

***SAFFORD UNIFIED SCHOOL DISTRICT V. REDDING AND
SCHOOL STRIP SEARCHES: ALMOST, BUT NOT QUITE
THERE YET***

*Timothy J. Petty**

I. INTRODUCTION

On June 25, 2009, the U.S. Supreme Court decided *Safford Unified School District v. Redding* and held that the strip search of thirteen-year-old Savana Redding was unconstitutional under the Fourth Amendment of the U.S. Constitution.¹ *Redding* is important because it marks the first time that the Supreme Court has addressed strip searches in schools; the Court has only considered the Fourth Amendment in the school context on two other occasions.² In *Redding*, school officials suspected Savana Redding of carrying banned prescription-strength and over-the-counter pills without permission.³ At the end of a series of searches, female school officials, upon the directive of the school principal, ordered Savana to strip down to her underwear, “pull her bra to the side and shake it,” and “pull out the elastic on her underpants.”⁴ The strip search caused Savana to expose her breasts and pelvic area.⁵ The Court determined that the Fourth Amendment did not permit the strip search of the thirteen-

* J.D. Candidate, 2011, Seton Hall University School of Law; B.S., *magna cum laude*, 2008, The College of New Jersey. The author would like to thank family, friends, and everyone who provided guidance for this Comment.

¹ 129 S. Ct. 2633, 2643 (2009).

² The other two U.S. Supreme Court cases that considered the Fourth Amendment in the school setting are *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). *Vernonia* considered whether random urinalysis testing of student athletes violates the Fourth Amendment. 515 U.S. at 648. *T.L.O.*, however, deals with the search of a student’s belongings in a school. 469 U.S. at 328. *T.L.O.* also marked the first time that the Supreme Court considered how the Fourth Amendment should apply, if at all, to searches in schools conducted by school officials. *Id.* at 332.

³ *Redding*, 129 S. Ct. at 2638.

⁴ *Id.*

⁵ *Id.*

year-old female student under those circumstances because of insufficient danger or information about the item's location.⁶

To someone unfamiliar with the history of Fourth Amendment school search jurisprudence, the result that the Court reached in *Redding* may seem like an obvious conclusion. Moreover, the result that the Court reached may seem like the only reasonable conclusion under the circumstances. But lower courts have demonstrated an inability to reach such seemingly sound rulings and have found arguably less reasonable strip searches either constitutional or protected by qualified immunity.⁷ In *Jenkins v. Talladega City Board of Education*, for example, the Eleventh Circuit affirmed summary judgment for school officials who strip searched two eight-year-old girls in a school bathroom in an attempt to locate seven dollars that one student had reported missing from her purse.⁸ Cases like *Jenkins* are the result of courts taking a vague standard and applying it in a way that leads to unfortunate outcomes. The case law leading up to *Redding* contains examples of courts construing the standard to justify the result that each court wanted to reach.

Prior to the Court's recent decision in *Redding*, the U.S. Supreme Court's only other attempt to express what the Fourth Amendment permits in the school search context occurred over two decades ago in *New Jersey v. T.L.O.*⁹ In *T.L.O.*, the Court held that Fourth Amendment protection does apply to searches conducted by public school officials.¹⁰ Although the Court provided protection, it also imposed a lesser standard and declared that searches conducted by school officials must only be reasonable under the circumstances rather than be supported by probable cause.¹¹

Despite *T.L.O.*'s guidance, lower courts that have considered school strip searches have managed to misapply the standard, which has created more confusion for future courts that consider similar cases. Specifically, courts often apply the *T.L.O.* test in different ways, and some courts stress certain factors more than others.¹² Furthermore, the Supreme Court has declined to take any certiorari petitions over the last twenty-five years to clarify the standard and how it

⁶ *Id.* at 2643.

⁷ *See, e.g., Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997).

⁸ *Id.* at 822–23. *See infra* Part II for a discussion of similar cases.

⁹ 469 U.S. at 328.

¹⁰ *Id.* at 333.

¹¹ *See id.* at 340.

¹² *See infra* Part II.C.

should be applied, particularly in the strip search context.¹³ This lack of clarification by the Court has allowed the confusion and inconsistencies to continue among the lower courts.

The Court made an attempt to rectify these problems in *Redding*. Although it clarified *T.L.O.* and added two additional factors to the *T.L.O.* standard,¹⁴ the Court may not have gone far enough to assure that the same problems do not continue. Fortunately, the Court did provide additional guidance on the extent of permissible strip searches. The real effect of the decision, however, depends on whether lower courts properly apply *Redding* when facing strip search questions under slightly different factual circumstances. This Comment will analyze the two additional factors promulgated by the Court in *Redding* to demonstrate that strip searches conducted by school officials in the school setting should almost always violate the Fourth Amendment. This Comment will also propose that both factors should be required to justify an intrusive strip search.

Another subsidiary problem to the improper application of the *T.L.O.* standard is qualified immunity. Qualified immunity is a doctrine that allows public officials to avoid liability when making decisions in an official capacity if they can show that although they violated the law, they had insufficient notice because clearly established law does not indicate a constitutional violation.¹⁵ When deciding cases involving searches by school officials, even if courts find that an official violated the Fourth Amendment, courts often find that the law was unclear and grant qualified immunity to the official. The frequent granting of qualified immunity under the current standard compounds the problem by creating a snowball effect where each court that grants qualified immunity is failing to clarify the standard for school searches in their jurisdiction.¹⁶ Granting qualified immunity ignores *T.L.O.* and perpetuates unconstitutional searches by permitting school officials to escape liability.

In *Redding*, the Court granted qualified immunity to the school officials who conducted the strip search of Savana.¹⁷ The decision to

¹³ See, e.g., *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997).

¹⁴ See *Redding*, 129 S. Ct. at 2642–43. When considering the reasonable-in-scope prong of the *T.L.O.* standard, the Court noted that there was no danger to the students due to the small quantity of prescription drugs and that there was no reason to suspect that Savana was hiding the pills in her underwear. *Id.*

¹⁵ See *id.* at 2643.

¹⁶ See, e.g., *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991).

¹⁷ *Redding*, 129 S. Ct. at 2637–38.

grant qualified immunity in *Redding* may be seen as a stamp of approval to both school officials who act outside of their authority and to courts that may be inclined to continue granting immunity to school officials. Most importantly, the imprecise standard articulated by the Court and its grant of qualified immunity may lead lower courts to continue granting qualified immunity when novel situations not previously evaluated under the new *Redding* test arise.

Part II of this Comment will discuss the history of case law regarding strip searches in the school setting under the Fourth Amendment. The focus of this Part will be the Supreme Court's decision in *T.L.O.* and the circuit courts that have since interpreted the *T.L.O.* standard. This Part will demonstrate that although *T.L.O.* offered a good standard at the time, it has faced much misapplication and dilution by lower courts. Part II will also discuss how *Redding* attempted to properly clarify the *T.L.O.* standard by offering guidance for future courts on the constitutionality of strip searches as well as the potential implications of that guidance.¹⁸ Notably, the Court refrained from seizing the opportunity to ban strip searches altogether. Part III of this Comment will examine the *Redding* factors and suggest that the test should be read by courts as a conjunctive, rather than disjunctive, test. Part IV of this Comment will discuss the Court's grant of qualified immunity, which may create a situation where qualified immunity is improperly granted in the future due to the imprecise standard established in *Redding*. Part V will conclude with a brief discussion of the possible impact going forward.

II. SCHOOL SEARCHES AND THE FOURTH AMENDMENT

A. *The Fourth Amendment*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁹

The Fourth Amendment is the guiding force behind all searches, whether in the home, the car, or the school. The main focus of the Fourth Amendment is that searches should not be "unreasonable." As for the warrant requirement, the U.S. Supreme Court

¹⁸ This Comment will focus more on the "reasonable-in-scope" prong of the *T.L.O.* test because *Redding* focused more on that prong.

¹⁹ U.S. CONST. amend. IV.

has articulated that searches outside the judicial process without approval are per se unreasonable unless a warrant exception applies.²⁰ Some exceptions to the warrant requirement include “hot pursuit,” consent to a search, search incident to arrest, pat downs, and administrative searches.²¹ Importantly, one of those exceptions to the rule permits warrantless searches when the government has a special need that would be frustrated by the traditional warrant requirements.²² *T.L.O.* serves as an example of a situation where a warrant was not required due to the special circumstances of the school setting.²³

B. The Supreme Court’s Treatment of School Searches

In 1985, the Supreme Court decided that a reasonableness test should apply to searches conducted by school officials.²⁴ In *T.L.O.*, a teacher discovered two girls smoking in the bathroom, one of whom was T.L.O.²⁵ T.L.O. denied the allegation that she was smoking.²⁶ The school principal, Choplick, searched T.L.O.’s purse, located a pack of cigarettes, and removed the pack from the purse.²⁷ After removing the cigarettes, Choplick noticed rolling papers, which he believed to be related to drug use, and continued to search the purse.²⁸ Choplick then found marijuana, a pipe, empty plastic bags, a large amount of one-dollar bills, and an index card containing students’ names.²⁹

Although the State of New Jersey only raised the issue of whether the exclusionary rule should bar certain evidence, the Court took the opportunity to consider the limits that the Fourth Amendment places on searches conducted by school officials.³⁰ The Court began its discussion by noting that state and federal courts have struggled to find a balance between protecting students’ Fourth Amendment interests and providing school officials with the ability to maintain a safe learn-

²⁰ See *Katz v. United States*, 389 U.S. 347, 357 (1967).

²¹ See David C. Blickenstaff, *Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve the Problem?*, 99 DICK. L. REV. 1, 6 (1994).

²² See *id.*

²³ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

²⁴ *Id.*

²⁵ *Id.* at 328.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *T.L.O.*, 469 U.S. at 328.

