

No. 18-1173

IN THE
Supreme Court of the United States

JANE DOE, AND I.B., BY
AND THROUGH HER NEXT FRIEND JANE DOE,
Petitioners,

v.

APRIL WOODARD, CHRISTINA NEWBILL,
SHIRLEY RHODUS, AND RICHARD BENGTTSSON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF FOR *AMICUS CURIAE* PACIFIC
JUSTICE INSTITUTE IN SUPPORT
OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The Pacific Justice Institute (PJI) is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented hundreds of parents in the area of parental rights against intrusive actions by state actors. As such, PJI has a strong interest in the development of the law in this area.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the matter before this Court, a child became the subject of two strip searches at the ages of three and four while enrolled in a Head Start program. Head Start serves as a federally funded preschool in which children engage in a course of age-appropriate studies conducted by a teacher.² Although not a K-12 public school, Head Start primarily functions as an educational institution for very young children. Indeed, this program meets on public school campuses.³ In this case, a social worker appeared at the school where the strip searches took place on school grounds, during school hours, and in front of a teacher and another school employee. Because the searches took

1. This brief is filed with the consent of all parties. No party, or party's counsel, authored any part of this brief. Further, no person or entity contributed money or otherwise paid to draft and submit this brief except *amicus curiae*, Pacific Justice Institute.

2. Head Start Programs. <https://www.acf.hhs.gov/ohs/about/head-start> (Accessed April 13, 2018).

3. CDCP Core Programs. <https://www.cpcdheadstart.org/our-programs> (Accessed April 13, 2018).

place at a school, the development of case law related to searches within a school setting merits review.

This brief addresses the issue of the psychological impact of a strip search for all persons and then the aggravated trauma of such a procedure on the young.

ARGUMENT

I. The Circuit Courts Of Appeals Uniformly Deem Strip Searches As A Trauma To The Ordinary Reasonable Person.

The First Circuit found a strip search constitutes an “extreme intrusion” on personal privacy and an offense to the dignity of the individual.⁴ Speaking for a unanimous court in the Second Circuit, Judge Katzman put forward the almost universally agreed upon proposition that “one of the clearest forms of degradation in Western Society is to strip a person of his clothes.”⁵ Due to the highly intrusive nature of a strip search, the Third Circuit saw the procedure as “fraught...with the inherent potential to degrade, demean, dehumanize, and humiliate.”⁶ The Fourth Circuit gave a nod to the self-evident proposition that strip searches “are ‘undoubtedly humiliating and deeply offensive to many.’”⁷ Likewise, the Sixth Circuit

4. *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir.1996). *Roberts v Rhode Island*, 239 F. 3d 107, 110 (1st Cir. 2001).

5. *Harris v. Miller*, 818 F.3d 49, 58-59 (2d Cir. 2016) (quoting 3 George B. Trubow, ed., *Privacy Law and Practice*, 25.02[1] (1991).

6. *Reppert v. Marino*, 259 F. App’x 481, 492 (3d Cir. 2007).

7. *Cantley v. W. Va. Reg’l Jail & Corr. Facility Auth.*, 771 F.3d 201, 208 (4th Cir. 2014) (quoting *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 341 (Alito, J. concurring)).

described a visual strip search as “an offense to the dignity of the individual.”⁸ Judge Wood from the Seventh Circuit described strip searches as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, and repulsive.”⁹ The Eighth Circuit noted that regardless of how professionally and courteously conducted, strip searches pose an embarrassing and humiliating experience.¹⁰ The Ninth Circuit deems such searches as “invasive and embarrassing”¹¹ and “we have consistently recognized the ‘frightening and humiliating invasion’ occasioned by a strip search, ‘even when conducted with all due courtesy.’”¹² Twenty-five years ago the Tenth Circuit articulated that exposing one’s self for visual inspection by a stranger clothed with the uniform and authority of the state as a “degrading and frightening” experience.¹³ Judge Hatchett for the Eleventh Circuit wrote, “It is axiomatic that a strip search represents a serious intrusion upon personal rights.”¹⁴

8. *Williams v. City of Cleveland*, 771 F.3d 945, 952 (6th Cir. 2014) (quoting *Stoudemire v. Mich. Dep’t of Corr.*, 705 F.3d 560, 573 (6th Cir. 2013).

9. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

10. *Hunter v. Auger*, 672 F. 2d 668, 674 (8th Cir. 1982).

11. *Bull v. City and County of San Francisco*, 595 F. 3d 964, 975 (9th Cir. 2010).

