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CASE NOTE

CONSTITUTIONAL LAW—“Can’t Touch This”: The Failing Standard of *New Jersey v. T.L.O.* in School Searches; *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009)

*Jeremy Shufflebarger**

INTRODUCTION

On October 8, 2003, Assistant Principal Kerry Wilson at Safford Middle School in Safford, Arizona received information from a student named Jordan Romero concerning students potentially possessing illegal prescription pills on school grounds, with the intent to ingest those pills at lunchtime.¹ Jordan handed Wilson one of the pills, informing Wilson that he received it from another classmate, Marissa Glines.² Wilson subsequently escorted Glines to his office, and in the presence of a female administrator, Helen Romero, directed Glines to empty her pockets and open her wallet.³ Glines emptied several pills, similar to the pill Jordan handed to Wilson, from her pockets, and when asked from whom she received the pills, she implicated Savanna Redding.⁴ Wilson then directed Romero to escort Glines to the nurse’s office, where Romero ordered Glines to lift up her shirt and pull out the band of her bra, as well as remove her pants and stretch out the elastic on her underwear—revealing no further contraband.⁵ Acting on the tip by Glines, as well as other information, Wilson subsequently escorted Redding to his office.⁶ Wilson proceeded to question Redding about the pills found on Glines; Redding denied any knowledge of the pills.⁷ In the presence of Romero, Wilson instituted a search of Redding’s backpack, which revealed nothing.⁸ Romero then escorted Redding to the nurse’s office, where Romero ordered Redding to strip down to her bra and underwear, pull out her bra, and stretch out the elastic on her underwear—also uncovering no contraband.⁹

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¹ *Redding v. Safford Unified Sch. Dist. No. 1 (Redding II)*, 531 F.3d 1071, 1076 (9th Cir. 2008).

² *Id.* Jordan Romero is not related to the school’s administrative assistant, Helen Romero. *Safford Unified Sch. Dist. No. 1 v. Redding (Redding)*, 129 S. Ct. 2633, 2640 (2009).

³ *Redding II*, 531 F.3d at 1076.

⁴ *Id.*

⁵ *Id.* at 1077.

⁶ *Id.* at 1074–77.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1074.

Redding's mother filed suit against Safford Unified School District No. 1, Wilson, Romero, and Nurse Schwallier (collectively, "Administrators"), alleging the strip search violated her daughter's Fourth Amendment right against unreasonable searches and seizures.¹⁰ After Redding's defeat in the district court, which a Ninth Circuit panel upheld, the Ninth Circuit en banc reversed—holding the strip search violated Redding's Fourth Amendment rights and granting qualified immunity for everyone except Wilson.¹¹

After granting the Administrators' petition for certiorari, the United States Supreme Court, in an 8-to-1 decision, applied the *New Jersey v. T.L.O.* reasonableness standard, holding the search of Redding unreasonable in scope and, thus, a violation of her Fourth Amendment rights.¹² However, the Court held the doctrine of qualified immunity protected the Administrators from liability.¹³

This case note criticizes the *Redding* Court for missing an ideal opportunity to revisit and clarify the confusing reasonable suspicion standard (first articulated in *T.L.O.*). Instead, the Court expanded and further confounded school search law.¹⁴ Moreover, this note details the progression of Fourth Amendment standards for searches beginning with the initial probable cause standard in criminal cases to the *T.L.O.* reasonable suspicion test currently utilized in schools.¹⁵ Finally, this case note argues for an adoption of the *Gates* probable cause standard in school searches.¹⁶

BACKGROUND

Probable Cause—Gates

The Fourth Amendment of the United States Constitution guarantees freedom from unreasonable searches and seizures.¹⁷ In *Illinois v. Gates* the

¹⁰ *Redding v. Safford Unified Sch. Dist. No. 1 (Redding III)*, 504 F.3d 828, 831 (9th Cir. 2007).

¹¹ *Safford Unified Sch. Dist. No. 1 v. Redding (Redding)*, 129 S. Ct. 2633, 2638 (2009).

¹² *Id.* at 2643; *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (holding the reasonableness of a search depends on two inquiries: (1) whether it was justified at its inception; and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place).

¹³ *Redding*, 129 S. Ct. at 2643.

¹⁴ See *infra* notes 109–44 and accompanying text.

¹⁵ See *infra* notes 17–46 and accompanying text.

¹⁶ See *infra* notes 145–70 and accompanying text.

¹⁷ U.S. CONST. amend. IV. The Fourth Amendment states:

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

United States Supreme Court established the current approach to determining the existence of probable cause.¹⁸ In *Gates*, the Bloomingdale, Illinois police department commenced surveillance of Gates, and executed a search warrant, based on an anonymous letter informing police of Gates's alleged drug related activities.¹⁹ Upon Gates's challenge to the admissibility of the evidence found in the subsequent search and seizure of Gates's home and car, the Court found the traditional *Aguilar v. Texas* and *Spinelli v. United States* two-prong inquiry too limiting.²⁰ The Court held the distinct two-prong analysis in *Aguilar–Spinelli* represented important considerations in a totality of the circumstances test, which traditionally has guided probable cause determinations.²¹ According to the *Gates* Court, the “totality of the circumstances test” operates as a balancing of all the various “indicia of reliability (and unreliability) attending an informant’s tip.”²²

Reasonable Suspicion Standard—Terry

In the landmark case of *Terry v. Ohio* the Court established a major exception to the probable cause standard in search cases.²³ *Terry* involved a “stop and frisk” of Terry and two other men by a police officer, based on his observations and suspicions of the mannerisms of the men.²⁴ The subsequent search led to the seizure of two revolvers and bullets from Terry.²⁵ Upon Terry's challenge to the admissibility of the pistols as evidence, the Court held law enforcement may execute less intrusive searches and seizures based on a lesser quantum of evidence than traditional probable cause—the Court labeled this new standard “reasonable suspicion.”²⁶ The Court defined the reasonable suspicion standard as a two-part

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.

Id.

¹⁸ *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

¹⁹ *Id.* at 225.

²⁰ *Id.* at 233, 238 (referring to *Aguilar v. Texas*, 378 U.S. 108, 114–15 (1964), *overruled by Gates*, 462 U.S. at 233; *Spinelli v. United States*, 393 U.S. 410, 415–16 (1969), *overruled by Gates*, 462 U.S. at 233) (holding the *Aguilar* test focuses on two “largely independent channels”: the reliability of the tipster paired with her basis for the knowledge of the tip).

²¹ *Id.* at 233. The Court effectively incorporated the two-prong inquiry of *Aguilar* and *Spinelli* into the new *Gates* totality of the circumstances analysis. *Id.*

²² *Id.* at 234; *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1 (explaining the Court in *Gates* developed the totality of the circumstances test as the applicable rule for probable cause in search and arrest cases).

²³ *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968); *see infra* notes 26–28 and accompanying text.

²⁴ *Terry*, 392 U.S. at 5–7 (stating the officer justified his suspicion for the stop and search of the men based on his training and years of experience with the police force).

²⁵ *Id.* at 7.

²⁶ 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 145 (LexisNexis & Matthew Bender eds., 4th ed. 2006) (citing *Terry*, 392 U.S. at 37).

analysis: (1) whether the search was justified at its inception; and (2) whether the scope of the search reasonably related to the circumstances justifying the inception of the search.²⁷ According to the Court, a two-part test of reasonable suspicion prevents “intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.”²⁸

School Search Standard—T.L.O.

In 1985, the United States Supreme Court developed a separate rule for determining the reasonableness of school searches in the seminal case *New Jersey v. T.L.O.*²⁹ In *T.L.O.*, a high school teacher escorted two students, including T.L.O., to Assistant Vice Principal Choplick’s office after discovering them smoking in the school lavatory.³⁰ Choplick questioned T.L.O., who denied the accusations.³¹ Choplick demanded to see T.L.O.’s purse, and when she opened it, Choplick noticed a pack of cigarettes.³² Choplick proceeded to remove the pack of cigarettes from the purse, and then noticed rolling papers.³³ Suspecting marijuana possession, Choplick thoroughly searched T.L.O.’s purse, which revealed marijuana, a pipe, plastic bags, a large amount of money, an index card listing people who owed T.L.O. money, and two letters implicating her in marijuana dealing.³⁴ The Court originally granted certiorari to determine the issue of a remedy for an unlawful school search in a juvenile court proceeding, but had to focus first on the threshold issue of whether the Fourth Amendment restricts the actions of school authorities.³⁵

In *T.L.O.*, the State of New Jersey argued the Fourth Amendment applied only to law enforcement officers, and did not apply to public officials, even though they are classified as state agents.³⁶ The Court rejected the State’s contention, holding the Fourth Amendment’s prohibition against unreasonable searches and seizures applies to school officials who institute a search; after all, the Court did not want to risk “strangl[ing] the free mind at its source and teach youth to

²⁷ *Terry*, 392 U.S. at 19–20.

