New Jersey,

Petitioner,

—v.— No. 83-712

T.L.O., a Juvenile

Respondent.

Washington, D.C.
Tuesday, October 2, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

BEFORE:

WARREN E. BURGER, *Chief Justice of the United States*
WILLIAM J. BRENNAN, JR., *Associate Justice*
BYRON R. WHITE, *Associate Justice*
THURGOOD MARSHALL, *Associate Justice*
HARRY A. BLACKMUN, *Associate Justice*
LEWIS F. POWELL, JR., *Associate Justice*
WILLIAM H. REHNQUIST, *Associate Justice*
JOHN PAUL STEVENS, *Associate Justice*
SANDRA DAY O'CONNOR, *Associate Justice*

APPEARANCES:

ALLAN J. NODES, ESQ., *Deputy Attorney General of New Jersey, Trenton, New Jersey; on behalf of the Petitioner.*

LOIS DE JULIO, ESQ., *First Assistant Deputy Public Defender, East Orange, New Jersey; on behalf of the Respondent.*

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in *New Jersey* against *TLO*.

Mr. Nodes, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALLAN J. NODES ON BEHALF OF THE PETITIONER

MR. NODES: Mr. Chief Justice, and may it please the Court, last term the state of New Jersey argued before this Court that the Fourth Amendment exclusionary rule should be held inapplicable to school searches conducted by schoolteachers and school administrators.

Following argument, this Court requested additional briefing and argument on the issue of whether under the facts and circumstances of this particular case—the vice principal's search of the student's purse—violated the Fourth Amendment at all.

We suggest that there was no constitutional violation in this case. We argue firstly that the Fourth Amendment should be held inapplicable to school searches. That amendment was intended as a deterrent to law enforcement officers and police officers and was not intended to be used against private citizens or against those who act *in loco parentis*.

We believe that schoolteachers do act *in loco parentis*. I will address the *in loco parentis* functions of schoolteachers later in my argument, and I would refer to my brief for the remainder of the argument concerning the applicability of the Fourth Amendment.

We would also urge that—

QUESTION: You mean of the exclusionary rule, don't you?

MR. NODES: I beg your pardon?

QUESTION: You mean of the exclusionary rule?

MR. NODES: Of the exclusionary rule or the Fourth Amendment. We would reply on the briefs for the exclusionary rule and for the application of the Fourth Amendment. I would like to argue the standard to be applied assuming that the Fourth Amendment is held to be applicable to school searches.

And we believe that the standard which should be applied to school searches should be lower than probable cause, and in fact should be a standard of reasonable suspicion.

QUESTION: Mr. Nodes, assuming the applicability of the Fourth Amendment, do you think that on this record there was probable cause for the search?

MR. NODES: Yes, I do, Your Honor. I believe that what we had in this case was an instance where a person who was very, very reputable witnessed an action which was a violation of a school regulation. He reported this violation to another person, who is also reputable.

Now, what he said was, he saw a cigarette in a person's hand, and I believe that it is pure common sense to believe that when one sees a cigarette in a person's hand, that that person will also be carrying cigarettes in a pack somewhere on their person. So, I—

QUESTION: Or, that the person is holding it in the hand because they intend to smoke it or are smoking it? Because they are going to smoke it?

MR. NODES: Yes. The fact that they have the cigarette indicates firstly that they are smoking it, secondly, that they have cigarettes, and I believe that that is all the vice principal actually needed in this case.

QUESTION: Well, Mr. Nodes, assuming again the applicability of the Fourth Amendment, if you are right that there was probable cause shown here, why should we address the question whether something less would satisfy?

MR. NODES: Well, I believe for two reasons. Firstly, I don't believe that it is settled that probable cause should be the standard to which schoolteachers should be held. In this case, of course, the New Jersey Supreme Court found that there wasn't probable cause and there wasn't even reasonable suspicion, even though we argued all along that probable cause was present.

The mere fact that we have met the highest possible standard, or that we argue that we have met the highest possible standard which could be enunciated does not mean that this Court could not set forth the appropriate standard for lower courts to follow in future cases.

I believe that—

QUESTION: Or that this Court could disagree with you that there was probable cause in this particular case.

MR. NODES: Very clearly this Court could disagree with that, and then it would be necessary to determine what lower standard would apply and whether or not we had met that lower standard.

QUESTION: What was the rule of the school? It was no smoking, right?

MR. NODES: There were school rules that there was no smoking in certain areas. TLO—

QUESTION: And she was smoking in that area?

MR. NODES: Yes, that is correct.

QUESTION: Isn't that the end of the case? Why do you have to go and search?

MR. NODES: Well, I think that, Your Honor, the reason why we did go and search, and it may very well be that we did not have to go and search, but the reason that we did go and search was that the principal was trying to be fair to the student. Rather than merely accepting the word of the teacher who said, "I saw two students smoking," he had a—

QUESTION: Well, suppose that the teacher reported that the child had cursed. Would that be enough? You wouldn't have to get additional proof for it, would you?

MR. NODES: No, I don't believe that it would be necessary to get additional proof.

QUESTION: Why do you need extra proof here?

