SAFFORD UNIFIED SCHOOL DISTRICT NO. 1 v. REDDING: BALANCING STUDENTS' RIGHTS AGAINST THE GOVERNMENT'S INTEREST IN PROTECTING THE EDUCATIONAL PROCESS

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I. INTRODUCTION

The Ninth Circuit, sitting *en banc*, concluded that Safford school officials violated the Fourth Amendment rights of Savana Redding, a thirteen-year-old middle school student, by strip-searching her in an effort to locate prescription drugs.[1] The Ninth Circuit further held, dividing 6-5, that Assistant Principal Kerry Wilson, who ordered the search, was not entitled to qualified immunity in light of the constitutional principles the court found were "clearly established" at the time of the event.[2]

On January 16, 2009, the Supreme Court granted Safford School District's petition for a writ of certiorari.[3] Safford has raised two issues: first, whether the Fourth Amendment permits school officials to search a student suspected of possessing and distributing prescription drugs on campus in violation of school policy; and second, if the search does not pass constitutional muster, whether the officials were nonetheless entitled to qualified immunity.

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1. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1089 (9th Cir. 2008).

2. *Redding*, 531 F.3d at 1089.

3. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071 (9th Cir. 2008), *cert. granted*, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 987 (mem.) (U.S. Jan 16, 2009) (No. 08-479).

II. FACTS

A student at Safford Middle School approached Assistant Principal Kerry Wilson on the morning of October 8, 2003, and handed him a small white pill.[4] The student, Jordan Romero, informed Wilson that a classmate, Marissa Glines, had given him the pill and that a group of students was planning to take the pills at lunchtime.[5] Wilson took the pill to the school nurse, who identified it as a 400 mg ibuprofen, obtainable only by prescription.[6] A student's possession of these pills violated School Rule J-3050, which prohibits students from bringing any prescription or over-the-counter drug onto campus without the school's permission.[7]

Wilson went to Marissa's classroom and asked her to gather her possessions and accompany him to his office.[8] Wilson noticed a black planner located in the desk next to Marissa and asked the classroom teacher to determine the owner.[9] Opening the planner, the teacher found several knives, cigarette lighters, and a cigarette, but Marissa denied having any knowledge of the planner or its contents.[10] Wilson escorted Marissa to his office, where he instructed Marissa to turn out her pockets and open her wallet.[11] This search revealed several white pills identical to the one Jordan had possessed and a blue pill.[12] Wilson asked Marissa where the blue pill[13] came from, and she responded, "I guess it slipped in when *she* gave me the IBU 400s."[14] Wilson asked, "Who is *she*?" Marissa responded "Savana Redding."[15]

Wilson asked a female assistant to take Marissa to the nurse's office for a more intensive search while Wilson located Savana Redding.[16] Wilson found Redding in class and asked her to gather her

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4. *Redding*, 531 F.3d at 1076.
5. *Id.*
6. *Id.*
7. Brief for Petitioners at 2–4, Safford Unified Sch. Dist. No. 1 v. Redding, No. 08-479 (U.S. Feb. 25, 2009) [hereinafter Petitioner's Brief] (noting that students are required to leave medicine in the school office).
8. *Id.* at 6.
9. *Id.*
10. *Id.* at 7.
11. *Id.*
12. *Id.*
13. *Id.* ("later discovered to be Naprosyn 200 mg").
14. *Id.*
15. *Id.*
16. *Id.* at 7–8.

belongings and accompany him to his office.[17] He then confronted her with the planner, its contents, and the pills from Jordan and Marissa.[18] Redding admitted that the planner was hers and that she had loaned it to Marissa a few days earlier but told Wilson that the knives, lighters, and cigarette were not hers.[19] She also denied distributing any pills to her classmates and claimed that she had never seen the pills.[20]

Redding consented to a search of her backpack, but Wilson did not find any pills.[21] Wilson then asked Romero, a female assistant, to take Redding to the nurse's office where she and Nurse Schwallier privately conducted a more thorough search of Redding.[22] The two women asked Redding to remove her socks and shoes so they could check for hidden pills.[23] Romero next asked Redding to remove her shirt and pants, and then instructed her to shake out her bra and underwear to ensure that Redding was not hiding any pills.[24] Confirming that Redding did not have any pills, Romero immediately returned the clothes to Redding.[25] April Redding soon after filed suit on behalf of her daughter pursuant to 42 U.S.C. § 1983 alleging that the school officials had violated Savana Redding's Fourth Amendment rights by conducting this search.[26]

