas, J., concurring in part and dissenting in part); *see also id.* at 2648 ("Fourth Amendment searches do not occur in a vacuum; rather, context must inform the judicial inquiry." (citing United States v. Cortez, 449 U.S. 411, 417–18 (1981))).

284. *Id.* at 2646–47, 2655.

285. *Id.* at 2646–47.

286. *Id.*

287. *Redding III*, 129 S. Ct. at 2647 (citing United States v. Sokolow, 490 U.S. 1, 8 (1989).

288. *Id.*

289. *Id.*

290. *Id.* at 2641–42 (majority opinion).

291. *Id.*

Justice Thomas interpreted both the *Redding* test and the Court's conclusion after applying the test to Savana's case as emphatic statements of the Court that a strip search will not be justified at its inception unless it meets the pay-off requirement and there is reasonable suspicion of danger to the school or that the student in question has resorted to his underwear as a hiding place for contraband.[292] Essentially, what Justice Thomas did was conflate into one search what the Court considered two separate searches: (1) the search of the backpack and outer clothing and (2) the strip search.[293] Consequently, Justice Thomas took the Court's conclusion that the first search was justified at its inception as a corresponding conclusion that the second was also justified at its inception.[294]

Thus, Justice Thomas found persuasive to justify the inception of the second search the same evidence the Court relied on to declare the initial search justified at its inception.[295] He also relied on a fact not discussed in the majority opinion in the case—an incident a few years prior at the school where a student took prescription medication and consequently had to be in intensive care for several days.[296] According to Justice Thomas, Safford Middle School had a "history" of drug problems which "had not abated by the 2003–2004 school year" when the strip search occurred.[297]

Under the second prong of the *T.L.O.* test, Justice Thomas, unlike the majority, concluded that the measure adopted—the strip search—was reasonable in scope.[298] In his view, this was the

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292. *See* Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2642 (2009) (asserting that, because of the especially intrusive nature of a strip search, such a search will not be reasonable absent a level of suspicion that indicates the search will uncover the object being sought); *see also id.* at 2643 (setting forth the *Redding* test); *supra* Section III.D (discussing the "pay-off" requirement).

293. *Compare Redding III*, 129 S. Ct. at 2647–50 (Thomas, J., concurring in part and dissenting in part) (refuting any suggestion that Fourth Amendment jurisprudence demands additional requirements to search underwear when reasonable suspicion remains after a search of bags and outer clothing), *with id.* at 2641–43 (majority opinion) (reasoning that a search of a person's undergarments is so intrusive as to place such a search in its own category, requiring its own specific suspicions).

294. *Id.* at 2647–48 (Thomas, J., concurring in part and dissenting in part).

295. *Id.*

296. *Id.*

297. *Redding III*, 129 S. Ct. at 2648.

298. *Id.* at 2648–49. Justice Thomas also concluded that the age and gender of Savana counseled for greater power for the school to protect her and extend the search as

correct conclusion because schools should have "considerable leeway" and "[b]ecause the school officials searched in a location where the pills *could* have been hidden."[299] He stated that "[t]he Court has generally held that the reasonableness of a search's scope depends only on whether it is limited to the area that is capable of concealing the object of the search."[300] While he did acknowledge that the Court applies a different standard to strip searches, he dismissed the applicability of the Court's strip search precedents to this case because he did not regard the search of Savana as a strip search.[301] As a result, he argued that, under the second prong of *T.L.O.*, the scope of student searches should be allowed to extend to "areas where the object of that infraction *could* be concealed."[302] If the Court were to adopt such an expansive view of permissible scope, school officials would be able to conduct all forms of student searches except those involving a "[full] disrobe in view of officials," regardless of the humiliation the student feels.[303] Strip searches would also be allowed in the absence of reasonable grounds for safety concerns, or reasonable grounds for resort to underwear for the specific student.[304] In a

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it did. *Id.* at 2654 n.6 ("Schools have a significant interest in protecting all students from prescription drug abuse; young female students are no exception .... In fact, among 12- to 17-year-olds, females are more likely than boys to have abused prescription drugs and have higher rates of dependence or abuse involving prescription drugs. Thus, rather than undermining the relevant governmental interest here, Redding's age and sex, if anything, increased the need for a search to prevent the reasonably suspected use of prescription drugs." (internal citations and quotation marks omitted)).

299. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2649 (2009) (Thomas, J., concurring in part and dissenting in part) (emphasis added).

300. *Id.* (citing Wyoming v. Houghton, 526 U.S. 295, 307 (1999); Florida v. Jimeno, 500 U.S. 248, 251 (1991); United States v. Johns, 469 U.S. 478, 487 (1985); United States v. Ross, 456 U.S. 798, 820 (1982)).

301. *Id.* at 2649 n.3.

302. *Id.* at 2649 (emphasis added); *see also id.* at 2650 ("A search of a student therefore is permissible in scope under *T.L.O.* so long as it is objectively reasonable to believe that the area searched could conceal the contraband.").

303. *See Redding III*, 129 S. Ct. at 2649 n.2 (distinguishing the search at issue in this case from what Justice Thomas considers to be a true strip search, remarking that "[t]he distinction . . . may be slight, but it is a distinction that the law has drawn").

304. *Id.* at 2648–50. Unlike the majority, Justice Thomas is willing to rely on generalities about students hiding contraband in their underwear. *Compare id.* at 2650 (Thomas, J., concurring in part and dissenting in part) (asserting that, because the search of Savana's backpack did not reveal any contraband, it was reasonable for the school officials to assume Savana "was secreting the pills in a place she thought no one would look"), *with id.* at 2642 (majority opinion) (contending that general beliefs about students hiding contraband in their clothing fall short of creating a sufficient level of suspicion,

tongue-in-cheek statement, Justice Thomas declared that the *Redding* test had effectively revealed to students "the safest place to secrete contraband in school."[305]

Additionally, Justice Thomas contended that the Court's decision undermined the school's rule against drugs.[306] He believed that the *Redding* test undermined the judgment of school officials about the threat levels the drugs in question posed at the school.[307] Specifically, he observed:

> The majority has placed school officials in this "impossible spot" by questioning whether possession of Ibuprofen and Naproxen causes a severe enough threat to warrant investigation. Had the suspected infraction involved a street drug, the majority implies that it would have approved the scope of the search.[308]

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given the extreme intrusiveness of a strip search). Justice Thomas is also willing to rely on mere newspaper accounts of people hiding contraband in their underwear. *See id.* at 2650 (Thomas, J., concurring in part and dissenting in part) (summarizing various newspaper accounts of persons concealing pills in their undergarments).

305. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2650 (2009) (Thomas, J., concurring in part and dissenting in part).

306. *Id.* at 2650–51. The Court did note, however, that its decision was not a commentary on the reasonableness of the rule. *Id.* at 2640 n.1 (majority opinion). In fact, the Court stated that "[t]he plenary ban [of drugs in the school's rule] makes sense, and there is no basis to claim that the search was unreasonable owing to some defect or shortcoming of the rule it was aimed at enforcing." *Id.* Even Justice Thomas seemed to partly concede this in his use of the word "seemingly" when describing the Court's position on the school's drug use rule. *Id.* at 2651 (Thomas, J., concurring in part and dissenting in part) ("Indeed, the Court in *T.L.O.* expressly rejected the proposition that the majority seemingly endorses—that 'some rules regarding student conduct are by nature too "trivial" to justify a search based upon reasonable suspicion.'" (quoting New Jersey v. T.L.O., 469 U.S. 343, 342 n.9 (1985))). Justice Thomas, however, tried to dismiss the Court's statement about not evaluating the reasonableness of the rule by positioning "rule reasonableness" as distinct from "rule importance." *Redding III*, 129 S. Ct. at 2650–52; *see also id.* at 2657–58 ("By deciding that it is better equipped to decide what behavior should be permitted in schools, the Court has undercut student safety and undermined the authority of school administrators and local officials. Even more troubling, it has done so in a case in which the underlying response by school administrators was reasonable and justified.").