MR. NODES: I don't believe that we had—

QUESTION: Well, didn't she deny it?

MR. NODES: I do not believe we had to have additional proof here. That does not mean that it is wrong for us to obtain additional proof.

QUESTION: Well, I am just raising the question. Is it necessary to violate somebody's rights in order to add on to the necessary ingredients for conviction?

MR. NODES: No, we would not advocate violating somebody's rights in order to add additional evidence.

QUESTION: I can understand—you didn't need to search to get the—I don't mean conviction, the action of the school board. You didn't need the search.

MR. NODES: We could have—the vice principal could have disciplined TLO without the search. I do not agree that we had to violate somebody's rights in order to get additional evidence. I believe that the vice principal was able to get the additional evidence with absolutely no violation of the person's rights.

What the vice principal ended up doing was listening to what the student had to say. The student presented a defense. The vice principal talked to the student and asked the student what the student had to say for herself. Under *Goss* v. *Lopez,* this was the proper standard.

I believe that it is appropriate, not mandatory, but appropriate then—

QUESTION: What is the defense to—because she wasn't smoking?

MR. NODES: The defense was a total denial of smoking, and the additional element—

QUESTION: Did she say that?

MR. NODES: —that she couldn't have been smoking then because she never smoked at all. And I believe that by demonstrating whether or not this person smoked, the vice principal had a much better idea of whether or not she was smoking on that particular occasion.

Yes, the vice principal could have said to TLO, "TLO, I am going to believe the teacher, who is totally credible, and I am going to assume without checking anything that you are lying to me." I think the vice principal tried to act more reasonably than that.

I think the vice principal tried to ensure that the school regulations were followed, but at the same time was also trying to ensure that a possibly innocent person wasn't punished. And

I think that an action of that type should be condoned rather than criticized.

QUESTION: All I can say is, schools are different from when—when I went to school, if a teacher said something, the vice principal believed the teacher and not the student.

[General laughter.]

QUESTION: That was when I went to school.

MR. NODES: That could very well be the case.

[General laughter.]

Your Honor, I would suggest also when I went to school searches were allowed much more easily.

QUESTION: I never got one hearing the whole time I was in school.

MR. NODES: But this Court has now decreed that in certain circumstances there will be at least limited hearings, and I think that this is what the vice principal followed. He did give a limited hearing before imposing discipline, and he didn't just give a pro forma hearing and at the end of the hearing say, okay, now I am going to ignore what you said.

He checked what the juvenile had said, and he checked what the juvenile said in an extremely reasonable manner, because we believe that at the very least he had a reasonable suspicion that an infraction had occurred, and that evidence of the infraction—

QUESTION: May I ask you, in the prior argument you seemed to accept the standard that the New Jersey Supreme Court laid down. I am not sure whether you still do or not.

MR. NODES: The standard reasonable suspicion, the name reasonable suspicion is—

QUESTION: That is not my question.

MR. NODES: Yes, we—

QUESTION: My question can be answered yes or no.

MR. NODES: Do I accept the standard—

QUESTION: That they laid down.

MR. NODES: No, I do not.

QUESTION: I didn't think—you have changed your position, haven't you?

MR. NODES: I think that that is a proper interpretation. I believe that the name reasonable interpretation is an appropriate name for a standard.

QUESTION: But the question, I suppose, is reasonable suspicion of what, and in your view I gather it is a suspicion of any violation of any school regulation would justify a search, whereas they say it has to be suspicion of a crime or of something —a major disorder. Is that right?

MR. NODES: No. I believe that they said crime or violation of school disciplinary regulations.

QUESTION: Would seriously interfere with school discipline or order.

MR. NODES: Yes, I don't think that first of all it would have to be a serious infringement, and I don't think—

QUESTION: So you disagree with that part.

MR. NODES: So I disagree with that part, but more than that, I disagree with their application of the announced standard to this case.

QUESTION: I understand, but you also do disagree with their standard. You would take the view, I take it, that if there was reasonable suspicion that the purse contained, say, a note or a diary or something that would disclose a violation of any rule, the rule requiring students to be on time for athletic games or something like that, they could still search?

MR. NODES: I think that you have to evaluate the need for the evidence and whether or not—

QUESTION: Well, the purpose is exactly the same, to find out if there is evidence of infraction of a school regulation that does not involve harm, physical harm or anything like that, just the child may have been late to school. Could they search to determine that?

MR. NODES: Yes, I believe that they could, provided that student is carrying that diary and that information with them. I believe that that would be constitutionally permissible.

QUESTION: Mr. Nodes, would you believe that if a reasonable

suspicion standard is applied, that it would have justified a strip search of the pupil in this case?

MR. NODES: I believe that when we are dealing with what we are classifying generally as school searches, we are talking about searches which would normally be made for violations of school regulations and school disciplines rather than law enforcement searches.

QUESTION: What standard do we apply to determine the validity of the search, assuming one is authorized? How far can you go in the search?

MR. NODES: I believe that a search of, for instance, lockers, items which a person carries into school, or searches of clothing or pockets would be within the normal area which a teacher under the normal functions of a teacher could search. I believe—

QUESTION: Do you think then that a male teacher could conduct a pat-down search of a young woman student at age 16 to find the cigarettes?