²⁸ *Id.* at 21.

²⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 333–42 (1985).

³⁰ *Id.* at 328.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 332.

³⁶ *Id.* at 334 (citing *Ingraham v. Wright*, 430 U.S. 651, 662 (1977)).

discount important principles of our government as mere platitudes.³⁷ The Court recognized schools require flexibility to maintain order and discipline in light of the rising trend of violent crimes and drug use in the school setting.³⁸ Moreover, the Court found searches permissible without a warrant or probable cause when the government possesses a special need, beyond normal crime control.³⁹ Instead of implementing the probable cause standard, the *T.L.O.* majority adopted the framework of the *Terry* “reasonable suspicion” balancing test, but extended it to apply to searches in the school setting.⁴⁰ The Court held that in order for a search to be justified at its inception, there must be a reasonable basis to suspect the search will reveal evidence of a violation of the law or school rules.⁴¹ Moreover, a search of a student is permissible in scope when “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁴²

The *T.L.O.* reasonable suspicion standard has been applied in numerous Fourth Amendment search cases, but often with inconsistent results.⁴³ The most

³⁷ *Id.* at 333–35 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)) (listing numerous cases establishing that the Fourth Amendment applied to civil authorities); *see also* *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) (holding the Fourth Amendment applied to firemen entering private premises); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312–13 (1978) (holding the Fourth Amendment applied to Occupation Safety and Health Act inspectors); *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967) (holding the Fourth Amendment applied to building inspectors).

³⁸ *T.L.O.*, 469 U.S. at 339.

³⁹ *Id.* at 325. The *T.L.O.* school search exception represents just one of the varied special needs exceptions. *See, e.g.*, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 454–55 (1990) (holding the operation of sobriety checkpoints to prevent drunk driving without a warrant or individual suspicion valid under the Fourth Amendment); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 678–79 (1989) (holding drug testing of government drug interdiction agents or of people in positions that require them to carry firearms without a warrant or individual suspicion valid under the Fourth Amendment); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 632–34 (1989) (holding drug and alcohol testing of railroad employees, after an accident has occurred involving that employee, without a warrant or reasonable suspicion valid under the Fourth Amendment); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566–67 (1976) (holding the operation of border checkpoints to detect illegal aliens without a warrant or individual suspicion valid under the Fourth Amendment).

⁴⁰ *T.L.O.*, 469 U.S. at 337–42. The Court in *T.L.O.* adopted the requirement that the search be justified at inception and permissible in scope in relationship to the objectives of the search. *Id.* at 341–42. The Court stated, “On one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order.” *Id.* at 337.

⁴¹ *Id.* at 337.

⁴² *Id.* at 342.

⁴³ *Safford Unified Sch. Dist. No. 1 v. Redding (Redding)*, 129 S. Ct. 2633, 2639 (2009) (finding relevant the divisive holdings of lower court judges in strip search cases); *see, e.g.*, *Cason v. Cook*, 810 F.2d 188, 190, 193 (8th Cir. 1987) (finding a pat down search, purse search, and locker search of a student reasonable based on information that items had gone missing in a locker room and the student was one of four students in the locker room at the time the items went

notable example of the inconsistent *T.L.O.* decisions is a line of strip search cases since 1985.⁴⁴ The divisiveness of these decisions is best evidenced by *Mark Anthony B.*, a Supreme Court of Appeals of West Virginia decision, where the majority firmly rejected strip searches unless exigent circumstances are present, when compared with *Williams*, a United States Court of Appeals for the Sixth Circuit decision, where the court granted significant deference to school officials to utilize strip searches.⁴⁵ The divide in these lower court decisions leading up to *Redding* represents a fundamental confusion regarding how to correctly apply the *T.L.O.* standard, especially in a strip search context.⁴⁶

missing); *Commonwealth v. Damian D.*, 752 N.E.2d 679, 727, 729 (Mass. 2001) (finding a search of a student's person based on the student's "truant behavior" unreasonable at its inception, and further finding the assistant headmaster's decision was based on a misunderstanding of *T.L.O.*); *In re Juvenile*, 931 A.2d 1229, 1232, 1234 (N.H. 2007) (holding the search of a student's locker for a "large pot pipe" reasonable under *T.L.O.*, but finding further guidance was needed regarding factors for whether the search was justified at its inception); *Commonwealth v. Cass*, 709 A.2d 350, 356 (Pa. 1998) (finding *T.L.O.* provides limited guidance for a general search of an entire school); see also David C. Blickenstaff, *Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve the Problem?*, 99 DICK. L. REV. 1, 43–44 (1994) (stating that since the *T.L.O.* decision, lower courts continue to differ on the constitutionality of strip searches in schools).

⁴⁴ See *Phaneuf v. Fraikin*, 448 F.3d 591, 592–93, 600 (2d Cir. 2006) (holding the inception of the strip search of a high school student unreasonable based on a tip by a fellow student that Phaneuf planned on hiding marijuana down her pants during a bag check on a field trip); *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1319, 1323 (7th Cir. 1993) (holding a strip search of a high school student reasonable on the suspicion he was hiding contraband in his crotch, because he was too well endowed); *Ex rel. Williams v. Ellington*, 936 F.2d 881, 882–83, 887 (6th Cir. 1991) (holding a strip search of a high school student reasonable based on a small brown vial of an over-the-counter inhalant Williams pulled out of her purse and a tip that a fellow student saw Williams with a glass vial of a white powdery substance); *Widener v. Frye*, 809 F. Supp. 35, 36, 38 (S.D. Ohio 1992) (holding a strip search of a high school student reasonable based on a teacher's observations of the student); *Cales v. Howell Pub. Schs.*, 635 F. Supp. 454, 455, 457 (E.D. Mich. 1985) (holding the inception of the strip search of a high school student unreasonable based on the tip of a school security guard that he witnessed the student ducking behind automobiles in the parking lot); *Coronado v. State*, 835 S.W.2d 636, 637–38, 641 (Tex. Crim. App. 1992) (holding a strip search of a student unreasonable in scope based on the student attempting to skip out of school and a tip two weeks prior to the search that the student was involved in drug distribution); *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41, 42–43, 49 (W. Va. 1993) (holding a strip search of a 14-year-old middle school student unreasonable in scope based on the student's duties as an assistant janitor in conjunction with \$100 that went missing from a teacher's classroom).

⁴⁵ Compare *Ex rel. Williams*, 936 F.2d at 887, with *Mark Anthony B.*, 433 S.E.2d at 49.

⁴⁶ Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921, 950 (1997); see also 5 LAFAYE, *supra* note 22, § 10.11 (levying a detailed criticism at the *T.L.O.* majority's decision to reject probable cause in favor of a lesser reasonable suspicion standard in schools); Blickenstaff, *supra* note 43, at 43–44 (observing such an "indefinite" standard fails to adequately ensure the protection of students' rights, because it grants courts too much leeway in deciding search cases).

PRINCIPAL CASE

A week prior to Redding's strip search, Jordan Romero and his mother met with Principal Beeman and Assistant Principal Wilson, where Jordan's mother explained that a few nights earlier Jordan acted violently toward her and then later he became ill.⁴⁷ Jordan explained he had ingested pills he received from fellow classmates.⁴⁸ He also reported certain students were bringing pills and weapons to school.⁴⁹ Moreover, Jordan informed Wilson that Redding hosted a party prior to a school dance, where she supplied alcohol to fellow students.⁵⁰ In addition, teachers notified Wilson that Redding and Glines were part of a rowdy group of students at the school dance where the teachers detected the smell of alcohol around them.⁵¹ Following the conclusion of the dance, administrators found a bottle of alcohol and cigarettes in the girls' bathroom.⁵²

With this background information, as well as the pill Jordan received from Glines, Principal Wilson went to Glines's classroom and asked her to gather her things and accompany him to his office.⁵³ Wilson noticed an open planner on the desk next to Glines, in which he found small knives, a cigarette lighter, and a cigarette.⁵⁴ Wilson then asked Glines about the planner.⁵⁵ She responded she did not know the source of the contraband.⁵⁶ Wilson returned to his office with Glines and asked a female administrator, Helen Romero, to observe while he directed Glines to empty her pockets and open her wallet.⁵⁷ Glines emptied several 400 mg Ibuprofen pills from her pockets, as well as a blue pill.⁵⁸ When Wilson asked Glines how she obtained the blue pill, she responded, "I guess it slipped in when she gave me the IBU 400s."⁵⁹ When asked who "she" was, Glines

⁴⁷ Redding v. Safford Unified Sch. Dist. No. 1 (*Redding II*), 531 F.3d 1071, 1076 (9th Cir. 2008) (en banc).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1075.

⁵² *Id.*

⁵³ *Id.* at 1076.

⁵⁴ *Id.*

⁵⁵ Redding v. Safford Unified Sch. Dist. No. 1 (*Redding III*), 504 F.3d 828, 830 (9th Cir. 2007).

