

**EXCESSIVELY INTRUSIVE IN LIGHT OF AGE OR  
SEX?: AN ANALYSIS OF *SAFFORD UNIFIED  
SCHOOL DISTRICT No. 1 V. REDDING* AND ITS  
IMPLICATIONS FOR STRIP SEARCHES  
IN SCHOOLS**

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I. INTRODUCTION

Last term, in *Safford Unified School District No. 1 v. Redding*,<sup>1</sup> the Supreme Court considered whether the strip search of a 13-year-old student in school violated the Fourth Amendment, and whether divergent opinions in lower courts about such searches entitled the school officials who conducted the search to qualified immunity from liability.<sup>2</sup> The case does not announce a new constitutional framework to govern strip searches of students in school, but rather reinforces a two-step standard previously established in *New Jersey v. T.L.O.*<sup>3</sup> as the proper guide for evaluating a school official's decision to search a student. A valid search must be:

First, . . . justified at its inception by the presence of reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Second, the search must be permissible in its scope, which is achieved 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.<sup>4</sup>

In a decision written by Justice Souter,<sup>5</sup> the majority applied the *T.L.O.* standard to hold that the strip search in Savana Redding's case violated the Fourth Amendment because it was unreasonable in its scope. However, the majority found that the school officials involved in the search were entitled

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<sup>1</sup> 129 S. Ct. 2633 (2009).

<sup>2</sup> *Id.* at 2637–38.

<sup>3</sup> 469 U.S. 325 (1985).

<sup>4</sup> *Redding*, 129 S. Ct. at 2644 (Stevens, J., concurring in part and dissenting in part) (quoting *T.L.O.*, 469 U.S. at 342) (internal quotation marks, citation, and emphasis omitted).

<sup>5</sup> Justice Souter was joined in the majority opinion by Justices Roberts, Scalia, Kennedy, Breyer and Alito. Justices Stevens, Ginsburg, and Thomas each wrote an opinion concurring in part and dissenting in part.

to qualified immunity because the *T.L.O.* standard for school searches had previously produced substantially divergent applications in lower courts.<sup>6</sup>

This Comment first provides a short summary of the facts and opinions in *Redding*, focusing primarily on the Fourth Amendment issue in the case. It then argues that although the majority correctly found the strip search of Savana Redding excessively intrusive under the circumstances, one major aspect of the standard set forth in *T.L.O.* was neither fully explained nor applied by the Court in *Redding*—namely, the role sex plays in evaluating the legality of a strip search.<sup>7</sup> As a result of the majority's ambiguous application of the *T.L.O.* standard and the Justices' disagreement over its meaning, school officials may now be unclear about how and why a student's sex matters in determining the permissibility of a search.

## II. SUMMARY OF THE FACTS AND PROCEDURAL HISTORY

On the morning of October 8, 2003, 13-year-old Savana Redding was ordered to leave her middle school math class and report to Assistant Principal Kerry Wilson's office.<sup>8</sup> A week earlier, another student, Jordan Romero, had warned Wilson that students were bringing drugs to school, and he claimed that he had become ill after receiving pills from a classmate.<sup>9</sup> Romero again met with Wilson on the day Savana was summoned to the assistant principal's office, and he handed over a pill that he said had been given to him by Marissa Glines, another middle school student.<sup>10</sup> Wilson subsequently questioned Glines and ordered her to empty the outer pockets of her clothes, whereupon he discovered several white and blue pills.<sup>11</sup> When asked to explain herself, Glines named Savana Redding as the supplier of the prohibited drugs, but Wilson did not question Glines any further at this point.<sup>12</sup>

Once Savana arrived in Wilson's office, he showed her an unzipped day planner that contained various contraband items and asked whether the planner was hers.<sup>13</sup> Savana explained that the planner did in fact belong to her but that the banned items did not, and that a few days earlier she had lent the planner to her friend, Marissa Glines.<sup>14</sup> Savana was then shown four white

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<sup>6</sup> *Redding*, 129 S. Ct. at 2644.

<sup>7</sup> For the purposes of this Comment, the author will use the term "sex" when referring to the Court's language and biological differences between males and females, but will use "gender" when describing the wider individual, cultural, and social understandings of masculinity and femininity.

<sup>8</sup> 129 S. Ct. at 2638.

<sup>9</sup> *Id.* at 2640.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The Court noted that even though "Wilson did not ask Marissa any followup questions," she was "subjected to a search of her bra and underpants by [Helen] Romero and [Peggy] Schwallier." *Id.* at 2640.