This incident was not the first time that Wilson or other Safford school officials were confronted with drug use at Safford Middle School. In 2002, a student brought prescription pills onto campus and distributed them to classmates, which nearly resulted in the death of a student.[27] The student suffered an adverse reaction and had to be airlifted to a hospital, where he spent several days in intensive care.[28] Even more recently—a week before the incident in this case—Assistant Principal Wilson had met with Jordan and his mother and

17. *Id.* at 8.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* 8.
22. *Id.* at 10.
23. *Id.* at 11.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 4–5.
28. *Id.* at 5.

learned that a classmate had given Jordan a pill that caused him to become violent and sick to his stomach.[29]

The incident was also not the first time officials suspected Savana Redding of violating school rule J-3050. At a school dance that opened the 2003-2004 school year, members of the school staff detected the smell of alcohol around a small group of students—including both Redding and Marissa—and later that evening discovered a bottle of liquor in the girls' bathroom.[30] The meeting with Jordan and his mother further supported the staff's suspicion when Jordan reported to Wilson that Redding had served students alcohol before the school dance.[31]

III. LEGAL BACKGROUND

The Supreme Court's decision in *New Jersey v. T.L.O.* established the constitutional framework for reviewing searches of students or their possessions performed by public school officials.[32] Although students do not "shed their constitutional rights . . . at the schoolhouse gate,"[33] the Supreme Court recognized that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[34] The Court concluded that the warrant requirement, in particular, was "unsuited to the school environment."[35] Instead, the Court sought to create a flexible standard that would "preserv[e] the informality of the student-teacher relationship."[36] The Court determined that "special needs"[37] inherent in the public school context justified adopting a standard by which the legality of a search would depend on the "reasonableness, under all the circumstances, of the search."[38]

T.L.O.'s reasonableness standard sought to strike a balance between students' expectation of privacy and school officials' equally

29. *Id.* at 5–6.
30. *Id.* at 5.
31. *Id.* at 6.
32. New Jersey v. T.L.O., 469 U.S. 325, 328 (1985).
33. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).
34. *T.L.O.*, 469 U.S. at 340.
35. *Id.*
36. *Id.* at 339–40.
37. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (discussing the *T.L.O.* standard).
38. *T.L.O.*, 469 U.S. at 341.

legitimate need to maintain a safe and orderly learning environment.[39] The standard "spare[s] teachers and school administrators the necessity of schooling themselves in the niceties of probable cause"[40] and permits educators to focus their attention on "teaching and helping students, rather than on developing evidence against a particular troublemaker."[41] At the same time, the reasonableness standard ensures "that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools."[42]

The Fourth Amendment[43] does not require the "least intrusive" search practicable in order to be reasonable.[44] Instead, courts evaluate the reasonableness of a school search by utilizing the two-prong test described in *T.L.O.*: first, whether the search was "justified at inception"; and second, whether the scope of the search was reasonably related to the circumstances justifying the interference in the first place.[45] Ordinarily, a search is justified at inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[46] Furthermore, a search is permissible in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[47] In assessing the scope of a search, judges may consider the nature of the infraction. The Supreme Court has made clear, however, that a school rule prohibiting certain conduct reflects a judgment by administrators that the conduct is destructive of a proper educational environment and courts should defer to those judgments, rather than attempting to determine which rules are "important."[48]

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39. *Id.* at 340.
40. *Id.* at 343.
41. *Id.* at 353 (Blackmun, J., concurring).
42. *Id.* at 342 (majority opinion).
43. U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").
44. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995).
45. *T.L.O.*, 469 U.S. at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).
46. *Id*. at 341–42.
47. *Id*. at 342.
48. *Id.* at 342 n.9 (rejecting the argument that some rules regarding student conduct are too "trivial" to justify searches based upon reasonable suspicion).