⁵⁶ *Redding II*, 531 F.3d at 1076.

⁵⁷ *Id.*; see also *supra* note 2 and accompanying text (explaining Jordan Romero and Helen Romero are not related).

⁵⁸ *Redding II*, 531 F.3d at 1076.

⁵⁹ *Id.*

implicated a fellow student, Savanna Redding.⁶⁰ Principal Wilson then escorted Redding from class to his office.⁶¹ Wilson questioned Redding about the planner and she informed him it belonged to her, but she lent it to Glines a couple of days earlier.⁶² She denied knowledge of the contraband.⁶³ Wilson showed Redding the pills, and stated she violated school rule J-3050, which prohibited bringing any prescription or over-the-counter drug on the school campus without prior permission.⁶⁴ Redding denied any knowledge of the pills.⁶⁵ With the information supplied by Glines and Romero, as well as the other tips, Wilson instituted a search of Redding's backpack and outer garments, which revealed nothing.⁶⁶ Romero subsequently escorted Redding to the nurse's office, where she ordered Redding to strip down to her bra and underwear, pull out her bra, and stretch out the elastic on her underwear—also uncovering no contraband.⁶⁷

Lower Courts

Redding's mother filed a § 1983 action against the Administrators, alleging the search violated her daughter's Fourth Amendment right against unreasonable searches.⁶⁸ The Administrators moved for summary judgment, asserting a two-prong defense: first, the search did not violate Redding's constitutional rights and, second, even if it did, the doctrine of qualified immunity protected the Administrators from civil suit.⁶⁹ The United States District Court of Arizona

⁶⁰ *Id.*

⁶¹ *Id.* at 1074.

⁶² *Id.* at 1075.

⁶³ *Id.*

⁶⁴ *Id.* Safford Middle School in Safford, Arizona, adopted a policy prohibiting the “nonmedical use, possession, or sale of drugs on school property or at school events.” *Redding v. Safford Unified Sch. Dist. No. 1 (Redding III)*, 504 F.3d 828, 829 (9th Cir. 2007). The policy defines the term “drugs” as including, but not limited to: (1) “[a]ll dangerous controlled substances prohibited by law,” (2) “[a]ll alcoholic beverages,” and (3) “[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted.” *Id.*

⁶⁵ *Redding II*, 531 F.3d at 1075.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1074.

⁶⁸ *Redding III*, 504 F.3d at 831 (bringing a 42 U.S.C. § 1983 action against the petitioners); see also 42 U.S.C. § 1983 (2006) (creating a method for individuals to redress violations of their federally protected rights from conduct by state or local government officials, who are usually protected from tort liability through qualified immunity).

⁶⁹ *Redding III*, 504 F.3d at 831. Administrators' qualified immunity defense stated the law was not clearly established at the time of the search. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating qualified immunity protects government officials from liability for civil damages unless the court finds an official's conduct violates clearly established statutory or constitutional rights of which a “reasonable person” would have known); *Wood v. Strickland*, 420 U.S. 308, 316 (1975) (holding there exists a “good faith” exception for school officials to a § 1983 action).

found for the Administrators, holding the search did not violate Redding's constitutional rights.⁷⁰ On appeal, the United States Court of Appeals for the Ninth Circuit reviewed the case de novo and affirmed the district court's ruling in favor of the Administrators.⁷¹ The Ninth Circuit agreed to rehear the case en banc and in a closely divided decision, reversed the panel.⁷² The Ninth Circuit en banc held the strip search unreasonable under the *T.L.O.* standard and granted qualified immunity for the Administrators, except Principal Wilson, finding the others did not act as independent decisionmakers.⁷³

Majority Opinion

The United States Supreme Court granted certiorari to address the issue of whether the search by school officials of Redding's underclothes violated Redding's Fourth Amendment rights and, if so, whether Principal Wilson should be granted qualified immunity.⁷⁴ Justice Souter wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito.⁷⁵ The majority upheld the Ninth Circuit's determination that the strip search resulted in a violation of Redding's Fourth Amendment rights, but reversed the decision to deny qualified immunity to Wilson, and remanded back to the district court to decide the pending *Monell* claim.⁷⁶

The majority began by focusing on the first prong of the *T.L.O.* analysis: whether Wilson possessed reasonable suspicion to justify the inception of the backpack search.⁷⁷ The majority found Wilson possessed enough information to reasonably assume Redding carried pills on her person or in her backpack,

⁷⁰ *Redding II*, 531 F.3d at 1077.

⁷¹ *Id.*

⁷² *Safford Unified Sch. Dist. No. 1 v. Redding (Redding)*, 129 S. Ct. 2633, 2638 (2009). The Ninth Circuit en banc split 8-to-3 on the unconstitutionality of the strip search of Redding, but split 6-to-5 on denying qualified immunity for Wilson. *Redding II*, 531 F.3d at 1081–87.

⁷³ *Redding II*, 531 F.3d 1081–89.

⁷⁴ *Redding*, 129 S. Ct. at 2637–38.

⁷⁵ *Id.* at 2633.

⁷⁶ *Id.* at 2644; see *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978) (holding a local government may be liable under a § 1983 action only if the injury inflicted by its employees or agents occurred in the execution of a government's official policies or customs); see also *supra* note 68 and accompanying text (defining a 42 U.S.C. § 1983 claim). *Monell* claims lie outside the scope of this note. For more information about the *Monell* claim, see 1 LAFAVE, *supra* note 22, § 1.10, and 13 AM. JUR. 3D *Proof of Facts* § 1.3 (2009).

⁷⁷ *Redding*, 129 S. Ct. at 2641; see *supra* notes 41–42 and accompanying text (stating *T.L.O.* consists of a two-fold inquiry: whether an official possessed reasonable suspicion to justify the inception of a search, and whether the search was reasonable in scope in light of the sex and age of the student).

and thus, to justify the search of the backpack and Redding's outer garments.⁷⁸ However, the majority found the next step in the search, from the backpack and outer garments to the strip search of Redding in Nurse Schwallier's office, as "categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings."⁷⁹ In evaluating this type of search, the majority found particularly relevant the reasonable expectation of privacy, and the degree of intrusiveness of a strip search.⁸⁰

The majority's opinion focused primarily on the second prong of the *T.L.O.* standard—whether the strip search of Redding was reasonable in scope.⁸¹ Applying *T.L.O.*, the majority held the search must be reasonably related in scope to the circumstances that justified the inception of the search and may not be excessively intrusive when considering the age and gender of the student, in light of the character of the infraction.⁸² The *T.L.O.* majority ruled (in light of Redding's sex and age) the low prescription strength of the 400 mg Ibuprofen combined with the quantity of the pills failed to present enough of a dangerous threat to the students to justify escalating to such an intrusive search.⁸³ In finding the search unreasonable, the Court also found relevant the lack of any information showing Redding actually possessed pills in her underclothing at the time of the

⁷⁸ *Redding*, 129 S. Ct. at 2641 n.3 ("There is no question here that justification for the school officials' search was required in accordance with the *T.L.O.* standard of reasonable suspicion."). The Court found a variety of factors relevant including: the teachers' suspicion that Redding and Glines possessed and consumed alcohol at the school dance, Jordan's tip regarding the party with alcohol that Redding hosted at her house, evidence that Redding and Marissa were friends, the contraband in the planner, Jordan's tip that Marissa supplied the pills to him, the tip that students were intending to ingest the pills during lunchtime, and Glines's subsequent tip that she received the pills from Redding. *Id.* at 2641.

⁷⁹ *Id.* at 2641 (finding subjective and reasonable societal expectations of personal privacy to support categorizing the strip search as a different kind of search). The Court refused to specifically define a strip search, and instead focused on the impact on the students from this type of search. *See id.*

⁸⁰ *Id.* at 2641–42 (citing Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondents, *Redding*, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 870022; Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCHOOL PSYCHOL. 7, 13 (1998) (finding a strip search can lead to severe emotional damage); New York City Dep't of Educ., Reg. No. A-432, p. 2 (Sept. 13, 2005) ("Under no circumstances shall a strip-search of a student be conducted.")).

⁸¹ *Redding*, 129 S. Ct. at 2642.

⁸² *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985)).