12. *Byrd v. Maricopa County Sheriff’s Dep’t*, 629 F.3d 1135, 1143 (9th Cir. 2011). quoting *Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2005).

13. *Chapman v. Nichols*, 989 F. 2d 393, 396 (10th Cir. 1993); citing *John Does 1-100 v. Boyd*, 613 F. Supp. 1514 (D. C. Minn.1985).

14. *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992).

Recognized as harmful on all persons by nearly all circuits, the courts view strip searches of minors as particularly troubling. The Second Circuit wrote, “Since youth . . . is a . . . condition of life when a person may be most susceptible . . . to psychological damage . . . [c]hildren are especially susceptible to possible traumas from strip searches.”¹⁵ Writing for a unanimous court, Judge Fuentes of the Third Circuit opined, “Strip searches impose the substantial risk of psychological damage for juvenile detainees.”¹⁶ The Fifth Circuit observed that “adolescent vulnerability intensifies the patent intrusiveness of a strip search.”¹⁷ Finally, within the context of juvenile arrests, the Eleventh Circuit found that “strip searches are a serious intrusion upon personal rights.”¹⁸

Effects of the intrusiveness on personal rights remain both haunting and damaging to persons subjected to a strip search for many years. Mental health practitioners recognize that people who experience strip searches often suffer psychological symptoms of trauma similar to those endured by rape survivors.¹⁹ Anecdotally, courts across the country note the many testimonials of victims subject

15. *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 233 (2d Cir. 2004).

16. *J.B. v. Fassnacht*, 801 F.3d 336, 342 (3d Cir. 2015).

17. *Mabry v. Lee Cnty.*, 849 F.3d 232, 236 (5th Cir. 2017) (citation and quotation marks omitted).

18. *City of Peachtree City*, 961 F.2d at 192. (quoting *Mary Beth G. v. City of Chicago*, 723 F. 2d 1263, 1272 (7th Cir. 1983)).

19. Daphne, Ha, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 Fordham L. Rev. 2721, 2740 (2011).

to strip searches and attest to the resulting damages of such searches.

In Massachusetts, a woman who was stopped in an airport and subjected to a body cavity search reported that she suffered from a series of post traumatic symptoms including depression, suicidal ideations, and insomnia.²⁰ In a matter arising out of the Eleventh Circuit, police pulled over and arrested a woman for aggressively honking her horn in a high traffic area. Physicians subsequently diagnosed her with post-traumatic-stress-syndrome as a result of her strip search.²¹ Similarly, in the First Circuit, a woman strip searched before visiting her brother in prison experienced “substantial harm including PTSD, severe sexual dysfunction, guilt, and depression.”²² Women find it extremely difficult to talk about such searches of their bodies. “It was just the most horrifying thing that I have ever gone through, I could not tell my husband. I could not tell my family, I couldn’t tell anyone. It was such a traumatic thing to me I couldn’t even talk about it.”²³ Other reported symptoms include “instances of shock, panic, depression, shame, rage, humiliations, and nightmares.”²⁴

The cases reviewed above demonstrate that the Courts of Appeals universally view strip searches as a

20. *Adedeji v. United States*, 782 F. Supp. 688, 702 (D. Mass. 1992).

21. *Lee v. Ferraro*, 284 F. 3d 1188, 1192 (11th Cir. 2002).

22. *Blackburn v. Snow*, 771 F. 2d 556, 571-572 (1st Cir. 1985).

23. *Daphne*, *supra*, at 2739.

24. *Mary Beth G.*, 723 F. 2d at 1275.

highly unpleasant experience for an adult. That is a view that is reached by common sense and the ordinary human experience. But the social science literature goes further, showing that such an intrusive examination foists a unique harm on a child of tender years.

II. Academic Studies Support The View Of The Courts Regarding The Trauma Caused By Strip Searches.

The court in *Oklahoma v. Eddings* noted that “[youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”²⁵ This statement rings true for children subjected to such visual inspections of their bodies by strangers. Indeed, “[c]hildren are especially susceptible to possible traumas from strip searches.”²⁶

Unquestionably, childhood resides in a time of great modesty and privacy of one’s body parts.²⁷ Like the common archetypal dream of appearing nude in a public place, a child’s imagination of sexual abuse typically takes the form of standing naked in front of others.²⁸ The dark twist in the matter rests in the fact that while many children find themselves strip searched for the purpose of finding evidence of abuse, from the perspective of the

25. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

26. *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988).