T.L.O. is the only case in which the Supreme Court reviewed a school search based on individualized suspicion and applied the two-prong reasonableness test. In it, a school official searched T.L.O.'s purse after a teacher reported that T.L.O. was smoking in the bathroom.[49] The Court held the search was justified at inception because the purse was an obvious place to look for the cigarettes.[50] Satisfying *T.L.O.*'s "justified at inception" prong requires officials to possess reasonable grounds for suspecting that a search will turn up evidence that the student has violated or is violating school rules.[51] At least one lower court's application of this prong has held that a tip from a student informant gave school officials reasonable grounds to search another student for drugs.[52]

If a search is justified at inception, a court must then determine whether the scope of the search actually conducted was "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."[53] In this prong of the reasonableness test, a court must balance the student's legitimate expectations of privacy against the school's interest in preserving order. In *T.L.O.*, the Supreme Court acknowledged, "[The] search of a child's person . . . is undoubtedly a severe violation of subjective expectations of privacy."[54]

In considering whether a search was excessively intrusive, the Sixth Circuit concluded that a search undertaken by school officials to find money serves a less weighty governmental interest than a search for items that pose a threat to the health or safety of students, such as drugs or weapons.[55] As a result, a strip search to locate money may not be reasonable, but that same search might be reasonable if undertaken to find drugs or weapons.[56] This reasoning reflects the

49. *Id.* at 346.

50. *Id.* at 346 (noting that it was irrelevant that other "hypotheses" were also consistent with the teacher's accusation and focusing instead on whether the official had reasonable suspicion justifying search).

51. *Id.* at 342.

52. C.B. *ex rel.* Breeding v. Driscoll, 82 F.3d 383, 388 (11th Cir. 1996) (ruling that a student's tip provided directly to administrators is a reliable source of information because of the possibility of disciplinary repercussions if the information is misleading).

53. *T.L.O.*, 469 U.S. at 342.

54. *Id.* at 337–38.

55. Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 605 (6th Cir. 2005); Oliver v. McClung, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995).

56. *Oliver*, 919 F. Supp. at 1218.

Supreme Court's recognition that administrators possess a significant interest in protecting students from the consequences of drugs,[57] especially because "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[58] Accordingly, the Court has described school administrators' interest in deterring student drug use as "important—indeed, perhaps compelling,"[59] because of the disruptive effects of drugs on the users, the student body, the faculty, and the educational process as a whole.[60]

Several circuits have found strip searches reasonable after balancing students' interests against the interests of school administrators. In *Cornfield ex rel. Lewis v. Consolidated High School District Number 230*, the Seventh Circuit held that school officials' strip search of a male student they suspected of "crotching" drugs was not excessively intrusive and therefore that the search did not violate the student's rights.[61] In finding the officials' strip search reasonable, the court pointed to school officials' efforts to minimize the intrusion: the search took place in the privacy of a locker room; the two officials were the same gender as the student; and the officials did not touch the student during the search.[62] Likewise, in *Williams ex rel. Williams v. Ellington*, the Sixth Circuit concluded that a strip search by school officials was reasonable in light of the size of the item sought: a small vial containing suspected narcotics.[63] In that case, another student had informed school officials that she saw the plaintiff with a small vial of white powder.[64] After school officials searched the student's locker and purse, "it was reasonable for [officials] to suspect the girl may be concealing the contraband on her person."[65] The court held that the strip search was not excessively intrusive—because administrators reasonably suspected Williams was concealing evidence of illegal

57. Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002) ("The nationwide drug epidemic makes the war against drugs a pressing concern in every school.").

58. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995).

59. *Id.*

60. *Id.* at 662; *see also* Morse v. Frederick, 127 S. Ct. 2618, 2628 (2007) (reaffirming that school officials have a strong interest in deterring drug use among students).

61. Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1319 (7th Cir. 1993).

62. *Id.* at 1323.

63. Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 887 (6th Cir. 1991).

64. *Id.* at 882.

65. *Id.* at 887.

activity on her person—even though there was no information suggesting where Williams might be hiding the drugs.[66]

But even if a plaintiff can establish a deprivation of a constitutional right, government officials are entitled to qualified immunity, which protects them from civil damages, unless their conduct violates a constitutional right "clearly established" at the time of the events in question.[67] The Supreme Court has stated that a right is "clearly established" when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."[68] Thus, the qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[69] In obvious situations, the presence of earlier cases involving "fundamentally similar facts" is not necessary for a court to hold that a right was clearly established.[70] But in *Wilson v. Layne*, the Court concluded that government officials, in the absence of a consensus on the constitutionality of the conduct, should not be subject to damages when judges disagree: "If judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy."[71] Thus, in *Wilson*, the Court held that government officials were entitled to qualified immunity because the constitutional question was "by no means open and shut."[72]

Many lower courts, reviewing searches under the *T.L.O.* standard, have recognized school officials' qualified immunity because the law was not "clearly established" at the time of the search.[73] For instance, the Eleventh Circuit held school officials were entitled to qualified immunity for a strip search of an entire fifth-grade class to find

66. *Id.* at 889.

67. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

68. Wilson v. Layne, 526 U.S. 603, 614–15 (1999) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

69. Malley v. Briggs, 475 U.S. 335, 341 (1986).

70. Hope v. Pelzer, 536 U.S. 730, 741 (2002) (noting that officials can still be on notice that their conduct violates established law "even in novel factual circumstances").

71. *Wilson*, 526 U.S. at 617–18.

72. *Id.* at 615.

73. *E.g.*, Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 887 (6th Cir. 1991); Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1324 (7th Cir. 1993); Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 828 (11th Cir. 1997); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 608 (6th Cir. 2005).

twenty-six dollars.[74] Although the court found the search unreasonable in scope, the court concluded that *T.L.O.*'s balancing test did not provide fair warning[75] and in most instances left "school officials to speculate as to whether a court applying the balancing test to specific facts would find a search unreasonable."[76] The Sixth and Eleventh Circuits have repeatedly voiced concern that *T.L.O.* does not provide enough guidance to educators or judges.[77] For example, in *Jenkins ex rel. Hall v. Talladega City Board of Education*, the Eleventh Circuit remarked, "[I]t is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion that these defendants—or, more accurately, all reasonable educators standing in defendants' place—should have known that their conduct violated a clearly established constitutional right."[78] As a result, lower courts have been left "either reluctant or unable to define" conduct that is subject to a § 1983 cause of action.[79]

The Supreme Court's decision in *Saucier v. Katz* mandated that courts consider the constitutional question first, and only if a violation is found are courts to decide whether the right was "clearly established" at the time of the incident.[80] *Saucier* reasoned that deciding the constitutional question before addressing qualified immunity benefitted both government officials and the public by promoting clarity in the legal standards for official conduct.[81] But in January 2009, the Court reconsidered *Saucier*'s mandatory sequencing and held that judges were "permitted to exercise their sound discretion" in deciding whether to answer both questions in evaluating qualified immunity.[82]

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74. Thomas *ex rel.* Thomas v. Roberts (*Thomas II*), 323 F.3d 950, 952 (11th Cir. 2003).

75. *Id.* at 956.

76. *Id.* at 954; *see also Beard*, 402 F.3d at 607–08 (finding mass strip search without individualized suspicion to find missing money unconstitutional, however, school officials were still entitled to qualified immunity because the law did not "truly compel" the conclusion that search was unreasonable).

77. *Beard*, 402 F.3d at 607; *Williams*, 936 F.2d at 886; *Thomas II*, 323 F.3d at 954; *Jenkins*, 115 F.3d at 828 (finding that the law was not clearly established so as to vitiate qualified immunity for school officials who twice conducted strip searches of two eight-year-old second graders over missing seven dollars).

78. *Jenkins*, 115 F.3d at 828.

79. *Williams*, 936 F.2d at 886.

80. Saucier v. Katz, 533 U.S. 194, 201 (2001).

81. Wilson v. Layne, 526 U.S. 603, 609 (1999).

82. Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

IV. HOLDING

The Ninth Circuit in *Redding v. Safford Unified School District Number 1* began by setting out the *New Jersey v. T.L.O.* framework for deciding whether the strip search of Redding met the Court's reasonableness requirement.[83] The Ninth Circuit followed the approach of the Second[84] and Seventh[85] Circuits to determine whether the search was justified at inception and concluded that as the intrusiveness of a search intensifies, the reasonable suspicion necessary to justify the search should also intensify.[86] The court treated the searches of Redding as two separate inquiries.[87] First, the court considered whether the search of her backpack and pockets was justified at inception and then moved on to consider whether the strip search was justified at inception.[88] The court concluded that Safford school officials did not have a reasonable suspicion sufficient to justify the highly intrusive strip search of Redding for hidden pills.[89]

The court concluded that Marissa's statement incriminating Savana Redding was self-serving and unreliable.[90] Assistant Principal Wilson failed to fully investigate Marissa's claim and lacked specific information indicating a strip search would reveal hidden pills.[91] Furthermore, because the planner that Redding had loaned to Marissa did not contain any pills, the planner "d[id] not make it significantly more likely" that Redding was responsible for the pills found on Marissa.[92] Finally, the court noted that Redding did not have a disciplinary record that would contribute to forming a reasonable

83. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1079 (9th Cir. 2008).

