

SUPREME COURT DISPATCHES

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The Supreme Court is neither hot nor bothered by strip searches.

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When constitutional historians sit down someday to compile the definitive *Supreme Court Concordance of Not Getting It*, the entry directly next to [Lilly Ledbetter](#) ("Court fails utterly to understand [realities](#) of gender pay discrimination") will be Savana Redding ("Court compares strip searches of 13-year-old girls to [American Pie-style](#) locker-room hijinks"). After [today's argument](#), it's plain the court will overturn a [9th Circuit Court of Appeals opinion](#) finding a school's decision to strip-search a 13-year-old girl unconstitutional. That the school in question was looking for a prescription pill with the mind-altering force of a pair of Advil—and couldn't be bothered to call the child's mother first—hardly matters.



[Editorialists](#) and [pundits](#) have found [much to hate](#) in what happened to [Savana Redding](#). Yet the court today finds much to admire. And even if you were never a 13-year-old girl yourself, if you have a daughter or niece, you might see the humiliation in pulling a middle-school honor student with no history of disciplinary problems out of class, based on an uncorroborated tip that she was handing out prescription ibuprofen. You might think it traumatic that she was forced to strip down to her underclothes and pull her bra and underwear out and shake them in front of two female school employees. No drugs were found. But even those justices lacking a daughter, a niece, or a uterus had access to an [amicus brief](#) in this case documenting the fact that student strip searches "can result in serious emotional damage" and that student victims of strip searches "often cannot concentrate in school, and, in many cases, transfer or even drop out." Savana Redding, herself a data point, described the search as "the most humiliating experience" of her life. Then she dropped out of school. And five years later, at age 19, she gets to listen in on oral argument in *Porky's 3: The Supreme Court Says "Panties."*

The case law on school searches is sparse. In [New Jersey v. T.L.O.](#), a 1985 case involving high-schoolers with pot in their purses, the Supreme Court determined that for a student search to be permissible under the Fourth Amendment there must be "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" and that the search cannot be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Yet in recent years, the high court has slowly chipped away at the privacy rights of students—frequently based on the rationale that there were drugs!!! Somewhere in America!!! Drugs!!! Creating danger!!! (This led an annoyed Justice Ruth Bader Ginsburg to [dissent in a recent case](#) that the court was peddling "nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas" to justify drug tests for any student with a pulse.)

Today's argument features an astounding colloquy between Matthew Wright, the school district's lawyer, and Justice Antonin Scalia, who cannot understand why "black marker pencils" are also considered contraband. "Well, for sniffing!" answers Wright. "They sniff them?" asks Scalia, delightedly. "Really?"

Or when Justice Ginsburg complains that the tipster in this case fingered Redding only after she herself was caught with drugs, Justice Samuel Alito muses that "the school could keep records on its students, like the police keep records on confidential informants, so unless this student had a proven record of having accurately ratted out a certain number of classmates in the past, she couldn't be believed."

When Wright suggests kids have no incentive to implicate innocent students because "students can be disciplined if they tell tales," Justice John Paul Stevens asks what discipline was meted out to the girl who falsely ratted out Savana Redding. Wright replies, cheerfully, "Oh, there was no discipline that I know of."

David O'Neill from the Solicitor General's office tries to [thread the needle](#) between allowing schools to conduct daily strip searches for black sniffy markers and chilling the school district's broad power to search for dangerous contraband. He wants the court to impose a higher standard before schools may conduct a strip search but gets into trouble with Scalia, who wonders what happens after "you search the student's outer garments, and you have a reasonable suspicion that the student has drugs." Scalia's almost chortling when he exclaims, "You've searched everywhere else. By God, the drugs must be in her underpants!"

O'Neill responds by explaining that "where you have reasonable suspicion that there is contraband in the underwear, then you could go directly to that location, and you wouldn't have to work from the outside in." Which only really works if the student wears his underwear on the outside, like Superman.

Adam Wolf, the ACLU lawyer who represents Redding, explains that "the Fourth Amendment does not countenance the rummaging on or around a 13-year-old girl's naked body." Wolf explains that he is arguing for a "two-step framework," wherein schools can use a lower standard to search "backpacks, pencil cases, bookbags" but a higher standard when you "require a 13-year-old girl to take off her pants, her shirt, move around her bra so she reveals her breasts, and the same thing with her underpants to reveal her pelvic area." This leads Justice Stephen Breyer to query whether this is all that different from asking Redding to "change into a swimming suit or your gym clothes," because, "why is

this a major thing to say strip down to your underclothes, which children do when they change for gym?"

This leads Ginsburg to sputter—in what I have come to think of as her Lilly Ledbetter voice—"what was done in the case ... it wasn't just that they were stripped to their underwear! They were asked to shake their bra out, to stretch the top of their pants and shake that out!" Nobody but Ginsburg seems to comprehend that the only locker rooms in which teenage girls strut around, bored but fabulous in their underwear, are to be found in porno movies. For the rest of us, the middle-school locker room was a place for hastily removing our bras without taking off our T-shirts.

But Breyer just isn't letting go. "In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, OK? And in my experience, too, people did sometimes stick things in my underwear."

Shocked silence, followed by explosive laughter. In fact, I have never seen Justice Clarence Thomas laugh harder. Breyer tries to recover: "Or not *my* underwear. Whatever. Whatever. I was the one who did it? I don't know. I mean, I don't think it's beyond human experience."

It gets weirder. Wolf claims school administrators should have known better than to suspect that "Savana was currently concealing ibuprofen pills underneath her underpants for other's oral consumption," noting "a certain ick factor to this." The Chief Justice quickly replies that the ick factor doesn't attach when you are talking about "the brassiere as well, which doesn't seem as outlandish as the underpants, right?"

Oh, ick indeed. The search for a bright line rule about the expectations of student privacy has turned into a fight between a bunch of guys who still say "brassiere."

By now, even Justice David Souter has ditched Wolf, musing that if he were the principal in a school, he "would rather have the kid embarrassed by a strip search ... than have some other kids dead because the stuff is distributed at lunchtime and things go awry."

On the courthouse steps after argument today, Redding is asked what she'd have wanted the school to do differently. "Call my mom first," she says. You see, we now have school districts all around the country finding naked photos of teens [and immediately calling in the police](#) for possession of kiddie porn. Yet schools see nothing wrong with stripping these same kids naked to search for drugs. Evidently teenage nakedness is only a problem when the children choose to be naked. And the parents? They are always the last to know.