³⁰ *Id.* at 331–32.

ing environment.³¹ The Court then explained that although the Fourth Amendment typically applies to police conduct, the Court has never limited its application to situations involving the police.³² It then discussed how some courts have used the theory of *in loco parentis*, which means acting in the place of the parent,³³ to determine that the Fourth Amendment does not apply to teachers' and school administrators' conduct because their authority comes from parents, not the State.³⁴ *T.L.O.* rejected this approach because education is compulsory; thus, the Court explained, schools cannot claim parental immunity while carrying out public policy.³⁵

After determining that the Fourth Amendment applies to school officials, the Court turned to a discussion of the appropriate Fourth Amendment standard for searches in the school setting.³⁶ The Court noted that the underlying requirement of Fourth Amendment searches is that they must be reasonable and that reasonableness depends on the context of the search.³⁷ According to the Court, in order to receive Fourth Amendment protection, one must have a legitimate privacy expectation that is recognized by society.³⁸ The Court then acknowledged that schoolchildren have legitimate reasons for bringing non-contraband items to school and that there is no reason to conclude that they have waived their right to privacy.³⁹

The Court weighed the rights of schoolchildren against the legitimate interest that schools have in maintaining discipline and recognized that school officials should be given flexibility with disciplinary procedures.⁴⁰ As a result, the Court determined that the warrant requirement is inappropriate for the school setting because it will bur-

³¹ *Id.* at 332 n.2.

³² *Id.* at 335; *see, e.g.*, *Camara v. Mun. Court*, 387 U.S. 523, 540 (requiring building inspectors to comply with the Fourth Amendment).

³³ *In loco parentis* literally means "in the place or position of a parent." *See* 7 OXFORD ENGLISH DICTIONARY 765 (2d ed. 1989).

³⁴ *T.L.O.*, 469 U.S. at 336.

³⁵ *Id.* at 336–37.

³⁶ *Id.* at 337.

³⁷ *Id.* The Fourth Amendment protects against "unreasonable searches and seizures." *See* U.S. CONST. amend. IV. Therefore, the Fourth Amendment's standard is reasonableness and all searches, at the very least, must be reasonable. *T.L.O.*, 469 U.S. at 337. Of course, higher standards, such as probable cause, are required in certain situations.

³⁸ *Id.* at 338. Conversely, the Fourth Amendment does not protect subjective expectations of privacy that society deems unreasonable. *Id.*

³⁹ *Id.* at 339.

⁴⁰ *Id.* at 339–40.

den the need for “swift and informal disciplinary procedures.”⁴¹ The Court recognized that in most situations an official must have probable cause before a search can be performed.⁴² The Court explained, however, that “[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although ‘both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search . . . neither is required.’”⁴³ The Court then agreed with other courts that have determined that searches in the school setting should hinge on the search’s reasonableness rather than probable cause because of the strong need to maintain order.⁴⁴

The Court next parsed the reasonableness standard into a two-part inquiry.⁴⁵ The first inquiry considers whether “the search was justified at its inception.”⁴⁶ The Court explained that a search will normally be “justified at its inception” if there are reasonable grounds for believing that a search will reveal evidence of a violation of the law or school rules.⁴⁷ The second inquiry considers whether the search conducted “was reasonably related in scope to the circumstances which justified the interference in the first place.”⁴⁸ Under the second prong, the Court provided that a search will be 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.”⁴⁹

In *T.L.O.*, the Court ultimately found that the first search for the cigarettes was reasonable because Choplick had reasonable suspicion that he would find the cigarettes in T.L.O.’s purse, a violation of school rules.⁵⁰ Next, the Court found that Choplick’s search for marijuana was justified because he had reasonable suspicion once he dis-

⁴¹ *Id.* at 340.

⁴² *Id.*

⁴³ *T.L.O.*, 469 U.S. at 340 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973)).

⁴⁴ *Id.* at 341.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 341–42.

⁴⁸ *Id.* at 341. The Court used language from *Terry v. Ohio*, 392 U.S. 1, 20 (1968), in the two-part test it adopted in *T.L.O.*

⁴⁹ *T.L.O.*, 469 U.S. at 342.

⁵⁰ *Id.* at 345.

covered the rolling papers.⁵¹ The Court then concluded that the search was reasonable under the Fourth Amendment.⁵²

Safford Unified School District v. Redding marked the first time that the U.S. Supreme Court applied its *T.L.O.* framework to a new set of facts.⁵³ In *Redding*, Wilson, the assistant principal, requested that thirteen-year-old Savana Redding accompany him to his office.⁵⁴ Wilson then showed Savana a planner containing knives, lighters, a permanent marker, and a cigarette.⁵⁵ Savana admitted that the planner belonged to her but claimed that she had lent it to a friend and that none of the items belonged to her.⁵⁶ Wilson proceeded to show Savana four white prescription-strength ibuprofen and one over-the-counter naproxen, which were banned under school rules.⁵⁷ Savana denied knowledge of the pills and that she had been giving them to fellow students.⁵⁸ Savana consented to a search of her belongings, and Wilson, along with Romero, an administrative assistant, searched Savana's backpack.⁵⁹

After failing to locate the pills in the backpack, Wilson instructed Romero to take Savana to the nurse's office to search her clothes.⁶⁰ Romero and the school nurse, Schwallier, asked Savana to remove her jacket, socks, and shoes.⁶¹ Next, the school officials, both female,

⁵¹ *Id.* at 347. Thus, under the two-part test, the search for cigarettes was justified at its inception and the search of the purse and the further search for marijuana were reasonable in scope.

⁵² *Id.* at 347–48.

⁵³ See 129 S. Ct. 2633 (2009). In 1995, the U.S. Supreme Court considered the constitutionality of random urinalysis testing of student athletes. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995). In *Vernonia*, the Court held that the urinalysis policy conducted by the school did not violate the Fourth Amendment because of “the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search.” *Id.* at 664–65. The Court in *Vernonia*, however, did not apply the *T.L.O.* framework and relied on *T.L.O.* primarily for background information on the scope of privacy in the school setting. *Id.* at 652–57. Rather than apply the *T.L.O.* framework, the Court examined the reasonableness of the school's urinalysis policy and concluded that it was reasonable and therefore constitutional. *Id.* at 664–65. Interestingly, the dissent noted that the evidence that the school district used to justify its suspicionless drug-testing program could have been used to justify a search of particular students for drugs under *T.L.O.* *Id.* at 679 (O'Connor, J., dissenting).

⁵⁴ *Redding*, 129 S. Ct. at 2638.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Redding*, 129 S. Ct. at 2638.

⁶¹ *Id.*

asked Savana to remove her stretch pants and t-shirt, neither of which contained pockets.⁶² Lastly, the school officials instructed Savana to “pull her bra out to the side and shake it” and “to pull out the elastic on her underpants.”⁶³ These actions exposed, to some degree, Savana’s breasts and pelvic area.⁶⁴

Savana’s mother filed suit against the school district, Wilson, Romero, and Schwallier claiming that the strip search violated Savana’s Fourth Amendment rights.⁶⁵ The individual defendants moved for summary judgment and contended that Savana’s rights were not violated and, if they were, that the qualified immunity defense applied.⁶⁶ The District Court for the District of Arizona granted the summary judgment motion after determining that the search did not violate the Fourth Amendment.⁶⁷ The Ninth Circuit affirmed.⁶⁸ The circuit, sitting en banc, however, reversed the decision and found that the strip search violated the Fourth Amendment under the *T.L.O.* test.⁶⁹ The en banc court determined that the strip search failed both prongs of the *T.L.O.* test.⁷⁰ In addition, the court held that *T.L.O.* clearly established constitutional principles that put school officials on notice, and for that reason, it denied qualified immunity for Wilson.⁷¹

The Supreme Court granted certiorari.⁷² The *Redding* Court began its analysis by discussing *T.L.O.* and noting that unlike the probable cause standard, the lesser standard for school searches only requires school officials to have a “moderate chance of finding evidence of wrongdoing.”⁷³ The Court turned to a discussion of

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Redding v. Safford Unified Sch. Dist.*, 504 F.3d 828, 831 (9th Cir. 2007).

⁶⁷ *Id.* at 829.

⁶⁸ *Id.*

⁶⁹ *Redding v. Safford Unified Sch. Dist.*, 531 F.3d 1071, 1089 (9th Cir. 2008) (en banc).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Grant of Petition for Writ of Certiorari, *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 987 (2009) (No. 08-479).

⁷³ See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2639 (2009). The Court indicated that some factors to consider are the degree to which the facts suggest prohibited conduct, the specificity of the information, and the reliability of the source. *Id.* The Court, however, noted that none of these factors can control and that standards are fluid and depend on the context. *Id.*

whether the school officials were justified in their search of Savana.⁷⁴ After examining the facts leading up to the initial search of Savana's backpack, the Court concluded that Wilson's level of suspicion about Savana's involvement in pill distribution justified a search of Savana's bag and outer clothing.⁷⁵ The Court found that the searches were not excessively intrusive given the facts that the school officials uncovered and acted on; it stated that "[i]f Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making."⁷⁶

The Court next focused on the strip search.⁷⁷ First, the Court discussed the seriousness of strip searches by acknowledging reactions of students who have been strip searched and noted that personal privacy expectations suggest that strip searches require a higher level of justification.⁷⁸ The Court recognized that strip searches can be frightening, embarrassing, and humiliating, particularly for adolescents, and as a result, some jurisdictions have banned them altogether.⁷⁹ While strip searches are highly invasive, the Court made it a point to state that they may still be permissible in some circumstances; *T.L.O.* governs the searches' constitutionality.⁸⁰

Applying the *T.L.O.* standard, the Court stated that the "content of the suspicion" that Wilson possessed did not justify the level of intrusion of the search because of the limited threat that the prescrip-

⁷⁴ See *id.* at 2640.

⁷⁵ *Id.* at 2640–41. Prior to the search, Jordan Romero, another student, told the principal that certain students had been bringing drugs and weapons to school and that he had gotten sick after taking one of the pills. *Id.* at 2640. Romero gave a pill that he said he had received from another student, Marissa Glines, and told the principal that students were planning to take the pills at lunch. *Id.* A search in the principal's office revealed the pills along with a razor blade. *Id.* Marissa told Wilson that Savana gave her the pills and that she did not know anything about the day planner. *Id.* Wilson did not ask any follow-up questions regarding the likelihood of finding pills in Savana's possession. *Id.* The same school officials involved in Savana's strip search performed the same search on Marissa, finding no additional contraband. *Id.* Wilson also gathered additional information from staff members that implicated Savana in other rowdy behavior. *Id.* at 2641. At this point the events involving Savana took place. *Id.*

⁷⁶ See *id.* at 2641. In other words, the Court found that the searches, excluding the strip search, were reasonable at their inception due to the facts linking Savana to the pills and were reasonable in scope because they were not excessively intrusive.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Redding*, 129 S. Ct. at 2641–42.