84. Phaneuf v. Fraikin, 448 F.3d 591, 596 (2d Cir. 2006) (citing M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979) (holding, before the *T.L.O.* decision, that as the intrusiveness of a search intensifies, the reasonableness standard approaches that of probable cause)).

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

86. *Redding*, 531 F.3d at 1081.

87. *Id.*

88. *Id.* at 1081–82.

89. *Id.* at 1085.

90. *See id.* at 1082–83 (noting that Marissa could have incriminated Redding in an attempt to deflect personal responsibility).

91. *See id.* at 1083 (noting initial search of Redding's possessions had not revealed evidence linking her to the pills).

92. *Id.* at 1083–84.

suspicion that she possessed drugs.[93] Therefore the strip search was not justified at inception.[94]

The Ninth Circuit next addressed the scope of the search, weighing the nature of the infraction against the intrusiveness of the search.[95] The court found that the nature of the infraction—the alleged possession of prescription strength ibuprofen—"pose[d] an imminent danger to no one."[96] The court also found that a strip search significantly intruded on a student's legitimate privacy expectations[97] and held that a strip search was excessively intrusive in light of the "minimal nature" of the alleged infraction.[98] The Ninth Circuit concluded that Safford school officials violated Redding's constitutional rights by conducting a strip search that was neither justified at inception nor permissible in scope.[99]

Finally, the Ninth Circuit considered whether Redding's rights were "clearly established" at the time of the search.[100] The court explained that some rights can be inferred from common sense and reason, even when no factually similar cases can be found.[101] The Ninth Circuit held that *T.L.O.*'s legal framework put Safford school officials on notice that under these circumstances a strip search was not reasonable.[102] The Ninth Circuit held that Redding's rights were clearly established and therefore Assistant Principal Wilson was not entitled to qualified immunity.[103]

V. ANALYSIS

The Ninth Circuit applied *New Jersey v. T.L.O.*'s two-prong reasonableness test in a flawed manner because it mistakenly considered the intrusiveness of the search in determining whether the

93. *Id.* at 1084.
94. *Id.* at 1085.
95. *Id.*
96. *Id.*
97. *Id.* at 1085–86 (discussing the psychological trauma caused by a strip search).
98. *Id*. at 1087 (concluding that school officials had neutralized any danger the pills posed).
99. *Id.*
100. *Id.*
101. *See id.* at 1087 (explaining "common sense and reason supplement the federal reporters," and therefore it is not necessary to find a case "on all fours").
102. *Id.* at 1088.
103. *Id.* at 1089.

search was "justified at inception."[104] The Ninth Circuit followed the approach adopted by the Second and Seventh Circuits, both of which found that the level of suspicion needed to justify a search increases with its intrusiveness.[105] But the legal justification for this approach is flawed. The Seventh Circuit did not cite any legal authority, not even *T.L.O.*, for its sliding scale approach, while the Second Circuit relied on a case that *T.L.O.*'s framework has rendered inapplicable.[106] In *T.L.O.*, the Court focused its "justified at inception" analysis on whether the official had reasonable grounds for suspecting a search would produce evidence the student was violating a school policy.[107] The proper question in this analysis is whether *any* search was justified, leaving the *type* of search conducted for the later inquiry into the scope of the search.[108] Despite challenging much of the evidence Assistance Principal Wilson relied upon, the majority conceded that some search of Redding was likely justified in light of the available information,[109] which is sufficient to satisfy the first prong of the reasonableness analysis.[110]

The second prong of *T.L.O.*'s framework, whether the search was permissible in scope, is at "the heart of this case."[111] This prong requires careful consideration of whether, based on all of the circumstances, the search was excessively intrusive.[112] The majority significantly devalued the school's interest in deterring drug use by students, expressing a sentiment that is contrary to clear dictates from the Supreme Court.[113] The Ninth Circuit questioned whether the prescription pills posed a significant threat, but the school policy

104. *See id.* at 1095 n.3 (Hawkins, J., dissenting) (explaining that the intrusiveness of the search should be considered in assessing the scope of a search).