⁸³ *Id.* at 2642 n.4 ("An Advil tablet, caplet, or gel caplet, contains 200 mg of ibuprofen.") (citing PHYSICIANS' DESK REFERENCE FOR NONPRESCRIPTION DRUGS, DIETARY SUPPLEMENTS, AND HERBS 674 (28th ed. 2006)); *id.* at 2642 ("Wilson had no reason to suspect that large amount of the drugs were being passed around, or that individual students were receiving great numbers of pills."). The *Redding* majority never clarified how these considerations fit into the scope-prong inquiry of the *T.L.O.* standard. *See id.* at 2642.

search.⁸⁴ Ultimately, the Court held, “[t]he meaning of such a [strip] search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.”⁸⁵

Finally, the majority reversed the Ninth Circuit’s holding and granted Wilson qualified immunity, following its recent *Pearson v. Callahan* decision, because the law was not clearly established at the time of Wilson’s conduct.⁸⁶ The majority found compelling the inconsistent holdings in the strip search cases throughout the district and circuit courts, as well as the divisiveness of the Ninth Circuit’s previous holdings in this case.⁸⁷

Stevens’s Concurring & Dissenting Opinion

The two concurring opinions in *Redding* affirmed the majority’s holding that Redding’s search violated her Fourth Amendment rights, but diverged from the majority on the question of whether Wilson should be denied qualified immunity.⁸⁸ Justice Stevens found the *Redding* search violated the scope prong of the *T.L.O.* reasonableness inquiry, categorizing the strip search as a classic case where “clearly established law meets clearly outrageous conduct.”⁸⁹ Justice Stevens went on to eschew the majority’s finding that the divisive nature of the Ninth Circuit’s decisions in this case was compelling enough to meet the *Pearson* standard in granting Wilson qualified immunity.⁹⁰

⁸⁴ *Id.* at 2642 (“[T]here is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear.”).

⁸⁵ *Id.* at 2643.

⁸⁶ *Id.* (holding a school official is entitled to qualified immunity where established law cannot demonstrate the search of the student violated the Fourth Amendment); see *Pearson v. Callahan*, 129 S. Ct. 808, 813 (2009) (holding a petitioner possesses qualified immunity as a shield from liability if the law was not clearly established that the search was unconstitutional). The qualified immunity discussion lies outside the scope of this note. For more information on qualified immunity, see 1 LAFAYETTE *supra* note 22, § 1.10, and Wesley Kobylak, Annotation, *Immunity of Public Officials from Personal Liability in Civil Rights Actions Brought by Public Employees under 42 U.S.C.A. § 1983*, 63 A.L.R. FED. 744 (1983 & Supp. 2010).

⁸⁷ *Redding*, 129 S. Ct. 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.”).

⁸⁸ *Id.* at 2644–46 (Stevens & Ginsburg, JJ., concurring & dissenting).

⁸⁹ *Id.* at 2644 (Stevens, J., concurring & dissenting) (finding the strip search of Redding resulted in a far more intrusive search with less justifications to support it, than the search of the purse in *T.L.O.*).

⁹⁰ *Id.* at 2645 (finding the law clearly established at the time of Redding’s search, and the inconsistent lower court decisions insufficient to uphold qualified immunity for Wilson).

Ginsburg's Concurring & Dissenting Opinion

Justice Ginsburg's opinion also concurred with the majority's holding that Redding's search violated the scope prong of the *T.L.O.* test, but further emphasized the extremely intrusive nature of a strip search of a thirteen-year-old girl and the lack of sufficient evidence to deem the search reasonable.⁹¹ Justice Ginsburg agreed with Stevens's dissent in denying Wilson qualified immunity.⁹²

Thomas's Dissenting Opinion

Justice Thomas wrote an opinion dissenting in part and concurring in part.⁹³ He argued the strip search did not violate Redding's constitutional rights, but agreed with the majority in granting Wilson qualified immunity.⁹⁴ Justice Thomas, in examining the reasonableness of the search, focused on the systemic problems of school officials in maintaining order and discipline, especially in light of the rising trend of violence and drug use.⁹⁵

Justice Thomas argued the reasonable suspicion standard allows school officials to retain expansive discretion to promote a safe and proper educational experience for students.⁹⁶ He reiterated that a search satisfies the permissible-in-scope prong of the *T.L.O.* inquiry as long as "it is objectively reasonable to believe that the area searched could conceal the contraband."⁹⁷ According to Justice Thomas, Wilson's reasonable suspicion that Redding possessed and intended to distribute pills to other students did not dissolve once the search of the backpack failed to reveal contraband.⁹⁸ Thomas instead contended that after Wilson discovered no pills in her backpack or outer garments, Wilson reasonably concluded Redding secreted pills under her clothing.⁹⁹ Thomas supported the Administrators' position that students will routinely hide contraband under their clothing.¹⁰⁰

⁹¹ *Id.* (Ginsburg, J., concurring & dissenting) (finding no evidence existed in this case nor were there sufficient prior experiences at the school that would lead a reasonable person to believe Redding would secret pills under her clothes).

⁹² *Id.* at 2646 (finding the law clearly established at the time of Redding's search, and Wilson's actions amounted to an abuse of authority, thus invalidating any justification to grant him qualified immunity).

⁹³ *Id.* (Thomas, J., dissenting & concurring).

⁹⁴ *Id.*

⁹⁵ *Id.* at 2646 (citing *Goss v. Lopez*, 419 U.S. 565, 580 (1975)); *see also* *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (finding schools have a compelling need to maintain a safe environment to promote learning).

⁹⁶ *Redding*, 129 S. Ct. at 2647 (Thomas, J., dissenting & concurring).

⁹⁷ *Id.*

⁹⁸ *Id.* at 2650.

⁹⁹ *Id.* (arguing Wilson's conclusion was "eminently reasonable," especially considering that students routinely hide contraband under their clothing).

¹⁰⁰ *Id.*

Justice Thomas also attacked the majority for defying traditional *T.L.O.* reasoning by interpreting the “nature of the infraction” portion of the permissible-in-scope prong to allow judges to substitute their judgment for a particular school policy or rule.¹⁰¹ He argued the school rule J-3050, prohibiting the possession of prescription drugs on school property, not only parallels a similar Arizona criminal statute, but also was implemented to combat a troubling trend of teenage abuse of prescription and over-the-counter drugs.¹⁰² According to Justice Thomas, this trend is particularly troubling for officials due to the myth among students that these drugs provide a “safe high.”¹⁰³ Furthermore, Justice Thomas noted the likelihood of injuries or deaths that could result from students ingesting potentially lethal combinations of these drugs.¹⁰⁴

Justice Thomas concluded the majority, in effect, managed to replace a school rule that does not distinguish between drugs, with a law that does.¹⁰⁵ According to Thomas, the majority’s holding created an “unworkable and unsound” test, where the Court permits a search of a student for a prohibited drug only if the official can demonstrate a sufficient showing of the dangerous potency of the drug.¹⁰⁶ Thomas feared the majority’s approach in *Redding* risks yielding control of the public school system to its students.¹⁰⁷ Alternatively, Justice Thomas suggested returning to the common law doctrine of *in loco parentis*, which would return the parental authority back to the teachers to maintain a safe and educational learning environment for students.¹⁰⁸

¹⁰¹ *Id.* (“This approach directly conflicts with *T.L.O.* in which the Court was ‘unwilling to adopt a standard under which the legality of a search is dependent upon a judge’s evaluation of the relative importance of the school rules.’”) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985)).

¹⁰² *Id.* at 2653 (citing Ken Schroeder, *Get Teens Off Drugs*, EDUC. DIGEST 75 (Dec. 2006)); see also ARIZ. REV. STAT. ANN. § 13-3406(A)(1) (Supp. 2008) (“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.]”).

¹⁰³ *Redding*, 129 S. Ct. at 2653 (Thomas, J., dissenting & concurring) (citing OFFICE OF NAT’L DRUG CONTROL POLICY, TEENS AND PRESCRIPTION DRUGS: AN ANALYSIS OF RECENT TRENDS ON THE EMERGING DRUG THREAT 3 (2007) (noting youth ages 12 to 17 abuse prescription drugs more than any other illegal narcotics combined)).

¹⁰⁴ *Id.* at 2654 (citing NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., UNDER THE COUNTER: THE DIVERSION AND ABUSE OF CONTROLLED PRESCRIPTION DRUGS IN THE U.S. 25 (2005)); see also Press Release, Substance Abuse & Mental Health Servs. Admin., U.S. Dep’t of Health & Human Servs., Emergency Room Visits Climb for Misuse of Prescription and Over-the-Counter Drugs (Mar. 13, 2007), available at <http://www.samhsa.gov/newsroom/advisories/0703135521.aspx> (“[Hospital] visits involving the nonmedical use of prescription or over-the-counter drugs increased from 495,732 to 598,542. The majority of these visits involved multiple drugs.”).

¹⁰⁵ *Redding*, 129 S. Ct. at 2651 (Thomas, J., dissenting & concurring).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2655 (citing *Morse v. Frederick*, 551 U.S. 393, 421 (2007)).

¹⁰⁸ *Id.* For more information on *in loco parentis*, see 59 AM. JUR. 2D *Parent and Child* § 9 (2009), and 67A C.J.S. *Parent and Child* § 346 (2009).