⁸⁰ *Id.* at 2642. The Court's express decision not to ban strip searches will be discussed *infra*, in Part III.A.

tion drugs presented to the students.⁸¹ The Court next stated that Wilson did not have a reasonable suspicion that Savana hid the pills in her underwear.⁸² The majority noted that cases do exist where individuals have hidden drugs in their underwear, but it found that a mere general level of suspicion is not enough to justify such an intrusive search.⁸³ Rather, the majority found that for a search as intrusive as that performed on Savana to be reasonable, the officials must have “a suspicion that the search will pay off.”⁸⁴ The Court then determined that the combination of the prescription drugs’ lack of danger and the officials’ insufficient suspicion that Savana carried the pills in her underwear rendered the search unreasonable.⁸⁵ Ultimately, the Court concluded that “the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.”⁸⁶

Turning to the issue of qualified immunity for the individual school officials, the Court articulated the applicable standard: an individual is entitled to qualified immunity if clearly established law does not show that the search violated the Fourth Amendment.⁸⁷ The Court next discussed how lower courts, including the Ninth Circuit panel decision in the present case, have upheld strip searches under the *T.L.O.* standard.⁸⁸ It concluded that the foregoing court opinions differed enough in their application of *T.L.O.* to require immunity

⁸¹ *Redding*, 129 S. Ct. at 2642. The Court indicated that Wilson did not have a reason to believe that students were distributing large amounts of drugs. *Id.* Wilson also knew that the prescription pills possessed characteristics of common painkillers equivalent to two Advil or one Aleve. *Id.*

⁸² *Id.* at 2642.

⁸³ *Id.*

⁸⁴ *Id.* The Court explained that in this case, the intrusion was not warranted based on the facts. *Id.* It pointed to the non-dangerous contraband, the lack of a tradition of hiding pills in intimate places among the students, and the lack of evidence that Savana hid the drugs in her underwear. *Id.* In addition, the Court noted that the school officials never determined that Marissa actually received the drugs from Savana, and even if she had, the transaction took place days earlier, which would reduce the likelihood that Savana still possessed the pills. *Id.*

⁸⁵ *Id.* at 2642–43.

⁸⁶ *Id.* at 2643.

⁸⁷ *Redding*, 129 S. Ct. at 2643.

⁸⁸ *Id.* The Court mentioned *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991), *Jenkins v. Talladega City Bd. of Educ.*, 113 F.3d 821 (11th Cir. 1997), and *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003). *Id.* at 2643–44. See *infra* Part II.C for a more detailed discussion of these cases.

for the school officials.⁸⁹ The Court acknowledged that “disuniform views of the law” do not always warrant qualified immunity but stated that the cases are numerous enough to create doubt about *T.L.O.*’s clarity.⁹⁰

Justice Stevens and Justice Ginsburg, however, dissented on the issue of qualified immunity for the school officials.⁹¹ Justice Stevens first discussed how the majority opinion did not alter the *T.L.O.* framework but merely applied it to the present case to find the search unconstitutional.⁹² Justice Stevens noted that the conduct in this case was “clearly outrageous” because it went far beyond permissible conduct under *T.L.O.*; thus, the conduct obviously constituted an invasion of constitutional rights.⁹³ Justice Stevens next discussed how qualified immunity should not depend on whether lower courts have misread the Court’s precedents.⁹⁴ The Justice noted that the Court has relied on the divergence among courts in their decision to grant qualified immunity only when qualified immunity would prevent officials from having to predict future law.⁹⁵

Justice Ginsburg also claimed that the strip search violated clearly established law under *T.L.O.* and, therefore, that the Court should not have granted qualified immunity.⁹⁶ Justice Ginsburg discussed factors that contributed to the search’s unreasonableness and excessiveness under *T.L.O.*⁹⁷ According to Justice Ginsburg, the search could not be reconciled with *T.L.O.*, and Wilson could not reasonably

⁸⁹ *Redding*, 129 S. Ct. at 2643–44.

⁹⁰ *Id.*

We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.

Id.

⁹¹ *See id.* at 2644–45 (Stevens, J., concurring in part and dissenting in part); *id.* at 2645–46 (Ginsburg, J., concurring in part and dissenting in part).

⁹² *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part).

⁹³ *Id.* at 2644.

⁹⁴ *Id.* at 2644–45.

⁹⁵ *Redding*, 129 S. Ct. at 2645. Justice Stevens claimed that because *Redding* does not alter the *T.L.O.* standard, the Court did not alter the applicable law. *Id.*

⁹⁶ *Id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

⁹⁷ *See id.* at 2645–46.

have believed that the law permitted the strip search under the circumstances at issue.⁹⁸

Justice Thomas, concurring in part and dissenting in part, agreed with the majority that granting qualified immunity was proper; but, unlike the other eight members of the Court, Justice Thomas claimed that the school officials did not violate the Fourth Amendment.⁹⁹ The Justice first stated that he supported returning to the doctrine of *in loco parentis*, a much more deferential approach.¹⁰⁰ Justice Thomas maintained that the majority used a vague standard that permits judges to second guess school officials who are attempting to maintain discipline and contended that the search was reasonable under *T.L.O.*¹⁰¹ Justice Thomas explained that *T.L.O.* considered and rejected the notion that a search's legality depends on a court's evaluation of the school rule; *T.L.O.* held that if the school administrators reasonably suspected a student of violating school rules, the administrators could justify a subsequent search.¹⁰² Consequently, Justice Thomas argued that the Court has now placed school officials in an impossible position of determining whether a given infraction is severe enough to warrant an investigation.¹⁰³ Justice Thomas stated that a standard based on the actual threat of a drug is unworkable because it will require school officials to stop searches lest a court subsequently find the offense not serious enough to warrant the search.¹⁰⁴ Justice Thomas argued that the school should have been able to enforce a school rule that amounted to a crime.¹⁰⁵

C. Circuit Courts' Misapplication of the T.L.O. Standard

This Part examines circuit court opinions that have considered strip searches in the school context. It will serve to demonstrate some mistakes that courts have made when applying *T.L.O.* and the qualified immunity doctrine. The outcomes of these cases demonstrate why Supreme Court intervention was necessary to clarify the constitutionality of strip searches in schools.

⁹⁸ *Id.* at 2646. Justice Ginsburg quotes *T.L.O.* and states that the search became “excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

⁹⁹ *Id.* at 2646 (Thomas, J., dissenting).

¹⁰⁰ *Id.*

¹⁰¹ *Redding*, 129 S. Ct. at 2646.

¹⁰² *Id.* at 2651.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2651–52.

¹⁰⁵ *Id.* at 2653.

In 1991, six years after *T.L.O.*, a high school student sued her school and various school officials for a strip search that she claimed violated her Fourth Amendment rights.¹⁰⁶ In *Williams*, a student informed the school principal, Ellington, that another student had offered her white powder.¹⁰⁷ Eventually, after more reports of students using a substance called “rush,”¹⁰⁸ Ellington and Assistant Principal Easley removed Williams and Michelle from class and confronted them about the allegations.¹⁰⁹ Michelle took a brown vial containing “rush” out of her purse, but both girls denied ownership of the vial or any other drug.¹¹⁰ After failed initial searches, two female school officials asked Williams to remove her clothes down to her undergarments.¹¹¹ This search also failed to produce any drugs.¹¹²

The Sixth Circuit noted that *T.L.O.* alone governed the question of whether the search violated constitutional rights.¹¹³ The court then stated that the lack of additional case law has left courts reluctant to define the contours of a Fourth Amendment violation.¹¹⁴ The court concluded that it was not unreasonable for Ellington to believe that the search did not violate the student’s rights.¹¹⁵ The majority found Ellington’s decision to search to be reasonable based on the information that he possessed at the time.¹¹⁶ The majority also found the search to be reasonable in scope due to the small size of the object.¹¹⁷ In other words, Williams could have hid the object in her undergarments given the object’s size; thus, Ellington’s belief that she may have hidden the drugs in her undergarments was reasonable. The Sixth Circuit concluded by granting qualified immunity to the school

¹⁰⁶ See *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991).

¹⁰⁷ *Id.* at 882.

¹⁰⁸ “Rush,” according to the court, “is a volatile substance that can be purchased over the counter, and while possession of ‘rush’ is legal, inhalation of it is illegal under Kentucky law.” *Id.* at 882.

¹⁰⁹ *Id.* at 882–83.

¹¹⁰ *Id.* at 883.

¹¹¹ *Id.* There was a factual dispute over whether Easley pulled on the elastic of Williams’ underwear to see if anything fell out, but the court indicated that it was not material for summary judgment. *Id.*

¹¹² *Williams*, 936 F.2d at 883.

¹¹³ *Id.* at 886.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 887.

¹¹⁷ *Id.*

officials based on clearly established rights at the time of the incident.¹¹⁸

In 1993, the Seventh Circuit found a strip search of a student constitutional under the Fourth Amendment.¹¹⁹ In *Cornfield*, school officials forced a student to change in the locker room so the officials could visually inspect his body to assure that he was not carrying drugs.¹²⁰ The school officials believed that the student was “crotching” drugs.¹²¹

The court began its analysis by noting that the same reasonable suspicion required for a search of a locker, bag, or pocket may not be reasonable in the strip search context.¹²² Next, the Seventh Circuit considered the *T.L.O.* proclamation that age matters for reasonableness.¹²³ The court explained that children of different ages have different levels of potential criminality and determined that adolescents could be capable of both criminality and understanding whether they should consent to a search.¹²⁴ The court then stated that it will be more cautious when determining the reasonableness of a search of elementary school children because those children are not aware of the impact of a strip search or whether it is appropriate to consent to a strip search.¹²⁵ Finally, the Seventh Circuit concluded that the search was reasonable, and although children at sixteen are self-conscious about their adolescent bodies, the school officials carried out the search in the least intrusive manner possible.¹²⁶

In 1997, the Eleventh Circuit upheld the grant of qualified immunity for school officials who strip searched elementary school students suspected of stealing money from a classmate.¹²⁷ The incident began when a second-grade classmate informed the teacher, Fannin, that seven dollars were missing from her purse.¹²⁸ Several students implicated Jenkins, McKenzie, and Jamerson in the alleged theft, and

¹¹⁸ *Williams*, 936 F.2d at 887.