105. Phaneuf v. Fraikin, 448 F.3d 591, 596 (2d Cir. 2006); Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1321 (7th Cir. 1993).

106. *See Phaneuf*, 448 F.3d at 596–97 n.4 (citing M.M. v. Anker, 607 F.2d 588, 589 (1979)) (holding that probable cause is required to justify highly intrusive searches even in a school setting).

107. New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985).

108. *See Redding*, 531 F.3d at 1095 n.3 (Hawkins, J., dissenting) (describing why the two prongs should be meaningfully distinct).

109. *Id.* at 1081 (majority opinion) ("reasonable suspicion may very well have justified the initial search of Redding's backpack and the emptying of her pockets").

110. *Id.* at 1097 (Hawkins, J., dissenting).

111. *Id.* at 1103.

112. *T.L.O.*, 469 U.S. at 342 (considering the age and sex of the student, as well as the nature of the infraction).

113. *E.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 834 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995).

prohibits possession of prescription pills, and school officials' policy determinations are entitled to deference.[114]

Although hindsight might suggest the search in this case was overly intrusive, the school officials faced a potentially dangerous attention that necessitated prompt and decisive resolution. Assistant Principal Wilson knew students had planned to distribute and take prescription pills at lunch.[115] Marissa, a student with firsthand knowledge, claimed that Redding had given her ibuprofen as well as an unidentified blue pill.[116] Administrators were unsure whether Redding had pills in her possession or if she was distributing them.[117] However, confronted with a dangerous scenario similar to one that nearly killed a student the previous year, Assistant Principal Wilson felt immediate action was necessary.[118] Under such circumstances, administrators need flexibility to respond quickly to address situations that threaten student health or safety.[119]

The majority concluded that Assistant Principal Wilson had no specific evidence giving him a reason to suspect that a strip search would reveal evidence of the prescription pills.[120] In a similar case, however, the Sixth Circuit found there were reasonable grounds for a strip search despite uncertainty about whether it would reveal evidence.[121] The small size of the item sought (a vial of white powder) supported the administrator's suspicion even though no specific information suggested where the drugs might be found.[122] The majority's analysis ignored similar facts surrounding the search of Redding, and therefore bears a striking resemblance to the "crabbed

114. *T.L.O.*, 469 U.S. at 342 n.9.
115. *Redding*, 531 F.3d at 1076.
116. *Id*.
117. Petitioner's Brief, *supra* note 7, at 8–9.
118. *Id*. at 4–5.
119. *T.L.O.*, 469 U.S. at 352–53 (Blackmun, J., concurring) (discussing purpose of *T.L.O.* standard); *see also Redding*, 531 F.3d at 1103–06 (Hawkins, J., dissenting) (listing factors that should inform the "scope" inquiry, including the probability of success, the intrusiveness of the search, the nature of the infraction, the ongoing nature of the threat, and whether the behavior threatens students' health and safety).
120. *Redding*, 531 F.3d at 1083.
121. *See* Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 887 (6th Cir. 1991) (holding that even though the school found no evidence of drugs after searching the student's possessions, a strip search was justified because it was reasonable to suspect the student was carrying the drugs on his person).
122. *Id.*

notion of reasonableness" that the Supreme Court rejected in *T.L.O.*[123]

The scope of the search in this case certainly presents a more difficult question, but even if the search did violate Redding's constitutional rights, those rights were not "clearly established." The Ninth Circuit found that *T.L.O.*'s legal framework gave Assistant Principal Wilson fair warning that the search in this case was unreasonable.[124] But cases in the Sixth and Seventh Circuits, also applying *T.L.O.*'s reasonableness test, have held strip searches by school officials constitutional on similar facts.[125] Even in cases in which courts found egregious violations of the plaintiff's rights, school officials received qualified immunity.[126] Several circuits have explained that *T.L.O.* simply does not give enough guidance to school officials for the law to be clear.[127] Indeed, the Supreme Court has stated that when judges disagree about the constitutionality of conduct, government officials should not be subject to civil liability for picking the losing side of the controversy.[128] Despite judicial disagreement over the reasonableness of strip searches, the Ninth Circuit imposed civil liability on Assistant Principal Wilson, a result clearly contrary to the Supreme Court's intentions.