<sup>13</sup> *Id.* at 2638.

<sup>14</sup> *Id.*

prescription-strength ibuprofen pills and one over-the-counter blue naproxen pill—all of which are banned under the school code if possessed without advance permission—and asked if she “knew anything about the pills.”<sup>15</sup> Savana denied any knowledge of the pills’ source and claimed she had no role in their circulation. She did, however, allow Wilson to search her backpack with the help of an administrative assistant named Helen Romero.<sup>16</sup>

Wilson and Romero found no contraband, at which point Wilson ordered Romero to escort Savana to the school nurse’s office for a search of her clothes for pills.<sup>17</sup> Romero and the nurse asked Savana to “remove her jacket, socks, and shoes,” leaving her in only “stretch pants and a T-shirt,” which she was also then asked to remove.<sup>18</sup> She was also told to “pull her bra out and to the side and shake it, and to pull out the elastic on her underpants.”<sup>19</sup> During the search, Savana’s “breasts and pelvic area” were both exposed “to some degree,” but no pills were found on her person.<sup>20</sup> After the search, Savana was forced to sit outside Wilson’s office for over two hours without explanation.<sup>21</sup> At no point before Savana’s strip search was a parent or guardian contacted.<sup>22</sup>

Savana’s mother filed suit against Safford Unified School District No. 1, Wilson, Romero, and the nurse involved, Peggy Schwallier, “for conducting a strip search in violation of Savana’s Fourth Amendment rights.”<sup>23</sup> The petitioners-school officials moved for summary judgment on the ground of qualified immunity.<sup>24</sup> The District Court for the District of Arizona granted the petitioners’ motion, finding no Fourth Amendment violation, and a Ninth Circuit panel affirmed.<sup>25</sup> The Circuit, sitting en banc, reversed 6–5, holding that the strip search was a violation of Savana’s Fourth Amendment rights and that it was unjustified under the standard set forth in *New Jersey v. T.L.O.*<sup>26</sup> Regarding the qualified immunity issue, the Circuit found that since Savana’s right was “clearly established at the time of the search,” Wilson was not entitled to qualified immunity from liability, but Romero and Schwallier were shielded since they had not acted as “independent decision-makers.”<sup>27</sup>

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<sup>15</sup> *Id.* Poison control confirmed the medical make-up of the pills. *Id.* at 2640.

<sup>16</sup> *Id.* at 2638.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2638 (majority opinion).

<sup>24</sup> *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 831 (9th Cir. 2007).

<sup>25</sup> *Id.* at 831, 836.

<sup>26</sup> *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1089 (9th Cir. 2008).

<sup>27</sup> *Id.*

III. THE *REDDING* OPINIONS

The Supreme Court granted certiorari, affirmed in part, reversed in part, and remanded.<sup>28</sup> It held that, in order to comply with the Fourth Amendment, a school official must first believe there is a “moderate chance of finding evidence of wrongdoing” before effectuating the search of a student.<sup>29</sup> In *T.L.O.*, the Court defined this standard as “‘reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.’”<sup>30</sup> Once a school official has reason to suspect a student of wrongdoing, a “search ‘will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.’”<sup>31</sup> The Fourth Amendment issue in *Redding* thus hinged upon whether the scope of the strip search was permissible given that the school officials had reasonable suspicion that Savana brought forbidden medications to school.

Writing for the majority in *Redding*, Justice Souter applied the two-step standard set forth in *T.L.O.* to accept the initial search of Savana’s belongings and outer clothing as justified at its inception, but he found that “the content of the suspicion failed to match the degree of intrusion” that she ultimately endured.<sup>32</sup> The majority concluded that Assistant Principal Wilson had reason to suspect that Savana was distributing prohibited medications based on the totality of the surrounding circumstances: the conversations he had with students Jordan Romero and Marissa Glines, an inference that Savana and Glines were on “friendly terms” given Savana’s having lent her day planner to Glines, and reports that Savana and Glines were “part of an unusually rowdy group at the school’s opening dance.”<sup>33</sup> Thus, once Glines disclosed to Wilson that she had received the pills from Savana, he had sufficient reasonable suspicion “that Savana was involved in pill distribution” to justify his initial search of Savana’s “backpack and outer clothing.”<sup>34</sup>

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<sup>28</sup> 129 S. Ct. at 2639. The Court affirmed the Ninth Circuit decision finding a Fourth Amendment violation, reversed on the qualified immunity question, and remanded to the Ninth Circuit on the question of Safford Unified School District No. 1’s liability under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Under *Monell*, the school district can only be held responsible for employee conduct that represented district policy. The Ninth Circuit did not address this issue.