¹¹⁹ See *Cornfield v. Consol. High School Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993).

¹²⁰ *Id.* at 1319.

¹²¹ *Id.*

¹²² *Id.* at 1321.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Cornfield*, 991 F.2d at 1321.

¹²⁶ *Id.* at 1323.

¹²⁷ *Jenkins v. Talladega City Bd. of Ed.*, 115 F.3d 821, 822 (11th Cir. 1997).

¹²⁸ *Id.*

Fannin questioned the students; each accused the other.¹²⁹ Fannin asked the students to remove their shoes and socks, and when this effort to locate the money failed, she directed Jenkins and McKenzie to the girls' bathroom.¹³⁰ Another teacher, Herring, ordered the two girls to enter the bathroom stalls and come back out with their underpants to their ankles.¹³¹ The teachers failed to locate the missing money and proceeded to bring the three students to the principal's office.¹³² Jamerson informed the principal that the money was hidden behind a file cabinet, but a search in that location did not reveal the money.¹³³ Jenkins and McKenzie claimed that Herring escorted them to the bathroom for a second time where they were asked to remove their clothes again.¹³⁴

The Eleventh Circuit focused its opinion on whether the district court should have granted qualified immunity to the individuals for the Fourth Amendment claims.¹³⁵ The Eleventh Circuit began its analysis by noting that *T.L.O.* is the only authority on school searches, and thus, is the only authority that could have clearly established the law.¹³⁶ The court disagreed with the plaintiffs' claim that the school officials must have known that the search exceeded the reasonableness standard established in *T.L.O.*¹³⁷ The court indicated that *T.L.O.* did not apply to the present facts with obvious clarity and that "[t]here is no illustration, indication, or hint as to *how* the enumerated factors might come into play when other concrete circumstances are faced by school personnel."¹³⁸ The court opined that

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 822–23.

¹³³ *Jenkins*, 115 F.3d at 823.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 824 n.1.

¹³⁷ *Id.* at 824.

¹³⁸ *Id.* at 825. Furthermore, the Eleventh Circuit stated the following in relation to the ambiguity of the current standard:

In the absence of detailed guidance, no 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.

Id. at 825–26.

courts should not require school officials to interpret “general legal formulations that have not been applied to specific . . . facts.”¹³⁹ Consequently, the Eleventh Circuit granted qualified immunity finding that the law did not put the school officials on notice that their conduct was impermissible.¹⁴⁰

In 2003, the Eleventh Circuit affirmed a grant of qualified immunity to a school teacher and an officer who conducted a strip search of thirteen elementary school students in an attempt to locate twenty-six dollars.¹⁴¹ After noticing that the money disappeared from her desk, the teacher, Morgan, obtained permission from the vice principal to conduct the strip searches.¹⁴² Officer Billingslea took the boys into the bathroom in groups of five and asked them to drop their pants; some dropped their pants and underwear.¹⁴³ Billingslea then proceeded to check their underwear for the money.¹⁴⁴ Similarly, Morgan asked the female students to lift their shirts and their bras to show that they did not possess the money.¹⁴⁵

The Eleventh Circuit noted that *T.L.O.* did not state whether a search required an individualized suspicion and instead adopted a reasonableness test.¹⁴⁶ Citing *Jenkins*, the court concluded that *T.L.O.* did not attempt to establish the contours of the Fourth Amendment in different school settings.¹⁴⁷ The court then posited that the *T.L.O.* standard did not put defendants on notice that a strip search in this case would be unconstitutional.¹⁴⁸ It suggested that when the standard is significantly general in nature, existing case law that applies the general standard to more specific facts will usually be necessary to give fair and clear notice.¹⁴⁹ Although the court ended up granting

¹³⁹ *Jenkins*, 115 F.3d at 827.

¹⁴⁰ *Id.* at 828. The dissent believed that *T.L.O.* sufficiently warns that a strip search in these circumstances violates the Fourth Amendment. *Id.* (Kravitch, J., dissenting). The dissent noted that the Supreme Court has never required factual identity for qualified immunity. *Id.* at 829. The dissent argued that certain searches violate the Constitution as a matter of common sense. *Id.* at 834. The dissenting judge also opined that the nature of the infraction did not warrant a strip search and that strip searches should only be permissible in extraordinary circumstances. *Id.*

¹⁴¹ *Thomas v. Roberts*, 323 F.3d 950, 951–52 (11th Cir. 2003).

¹⁴² *See id.* at 952.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 953.

¹⁴⁷ *Roberts*, 323 F.3d at 954.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

qualified immunity, it did note that an action in certain narrow circumstances may be so egregious that an official is not entitled to qualified immunity even without well-established case law.¹⁵⁰

In 2005, the Sixth Circuit found a strip search of twenty students for missing money to be unconstitutional but granted qualified immunity to the school officials.¹⁵¹ In *Beard*, teachers searched students in the locker room for prom money that a student reported missing.¹⁵² The search of the male students in the locker room by two male teachers, Munz and Carpenter, consisted of the students “lowering their pants and underwear and removing their shirts.”¹⁵³ The search of the female students conducted by two female teachers, Balsillie and Langen, consisted of the females pulling up their shirts and pulling down their pants, but not their underwear, while standing in a circle.¹⁵⁴

Evaluating the strip searches of the male and female students under *T.L.O.* and *Vernonia*, the court found that the searches violated the Fourth Amendment.¹⁵⁵ In finding the constitutional violation, the court noted the highly intrusive nature of the searches, the fact that the searches were conducted to locate money, the lack of individualized suspicion, and the lack of consent.¹⁵⁶ The Sixth Circuit, however, found that the law at the time did not “clearly establish that the searches were unreasonable under the particular circumstances present in this case.”¹⁵⁷ Further, the court opined that *T.L.O.* and *Vernonia* set forth basic principles for school searches, “yet do not offer the guidance necessary to conclude that the school officials were, or should have been, on notice that the searches performed in this case were unreasonable.”¹⁵⁸

¹⁵⁰ *Id.* at 955 (“If the plaintiff . . . can show that ‘the official’s conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw,’ then the official is not entitled to qualified immunity.” (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997))).

¹⁵¹ *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 601 (6th Cir. 2005).

¹⁵² *Id.*

¹⁵³ *Id.* A police officer arrived halfway through the search of the male students and told the teachers to continue searching the students because teachers “had a lot more leeway” than the police. *Id.*

¹⁵⁴ *Id.* at 602.

¹⁵⁵ *Id.* at 605–06.

¹⁵⁶ *Id.*

¹⁵⁷ *Beard*, 402 F.3d at 606.

¹⁵⁸ *Id.* In explaining *T.L.O.*, the Sixth Circuit noted that “the Court did little to explain *how* the factors should be applied in the wide variety of factual circumstances facing school officials today.” *Id.*

In *Phaneuf v. Fraikin*, the Second Circuit found a strip search of a female high school student to be unreasonable under the Fourth Amendment.¹⁵⁹ In *Phaneuf*, a student told Birdsall, a teacher, that another student planned to bring marijuana on a school trip.¹⁶⁰ The student, Phaneuf, denied the allegation but both teachers present, Birdsall and Cipriano, believed Phaneuf was lying.¹⁶¹ Cipriano asked the school's substitute nurse, Fraikin, to conduct the strip search.¹⁶² Fraikin stated that she did not want to conduct the search herself, and school officials asked Phaneuf's mother to conduct the search or the police would be called.¹⁶³ Cipriano searched Phaneuf's purse and found cigarettes and a lighter while waiting for her mother to arrive.¹⁶⁴ The mother strip searched Phaneuf in the presence of Fraikin.¹⁶⁵

The court determined that the search was not justified at its inception under *T.L.O.*¹⁶⁶ It found that the four factors raised by the school officials—the tip from another student, Phaneuf's disciplinary problems, Phaneuf's suspicious denial, and “discovery of cigarettes in her purse”—did not create the reasonable suspicion necessary to justify the search.¹⁶⁷ Specifically, the court determined that the student's tip justified additional investigation by school officials but did not justify a strip search.¹⁶⁸ The court concluded by noting that the district court never reached the qualified immunity issue and that it should resolve the issue on remand.¹⁶⁹

D. Harms Associated with Strip Searches of Students

Many legislatures, courts, and researchers have taken note of the emotional harm that can result from a strip search. Both states and school boards have recognized the traumatic effects of strip searches in the school context and have prohibited or severely restricted

¹⁵⁹ 448 F.3d 591, 592 (2d Cir. 2006).

¹⁶⁰ *Id.* at 593.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 593–94.

¹⁶⁴ *Id.* at 594.

¹⁶⁵ *Phaneuf*, 448 F.3d at 594.

¹⁶⁶ *Id.* at 600.

¹⁶⁷ *Id.* at 597.

¹⁶⁸ *Id.* at 598–99.