ANALYSIS

Redding v. Safford Unified School District No. 1 represents yet another example of a long line of Fourth Amendment cases where the majority developed new requirements for a case specific situation—Redding’s strip search.¹⁰⁹ For a search to satisfy the permissible-in-scope prong, *Redding* now requires a court—in addition to utilizing the traditional *T.L.O.* standard—to consider evidence of the dangerous power and quantity of the contraband as well as evidence the suspect actually secreted contraband under his or her clothes.¹¹⁰ *Redding* operates as an extension of the *T.L.O.* rule, specific to severe invasions of privacy.¹¹¹ *Redding* and *T.L.O.* continue to fail in providing clear guidelines for practitioners and school officials when dealing with Fourth Amendment searches in schools.¹¹² The clear alternative is the existing Fourth Amendment standard of probable cause, supported by a long history of case law to guide school officials on how to conduct constitutionally valid searches in schools.¹¹³

The Inadequacies of Redding and the Failing T.L.O. Standard

Redding and *T.L.O.* leave school officials, courts, and practitioners with an unpredictable standard, which will apply inconsistently depending on the specific facts of a case.¹¹⁴ First, the *Redding* Court never explained how to apply the factors properly in the *T.L.O.* permissible-in-scope prong.¹¹⁵ This prong requires

¹⁰⁹ *Redding*, 129 S. Ct. at 2643; see, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (establishing a two-prong reasonable suspicion test for searches in schools); *New York v. Belton*, 453 U.S. 454, 460 (1981) (creating a separate rule specific to automobile searches incident to arrest); *Chimel v. California*, 395 U.S. 752, 756 (1969) (establishing the current rule for the search incident to arrest exception, which limited the area police officers could search to the limited area around the defendant); *Terry v. Ohio*, 392 U.S. 1, 19–21 (1968) (establishing a reasonable suspicion standard for lesser intrusive searches like a “stop and frisk” search); *Carroll v. United States*, 267 U.S. 132, 162 (1924) (establishing the automobile exception for the warrant requirement in vehicle searches).

¹¹⁰ *Redding*, 129 S. Ct. at 2643.

¹¹¹ *Id.* (finding the extremely intrusive nature and implications of a strip search place it in a distinct category requiring a much greater level of specific suspicions).

¹¹² See *Blickenstaff*, *supra* note 43, at 54–55 (observing there is much confusion for what precisely is reasonable in student strip search cases); see also *infra* notes 114–41 and accompanying text (describing the case specific nature of the *Redding* holding and trouble lower courts have encountered in applying the reasonableness standard to school searches).

¹¹³ See *infra* notes 147, 154 and accompanying text (listing the cases where the Court has developed the probable cause standard).

¹¹⁴ See *infra* notes 114–41 and accompanying text; see also Martin R. Gardner, *Student Privacy in the Wake of T.L.O.: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 922 (1988) (voicing fears that *T.L.O.* opens the floodgates for abandonment of decades of rule-focused jurisprudence for a case-by-case analysis of reasonableness).

¹¹⁵ *Redding*, 129 S. Ct. at 2641–43. The Court briefly mentioned the damaging effects of a strip search on young people in general, but never provided any analysis of the relevance of Redding’s specific age, her gender, or the nature of her alleged infraction. See *id.*

the search to be reasonably related to the search's objectives, without resulting in an "excessively intrusive" search in light of the student's age and sex, as well as the nature of the infraction.¹¹⁶ A major criticism of the original *T.L.O.* decision targeted the Court's complete lack of guidance on the relevance of and weight given each factor in the permissible-in-scope prong.¹¹⁷ Twenty-five years later, the *Redding* decision offered an ideal case for the Court to finally provide guidance on how to correctly apply these factors, bearing in mind Redding's young adolescent age, her gender, and the nature of her alleged unlawful possession of low-strength prescription drugs.¹¹⁸ However, the *Redding* Court avoided the discussion altogether, thus failing to provide any clear guidelines for how school officials, courts, and practitioners may correctly analyze each factor of the *T.L.O.* permissible-in-scope prong.¹¹⁹

Moreover, in *Redding* both the majority and dissent managed to apply only parts of the *T.L.O.* permissible-in-scope prong.¹²⁰ The *Redding* majority focused solely on "excessive intrusiveness," without explaining why the search failed to relate to the objectives of the search.¹²¹ The *Redding* majority's faulty analysis of

¹¹⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

¹¹⁷ *See Gardner*, *supra* note 114, at 922 (stating the *T.L.O.* majority never explained how or why these factors are relevant); *see also T.L.O.*, 469 U.S. at 365 (Brennan & Marshall, JJ., concurring & dissenting) ("As compared with the relative ease with which teachers can apply the probable-cause standard, the amorphous 'reasonableness under all the circumstances' standard freshly coined by the Court today will likely spawn increased litigation and greater uncertainty among teachers and administrators."). The United States Court of Appeals for the Eleventh Circuit provided a scathing criticism of *T.L.O.*'s complete lack of guidance for the scope factors:

[N]o reasonable school official could glean from these broadly-worded phrases whether the search of a younger or older student might be deemed more or less intrusive; whether the search of a boy or girl is more or less reasonable, and at what age or grade level; and what constitutes an infraction great enough to warrant a constitutionally reasonable search or, conversely, minor enough such that a search of property or person would be characterized as unreasonable. . . .

Indeed, not only does the language used by the Court to announce a legal standard regarding the permissible scope of a reasonable school search lack specificity but, it appears, purposefully so.

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 825–827 (11th Cir. 1997).

¹¹⁸ *Redding*, 129 S. Ct. at 2637, 2642.

¹¹⁹ *See id.* at 2641–43. The Court in *Redding* focused solely on the excessive intrusiveness of the strip search in light of the lack of sufficient suspicions by Wilson. *See id.* ("[T]he content of the suspicion failed to match the degree of intrusion . . . [The] meaning of such a search, and the degradation the subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions."); *see also Jenkins*, 115 F.3d at 828 ("[*T.L.O.*] did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in [*T.L.O.*]").

¹²⁰ *See infra* notes 121–26 and accompanying text.

¹²¹ *See Redding*, 129 S. Ct. at 2641–43. Instead, the majority took particular care to point out the extremely intrusive nature of a strip search and the resulting psychological damage it causes to children and adolescents. *See id.* at 2641–42 (describing a strip search as "embarrassing, frightening, and humiliating").

the permissible-in-scope prong lacks support from case law.¹²² A series of Fourth Amendment cases have held 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."¹²³ Accordingly, once the search of Redding's backpack and outer garments revealed no contraband—with the information Wilson possessed—he reasonably assumed Redding hid the pills in a place she thought no one would look: under her clothes.¹²⁴ But even Justice Thomas in his lengthy dissent failed to assess completely *T.L.O.*'s scope requirement.¹²⁵ The discrepancy between the opinions of Thomas and the majority represents a further example of the numerous difficulties school officials, courts, and practitioners face in correctly applying the *T.L.O.* standard to school searches.¹²⁶

Next, the *Redding* majority included additional factual considerations beyond those required under the *T.L.O.* permissible-in-scope prong.¹²⁷ The majority insisted on two "distinct elements" to justify such an intrusive search,

¹²² See *infra* note 123 and accompanying text.

¹²³ *Redding*, 129 S. Ct. at 2649 (Thomas, J., dissenting & concurring) (emphasis added) (citing *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (holding law enforcement officers may search the belongings of passengers in a vehicle without individualized probable cause that the passenger's belongings contain the suspected contraband); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (holding the scope of a search is defined by its expressed object, thus holding that a search of a container in a car that could contain narcotics was reasonable); *United States v. Johns*, 469 U.S. 478, 487 (1985) (holding the subsequent search of packages in trucks was reasonable based on the reasonable belief the trucks contained illegal contraband); *United States v. Ross*, 456 U.S. 798, 820 (1982) (holding a lawful search of a premises extends to the entire area the object could be found in, including containers or packages)).

¹²⁴ *Id.* at 2650.

¹²⁵ Compare *id.* at 2646–59 (failing to mention the relevance of Redding's age or sex in his dissent), with *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (holding a search will be permissible in its scope when it is not excessively intrusive considering the age and sex of the student and the nature of the infraction).

¹²⁶ See *supra* notes 121–25 and accompanying text. Commentators Avery and Simpson listed examples of areas of search law left unanswered by *T.L.O.*:

1. How does this standard relate to the general search versus the particularized search?
2. How does police involvement, prior or otherwise, alter the lawfulness of the search?
3. Under what circumstances, if any, is a strip search justified?
4. Are articles placed in a student's car or locker given less protection than articles placed on a student's person or purse?
5. In short, what are the consequences and legal safeguards associated with particular types of searches?

Charles W. Avery & Robert J. Simpson, *Search and Seizure: A Risk Assessment Model for Public School Officials*, 16 J.L. & EDUC. 403, 407–08 (1987).