<sup>29</sup> 129 S. Ct. at 2639.

<sup>30</sup> *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

<sup>31</sup> *Id.* at 2639 (majority opinion) (quoting *T.L.O.*, 469 U.S. at 342).

<sup>32</sup> *Id.* at 2642.

<sup>33</sup> *Id.* at 2641.

<sup>34</sup> *Id.*

The majority recognized, however, that a strip search is not analogous to a search of one's outer clothing or belongings;<sup>35</sup> nor is it like an "experience of nakedness or near undress in other school circumstances."<sup>36</sup> Rather, a strip search is "categorically distinct"<sup>37</sup> in that it is prompted by "an accusation reserved for suspected wrongdoers"<sup>38</sup> and done in the presence of school officials.<sup>39</sup> Therefore, even though the initial search was supported by reasonable suspicion, because Wilson had no "reason to suppose that Savana was carrying pills in her underwear,"<sup>40</sup> he needed more "particularized suspicion" under the circumstances to justify such an invasive search.<sup>41</sup>

The majority reasoned that the scope of the strip search was impermissible under the second part of the *T.L.O.* inquiry because "extending the search . . . to the point of making [Savana] pull out her underwear was constitutionally unreasonable,"<sup>42</sup> given "'the age and sex of the student and the nature of the infraction.'"<sup>43</sup> Applying the age factor from *T.L.O.*, Justice Souter explained that the reasonableness of Savana's expectation of bodily privacy "is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."<sup>44</sup> As to the nature of the infraction, the majority found that there was no danger to the students from the power or quantity of the drugs found.<sup>45</sup> Even though the *T.L.O.* standard requires consideration of a student's age, sex, and the nature of the infraction, the significance of Savana's sex was not explicitly explored in the majority's analysis of the search.

With respect to the qualified immunity issue in *Redding*, the majority found that because "lower courts have reached divergent conclusions regarding how the *T.L.O.* standard applies to such searches" in schools, the "prior statement of law" must not have been "sufficiently clear," and the

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<sup>35</sup> *Id.* at 2643; *see also id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part) (distinguishing between this case and *T.L.O.*, which involved a search of a student's purse only).

<sup>36</sup> *Id.* at 2642 (majority opinion) (distinguishing the strip search from other activities such as "changing for gym," which is understood by children as "getting ready for play").

<sup>37</sup> *Id.* at 2641.

<sup>38</sup> *Id.* at 2642.

<sup>39</sup> *Id.* at 2641.

<sup>40</sup> *Id.* at 2643.

<sup>41</sup> *Id.* at 2649 (Thomas, J., concurring in part and dissenting in part).

<sup>42</sup> *Id.* at 2641 (majority opinion).

<sup>43</sup> *Id.* at 2642 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

<sup>44</sup> *Id.* at 2641. In support, Justice Souter cites two sources: Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent at 6–14, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 870022, available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-479\\_RespondentAmCu5ProHealthOrgs.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-479_RespondentAmCu5ProHealthOrgs.pdf), 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) (noting that "strip searches . . . can result in serious emotional damage").

<sup>45</sup> 129 S. Ct. at 2642–43.

school officials were therefore entitled to qualified immunity.<sup>46</sup> Justices Stevens and Ginsburg disagreed with the majority on this issue, each writing separate opinions concurring in part and dissenting in part. Reiterating that the strip search in *Redding* is governed by the two-step inquiry established in *T.L.O.*, Justice Stevens found the search unconstitutional, but he did not agree with the majority's decision to grant the school officials qualified immunity.<sup>47</sup> In Justice Stevens's view, the standard in *T.L.O.* was unambiguous and since the Court charts "no new constitutional path" in *Redding*, the Court should not concern itself with the "seemingly divergent views about *T.L.O.*'s application to strip searches."<sup>48</sup> Justice Ginsburg agreed with Justice Stevens that *T.L.O.* set a clear standard for the Court to follow in *Redding*, but wrote separately to stress her belief that "Wilson's treatment of [Savana] was abusive and it was not reasonable for him to believe that the law permitted it."<sup>49</sup>