VI. ARGUMENTS AND DISPOSITION

Redding has a strong argument that the scope of the officials' search was unreasonable and violated her constitutional rights.[129] Strip searching a student to find prescription ibuprofen might be unreasonable, even in light of the strong interest schools have in

123. *T.L.O.*, 469 U.S. at 343.

124. *Redding* , 531 F.3d at 1088.

125. *Williams*, 966 F.2d at 887; Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993).

126. *See* Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 828 (11th Cir. 1997) (holding that officials were entitled to qualified immunity when, on two occasions, they strip searched two eight-year-old students to find seven dollars); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 607–08 (6th Cir. 2005) (holding that officials were entitled to qualified immunity for mass strip search of over twenty students without individualized suspicion in order to locate missing money).

127. *Beard*, 402 F.3d at 607; Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 954 (11th Cir. 2003).

128. Wilson v. Layne, 526 U.S. 603, 618 (1999).

129. Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 14–15, Safford Unified Sch. Dist. No. 1 v. Redding, No. 08–479 (U.S. Dec. 11, 2008) [hereinafter Respondent's Brief].

deterring drug use,[130] but to prevail Redding also must prove that *New Jersey v. T.L.O.* establishes a clear framework that put the officials on notice that the search was unreasonable in her case.[131] Redding will argue that courts reviewing school searches have come to different conclusions because the balancing test is fact-sensitive, not because the law is unclear.[132] Yet, Redding's qualified immunity argument is weak and it will be difficult to prevail on that issue.[133]

Safford's strongest argument is that Assistant Principal Wilson is entitled to qualified immunity because the law was not "clearly established" at the time of the search.[134] The Ninth Circuit's conclusion that Redding's constitutional rights were "clearly established" does not seem true when multiple judges have concluded the search of Redding was reasonable.[135] In addition to the disagreement in this case, other courts have found similar searches to be constitutional or found the officers entitled to qualified immunity.[136] It will be difficult, however, for Safford to prove that the scope of the search was justified.[137] Safford officials conducted an extremely intrusive search without any specific evidence regarding the location where Redding was allegedly hiding pills.[138]

Although the Supreme Court could simply conclude that the law was not clearly established and avoid the constitutional question, it is likely the Court will fully address the merits of this case. The Ninth Circuit, following the Second and Seventh Circuits, adopted a sliding scale approach that unnecessarily complicates *T.L.O.*'s two-prong inquiry.[139] This case presents the Court with an opportunity to provide

130. *See* Brief for the United States as Amicus Curiae Supporting Reversal at 21, Safford Unified Sch, Dist. No. 1 v. Redding, No. 08–479 (U.S. Mar. 4, 2009) [hereinafter U.S. Amicus Brief] (arguing that the reasonableness standard would only permit a highly intrusive search if Assistant Principal Wilson had a reasonable suspicion that the drugs were hidden in a place that a strip search would reveal them).

131. Respondent's Brief, *supra* note 129, at 18.

132. *Id.* at 10.

133. *See* U.S. Amicus Brief, *supra* note 130, at 29–33 (concluding Assistant Principal Wilson was entitled to qualified immunity because the law was not clearly established).

134. *See* Petitioner's Brief, *supra* note 7, at 49–52 (arguing that the Ninth Circuit's qualified immunity analysis ignored a vast body of relevant case law).

135. *Id.* at 52.

136. *Id.* at 50–52.

137. *See* U.S. Amicus Brief, *supra* note 130, at 21 (recognizing that the search was not justified in scope).

138. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1084–85 (9th Cir. 2008).

139. *Id.* at 1095–97 (Hawkins, J., dissenting).

further guidance for assessing the reasonableness of school searches. The Court should conclude that a search of Redding was justified at inception, and may even conclude that despite the significant intrusion, the scope of the search was permissible due to the special needs of the school environment. Due to the current lack of guidance for lower courts especially when determining whether a search is excessively intrusive, the Supreme Court may articulate factors for lower courts to consider.[140] Even if the Court finds the search of Redding was unconstitutional, Assistant Principal Wilson is entitled to qualified immunity because the unconstitutionality of the search was not clearly established.

140. *See id.* at 1103–06 (suggesting factors that would help define the contours of the scope analysis).