307. *Id.* at 2651.

308. *Id.* It is true that the Court stated that the search was merely for prescription and over-the-counter drugs that presented "limited threat" to students. *Id.* at 2642 (majority opinion). However, this was not a commentary on the school rule's reasonableness or its importance but its implementation relative to the intrusiveness of the strip search. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2642 (2009). In fact, the Court made clear in the *Redding* test itself and in applying it to the facts of this case that a strip search for the ibuprofen and naproxen would have been justified if the students were getting the drugs in great quantities or there were large amounts in distribution at the school. *Id.* at 2642–43.

Continuing his theme of deference to school officials, he cautioned courts not to take on the role of evaluating the importance of school rules or the threat level contraband poses at schools.[309] In his view, the school rule was a well-reasoned one entitled to judicial deference.[310]

Justice Thomas also relied on what I characterize as the "crime rationale" to support his call for deference to the school officials in the case.[311] Particularly, he observed that in Arizona, possession or use of "prescription-strength Ibuprofen," except by lawful prescription, is a crime, elevating the importance of the school rule.[312] Moreover, Justice Thomas reasoned that the school rule

309. *Id.* at 2651 (Thomas, J., concurring in part and dissenting in part); *see also id.* at 2652 ("Judges are not qualified to second-guess the best manner for maintaining quiet and order in the school environment. Such institutional judgments, like those concerning the selection of the best methods for 'restrain[ing students] from assaulting one another, abusing drugs and alcohol, and committing other crimes, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.'" (internal citations omitted) (quoting *T.L.O.*, 469 U.S. at 342 n.9; Collins v. Harker Heights, 503 U.S. 115, 129 (1992))); *cf.* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) ("If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." (internal citations and quotation marks omitted)).

310. *Redding III*, 129 S. Ct. at 2651–52; *see also id.* at 2657 ("[T]he task of implementing and amending public school policies is beyond this Court's function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a Constitutional imperative.").

311. I characterize it as such, to capture Justice Thomas's reasoning, that if action rises to the level of a crime, it takes on a significant level of importance such that judges should hesitate to second guess law enforcement or other officials taking action against the crime. Justice Thomas argued here that the school rule was especially important because it was effectively enforcing state law against a crime. *Id.* at 2652–53. He contended that "[b]y prohibiting unauthorized prescription drugs on school grounds—and conducting a search to ensure students abide by that prohibition—the school rule here was [merely] consistent with a routine provision of the state criminal code." *Id.* at 2653; *see also id.* ("It hardly seems unreasonable for school officials to enforce a rule that, in effect, proscribes conduct that amounts to a crime.").

312. *Redding III*, 129 S. Ct. at 2652–53 ("'A person shall not knowingly . . . [p]ossess or use a prescription-only drug unless the person obtains the prescription-only drug pursuant to a valid prescription of a prescriber who is licensed pursuant to [state law]'" (citing ARIZ. REV. STAT. ANN. § 13-3406(A)(1) (West Supp. 2008))). Justice Thomas also

was very important, and therefore subject to deference, because of various statistics showing the "increasingly alarming national [drug] crisis" leading to poisonings and deaths.[313] In his view, this warranted treating prescription and over-the-counter drugs as similarly threatening, at schools, as street drugs.[314] He weakened his arguments, however, by conceding that "the Ibuprofen and Naproxen at issue in this case are not the prescription painkillers at the forefront of the prescription-drug-abuse problem."[315]

Justice Thomas suggested that schools can rely on anticipated public outrage at school inaction to justify a rule or action that extends a search to any point short of full disrobe.[316] However,

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cited laws in other states criminalizing the same thing. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2653 n.5 (2009).

313. *Id.* at 2653–54, 2657; *see also id.* at 2653 (insisting that "school districts have valid reasons for punishing the unauthorized possession of prescription drugs on school property as severely as the possession of street drugs").