Justice Thomas reached the same conclusion as the majority on the qualified immunity issue, but he disagreed with the majority's holding that the search of Savana violated the Fourth Amendment.<sup>50</sup> For Justice Thomas, the Court's role in cases involving school administrative procedures should be particularly deferential, and the scope of the search at issue was permissible under the circumstances. First, he argued that "school officials retain broad authority to protect students" because "[s]chool officials have a specialized understanding of the school environment, the habits of the students, and the concerns of the community."<sup>51</sup> He then cited a variety of facts from the record (as explicated above) that suggested "the totality of relevant circumstances justified a search of Redding for pills."<sup>52</sup> Departing from the majority decision, Justice Thomas found that the search was "reasonable in scope under *T.L.O.*" because "the school officials searched in a location where the pills could have been hidden," and any further "particularized suspicion" was not required under the Fourth Amendment.<sup>53</sup>

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<sup>46</sup> *Id.* at 2643–44. The majority stated that its ruling did not resolve the question of the school district's liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and therefore remanded the case for consideration of that issue. See *supra* note 27.

<sup>47</sup> *Redding*, 129 S. Ct. at 2645 (Stevens, J., concurring in part and dissenting in part).

<sup>48</sup> *Id.* at 2644–45.

<sup>49</sup> *Id.* at 2646 (Ginsburg, J., concurring in part and dissenting in part). At oral argument, Justice Ginsburg emphasized, "[i]t wasn't just that [Redding and Glines] were stripped to their underwear. They were asked to shake their bra[s] out, . . . to shake, stretch the top of their pants and shake that out." Transcript of Oral Argument at 45, *Redding*, 129 S. Ct. 2633 (No. 08-479).

<sup>50</sup> 129 S. Ct. at 2646 (Thomas, J., concurring in part and dissenting in part).

<sup>51</sup> *Id.* at 2647.

<sup>52</sup> *Id.* at 2648.

<sup>53</sup> *Id.* at 2649.

## IV. ANALYSIS

In order to determine whether a school official's search of a student is permissible in scope, *T.L.O.* requires a court to examine the student's age and sex and the nature of the infraction. Yet the majority failed to fully explain the significance of a student's sex under the *T.L.O.* test and provides no clear indication of whether Savana's sex affected the outcome of the case. Instead the majority emphasized Savana's age, the non-dangerous nature of the alleged infraction, and the physical invasiveness of the search. Thus, although the majority may have correctly found Savana's strip search excessively intrusive in this case, its failure to explain its reasoning sends an ambiguous message to school officials about which factors are most relevant in determining the permissible scope of a search. Furthermore, by leaving lower courts with a somewhat unclear application of the law in this case, the majority opinion potentially places school officials in a position to receive qualified immunity in the future.

## A. "Clearly Outrageous Conduct"

Most of the Justices in *Redding* expressed clear disapproval of the strip search that occurred, and for good reason—it was repeatedly described as a “degrading,”<sup>54</sup> “embarrassing, frightening, and humiliating”<sup>55</sup> experience for 13-year-old Savana.<sup>56</sup> But were they disturbed by the search in light of her age, sex, the nature of the infraction—or all of the above? Justice Stevens found that “[t]his is, in essence, a case in which clearly established law meets clearly outrageous conduct. . . . ‘[I]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.’”<sup>57</sup> Additionally, the aforementioned statement by Justice Souter describing the particular trauma an adolescent may feel after a strip search suggests that Savana's vulnerable age significantly influenced the outcome of the case.<sup>58</sup> The majority arguably also took issue with the relative harmlessness of the over-the-counter drugs involved when they found the search unreasonable,<sup>59</sup> suggesting that the nature of the infraction was minimal.

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<sup>54</sup> *Id.* at 2642 (majority opinion).

<sup>55</sup> *Id.* at 2641; *see also id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

<sup>56</sup> Justice Souter noted that some communities have found strip searches of children in school “so degrading” that they are now banned completely. *Id.* at 2642 (majority opinion).

<sup>57</sup> *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part) (quoting *Doe v. Renfrow*, 631 F.2d 91, 92–93 (7th Cir. 1980)).

<sup>58</sup> *See supra* text accompanying note 44.

<sup>59</sup> 129 S. Ct. at 2642 (majority opinion) (“Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for . . .”).