¹⁶⁹ *Id.* at 600.

them.¹⁷⁰ For example, Wisconsin goes as far as to criminalize strip searches conducted by school officials.¹⁷¹

Courts have already recognized the intrusive and traumatic nature of strip searches.¹⁷² The court in *Justice v. City of Peachtree* stated that strip searches are “demeaning, embarrassing, repulsive, signifying degradation and submission.”¹⁷³ The Seventh Circuit in *Doe v. Renfrow* stated: “It does not require a constitutional scholar to conclude that a nude search of a thirteen-year old is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency.”¹⁷⁴ In *Cornfield*, the court stated that “no one would seriously dispute that a nude search of a child is traumatic.”¹⁷⁵ The court recognized that adolescents will suffer greater trauma from a strip search because they are becoming more self-conscious about their bodies.¹⁷⁶

A search of a child or adolescent has a greater impact than a similar search of an adult because privacy is more important for a child’s maturation than it is for an already mature adult.¹⁷⁷ A child may even experience a strip search in a manner akin to sexual abuse.¹⁷⁸ Even though school officials may be viewing or touching during the search rather than sexually assaulting, the level of trauma to the child may be the same.¹⁷⁹ Some post-search symptoms of victims include “sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions,” and strip searches may even lead to attempted suicide.¹⁸⁰ Also, the traumatic impact on any given child va-

¹⁷⁰ See Brief for Nat’l Ass’n of Social Workers and its Arizona Chapter et al. as Amici Curiae Supporting Respondent, *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 870022 at *14 [hereinafter Nat’l Ass’n of Social Workers Amici Curiae Brief].

¹⁷¹ *See id.*

¹⁷² *See id.* at *16.

¹⁷³ 961 F.2d 188, 198 (11th Cir. 1992).

¹⁷⁴ 631 F.2d 91, 92–93 (7th Cir. 1980).

¹⁷⁵ *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993).

¹⁷⁶ *Id.* at 1321 n.1.

¹⁷⁷ Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 11 (1991).

¹⁷⁸ *Id.* at 12.

¹⁷⁹ *See id.* at 13.

¹⁸⁰ *Id.* at 12.

ries, and school officials do not know what the impact will be when commencing a search.¹⁸¹

In addition to the statements about the effect of strip searches generally, Savana Redding's experience illustrates a specific reaction to a strip search. Savana stated: "I was embarrassed and scared, but felt I would be in more trouble if I did not do what they asked. I held my head down so that they could not see that I was about to cry."¹⁸² In addition, Savana stated:

The strip search was the most humiliating experience I have ever had. Mrs. Romero and Mrs. Schwallier did not look away while I was taking off my clothes. They did nothing to respect my privacy . . . [and] I felt offended by the accusations made against me and violated by the strip search.¹⁸³

Savana did not return to the middle school after the strip search because she did not want to be near the school officials who searched her.¹⁸⁴ Savana attended an alternative high school but dropped out.¹⁸⁵

III. POTENTIAL ISSUES THAT *REDDING* FAILED TO ADDRESS AND WHAT IT MEANS GOING FORWARD

A. *Implications of Redding*

Despite the obvious outrageousness of many school strip searches, courts are reluctant to find constitutional violations. Lower courts often looked for reasons to justify the search rather than apply the *T.L.O.* test in a method consistent with the language of *T.L.O.* and common sense. The *Redding* Court possessed a unique opportunity to guide lower courts by clearly realigning constitutional jurisprudence in school search cases with common sense. This Part examines *Redding's* contribution and recommends how courts should apply the *Redding* factors.

The Supreme Court in *Redding*, as suggested by Justice Stevens,¹⁸⁶ merely applied the *T.L.O.* standard in a way that it deemed proper in relation to the facts in the case and did not substantively alter the test.

¹⁸¹ *Id.* at 13.

¹⁸² See Nat'l Ass'n of Social Workers Amici Curiae Brief, *supra* note 170, at *13.

¹⁸³ *Id.*

¹⁸⁴ See David G. Savage, *Supreme Court to Weigh Strip-Searches at Schools*, L.A. TIMES, Apr. 19, 2009, at 3, available at <http://articles.latimes.com/2009/apr/19/nation/na-stripsearch19>.

¹⁸⁵ *Id.*

¹⁸⁶ In his dissent, Justice Stevens stated that "[n]othing the Court decides today alters this basic framework . . . [and] it simply applies *T.L.O.* . . ." *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2644 (2009) (Stevens, J., dissenting).

The Court did attempt to clarify *T.L.O.* by indicating two factors that should be considered when determining whether a search is reasonable in scope under the second prong of the inquiry.¹⁸⁷ Because *Redding* does not create a new test for school strip searches, it is possible that the same types of problems and outcomes that existed before the Supreme Court intervened will continue. Although the Court refrained from banning strip searches entirely, the two factors of the reasonable-in-scope inquiry suggest that strip searches will pass constitutional muster less than before *Redding*.¹⁸⁸

The first factor that the Court articulated under the reasonable-in-scope prong is the threat presented by the item sought (“threat factor”).¹⁸⁹ When applying this factor to the second *T.L.O.* prong, the Court determined that the drugs in question presented a limited threat even though they could potentially pose more danger if students digested them in large enough quantities.¹⁹⁰ Thus, both the type and quantity of contraband can contribute to establishing a sufficient threat factor.

The second factor under the reasonable-in-scope prong is that there must be some indication that discovering the evidence sought requires an intrusive strip search (“location factor”).¹⁹¹ Moreover, the mere fact that cases exist where students have hidden contraband in their underwear does not make the search reasonable.¹⁹² General background possibilities that contraband is hidden in locations that require strip searches are not enough; a reasonable search requires suspicion that it will pay off.¹⁹³ In addition, the Court pointed to the fact that the strip search of the other student did not yield the pills, and the allegations against Savana occurred days before Wilson ordered the search.¹⁹⁴ The Court indicated that perhaps witnesses stating that Redding was hiding the pills in her underwear would have contributed to the search’s reasonableness.¹⁹⁵ Even though the Court indicated general considerations for determining whether contra-

¹⁸⁷ See *id.* at 2639 (majority opinion).

¹⁸⁸ “Its indignity does not outlaw the search” *Id.* at 2636.

¹⁸⁹ *Id.* at 2642.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Redding*, 129 S. Ct. at 2642.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

band is hidden in undergarments, it did not establish definitive criteria for when location suspicion warrants a strip search.¹⁹⁶

The Court's analysis of both factors does not provide much guidance on how the factors should apply to situations outside of the facts in *Redding*. First, the threat factor fails to explicitly guide school officials as to what type and amount of drugs will warrant a strip search. Presumably, at the very least, this additional factor means that strip searches for money or other non-dangerous items will fail.¹⁹⁷ Under the threat factor, money does not pose a physical danger to the student in possession or to the general student population. Additionally, a certain quantity of money does not render it more dangerous, as with prescription pills, for example. Next, although weapons pose the greatest threat of immediate harm to students, a strip search will not be necessary due to their size.¹⁹⁸ The inquiry becomes less clear when school administrators search for drugs; the question of determining what is serious enough to warrant a strip search still lingers.¹⁹⁹

¹⁹⁶ The factors that the Court lists are summarized as: 1) general practices of hiding drugs in undergarments at the school; 2) other students' indications that the drugs were hidden there; 3) a prior strip search yielded drugs; and 4) a short time frame between the allegation and the search. *Id.* at 2642.

¹⁹⁷ If strip searches for money and other non-dangerous items are not permitted under *Redding*, two of the circuit court cases will no longer be good law on the permissible scope of a search. See *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003) (granting qualified immunity to officials who conducted a strip search of students in an attempt to locate twenty-six dollars); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997) (granting qualified immunity for a strip search of two female second graders to locate seven dollars).

¹⁹⁸ None of the cases cited in Part II of this Comment deal with weapons. See *supra* Part II. Searches for drugs are much more commonplace than searches for weapons as indicated by the widespread problem with drugs in schools. A search of outer clothing and bags or backpacks will most likely reveal a weapon, which is much larger in size than a handful of pills. After a school official searches outer clothing and pockets, the only place left for a gun or knife would arguably be the waistband of pants, and this item could be retrieved without conducting a strip search. In these types of cases, where the suspicion that a student possesses a weapon is high enough to potentially justify a strip search, the police probably have been involved. See generally 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, 924 (1997) (recommending that if a school official believes that a search will reveal evidence of a serious crime, the student's parents and law enforcement should be notified).

¹⁹⁹ Justice Thomas's dissent addresses this concern. Cf. *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2651 (2009) (Thomas, J., dissenting) ("The majority has placed school officials in this 'impossible spot' by questioning whether possession of Ibuprofen and Naxprofen causes a severe enough threat to warrant investigation. Had the suspected infraction involved a street drug, the majority implies that it would have approved the scope of the search."). Justice Thomas contended that the

Unfortunately, *Redding* did not indicate, beyond certain amounts of particular prescription pills, which drugs at what quantity constitute a sufficient threat. Therefore, the majority's determination that the pills in *Redding* did not present a sufficient threat to warrant the strip search will only be useful to school officials in similar factual circumstances involving similar prescription pills. It is unclear, for example, whether a small amount of marijuana constitutes a sufficient threat.²⁰⁰ Certainly, any drug, including prescription pills, can be dangerous.²⁰¹ Whether a common drug for students to possess, such as Ritalin,²⁰² could warrant a strip search if a student possesses it without permission is ambiguous under *Redding*. Ritalin works well and does not produce negative effects on most children.²⁰³ Some contend, however, that Ritalin "leads to future drug abuse, dulls a child's personality, and gives children 'highs.'"²⁰⁴ Students buying Ritalin on the black market and snorting it is another major concern, which can lead to harmful results, such as toxic psychosis.²⁰⁵ Under the threat factor, courts will need to develop a system to weigh the potential harmfulness of a substance to determine if a strip search is warranted.

Despite Justice Thomas's dissenting opinion that courts should not distinguish between types of drugs, not all strip searches for drugs should be found reasonable under the threat factor. According to the majority's evaluation, drugs will not always present a serious

majority neglected to honor the *T.L.O.* proposition that judges should not determine the legality of the search based on their view of the importance of the school rule. *Id.* at 2651. Justice Thomas stated that the school officials could have reasonably concluded that the backpack search did not yield the pills because Savana hid them in a place where no one would look. *Id.* at 2650. In essence, Justice Thomas argued in his dissent that judges should not determine the reasonableness of a search based on the importance of the school rule.

²⁰⁰ The confusion over which drugs would be serious enough to satisfy the requirement was apparent from oral arguments. See Transcript of Oral Argument, *Redding*, 129 S. Ct. 2633 (2009). Some justices asked how the standard would apply with certain contraband, such as a black marker pencil, methamphetamine, heroine, and cocaine. *Id.* at 14. The Court's opinion did not address these concerns.