314. *See id.* ("The risks posed by the abuse of these drugs are every bit as serious as the dangers of using a typical street drug."); *see also id.* at 2655 (concluding that "[b]y declaring the search unreasonable in this case, the majority has 'surrender[ed] control of the American public school system to public school students' by invalidating school policies that treat all drugs equally and by second-guessing swift disciplinary decisions made by school officials" (quoting Morse v. Frederick, 551 U.S. 393, 421 (2007) (Thomas, J., concurring))).

315. *Redding III*, 129 S. Ct. at 2654. Justice Thomas nevertheless argued that the drugs at issue in this case "pose a risk of death from overdose." *Id.* However, there was no risk of overdose in this case, as the Court specifically noted that the assistant principal had "no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills." *Id.* at 2642. Justice Thomas also pointed out that ibuprofen and naproxen have side effects. *Id.* at 2654. However, so do many other legal drugs, and the side effects can vary from individual to individual. These side effects are present even with legally prescribed drugs. Thus, contrary to Justice Thomas's position, side effects should not be an important factor to justify a strip search where the *Redding* test is not satisfied. Indeed, ironically, what Justice Thomas is in effect suggesting is that courts should have to make judgments based on side effects of drugs—an area courts are not schooled in. It is ironic, in that Justice Thomas presents his arguments in this case as a stand against judicial intervention in areas where the justices lack expertise. *See id.* at 2646–56.

316. *See* Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2654–55 (2009) (Thomas, J., concurring in part and dissenting in part) ("If a student with a previously unknown intolerance to Ibuprofen or Naproxen were to take either drug and become ill, the public outrage would likely be directed toward the school for failing to take steps to prevent the unmonitored use of the drug. In light of the risks involved, a school's decision to establish and enforce a school prohibition on the possession of any unauthorized drug is thus a reasonable judgment."). In fact, according to Justice Thomas, "[r]easonable suspicion that Redding was in possession of drugs in violation of these policies, therefore, justified a search extending to *any* area where small pills could be concealed. The search did not violate the Fourth Amendment." *Id.* at 2655 (emphasis

this "anticipated public outrage" rationale would give schools extensive powers to legislate student conduct.[317] If left to Justice Thomas, teachers and other school officials would "be able to govern the[ir] pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn by making rules, giv[ing] commands, and punish[ing] disobedience without interference from judges."[318] Nevertheless, as the Supreme Court explained:

> Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.[319]

Besides, as the Court noted in *Tinker v. Des Moines Independent Community School District*,[320] "state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."[321]

IV. CONCLUSIONS AND IMPLICATIONS

While this case involved a strip search for drugs, the Court's reasoning encompasses all strip searches in public schools.[322] By establishing constraints specific to strip searches on the search and seizure authority of school officials, *Redding III* represents a pivotal decision in school search and seizure jurisprudence. As indicated above, this case was also designed to provide a uniform test for the judiciary and school officials alike when evaluating the reasonableness of strip searches of students. This section of the Article highlights various implications of the decision for school

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added).

317. The extensive powers Justice Thomas advocated for schools can also be gleaned from the tenor of his following statements: "In determining whether the search's scope was reasonable under the Fourth Amendment, it is therefore irrelevant whether officials suspected Redding of possessing prescription-strength Ibuprofen, nonprescription-strength Naproxen, or some harder street drug. Safford [the school] prohibited its possession on school property." *Id.* at 2655.

318. *Id.* at 2657 (internal quotation marks omitted) (citing *Morse*, 551 U.S. at 414 (Thomas, J., concurring)).

319. *Id.* at 2643 (majority opinion).

320. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

321. *Id.* at 511.

322. For instance, at various points in its opinion, the Court used the words "drug" and "contraband" interchangeably. *Redding III*, 129 S. Ct. at 2642.

officials.