¹²⁷ See *infra* note 128 and accompanying text. However, the *Redding* majority correctly applied the first prong of the *T.L.O.* test, finding Wilson possessed sufficient reasonable suspicion to justify the inception of the search. See *Redding*, 129 S. Ct. at 2641.

which have no place in school search jurisprudence: evidence of the dangerous power or quantity of the pills and evidence the student secreted the pills under her clothes.¹²⁸ Accordingly, in future cases a strip search could be found legitimate if, under a similar fact pattern, the prescription drug was a stronger painkiller.¹²⁹ The majority's holding, contrary to providing guidance for school officials on conducting strip searches, manages only to further entangle an already perplexing standard.¹³⁰

Also, the *Redding* majority's misapplication of the *T.L.O.* standard will result in a further lack of predictability for school officials, courts, and practitioners.¹³¹ This becomes especially significant when considering many educators already do not understand the breadth of a student's Fourth Amendment protection from unreasonable searches.¹³² *Redding* illustrates the difficulty courts at all levels face in attempting to apply the *T.L.O.* standard to school searches.¹³³ In a line of strip search cases since *T.L.O.*, lower courts have managed to fall across the spectrum in attempting to apply the standard properly.¹³⁴ In many of these cases, the courts

¹²⁸ See *Redding*, 129 S. Ct. at 2641–43; *id.* at 2649 (Thomas, J., dissenting & concurring) (contending the majority's approach is “an unjustifiable departure from bedrock Fourth Amendment law” in the school setting). The majority never required these additional considerations in the *T.L.O.* two-prong test. See *T.L.O.*, 469 U.S. at 341, 347–48.

¹²⁹ See John Dayton & Anne Proffitt Dupre, *Searching for Guidance in Public School Search and Seizure Law: From T.L.O. to Redding*, 248 EDUC. L. REP. 19, 32 (2009) (“Even if the law concerning strip searches was not well established prior to *Redding*, after *Redding*, strip searches for non-dangerous contraband based on insufficient evidence will likely result in both institutional and individual liability for school officials.”).

¹³⁰ See *supra* notes 115–29 and accompanying text; see also Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 8 (1992) (“[*T.L.O.*’s] departure from established doctrine, its vague reasoning, and its lack of stated standards make its application to child strip searches extremely problematic.”).

¹³¹ See Gartner, *supra* note 46, at 949, 951–52, 955 (observing case law subsequent to *T.L.O.* demonstrates the standard failed to offer sufficient guidance to school officials and courts, and even if the Supreme Court heard a strip search case without requiring a probable cause standard, inconsistent adjudications would continue, and thus would fail to provide guidance for school officials).

¹³² *Id.* at 955 (stating news accounts and research studies indicate a lack of knowledge on the part of school officials regarding the legality of searches and seizures in schools—a direct result from the lack of training and experience of school officials in Fourth Amendment search and seizure matters).

¹³³ *Redding*, 129 S. Ct. at 2643 (referring to a number of divisive lower court strip search decisions).

¹³⁴ *E.g.*, *Ex rel. Williams v. Ellington*, 936 F.2d 881, 882–83, 887 (6th Cir. 1991) (holding a strip search of a high school student reasonable based on a small brown vial of an over-the-counter inhalant Williams pulled out of her purse and a tip that a fellow student saw Williams with a glass vial of a white powdery substance); *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41, 42–43, 49 (W. Va. 1993) (holding a strip search of a 14-year-old middle school student unreasonable in scope based on the student's duties as an assistant janitor in conjunction with \$100 that went missing from a teacher's classroom); see also *supra* note 44 and accompanying text (listing numerous inconsistent lower court strip search decisions).

failed to assess relevant factors in the balancing test, such as the student's age, history of drug use or violence in schools, or the student's disciplinary record.¹³⁵ Even the *T.L.O.* majority managed to overlook the age and sex of the student, as well as the nature of the intrusion facet of the permissible-in-scope prong of the standard it created.¹³⁶

Furthermore, the *T.L.O.* reasonableness standard has left courts and practitioners with little direction in handling various other Fourth Amendment search issues in schools.¹³⁷ These unanswered issues include: whether the exclusionary rule is applicable; what standard of suspicion is sufficient when the search involves school officials and law enforcement working together; and whether students' privacy rights extend to unique school property, such as lockers.¹³⁸ The *Redding* majority expressed concern with the decades of inconsistent applications of the *T.L.O.* standard.¹³⁹ Nevertheless, the Court chose

¹³⁵ Tamela J. White, Note, *Williams by Williams v. Ellington: Strip Searches in Public Schools—Too Many Unanswered Questions*, 19 N. KY. L. REV. 513, 539–40 (1992) (“Although these were not requirements of the [*T.L.O.*] decision, these are attributes that weigh heavily in the balance of the competing interests at hand.”); *see, e.g., Ex rel. Williams*, 936 F.2d at 882–83, 887 (holding the strip search of a high school girl unreasonable, failing to mention the student's actual age at all in the opinion, and failing to analyze the sex of the student as well as the nature of her infraction); *Widener v. Frye*, 809 F. Supp. 35, 36, 38 (S.D. Ohio 1992) (holding a strip search of a high school student reasonable, failing to mention the boy's age, any history of him breaking previous rules, and never mentioning any infraction of school rules or the law by the boy); *Mark Anthony B.*, 433 S.E.2d at 42–43, 49 (holding a strip search of a fourteen year-old-boy unreasonable in scope, failing to mention any other relevant factors beyond the nature of the infraction).

¹³⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (holding a search is permissible in scope when it is not excessively intrusive considering the sex and age of the student as well as the nature of the infraction); *see also Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 825 (11th Cir. 1997) (“Specific application of the factors established to define the constitutionally permissible parameters of a school search . . . is notably absent from the Court's discussion and conclusion with respect to [*T.L.O.*]”).

¹³⁷ *See* Jason E. Yearout, Note, *Individualized School Searches and the Fourth Amendment: What's a School District to Do?*, 10 WM. & MARY BILL OF RTS. J., 489, 495–96 (2002) (listing the various areas of Fourth Amendment search law for which *T.L.O.* has failed to provide guidance); *see also Avery & Simpson, supra* note 126, at 407–08 (listing examples of unanswered questions that the *T.L.O.* standard imparts).

¹³⁸ Yearout, *supra* note 137, at 495–96.

¹³⁹ *Safford Unified Sch. Dist. No. 1 v. Redding (Redding)*, 129 S. Ct. 2633, 2643–44 (2009); *see, e.g., Thomas v. Roberts*, 323 F.3d 950, 956–57 (11th Cir. 2003) (holding a group strip search over a missing \$26 unreasonable but granting qualified immunity because the law was too unclear to put the school official on notice that his conduct violated the students' constitutional rights); *Jenkins*, 115 F.3d at 828 (“[*T.L.O.* represents a] series of abstraction on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other.”); *Ex rel. Williams*, 936 F.2d at 882–83, 887 (holding a strip search of a high school student for a drug reasonable, without any suspicion the contraband was hidden next to her person); *see also supra* note 44 and accompanying text (listing numerous divisive holdings of strip search cases amongst the lower courts since the *T.L.O.* decision).

not to reevaluate *T.L.O.*—instead it effectively proclaimed the fault in *Redding* existed in the actions of Wilson, not in the *T.L.O.* standard.¹⁴⁰ As a result, the *Redding* decision offers limited guidance to courts and school officials only when handling factually parallel cases, thus forcing courts and officials in future school search cases to rely on the already problematic *T.L.O.* standard.¹⁴¹

In sum, *Redding* illustrates that even the United States Supreme Court resorts to the creation of ad hoc, additional considerations when applying *T.L.O.* to certain fact-specific situations.¹⁴² The Supreme Court specifically designed the *T.L.O.* standard to provide school officials with a common sense method to regulate conduct while upholding students' privacy interests.¹⁴³ However, the *T.L.O.* standard remains too inconsistent, broad, and vague for school officials to effectively utilize it in the school setting.¹⁴⁴

Instituting a Probable Cause Standard in Schools

The post-*T.L.O.* school strip search cases, culminating in *Redding*, conclusively demonstrate the need for a workable standard in the school setting: probable cause.¹⁴⁵ The Court in *Terry v. Ohio* created the reasonable suspicion standard

¹⁴⁰ *Redding*, 129 S. Ct. at 2643–44. Justice Ginsburg's concurring and dissenting opinion most clearly illustrates this point by labeling Wilson's "humiliating stripdown search" of Redding as an "abuse of authority of [an] order [that] should not be shielded by official immunity." *Id.* at 2645 (Ginsburg, J., concurring & dissenting).

¹⁴¹ See *id.* at 2642–43 (majority opinion) (giving no indication that if the contraband was a narcotic or dangerous weapon of some sort the Court would require the same considerations as in *Redding*); see also Dayton & Dupre, *supra* note 129, at 30–31 ("The Court's opinion in *Redding* makes it clear that when the search is premised on finding a non-dangerous item, school officials' legitimate interest in finding and seizing the non-dangerous item is unlikely to warrant an intrusive search [*T.L.O.*] remains the standard for searches of students by public school officials."); Gerald S. Reamey, New Jersey v. T.L.O.: *The Supreme Court's Lesson on School Searches*, 16 ST. MARY'S L.J. 933, 948–49 (1985) ("[*T.L.O.*'s reasonableness test] requires great care to avoid abuse, and whatever its virtue, it is likely to foster inconsistency of application and result.").