Noticeably absent, however, is any clear statement of how Savana's sex affected the majority's decision. Justice Souter described in detail how the school officials made Savana shake out her bra and that her breasts and pelvic area were exposed during the strip search.<sup>60</sup> Yet the majority stated that "who was looking and how much was seen" was not a necessary inquiry.<sup>61</sup> Rather, "[t]he very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed breasts and pelvic area to some degree," combined with her "subjective expectation of privacy" and the "consistent experiences of other young people similarly searched," rendered the search constitutionally unreasonable.<sup>62</sup>

So how, if at all, does Savana's sex factor into this picture for the majority? Under the majority's analysis it is unclear whether the fact that Savana was forced to shake out her bra and show her pelvis—two markers of her female sex—swayed the majority to find the search unconstitutionally invasive, or whether the Justices gave more weight to Savana's subjective embarrassment as a young person. Justice Souter claimed that strip searches are often traumatic for adolescents. Why, then, did the Court repeatedly reaffirm a student's sex as a relevant part of the inquiry for determining the permissibility of a search? Or if sex is in fact a meaningful factor under *T.L.O.*, why did the majority fail to address whether Savana's sex made the search more (or less) invasive than it would have been in another student's circumstances? One is left to wonder if the Justices would have reached the same outcome if Savana had been a 13-year-old boy, because the majority does not provide any indication whether adolescent boys and girls are equally vulnerable to such intrusive searches. Moreover, what if Savana had been in the process of a gender transition? The majority similarly gives no signal as to whether Savana's potential discomfort in such a situation would have been constitutionally meaningful.

Furthermore, Justice Souter suggested that "who was looking" at Savana while she was forced to strip was not relevant to the majority's examination of the case, but what if Assistant Principal Wilson had conducted the strip search instead of the two female school officials? The sex of the student is a factor under the *T.L.O.* analysis, but, in applying this standard, the *Redding* Court does not reflect on the sex of the officials as it relates to the sex of the student, giving no indication to school officials whether this comparison would be a relevant inquiry under the sex prong of the test for determining the permissibility of a search.

The majority in *T.L.O.* similarly failed to elaborate on the relevance of a student's sex in determining the permissibility of a search, although they repeatedly identified sex as a factor. However, in his concurrence in *T.L.O.*,

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<sup>60</sup> *Id.* at 2638, 2641.

<sup>61</sup> *Id.* at 2641.

<sup>62</sup> *Id.*

Justice Stevens noted: “[t]he Court’s standard for evaluating the ‘scope’ of reasonable school searches is obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses.”<sup>63</sup> The Ninth Circuit panel in *Redding* also appeared to agree with Justice Stevens’s understanding of the sex prong in *T.L.O.* when it concluded: “[the] Defendants administered the search in a reasonable manner. The search of Redding’s person was conducted by two employees who were of the same gender as Redding . . . .”<sup>64</sup>

Perhaps the Justices in *T.L.O.* and *Redding* have taken for granted the reasoning underlying the sex prong of the test, and it is in fact the dynamic between the sex of the student and the school official doing the search that matters, but the Court should nevertheless have stated such reasoning explicitly. By remaining silent on the issue of a student’s sex, the Court leaves lower courts to interpret the sex prong as the Ninth Circuit panel did in its decision, which effectively rendered same-sex strip searches more reasonable.<sup>65</sup> Thus, under *Redding*, school officials may wonder, if a school does not have available any administrative personnel of the same sex as the student subject to a search, can the school therefore not conduct a search or is the sex of the school officials *never* relevant?

### B. Future Gendered Ramifications?

The majority’s failure to address in *Redding* the sex prong required under *T.L.O.* might leave the case open to potentially undesired interpretations in the future. One possible interpretation is Justice Thomas’s view of the way in which a student’s age and sex may affect the permissibility of a search.<sup>66</sup> In his discussion of a school administrator’s prerogative to prohibit unauthorized drugs in school, he found one study that claimed “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.’”<sup>67</sup> From this study, he concluded that “Redding’s age and

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<sup>63</sup> 469 U.S. 325, 381 (1985) (Stevens, J., concurring in part and dissenting in part).

<sup>64</sup> *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 835–36 (9th Cir. 2007).

<sup>65</sup> Sitting en banc, the Ninth Circuit later reversed the panel decision, finding that the search was not reasonable, but they did so with very little discussion of how sex factored into their analysis. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1089 (9th Cir. 2008). The court’s only explicit mention of the sex prong of the *T.L.O.* test was in a footnote where they noted that the search of Savana was even more unreasonable because only she and Marissa had been asked to remove their clothes, but not a third male student who was only asked to shake out his clothes. *Id.* at 1085 n.12. In this reading of the sex prong, the court seems to imply that strip searches become more reasonable when they are applied equally to girls and boys, another potentially confusing and harmful precedent for lower courts to follow.