Strip searches should not be initiated until the school has conducted a thorough investigation to ensure the reliability of the information available to determine if it justifies inception of a strip search. This evaluation must include inquiry into (1) "the specificity of the information received";[323] (2) the extent to which the facts known to the school officials "imply [the] prohibited conduct";[324] and (3) the trustworthiness of the source.[325] Follow-up questions should be asked in order to determine whether the student currently (at the time of the search) has the contraband on her person.[326] Likewise, schools would be wise to ask their informants to identify places the student is hiding the contraband, and provide supporting evidence for the places identified.[327] Furthermore, if the informants do not identify the underwear as one of the places, the school should not proceed with a strip search unless an analysis of the other requisite factors from *Redding III* and the *T.L.O.* test reveals that the search would likely pass constitutional muster. Based on the available evidence, the school official should assess whether a search of the student has "a moderate chance of finding evidence of wrongdoing."[328] This standard only governs searches other than strip searches.[329] For strip searches, the evidence must be evaluated to determine if a strip search "will pay off."[330] *Redding III* also revealed that the constitutionality of strip searches does not depend on how much of a student's body is seen during the search.[331]

From the Court's reasoning, it is clear that student accounts of embarrassment, fright, or humiliation will establish a subjective

323. *Id.* at 2639.

324. *Id.*

325. *Id.*

326. *Id.* at 2640.

327. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2640 (2009); *see also id.* at 2642 ("[The assistant principal] never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.").

328. *Id.* at 2639.

329. *See id.* at 2639–42 (stressing that a search of outer clothing or a backpack would not require the same level of suspicion as a search of undergarments).

330. *Id.* at 2642.

331. *Redding III*, 129 S. Ct. at 2642.

expectation of privacy against a strip search.[332] Courts can rely on research on "adolescent vulnerabilit[ies]" in strip searches to establish objective expectations of privacy.[333] As noted earlier, this research should at least examine "the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[334]

As the Supreme Court ruled in *Redding III*, the "content of the suspicion" for a strip search must "match the degree of intrusion."[335] In other words, the intrusiveness of a search must match the threat or danger presented by the item (content) searched for, or a large quantity of drugs must be involved for the intrusiveness of a strip search to match the "content of the suspicion."[336] The Court revealed various factors for consideration in determining the match between the degree of intrusiveness and the "content of the suspicion"[337] of which schools should be aware. The first is whether the school official authorizing or conducting the search reasonably had prior knowledge[338] of: (a) the nature of the specific drugs sought in a strip search (in other words, is it merely a "prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve" or an illegal drug such as marijuana?);[339] (b) the threat of the specific drugs sought;[340] and (c) the quantity of the specific drugs sought.[341] The match is more likely to be found if there is evidence that "large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills."[342]

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332. *Id.* at 2641.

333. *Id.* at 2641–42.

334. *Id.* at 2641.

335. *Id.* at 2642.

336. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2642 (2009).

337. *Id.*

338. That is, knowledge prior to commencement of the strip search.

339. *Id.*

340. According to the Court, "nondangerous school contraband does not raise the specter of stashes in intimate places." *Id.* at 2642.

341. *See id.* (emphasizing that, before choosing to subject Savana to a strip search, school officials had no reason to suspect that she possessed ibuprofen in amounts that would pose a threat to the student body).

342. *Redding III*, 129 S. Ct. at 2642.

The second factor the Court identified for assessing the match between the degree of intrusiveness and the "content of the suspicion"[343] was whether the school official had reasonable grounds, prior to the search, to suspect that the drugs were specifically hidden in the underwear.[344] A general claim and even research showing that students generally hide drugs in their underwear will not suffice.[345] There must be reasonable grounds to suspect that the particular student to be searched is hiding drugs in his underwear, or that students at that particular school have a "general practice" of hiding drugs in their underwear.[346] In fact, as indicated above, the Court went further and now requires that for a strip search to survive constitutional scrutiny, the school official must have reasonable suspicion that the strip search "will pay off."[347] This "pay off" requirement should particularly caution school officials not to rush to initiate a strip search of students; reasoned decision-making is indispensable. This implicates the first prong of the *T.L.O.* test.