²⁰¹ Justice Thomas also noted that possession of prescription strength Ibuprofen without a prescription is a crime in Arizona. *Redding*, 129 S. Ct. at 2652–53 (Thomas, J., dissenting). In addition, Justice Thomas noted studies indicating the prevalence of prescription drug abuse among adolescents. *Id.* at 2653.

²⁰² Praveen Madhiraju, *R.I.P. Ritalin in Proportion! The Eighth Circuit's Restriction on a Parent's Right to Have Schools Accommodate the Needs of Their Disabled Children*: Debord and Davis, 95 NW. U. L. REV. 1661, 1164–66 (2001) (explaining that three to five percent of children have ADHD and that Ritalin is the most commonly prescribed drug for ADHD).

²⁰³ *Id.* at 1166.

²⁰⁴ *Id.* at 1167.

²⁰⁵ *Id.*

enough threat to warrant a strip search.²⁰⁶ Prescription pills in general, including Ritalin, should not warrant strip searches even though the Court put less emphasis on the harm of the drugs to the individual and more on the likelihood that students were distributing them in large quantities.²⁰⁷ While the Court indicated that the amount of the drug can sometimes make a strip search reasonable, strip searching is too intrusive a method for attempting to locate prescription pills that many students are permitted to possess. Without a legitimate and immediate threat to school safety, courts should not allow strip searches under the threat factor of the reasonable-in-scope prong.²⁰⁸

The location factor of the reasonable-in-scope inquiry rightly suggests that a school official conducting a strip search should at the very least have some evidence that a student has hidden the contraband in his or her underwear. This factor clarifies part of the uncertainty the *T.L.O.* standard created and would have caused some of the more obvious cases already decided to come out differently.²⁰⁹ On the other hand, a case with facts similar to *Cornfield* would seem to pass this second factor.²¹⁰ In *Cornfield*, the school officials had reason to suspect that the student hid drugs in his crotch area.²¹¹ The poten-

²⁰⁶ See *Redding*, 129 S. Ct. at 2642.

²⁰⁷ *Id.* This notion is consistent with *Cornfield*, where the court admitted the limited threat posed by the suspicion that the student possessed marijuana. *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993). Although marijuana is illegal and banned in all schools, the Seventh Circuit noted that it created a limited threat to school safety and required a higher level of reasonableness for an intrusive search. *Id.* Therefore, under the *Redding* Court's articulation of the reasonable-in-scope prong, possession of small amounts of street drugs that do not threaten school safety would fail due to lack of a sufficient threat for a strip search.

²⁰⁸ Even if a strip search for drugs may be warranted because of the significant threat posed by the contraband, the next factor, evaluating the suspicion that drugs are hidden in undergarments, will make it almost impossible for a strip search to be found reasonable.

²⁰⁹ See *Thomas v. Roberts*, 323 F.3d 950, 955–56 (11th Cir. 2003) (granting qualified immunity for school officials who conducted a strip search for twenty-six dollars without any reason to suspect the money would be located in the students' undergarments); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir. 1997) (granting qualified immunity based on a strip search for seven dollars where there was no indication that the students were hiding the money in their undergarments); *Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991) (granting qualified immunity to school officials where no evidence suggested that the "rush" being searched for would be located in the undergarments).

²¹⁰ See generally *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993).

²¹¹ *Id.* at 1319.

tial problem down the road is that the location factor alone will not be enough to deter lower courts that had failed to fault school officials when they did not possess enough information to reasonably search a student's undergarments.²¹²

Fortunately, strip searches for money are seemingly no longer proper under the threat factor of the reasonable-in-scope prong. Again, it is unlikely that a strip search would be necessary to locate a weapon due to its size. Therefore, similar to the threat factor, the location factor will become relevant almost exclusively when a student is allegedly carrying drugs.

To permit any one of the vague indications that drugs are hidden in the undergarments to justify a strip search is unreasonable. For example, a general practice among students of hiding pills in their underwear at the school should not suffice to warrant a strip search.²¹³ Next, it would be dangerous to allow school officials to base a strip search of a student on an incriminating statement by another student without making sure the statement has some level of credibility.²¹⁴ Courts should require school officials to follow up on tips as much as reasonably possible to assure that they are reliable enough to warrant an intrusive strip search.²¹⁵ Specifically, the credibility of the tip should be examined before strip searching. Finally, as happened in *Redding*, school officials sometimes obtain information about con-

²¹² At oral argument, the Court raised concerns over when a search of the undergarments is reasonable, and the Court did not respond to these concerns in the majority opinion. See Transcript of Oral Argument, *Safford United Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009). For example, Justice Alito raised concerns over the reliability of student accusations. *Id.*

²¹³ Cf. *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003). Although not directly on point, the Eleventh Circuit in *Thomas* found a strip search without particularized suspicion to be unconstitutional. *Id.* at 956. The school officials in *Redding* suspected Savana of possessing the pills, which would satisfy the requirement of particularized suspicion set out in *Thomas*. See *Redding*, 129 S. Ct. at 2641. It seems unlikely that, just because some students have hidden drugs in their undergarments, strip searches will be more constitutional where school officials have no other reason to suspect that the drugs were hidden in the undergarments.

²¹⁴ Courts have recognized reliability concerns with informants' tips. See *Adams v. Williams*, 407 U.S. 143, 147 (1972) ("Informant's tips . . . may vary greatly in their value and reliability."). Reasonable suspicion depends on the content of information and its reliability. *Alabama v. White*, 496 U.S. 325, 330 (1990). When evaluating the totality of the circumstances to determine if reasonable suspicion is present, courts should take into account the quantity and quality of the information. *Id.* Corroboration of details by independent police work is important to the totality of the circumstances inquiry. *Illinois v. Gates*, 462 U.S. 213, 241 (1983).

²¹⁵ The Second Circuit in *Phaneuf* evaluated the informant's tip and determined that it was not reliable enough to warrant a strip search without additional investigation by school officials. *Phaneuf v. Fraikin*, 448 F.3d 591, 598-99 (2d Cir. 2006).

traband one day, and the strip search is performed on another day.²¹⁶ This situation raises concerns about the certainty that the contraband is located where a strip search would be necessary to uncover it. All of these factors represent obstacles school officials should overcome before they possess reasonable suspicion under the Fourth Amendment that a student is carrying drugs in his undergarments.²¹⁷ Generic evidence suggesting drugs are located in a student's undergarments should not be enough for a strip search.

The Court articulated a disjunctive approach where only one of the two factors of the reasonable-in-scope prong must be satisfied for the search to be reasonable in scope.²¹⁸ First, the Court indicated that "what was missing from the suspected facts that point to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reasons to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal"²¹⁹ Two paragraphs later the Court explained that "reasonable scope requires the support of reasonable suspicion of danger *or* of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts."²²⁰

B. A Proposed Solution Under Redding for Strip Searches in the School Setting

It is unclear exactly how courts will apply the factors.²²¹ It is possible that lower courts will follow the disjunctive wording in *Redding*, defer to school officials, and only require that they meet one factor to

²¹⁶ See *Redding*, 129 S. Ct. at 2640.

²¹⁷ The Court in *Redding* did not indicate whether a visual detection of unusual volume in the undergarment areas contributes to this factor. *Redding*, 129 S. Ct. at 2642. This should not count towards the reasonableness of the search because it is a highly subjective inquiry of whether an area looks too large based on the opinion of a school official. See generally *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1319 (7th Cir. 1993) (involving facts where a school official noticed an "unusual bulge," but the strip search did not yield the drugs).

²¹⁸ *Redding*, 129 S. Ct. at 2637 (2009) ("Because there were no reasons to suspect the drugs presented a danger *or* were concealed in her underwear, we hold that the search did violate the Constitution").

²¹⁹ *Id.* at 2642-43.

²²⁰ *Id.* at 2643 (emphasis added).

²²¹ One district court has restated the test as requiring one factor or the other. See *Foster v. Raspberry*, No. 4:08-CV-123(CDL), 2009 WL 2355854, at *5 n.5 (D. Ga. July 29, 2009) (stating that even with individualized suspicion "the scope of the search was not reasonable under the circumstances because there was no indication of danger to the students *or* any reason to suppose that King was carrying the iPod in her underwear" (emphasis added)).

justify the strip search. This Comment proposes that lower courts should require both factors to be present—threat and suspicion—in order for the search to be reasonable in scope.²²² Thus, the test should be conjunctive rather than disjunctive. Further, the conjunctive view recommended should require a threshold amount of both factors to be met rather than a balancing test. School officials should require reasonable suspicion of each factor rather than just one factor.

A balancing test, although better than a purely disjunctive approach, still presents the opportunity for an unwarranted strip search to be found constitutional. For example, under a balancing approach, a strip search for the same prescription pills involved in *Redding* would be found reasonable if the principal possessed more reliable information that the pills were located in Savana's undergarments. A reliable location factor should not diminish the need for a strong threat factor as well. Additionally, a situation like the one in *Cornfield* could arguably meet the location factor as long as the court determined that a school official had a reasonable suspicion that a student was hiding contraband in his or her undergarments. This would impose an even lesser standard than in *Cornfield* because in that case, that court at least acknowledged that an intrusive search should target contraband that poses a threat to school safety.²²³ Rather than have the effect the Court likely intended, *Redding* applied as a balancing test could serve to justify broader and more intrusive searches than some courts have already permitted.

The conjunctive approach provides the most protection to students as well as guidance to school officials and reviewing courts. If lower courts do not interpret *Redding* to require school officials to meet both additional factors, the opinion could lose much of its bite. For example, requiring only the location factor suggests that if school officials reasonably believed that a student carried in his underwear a permanent marker that was banned under school rules, officials

²²² *Cornfield* supports this contention. See *Cornfield*, 991 F.2d at 1321. In *Cornfield*, the Seventh Circuit articulated that “a highly intrusive search in response to a minor infraction would similarly not comport with the sliding scale advocated by the Supreme Court in *T.L.O.*” *Id.* Despite this declaration, the Court later gets around this statement by finding that the strip search “was the least intrusive way to confirm or deny their suspicions [and] was not unreasonable.” *Id.* at 1323. Nonetheless, the Seventh Circuit seems to be suggesting that a threat is required for an intrusive search. The only difference in approach is that this Comment would contend that the search in *Cornfield*, as with any strip search, is a highly intrusive search that warrants additional constitutional protection. For a brief discussion of the impact of strip searches, see *supra* Part II.E.