27. Steven F. Shatz, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991). citing Psychological evaluation of E.B., at 2-3, Basurto, No. Civ.S 86-1457 EJG. Expert witness in *Basurto v McCarthy*.

28. *Id.*

child, the strip search in itself comprises a form of abuse to the child. Professor Coleman of Duke Law School explains, “In the ultimate irony, children who are subject to genital examinations appear to experience the investigatory examinations as sexual abuse.”²⁹

In sexual abuse cases, two factors correlate most highly with trauma. The first trauma factor centers on the use of force or coercion by the abuser. The second factor creating trauma revolves around the substantial age difference between the abuser and the victim.³⁰ In a strip search of a child, both of these factors are present.³¹ The child finds herself coerced to remove her clothes by an adult.³² In that situation, the child of ordinary sensibilities experiences trauma as she stands naked before an unfamiliar adult arrayed in authority.

A child can also experience trauma from strip searches conducted by a person to which the child possesses no attachment of trust.³³ Literature from developmental biology and child psychology point to the finding that children at a very young age develop a sense of attachment to their primary caregiver, while developing a sense of fear and trepidation to those

29. Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of A Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 520-21 (2005).

30. Shatz, *supra* note 33, at 13.

31. *Id.*

32. *Id.*

33. Coleman, *supra* note 35, at 515-16.

they do not know.³⁴ Indeed, this phenomena begins in infancy.³⁵ Babies often become distressed when placed in a stranger's arms, but in such a situation, returning the baby to someone they know can put them back into a calm state.³⁶ While infants seem hardwired with this sense of familiarity versus unfamiliarity, as children grow older this characteristic intensifies as they develop a recognition of strangers.³⁷ Children develop "zones of privacy that almost by definition recognize[] government officials as quintessential strangers."³⁸ Thus, to a child a social worker enters the scene as a stranger.

A child's growing sense of self remains attendant upon an understanding that the child controls their personal information and modesty and can keep these from unfamiliar persons.³⁹ When a child recognizes that they can determine whether and to what degree others can access them, they develop an autonomous self-concept.⁴⁰ As children grow and learn about privacy and secrecy, they develop an awareness that things remain hidden

34. *Id.*

35. Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, Not A Determinative One*, 46 Fam. L.Q. 1, 5 (2012).

36. *Id.*

37. Coleman, *supra* note 35, at 516.

38. *Id.*

39. Kupfer, Joseph, *Privacy, Autonomy, and Self-Concept*, 24 Am. Phil. Q. 81 (1987).

40. *Id.*

unless the child chooses to reveal them.⁴¹ Thus, privacy fosters a perception of control and certainty for a child as they develop a sense of autonomy.

Justice Brandeis deemed the right to privacy as “the right most valued by civilized men.”⁴² Privacy comprises the catalyst that promotes core principles of identity and autonomy for mankind. Moreover, privacy allows the individual to maintain identity and self-esteem by controlling self-disclosure.⁴³

Not surprisingly, when a breach of the ordinary barriers that create privacy occurs through the means of a strip search, negative results ensue. Children are especially susceptible to damages from such an intrusion. Studies in the field of psychology support findings that a child experiences the impact of a strip search in a greater degree than an adult, because the development of a sense of privacy remains critical to a child’s maturation.⁴⁴ “The body constitutes the major locus of separation between the individual and the world and is in that sense the first object of each person’s freedom.”⁴⁵

41. *Id.*

42. David C. James, *Constitutional Limitations on Body Searches in Prisons*, 82 Colum. L. Rev. 1033, 1049 (1982).

43. *Hill v. Nat’l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 25, 865 P.2d 633, 647 (1994).

44. Shatz, *supra* note 33, at 11.

45. Scott A. Gartner, *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, 928 (1997) citing Laurence H. Tribe, *American Constitutional Law* § 15-9, at 1330 (2d ed. 1988).

But strip searches deprive the body of the essential personal freedom of privacy. In view of the importance of privacy expressed through modesty in a small child, the reasonableness of a search at a preschool must take into account the “age and sex” of the student.⁴⁶ The “indignity of the search does not . . . outlaw it, but it does implicate the rule of reasonableness.”⁴⁷

CONCLUSION

A strip search demeans, frightens, and traumatizes. Because the injury from such stands as particularly harmful to children of tender years, review of this Petition is necessary to provide needed clarity of the liberty interest of a very vulnerable class of persons.

Respectfully submitted,

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

47. *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364, 375 (2009).