In all, before proceeding with a strip search, schools must ensure that, in addition to satisfying both prongs of the *T.L.O.* test, the *Redding* test under the second prong is satisfied.[348] Recall, this test states:

> [T]he *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion [1] of *danger* [to the students from the power of the drugs or their quantity][349] or [2] of *resort to underwear* for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.[350]

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343. *Id.*

344. *See id.* (reiterating that school officials had no reason to suspect that there were drugs hidden in Savana's underwear).

345. *Id.* ("Petitioners suggest, as a truth universally acknowledged, that 'students . . . hid[e] contraband in or under their clothing,' and cite a smattering of cases of students with contraband in their underwear[.] But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off.").

346. *See id.* (noting that a prior strip search at Safford, the search conducted on Marissa earlier in the day, did not reveal any drugs hidden in Marissa's underwear).

347. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2642–43 (2009).

348. *Id.* at 2643.

349. *Id.*

350. *Id.* (emphasis added).

While the Court listed the *Redding* test for strip searches under the second prong of the *T.L.O.* test, as pointed out earlier, it readily implicates the first prong as well. This is especially so since the *Redding* test essentially warns school officials not to commence a strip search unless there is reasonable suspicion of (1) danger to the school from the potency or quantity of the drugs[351] or (2) that the student in question is hiding contraband specifically in his or her underwear.[352] Reasonable suspicion that a student is "carrying [contraband] on her person" is not sufficient to justify a strip search.[353] Such suspicion only allows a search of a person up to the outer clothing.[354] In other words, a strip search is not permissible unless the "danger" index or the "resort to underwear" index is present. The Court also made clear that it would not reevaluate the prudence of a school's rules against drugs or other contraband unless the rule is "patently arbitrary."[355]

The *Redding III* decision reaffirmed the rule that qualified immunity is only available where the law governing the challenged action of the school official in a case was not clearly established at the time of the action.[356] Courts will easily dispose of claims to qualified immunity where the action of the school official can reasonably be deemed outrageous. It is important for school officials to note, however, that "even as to action less than an outrage, officials can still be on notice that their conduct violates established law . . . in novel factual circumstances."[357] The word "novel" refers to something "different from anything seen or known before."[358] In other words, this exception is a limited one.

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351. *Id.* at 2642–43.

352. *Redding III*, 129 S. Ct. at 2642–43.

353. *Id.* at 2641; *see also id.* at 2649 (Thomas, J., concurring in part and dissenting in part) ("Thus, in the majority's view, although the school officials had reasonable suspicion to believe that Redding had the pills on her person . . . they needed some greater level of particularized suspicion to conduct this 'strip search.'").

354. *See id.* at 2641 (majority opinion) (concluding that, based on the level of suspicion the school administrators had prior to the search, neither the search of Savana's backpack nor the "subsequent search of her outer clothing" was excessive in this case).

355. *Id.* at 2640 n.1 ("Except in patently arbitrary instances, Fourth Amendment analysis takes the rule as a given, as it obviously should do in this case.").

356. Safford Unified Sch. Dist. No. 1 v. Redding (*Redding III*), 129 S. Ct. 2633, 2643 (2009).

357. *Id.* (citing Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

358. WEBSTER'S UNABRIDGED DICTIONARY 1327 (Deluxe ed. 2001). Merriam-Webster defines "novel" as something "new and not resembling something formerly

The Court also revealed that a basis for qualified immunity for school officials will be a "substantial" divergence in the decisions of various lower courts on the challenged government action such that it "counsel[s] doubt that we were sufficiently clear in the prior statement of law."[359] However, if the court with jurisdiction has been clear on its interpretation of the applicable law, "disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear."[360] The Court indicated that *Redding III* has settled the law on strip searches in schools. Consequently, and henceforth, school officials should not expect qualified immunity for student strip searches.

known or used." Merriam-Webster Online, Novel—Definition, http://www.merriam-webster.com/dictionary/novel (last visited Apr. 13, 2010).

359. *Redding III*, 129 S. Ct. at 2644.

360. *Id.*