²²³ *Id.* at 1321.

2011]

COMMENT

455

could conduct a strip search. Alternatively, using just the threat factor, school officials could strip search a student they reasonably believed brought dangerous drugs to school even if they were almost certain that the drugs were in the student's locker and did not locate them there during their initial search.

From a policy standpoint, requiring both factors assures that strip searches will be deemed reasonable only in the most extreme and rare circumstances. For example, if a school official receives a reliable tip that a student possesses heroin and is hiding it in his undergarments, a strip search would be proper. Other students will be protected against strip searches when the stricter test is not met. From a practical standpoint, requiring both factors will make reasonableness determinations easier and more accurate. For example, if courts find that one *Redding* factor is not met, the search would be unreasonable and the inquiry would end. Also, if courts mistakenly determine that either the threat or location factor is met, there is still another factor to be met before the search is found to be reasonable. When applying factor tests to factual situations that have yet to be tested in court, requiring two factors instead of just one will add an extra layer of protection before wrongly finding an intrusive search to be reasonable.

Even if strip searches are constitutional in only the rarest cases, the standard that the Court provided could lead to more problems if not properly applied by lower courts.²²⁴ Therefore, the best solution is to insist that lower courts properly apply both *Redding* factors while using common sense about whether a search is reasonable. Because the Court continues its use of a flexible standard for school searches, common sense and attention to the intrusiveness of strip searches is even more necessary. If courts do not agree on what is reasonable under *T.L.O.*, school officials will continue having difficulty recognizing the standard's limits.

²²⁴ See Robert Barnes, *Student Strip Search Illegal*, WASH. POST, June 26, 2009, at A1. For example, general counsel for the National School Boards Association stated that "the decision did not provide clear guidelines about how specific the accusation must be, or how dangerous the alleged drugs, before school officials employ such an intrusive search." *Id.* Also, many of the circuit court cases examined in the background section stated expressly that qualified immunity was granted because *T.L.O.* was not clear enough and that school officials should not be required to balance factors. See *Thomas v. Roberts*, 323 F.3d 950, 954 (11th Cir. 2003) (stating that the *T.L.O.* test did not put school officials on notice that a strip search would be unconstitutional); *Jenkins v. Talladega City Bd. of Educ.*, 11 F.3d 821, 825-27 (11th Cir. 1997) (stating that school officials should not be required to interpret general legal formulations).

Despite the potential for ambiguous future application of its tests, *Redding* is in line with the Fourth Amendment and *T.L.O.* in its attempt to assure that searches in school remain reasonable, both at their inception and in scope. Although the opinion did not set out a crystal clear standard to guide school officials who may still be confused about the permissibility of strip searches, lower courts should enforce the test strictly by requiring both factors. As indicated in the analysis above, enforcing the *Redding* factors strictly will mean that strip searches will be less likely to be reasonable in scope than under courts' previous interpretations of *T.L.O.* Although the *T.L.O.* prongs and the *Redding* factors can be met, a proper application of the test will result in strip searches only under the right circumstances—extreme situations where a strip search may be necessary for school safety.

C. *Other Proposed Solutions for Strip Searches in the School Setting*

Other authors, however, have taken different approaches to the problem. One author suggests a creative standard for strip searches.²²⁵ The proposed standard would require the school official to have probable cause before conducting a strip search.²²⁶ Next, strip searches would only be permitted to search for evidence of serious violations, which would mainly include situations involving weapons and drugs.²²⁷ Finally, the new standard would require that the disruption resulting from the contraband be one that would result in an immediate disruption of school order.²²⁸ This approach is in line with *Redding* by emphasizing that strip searches are particularly intrusive and deserve stricter review. One potential issue, however, is that school officials may not understand the probable cause standard.

Another author advocates a ban on strip searches in schools altogether.²²⁹ The author suggests that law enforcement officials should make the determination as to whether a higher standard of probable cause exists to perform the search.²³⁰ If a situation is sufficiently dangerous that it would warrant a strip search under the *Redding* threat

²²⁵ See Blickenstaff, *supra* note 21, at 49.

²²⁶ *Id.*

²²⁷ *Id.* at 50.

²²⁸ *Id.*

²²⁹ See Gartner, *supra* note 198, at 924. The author recommends that if a school official believes that a search will reveal evidence of a serious crime, school officials should notify the student's parents and law enforcement. *Id.*

²³⁰ See *id.* (stating that law enforcement would have to determine whether probable cause exists and then obtain a warrant).

factor, perhaps it makes sense to involve the police anyway. On the other hand, involving the police will likely refocus the situation away from school safety and towards punishing the perpetrator if contraband is found. This approach may also seem too burdensome to those who are concerned about school officials' ability to control discipline in the school. An additional concern is that *T.L.O.* did not envision the increased use of police in schools and therefore is inadequate to deal with commingling of schools and the police.²³¹

The Fourth Amendment requires searches to be "reasonable."²³² Accordingly, because strip searches by school officials are unlikely to be reasonable in the school setting,²³³ a ban on strip searches is an appealing solution to the problem.²³⁴ In fact, several states and school districts have already banned strip searches in their schools.²³⁵ Despite this apparent trend towards banning strip searches, the judiciary's role is to interpret the Fourth Amendment. In doing so, the judiciary should conclude that strip searches in the school setting are unconstitutional a large percentage of the time—when they fail the

²³¹ Josh Kagan, *Reappraising T.L.O.'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291, 294, 325 (2004) ("Refusing to evaluate *T.L.O.* . . . would allow school systems and law enforcement agencies to continue sending children a poor message: We will subject you to a police state at school because you are children without rights, then we will subject you to severely-punitive, adult-like consequences for any infraction.").

²³² U.S. CONST. amend. IV.

²³³ See Barnes, *supra* note 224. Savana's ACLU attorney stated that the Court made clear that strip searches should only be used in "extraordinary circumstances." *Id.*

²³⁴ One author noted that it is unlikely that the Court will ever ban strip searches or impose a stricter standard for evaluating them. See Patsy Thimmig, Note, *Not Your Average School Day—Reading, Writing and Strip Searching: The Eleventh Circuit's Decision in Jenkins v. Talladega City Board of Education*, 42 ST. LOUIS U. L.J. 1389, 1416 (1998). The author stated that the Court should at least require strip searches to be reasonable. *Id.* The Court in *Redding* arguably imposed a stricter standard, although technically it is just a clarification of *T.L.O.* This Comment suggests that a stricter application of the standard will assure that permissible strip searches are reasonable.

²³⁵ Both states and school boards have recognized the traumatic effects of strip searches in the school context and have prohibited or restricted their use. See Nat'l Ass'n of Social Workers Amici Curiae Brief, *supra* note 170, at *14. Seven states have banned strip searches. *Id.* These seven states are California, Iowa, New Jersey, Oklahoma, South Carolina, Washington, and Wisconsin. *Id.*; see CAL. EDUC. CODE § 49050 (West 2009); IOWA CODE ANN. § 808A.2(4) (West 2010); N.J. STAT. ANN. § 18A:37-6.1 (West 2010); OKLA. STAT. ANN. tit. 70, § 24-102 (West 2009); S.C. CODE ANN. § 59-63-1140 (West 2009); WASH. REV. CODE ANN. § 28A.600.230(3) (West 2010); WIS. STAT. ANN. § 948.50(3) (West 2009). Furthermore, many school districts, including New York City, have banned strip searches. Nat'l Ass'n of Social Workers Amici Curiae Brief, *supra* note 170, at *14. For a discussion of the power of local school boards to adopt policies that ban strip searches, see generally Gartner, *supra* note 198.

meet the *T.L.O.* prongs and the *Redding* factors. The Supreme Court chose not to ban strip searches, so courts will have to stringently apply the *Redding* test in the meantime.

IV. THE QUALIFIED IMMUNITY DOCTRINE

A. *A Brief Description of the Qualified Immunity Doctrine*

The qualified immunity doctrine is not constitutional nor is it statutorily created; rather, the Supreme Court created the doctrine based upon the belief that governmental interests in the execution of its policies may, in some circumstances, outweigh an individual's interest in challenging unconstitutional government conduct.²³⁶

The Court first mentioned qualified immunity in 1967 in *Pierson v. Ray*.²³⁷ In *Pierson*, the Court held "that the defense of good faith and probable cause . . . is available to [the police officers] in the action under § 1983."²³⁸ The Court's first major consideration of qualified immunity occurred in *Scheuer v. Rhodes*.²³⁹ In *Scheuer*, the Court determined that the governor of Ohio did not have a right to absolute immunity from suit but that qualified immunity may be available to officers of the executive branch.²⁴⁰ In *Wood v. Strickland*, the Court found that a school official is not immune from suit if he knew or a reasonable person would have known that his official action would violate the Constitution or if he acted with malicious intention to interfere with another's constitutional rights.²⁴¹ Next, in *Harlow v. Fitzgerald*, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."²⁴² *Harlow* simplified the test by eliminating the subjective component and only examining the objective component.²⁴³

Finally, in *Anderson v. Creighton*, the Court elaborated on the qualified immunity doctrine once more and explained that the right violated "must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right

²³⁶ See Blickenstaff, *supra* note 21, at 21.

²³⁷ 386 U.S. 547 (1967).

²³⁸ *Id.* at 557.

²³⁹ 416 U.S. 232 (1974).

²⁴⁰ *Id.* at 235, 247.

²⁴¹ 420 U.S. 308, 322 (1975).

²⁴² 457 U.S. 800, 818 (1982).