<sup>66</sup> Although no other member of the Court joined Justice Thomas’s opinion, it should be evaluated nevertheless as an example of *Redding*’s potential consequences.

<sup>67</sup> 129 S. Ct. at 2654 n.6 (Thomas, J., concurring in part and dissenting in part) (quoting OFFICE OF NAT’L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, TEENS AND PRESCRIPTION DRUGS: AN ANALYSIS OF RECENT TRENDS ON THE EMERGING DRUG

sex, if anything, increased the need for a search to prevent the reasonably suspected use of prescription drugs.”<sup>68</sup> The statistical prevalence of drug use among teenage girls cited in this study may in fact be accurate, but what meaningful relationship should these statistics bear to the result reached in this case? Because a student’s sex is a legitimate factor of inquiry in determining the permissibility of a search, Justice Thomas illustrated how the gender profiling of female students could be used to justify a search under certain circumstances. Perhaps the majority did not anticipate the possibility of sex being used as a proxy for prohibited drug use and instead meant it to be used only as an indicator of whether a search was more or less reasonable, but Justice Thomas’s analysis demonstrates the risk the majority runs by not explicating this point further.

The facts on the record do not indicate that Assistant Principal Wilson targeted Savana for a strip search specifically because she was a female student; however, schools may now receive a decidedly confusing message from the Court about the permissible scope of a search. A majority of the Justices appear genuinely empathetic toward Savana’s ordeal given her age and the physical invasiveness of the search, but Justice Thomas found the search perfectly reasonable, especially in light of her age and sex. The Court therefore should recognize that because the majority failed to explain the significance of the sex factor under the *T.L.O.* standard and neglected to apply it to Savana’s situation, it produced an ambiguous framework for school officials to follow when making determinations about the permissible scope of a search in the future. School officials are left with no guidance, other than their best judgment, as to whether the search of a 13-year-old girl suspected of distributing cocaine is more or less invasive than the search of a 16-year-old boy suspected of distributing caffeine pills. The majority did not explain whether strip searches are equally invasive for boys and girls or how the element of sex should be weighed in relation to age and the nature of the infraction under *T.L.O.*

In addition, the majority’s argument for granting the school officials qualified immunity in *Redding* rests upon the Court’s previous failure to set out a sufficiently clear standard as to when a strip search in school violates the Fourth Amendment. Yet by focusing only on Savana’s vulnerable age and insufficiently explaining the relevance of her sex, the majority subverts its own self-conscious attempt to elucidate the *T.L.O.* standard and runs the risk of once again providing lower courts with an indefinite rule to apply in strip search cases. This result may ultimately produce divergent conclusions about the *T.L.O.* standard and place school officials in a position to again receive immunity for such abuses of students’ rights.

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THREAT 2, 5 (2007), available at [http://www.theantidrug.com/pdfs/TEENS\\_AND\\_PRESCRIPTION\\_DRUGS.pdf](http://www.theantidrug.com/pdfs/TEENS_AND_PRESCRIPTION_DRUGS.pdf).

<sup>68</sup> *Id.*

## V. CONCLUSION

The majority in *Redding* reached the correct result because the intrusiveness of the strip search was not “justifiably related to the circumstances.”<sup>69</sup> There was no evidence that Savana was hiding pills in her underwear. Moreover, Assistant Principal Wilson’s primary reason to suspect Savana of wrongdoing was based on the untested accusation of another student, and he had no reason to believe drugs were being distributed in large quantities. Finally, Savana was a 13-year-old student subject to the typical vulnerabilities of adolescence, making the search highly embarrassing for her. One might surmise that the balance of these factors served to make the strip search in *Redding* excessively intrusive and unreasonable. The majority, however, leaves out one major feature required for analyzing a search under the *T.L.O.* standard—the student’s sex. It is unclear exactly how the *Redding* decision might impact future cases of strip searching in schools, but such a result places school officials in the precarious position of not knowing how to weigh a student’s sex when deciding whether to conduct a search. The Supreme Court’s failure to provide guidance to school officials and lower courts thus leaves students vulnerable to continued violations of their rights.

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<sup>69</sup> *Id.* at 2643 (majority opinion).