¹⁴² See *supra* note 128 and accompanying text (describing the two additional requirements the majority used to decide *Redding*); see also Dayton & Dupre, *supra* note 129, at 32 ("[T]he most intrusive searches, if ever reasonable, would require credible evidence of urgency, danger, and a reasonable basis for believing that the danger is hidden in an intimate area.").

¹⁴³ New Jersey v. T.L.O., 469 U.S. 325, 343 (1985).

¹⁴⁴ Blickenstaff, *supra* note 43, at 54–55; Gartner, *supra* note 46, at 949–50; see also Sunil H. Mansukhani, *School Searches After New Jersey v. T.L.O.: Are There Limits?*, 34 J. FAM. L. 345, 360 (1995) (claiming the *T.L.O.* reasonableness standard fails to provide courts with a clear test to apply to various fact specific situations); Reamey, *supra* note 141, at 948 ("[R]eduction of the level of suspicion justifying a search will inevitably increase the incidence of mistake, particularly in the absence of review by a magistrate.").

¹⁴⁵ See Blickenstaff, *supra* note 43, at 41 (stating under *T.L.O.* substantial inconsistencies and difficulties exists in how to correctly apply *T.L.O.*, as evidenced by the divisive strip search cases in the lower courts); see also Safford Unified Sch. Dist. No. 1 v. Redding (*Redding*), 129 S. Ct. 2633, 2638 (2009) (evidencing the split in the Ninth Circuit's decision in the *Redding* case, and the closely

(which *T.L.O.* adopted) to fit the specific mold of a stop and frisk search, never intending it to apply in a full-scale search.¹⁴⁶ Justice Brennan in his prescient dissent in *T.L.O.* aptly criticized the majority's test as a "sizable innovation in Fourth Amendment analysis" that "finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens."¹⁴⁷ Reasonable suspicion would be legitimate for a minimally intrusive *Terry* "stop and frisk" search, but because the *T.L.O.* majority conceded students possess legitimate expectations of privacy and Fourth Amendment rights, probable cause should be the only applicable standard for a full search.¹⁴⁸

The *T.L.O.* majority voiced two primary justifications for adopting a reasonable suspicion standard in schools: (1) the *T.L.O.* standard would spare educators the "necessity of schooling themselves in the niceties of probable

divided Ninth Circuit en banc decision); Neal I. Aizenstein, *Fourth Amendment—Searches by Public School Officials Valid on "Reasonable Grounds"*: *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985), 76 J. CRIM. L. & CRIMINOLOGY 898, 923–24 (1985) (observing the reasonable suspicion standard lacks authority and promotes inconsistency in case law); *supra* note 44 and accompanying text (listing the split in circuit court decisions regarding strip searches).

¹⁴⁶ See Gardner, *supra* note 114, at 920 ("Several critics have taken the [*T.L.O.*] Court to task for its misuse of prior precedent in attempting to justify the rejection of the probable cause standard in school searches in favor of the reasonable grounds, balancing approach."); Mansukhani, *supra* note 144, at 351 (explaining the *Terry* Court's rationale in adopting a lesser standard of suspicion was to ensure officer and the public's safety, by allowing an officer to engage in a quick pat down search of a person suspected of hiding a weapon—not a full-scale search); see also *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The *Terry* majority held:

[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

Terry, 392 U.S. at 27.

¹⁴⁷ *T.L.O.*, 469 U.S. at 358 (Brennan & Marshall, JJ., concurring & dissenting). Justice Brennan cited a long line of Fourth Amendment jurisprudence which holds probable cause is a prerequisite for any full-scale search. *Id.* at 358–59; see *United States v. Ortiz*, 422 U.S. 891, 896 (1975) ("A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search." (citation omitted)); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) ("In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."); *Carroll v. United States*, 267 U.S. 132, 149 (1925) ("[O]n reason and authority the true rule is that if the search and seizure . . . are made upon probable causes . . . the search and seizure are valid.").

¹⁴⁸ *T.L.O.*, 469 U.S. at 362 (Brennan, J., dissenting & concurring); see also Aizenstein, *supra* note 145, at 930 (stating only a probable cause standard sufficiently protects students' privacy interests in schools); Mansukhani, *supra* note 144, at 351–61 (observing a *Terry* stop and frisk search fails to amount to a full-scale search, and would be appropriate in situations where an officer has reason to believe a person possesses an object that could harm the person conducting the search or bystanders).

cause,” and (2) a probable cause standard would allow students engaged in criminal activity, like *T.L.O.*, to escape punishment.¹⁴⁹ However, neither of these justifications holds up to scrutiny. First, the Court decided *Illinois v. Gates* specifically to create a “common sense” and “practical” probable cause standard, hinging on an evaluation of the “totality of the circumstances,” that would apply neatly in numerous areas, such as schools.¹⁵⁰ Ironically, in its search for such a common sense standard the *T.L.O.* majority created a far more confusing and muddled standard than the already existing post-*Gates* probable cause standard.¹⁵¹ Second, in *T.L.O.* and many of the search cases applying *T.L.O.*, there existed sufficiently detailed and specific evidence of criminal activity to meet the probable cause “totality of the circumstances” test.¹⁵² Moreover, school officials often work in a position to gather far more reliable and verifiable information than police officers, due to the amount of time the officials spend with a limited amount of students and the reliability of student and teacher informants.¹⁵³ The clear solution for the increasingly inconsistent and unworkable *T.L.O.* standard is a reversion to probable cause.¹⁵⁴

¹⁴⁹ *T.L.O.*, 469 U.S. at 340–43 (finding the search would fail to meet the onerous requirements of Fourth Amendment jurisprudence for probable cause).

¹⁵⁰ *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) (“We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires.”); see Aizenstein, *supra* note 145, at 927–30 (observing the probable cause standard has developed over years of case law to become a common sense test hinging on an assessment of the totality of circumstances, which is particularly well suited to the school environment); see also 5 LAFAVE, *supra* note 22, § 10.11 (asserting the Court in *T.L.O.* could not demonstrate how the probable cause standard would fail in the school context, and until it can be proven the probable cause standard (with decades of jurisprudence supporting it) is unworkable, then probable cause should be the only standard in schools); Mansukhani, *supra* note 144, at 351–61 (listing numerous often cited justifications for lesser standards than probable cause cited in case law and demonstrating how they do not apply in the school setting, thus proving probable cause is perfectly applicable in the school setting).

¹⁵¹ See Aizenstein, *supra* note 145, at 923 (“Unlike the probable cause standard, which has many court decisions and legal authorities defining its meaning, there is little authority available defining a [reasonable suspicion standard].”); see also Avery & Simpson, *supra* note 126, at 407–08 (listing the numerous areas of potential conflict in search cases where *T.L.O.* has failed to provide a clear standard for school officials and courts to follow); Blickenstaff, *supra* note 43, at 43 (describing the *T.L.O.* standard as indefinite and too mushy).

¹⁵² See 5 LAFAVE, *supra* note 22, § 10.11 (noting that most school search cases satisfy the traditional probable cause requirement) (citing *In re Doe*, 91 P.3d 485 (Haw. 2004); *In re L.A.*, 21 P.3d 952 (Kan. 2001); *Commonwealth v. Lawrence L.*, 792 N.E.2d 109 (Mass. 2003)); see also Mansukhani, *supra* note 144, at 360 (“[T]he Court took the ‘easy’ case [in] announcing a [reasonableness] standard that would govern subsequent school searches. . . . [T]here was no need for the Court to depart from the traditional probable cause standard to reach the same result in *T.L.O.*”).

¹⁵³ Reamey, *supra* note 141, at 947–48.

¹⁵⁴ See 2 LAFAVE, *supra* note 22, § 3.2 (referring to a long history of case law development for the probable cause standard); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 360 (1985) (Brennan, J., concurring & dissenting) (finding that probable cause determines the legitimacy of any searches

Applying the probable cause standard in the school setting becomes especially appropriate in light of the ever-increasing similarities between law enforcement officers and school officials.¹⁵⁵ In numerous search cases reaching the appellate courts, the official involved worked as a school administrator, not a teacher.¹⁵⁶ The role of school administrators seems analogous to the duties of law enforcement officers: school officials operate as agents of the state, enforce rules and regulations, mandate compulsory attendance of students, and much of what they uncover in searches of students may lead to criminal prosecution or school disciplinary measures.¹⁵⁷ In search cases involving both administrators and police officers, many courts allowed the use of the lesser standard of reasonable suspicion, only resorting to a probable cause standard in very narrow circumstances.¹⁵⁸ Requiring

beyond a minimal *Terry*-type stop and frisk search); Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 329 (1992) ("It may seem peculiar to argue that probable cause is more predictable than some other form of analysis. Considerable precedent exists, however, construing what probable cause means in various contexts [C]ourts will suffer from the lack of consistency and predictability of the new special needs and reasonableness analyses."); Shatz et al., *supra* note 130, at 8 ("The [*T.L.O.*] decision is impossible to square with the Court's prior Fourth Amendment jurisprudence.").