²⁴³ Thimmig, *supra* note 234, at 1395.

must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”²⁴⁴ Further, the Court articulated that “[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”²⁴⁵ In *Anderson*, the Court defined “clearly established” as whether a reasonable official would believe the conduct to be unlawful rather than whether the action was unlawful.²⁴⁶ This clarification expanded the ability of public officials to seek protection under the qualified immunity doctrine.²⁴⁷

An officer is “entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment.”²⁴⁸ Furthermore, the Court has held that “officials can still be on notice that their conduct violates established law even in novel factual circumstances.”²⁴⁹ Fundamentally similar facts are not necessary for finding a law to be clearly established.²⁵⁰

One author discussed some of the practical implications of the qualified immunity doctrine.²⁵¹ The author raised the difficulty of understanding the difference between Fourth Amendment reasonableness and qualified immunity.²⁵² For example, “a police officer can reasonably (within the meaning of qualified immunity) violate otherwise clearly established Fourth Amendment dictates.”²⁵³ The author suggested the potential problems of this type of logic applied to other areas of law through the following hypothetical: “I may have been negligent, but I was reasonable in believing that I wasn’t.”²⁵⁴

²⁴⁴ 483 U.S. 635, 640 (1987).

²⁴⁵ *Id.* (citation omitted).

²⁴⁶ *See id.*; Thimmig, *supra* note 234, at 1395.

²⁴⁷ *See id.*

²⁴⁸ *Pearson v. Callahan*, 129 S. Ct. 808, 822 (2009).

²⁴⁹ *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

²⁵⁰ *Id.*

²⁵¹ *See* Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185 (2008).

²⁵² *Id.* at 193–94.

²⁵³ *Id.* at 193.

²⁵⁴ *Id.* at 194. For an interesting discussion on the qualified immunity doctrine, see Blickenstaff, *supra* note 21, at 21–24. The author noted how *Anderson* gives officials two bites at the apple because officials escape liability even if their conduct is found to be unreasonable as long as the reasonable official would have believed it to be lawful. *Id.* at 23. The official can claim that even though he acted unreasonably under the Fourth Amendment, the conduct was still reasonable because it was not clearly prohibited. *Id.* at 23–24. The wisdom of the qualified immunity doctrine is beyond the scope of this Comment, but it is important to recognize the potential

The author, however, noted that the qualified immunity doctrine may be justified as not only a substantive defense but as a procedural rights defense as well.²⁵⁵ Thus, qualified immunity can be viewed as protecting officials from both financial burdens and the burdens of a lawsuit.²⁵⁶ The qualified immunity issue “creates a ‘super-summary judgment’ right on behalf of government officials.”²⁵⁷ The advantage for school officials is that even when summary judgment may not be proper, summary judgment may be granted if the court finds that the law was not reasonably clear.²⁵⁸

B. Redding’s *Grant of Qualified Immunity*

As discussed in Part II.B, the Court in *Redding* granted qualified immunity to the school officials who conducted the strip search of Savana.²⁵⁹ The majority acknowledged divergent conclusions on how the *T.L.O.* standard applies to strip searches and found that the differences of opinion were enough to warrant qualified immunity.²⁶⁰ Interestingly, the majority noted that its grant of qualified immunity does not mean that disuniform application of the law will always warrant a grant of qualified immunity but that it is warranted in this case because the Court may not have been sufficiently clear in *T.L.O.*²⁶¹

C. Implications of Granting Qualified Immunity in Redding

The dissenting Justices correctly noted that *Redding* does not alter the basic *T.L.O.* framework other than clarifying the reasonable-in-scope prong as it relates to strip searches.²⁶² Although it is debatable whether qualified immunity technically should have been granted in *Redding*,²⁶³ the majority recognized the confusion that existed

sweeping power that the doctrine has to allow officials to escape liability. In factual circumstances where the conduct is clearly out of line, protection under the doctrine should not be granted.

²⁵⁵ See *Brown*, *supra* note 251, at 194.

²⁵⁶ *Id.* at 195.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Redding*, 129 S. Ct. at 2644.

²⁶⁰ *Id.* at 2643–44.

²⁶¹ *Id.* at 2644.

²⁶² See *id.* at 2644–46 (Stevens, J., concurring in part and dissenting in part). Justice Stevens also stressed that “the clarity of a well-established right should not depend on whether jurists have misread our precedents.” *Id.* at 2645. Consequently, both the majority and dissent seemed to agree that qualified immunity usually is not appropriate simply because lower courts got it wrong.

²⁶³ One author, discussing the Eleventh Circuit’s decision in *Jenkins*, contended that the Supreme Court should have granted certiorari and reversed the grant of

amongst lower courts and decided to grant qualified immunity. Perhaps it is sensible for the Court to grant qualified immunity to the school officials in *Redding* who conducted a strip search that was less severe than other searches where courts have granted qualified immunity.²⁶⁴

Post-*Redding*, it is difficult to predict how the Court's grant of qualified immunity will impact the Fourth Amendment school-search frontier. The concern for future qualified immunity issues in the school search context is twofold. First, courts may view the Court's grant of qualified immunity in *Redding* as a stamp of approval towards granting qualified immunity in questionable situations. Second, because *Redding* uses a factor-based test that leaves the constitutionality of strip searches in other contexts up in the air, courts may continue to grant qualified immunity to school officials in novel situations that are sure to arise. Consequently, *Redding's* imprecision may perpetuate the improper granting of qualified immunity in novel factual circumstances.

It is possible that because the Court failed to both articulate a more comprehensive test for strip searches and deny qualified immunity, nothing will change. If *Redding* had articulated a clearer test, the future of the qualified immunity doctrine in the school search context would not be as uncertain. Conversely, if the Court denied qualified immunity to the school officials, the Court would have at least sent a more serious message that lower courts should not grant qualified immunity as leniently as had been done in the past. Instead, the Court's approach runs the risk of perpetuating the same problems that existed pre-*Redding*.

It is more likely, however, that courts will follow *Redding's* lead and find unreasonable strip searches unconstitutional. Thus, lower courts should stringently apply the threat and location factors under the reasonable-in-scope prong of *T.L.O.* to prevent constitutional violations against school children. If this occurs, qualified immunity will no longer provide school officials with an escape from liability.

qualified immunity in order to deter school officials from conducting unreasonable strip searches of school officials. Thimmig, *supra* note 234. Another author stated in reference to the decision in *Thomas* that “[c]ourts cannot continue to promote this ignorance by granting qualified immunity to school officials and school districts.” Dana Ingrassia, Note, *Thomas Ex. Rel. Thomas v. Roberts: Another Photo Finish Where School Officials Win the Race for Qualified Immunity*, 26 WHITTIER L. REV. 621, 651 (2004).

²⁶⁴ See, e.g., *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (1997) (granting qualified immunity for a strip search of two female second graders for seven dollars that was missing).

Because *Redding* directly considered a strip search under the *T.L.O.* test, courts must recognize, as the Supreme Court did, the intrusiveness of strip searches and the emotional harm that can result. The only missing piece to the solution is for courts to properly apply the tests to limit strip searches to the extreme situations where they are warranted.

Although the Court chose not to expressly ban strip searches, the opinion in *Redding* recognizes the seriousness of strip searches in both the emotional and the constitutional context. It is unlikely that the Supreme Court will revisit the issue anytime soon; lower courts will need to take responsibility for protecting student's constitutional rights. Once the ball starts moving in the right direction, the momentum should set the judicial system on the right course going forward.

V. CONCLUSION

Although the Court expressed distaste for the strip search of Savana and further analyzed the second prong of *T.L.O.*, the law could remain almost exactly where it was over twenty years ago if the right steps are not taken. Many circuit courts squandered the opportunity to properly apply *T.L.O.* and deny qualified immunity to school officials conducting unreasonable strip searches of students. Lower courts now must change course and properly apply the Fourth Amendment to school strip search cases.

Redding clarified *T.L.O.* by adding two factors to the second prong, requiring that the item in question present a threat and that the school officials have a reasonable belief that the item is located in the student's undergarments.²⁶⁵ Thus, *Redding's* additional factors and the application of these factors to the reasonableness requirement indicate that strip searches should rarely be found reasonable under the Fourth Amendment. The Court's approach allows some flexibility for school officials to determine when the proper criteria for strip searches exist, but courts need to prevent the test from becoming one where the lack of express factors results in finding no constitutional violations. Because the Supreme Court is unlikely to address the issue again, it will be up to the lower courts or legislatures to properly address these issues.

Naturally, there is concern that the Court was insufficiently clear in articulating how searches not entirely similar to the factual situation of *Redding* should be handled. Because *Redding* created a flexi-

²⁶⁵ See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2642–43 (2009).

ble factor test, uncertainty about how the factors will be applied remains. This Comment proposes that lower courts need to take the initiative to prevent unreasonable strip searches by carefully examining the threat and location factors established in *Redding*. Further, courts should examine both factors in conjunction rather than allowing one factor alone to satisfy the reasonableness requirement. Courts should insist that school officials possess a reasonable suspicion that each factor is satisfied independently rather than permitting a strong showing of one factor to compensate for a weak or nonexistent showing of the other. For example, an item presenting a significant threat should not justify a strip search if very little or no evidence suggests the item is located in a student's undergarments. States and school districts are free to ban strip searches, but until that decision is made, the judiciary needs to safeguard students' constitutional rights.

Finally, the Court's grant of qualified immunity poses some potential problems when combined with the flexible factor test it provides. A grant of qualified immunity sends the wrong message to the courts that have been improperly analyzing qualified immunity questions.²⁶⁶ Also, the ambiguous factors announced in *Redding* open the door for the same problem where courts automatically grant qualified immunity in factual situations that have not been directly addressed by the Court. Using a stricter conjunctive approach to the factors will remedy this issue as well.

When the Court granted certiorari in *Redding*, it had a unique opportunity to rectify the problems that have been occurring in the school strip search context. The Court went far enough in explaining factors that should limit strip searches to rare situations. *Redding* indicated that strip searches are unlawful in at least one factual situation, ensuring that the scope prong of *T.L.O.* actually has some bite. Importantly, the Court gave the judiciary the tools to properly handle these situations. The factors in *Redding* should be used to bolster *T.L.O.*'s reasonableness test and to prevent courts and school officials from claiming that the guidelines for school strip searches are unclear. Lower courts must stop history from repeating by assuring that *Redding* does not fall by the wayside like *T.L.O.* did over the past twenty-five years.

²⁶⁶ See *supra* Part II.C.