¹⁵⁵ See Josh Kagan, *Reappraising T.L.O.'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291, 316–20 (2004) (observing the exceedingly difficult nature of distinguishing the level of suspicion required in a search, especially in light of the increasing coordination between school officials and law enforcement in schools).

¹⁵⁶ See *Safford Unified Sch. Dist. No. 1 v. Redding* (*Redding*), 129 S. Ct. 2633, 2638 (2009) (Assistant Vice Principal); *T.L.O.*, 469 U.S. at 328 (Assistant Vice Principal); *Phaneuf v. Fraikin*, 448 F.3d 591, 593 (2d Cir. 2006) (Principal); *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1319 (7th Cir. 1993) (Dean, equivalent to a principal); *Ex rel. Williams v. Ellington*, 936 F.2d 881, 882–83, 882 (6th Cir. 1991) (Principal); *Widener v. Frye*, 809 F. Supp. 35, 36 (S.D. Ohio 1992) (Dean of Students and a former detective with the Cincinnati Police Department); *Cales v. Howell Pub. Schs.*, 635 F. Supp. 454, 455 (E.D. Mich. 1985) (Assistant Vice Principal); *Coronado v. State*, 835 S.W.2d 636, 637 (Tex. Crim. App. 1992) (Assistant Principal); *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41, 43 (W. Va. 1993) (Principal).

¹⁵⁷ See Reamey, *supra* note 141, at 942; see also Kagan, *supra* note 155, at 307–08 (identifying many state regulations and school board policies require school officials often to act in a law enforcement type capacity and routinely work with law enforcement officials in search and seizure situations); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1069 (2003) (stating in many cases, courts have a tendency to interchange the roles of law enforcement officers and school officials in school searches).

¹⁵⁸ See Pinard, *supra* note 157, at 1082–83 ("[T]ensions inherent in these relevant factors, as well as the inconsistent manner in which courts weigh these factors, the case law does not establish clear parameters to guide school officials and law enforcement authorities."); see also Mansukhani, *supra* note 144, at 366 (citing *In re P.E.A.*, 754 P.2d 382, 384 (Colo. 1988)) (stating there exists a threat police officers could, and have, attempted to use school officials to carry out searches that would ordinarily fail to meet a probable cause standard).

probable cause in all but the least intrusive *Terry*-type searches would provide a clear standard across the board, regardless of whether the search involves a school administrator, law enforcement officer, or both.¹⁵⁹

The Exclusionary Rule Safeguards Students' Rights

Requiring a probable cause standard in school searches would also result in a much needed benefit of instituting the exclusionary rule in school searches.¹⁶⁰ The majority in *T.L.O.* ignored the original issue it granted certiorari for: to determine if the exclusionary rule had a place in school searches.¹⁶¹ As evidenced by *Redding*, students with legitimate Fourth Amendment claims experience an almost impassable roadblock in upholding their rights against intrusions.¹⁶² Currently, the qualified immunity doctrine, the reduced protections inherent in the *T.L.O.* reasonable suspicion standard, and the lack of a warrant requirement “dramatically reduce the likelihood of success for the plaintiff student.”¹⁶³ The probable cause standard with the exclusionary rule attached would provide a significant degree of deterrence to unreasonable conduct by school officials.¹⁶⁴ Thus, even if courts continue to uphold qualified immunity in cases like *Redding*, students will at least possess recourse through the exclusionary rule to prevent evidence gathered in an unconstitutional search from being admissible against them in criminal or juvenile proceedings.¹⁶⁵

¹⁵⁹ See Kagan, *supra* note 155, at 325 (claiming in light of the close cooperation between school officials and law enforcement, *T.L.O.* represents a failing standard allowing students to find themselves subjected to routine law enforcement procedures with none of the same protections from police abuses adults possess); see also *supra* notes 155–58 and accompanying text.

¹⁶⁰ See 1 LAFAYETTE, *supra* note 22, § 1.1 (explaining the exclusionary rule has been primarily utilized to deter unconstitutional search and seizures by the government and that evidence found in an unconstitutional search by the government is inadmissible in criminal proceedings).

¹⁶¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 327 (1985).

¹⁶² *Safford Unified Sch. Dist. No. 1 v. Redding (Redding)*, 129 S. Ct. 2633, 2644 (2009). *Redding*'s only remaining recourse is to pursue the *Monell* claim. *Id.*; see also Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1920 (2007) (asserting in order to establish a *Monell* claim plaintiffs have to prove the government entity deprived them of their constitutional rights, and that deprivation occurred pursuant to the government entity's official policy, which can be extremely difficult for students to satisfy).

¹⁶³ Reamey, *supra* note 141, at 943–44; see also *supra* note 76 and accompanying text (explaining that *Redding* only can pursue the *Monell* claim against the school district following the *Redding* Court's holding, which granted Wilson, Romero, and Schwallier qualified immunity).

¹⁶⁴ Reamey, *supra* note 141, at 944 (“The exclusionary rule assumes greater significance in deterring misconduct by school officials when considered in light of the rather restricted availability of the civil remedy.”).

¹⁶⁵ *Id.* at 944. This note does not advocate for the adoption of the exclusionary rule in school disciplinary hearings, only criminal proceedings. See *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 981–82 (8th Cir. 1996) (holding the implementation of the exclusionary rule infeasible in school disciplinary proceedings).

The Merits of Probable Cause in Schools

Beyond the importance of implementing a clearer standard for officials, courts, and practitioners is the need for schools to properly educate students in the powers of the government and of their constitutional rights.¹⁶⁶ The school setting represents the first opportunity for children to experience their constitutional rights in conjunction with the power of the government.¹⁶⁷ By retaining the *T.L.O.* lesser suspicion standard in schools, the Court set a dangerous precedent in the education of children—the full protection of their privacy interest ends the moment they step onto school grounds.¹⁶⁸ As Justice Brennan critically stated in his dissenting opinion in *Doe v. Renfrow*: “Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.”¹⁶⁹ Implementing a probable cause standard in schools would emphasize to America’s youth from the beginning the importance of their Fourth Amendment protections and legitimate expectations of privacy.¹⁷⁰

CONCLUSION

The majority in *T.L.O.* created a standard it thought would adequately provide a balance between students’ legitimate expectations of privacy and the compelling interest of educators to maintain order and discipline in the school

¹⁶⁶ See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).

¹⁶⁷ See Aizenstein, *supra* note 145, at 930 (observing the statements made by the Supreme Court indicate the importance of schools in educating students about democratic principles); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 385–86 (1985) (Stevens, Marshall, & Brennan, JJ., dissenting & concurring). Stevens stated:

Through [the school] passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court’s decision today is a curious moral for the Nation’s youth.

Id.

¹⁶⁸ See Gardner, *supra* note 114, at 907 (stating that outside of schools, courts grant youths the full protection of the Fourth Amendment in searches and seizures by police); see also *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that students . . . shed their constitutional rights . . . at the schoolhouse gates.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“[Schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).

¹⁶⁹ *Doe v. Renfrow*, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting).

¹⁷⁰ See Aizenstein, *supra* note 145, at 930 (stating that implementing a probable cause standard in school searches would demonstrate to students the importance of the Fourth Amendment protections of privacy interests for everyone in a democratic society).

setting.¹⁷¹ However, as evidenced by the last twenty-five years of school search jurisprudence, especially in light of *Redding*, the reasonable suspicion standard is too inconsistent to adequately protect students' Fourth Amendment rights, and too confusing to provide school administrators with a "flexible," "common sense" standard for searches.¹⁷² The solution is to rely on the only standard with a solid foundation in the Constitution and a long history of jurisprudence: probable cause.¹⁷³ A *Gates* probable cause standard would provide school officials with a clear, easy to understand framework for handling any search beyond a minimally intrusive *Terry* "stop and frisk" search, while providing a clear protection for students' legitimate expectations of privacy.¹⁷⁴ Finally, no other forum is more appropriate to teach our students the core concepts of democracy, and the inherent rights which follow, than our schools.¹⁷⁵

¹⁷¹ See *supra* notes 36–42 and accompanying text.

¹⁷² See *supra* notes 109–44 and accompanying text.

¹⁷³ See *supra* notes 147, 154 and accompanying text.

¹⁷⁴ See *supra* notes 145–65 and accompanying text.

¹⁷⁵ See *supra* notes 166–70 and accompanying text.