MR. NODES: I believe that that would be constitutionally permissible. I would note that as in the area with airplane searches and with most police searches, if it can be avoided, that simply is not done. I don't expect that that is something which would occur.

Now, if that does occur, if there is a pat-down of a female by a male teacher or administrator, or if there is a strip search, and that search is for anything except a constitutionally permissible purpose, if there is any evidence of harassment or anything of that type, of course, other actions can be brought, the same as they could against—

QUESTION: Well, do you concede that there would be a further requirement in any event that the extent of the search itself would have to be reasonable under the circumstances considering the age and sex of the child and the circumstances?

MR. NODES: Yes, I would agree with that. I would agree that we are not advocating strip searches of students to find out whether or not they have been smoking cigarettes, and I don't think that that is what is normally held to be a school search, and in fact I believe that there are the laws, the regulations, and possibly other parts of the Constitution—

QUESTION: Well, I am more concerned with your view of what the Constitution requires rather than your view of what is normally done in the school scene.

MR. NODES: I believe that the extent of the search could become part of the standard, and while it might be reasonable to search a person's pockets, search a person's jacket, the person's locker, or person's purse for a certain item, it would not in many instances, possibly the same circumstances, be permissible to strip search the student.

I think it would almost never be permissible.

QUESTION: If the school official suspected the commission of a crime and called a policeman to the scene, would the policeman conducting a search at the school have a higher standard in any event, in your view?

MR. NODES: I believe when it becomes a police search—

QUESTION: Probable cause?

MR. NODES: —yes, a higher standard, possibly probable cause, depending on the circumstances, would apply.

QUESTION: Is there any regulation against the possession of cigarettes?

MR. NODES: In this particular case, there was no regulation in this school against the possession of cigarettes. It was permissible for the student to possess cigarettes. The search which—

QUESTION: Are you going to get to the question of whether there is a difference between people on the street and students in the school?

MR. NODES: I am not sure I fully understand Your Honor's question.

QUESTION: The difference between a man or a woman walking on the street, downtown Washington, and a student, a minor, in a school.

MR. NODES: Well, I believe that there are many differences between a person on the street—I believe that first of all there may be a difference between a minor on a street carrying a purse—

QUESTION: Well, we don't have to worry about a minor on the street. We are worrying about a minor in the school here, and the comparison I am surprised you haven't made in your analysis is that there is a difference between a student who has been sent to school by the parents and is required by law to go to school in the school quarters and a person walking on the street, an adult.

MR. NODES: Well, I believe that when a student is sent to school, of course, the school and the state takes on a responsibility for ensuring not only that that student is educated, but also that that student is safe and secure while in school, and that discipline is maintained while in school.

QUESTION: Well, Mr. Nodes, you think there is such a difference that the Fourth Amendment shouldn't apply at all?

MR. NODES: I believe—

QUESTION: That was your first submission.

MR. NODES: Yes, I believe that there is such a significant difference in the function performed by the schoolteacher during the school day that the Fourth Amendment shouldn't apply. However, the same arguments would also be applicable concerning a reduced standard.

QUESTION: Right.

MR. NODES: The teacher does act in an *in loco parentis* manner during the school day. Now, it is possible that since the advent of mandatory compulsory education up until a certain age, that the traditional Blackstonian views and reasons for imposing the *in loco parentis* doctrine would no longer apply.

However, when we look at what is happening in fact, it is clear that as far as the supervision of juveniles, the teacher acts *in loco parentis*. Firstly, the student spends as much as a third of his or her day attending a public school. During that period, the teachers and administrators provide the only supervision which that juvenile—that student has, and in many ways they take the place of and perform the functions of parents.

QUESTION: That's correct.

QUESTION: And does that mean that their authority then to make searches, if the Fourth Amendment is completely inapplicable, extends to any kind of search, strip search or otherwise?

MR. NODES: I believe that if the Fourth Amendment is inapplicable, of course, the Fourth Amendment would not itself forbid strip searches. However, I think that strip searches are such an egregious example, and the courts, the circuit courts, have continuously held this, that there could quite possibly be another constitutional violation.

QUESTION: What one?

MR. NODES: It is possible that under *Rochin,* for instance, this would be considered such an invasion of the person's privacy, and such an unwarranted invasion, that it would be constitutionally impermissible. However, I think that even that—it would not be necessary to use that.

I believe that strip searches can be stopped very easily without the Constitution, and I might note that in many of the strip search cases there has been either a finding of no constitutional violation or there has been no punishment of the violators. I believe primarily the cases say no punishment of the violators because of the circumstances.

But for two reasons, those searches will be stopped. First of all, I believe that in all states people are becoming more sensitive to strip searches whether they are conducted by law enforcement authorities or by other persons, and there are laws now which limit even the authority of a police officer to conduct a strip search.

However, maybe even more importantly, the factors which were noted in *Ingraham* v. *Wright* by this Court—

QUESTION: Well, if I understand your argument, though, Mr. Nodes, it is that because the Fourth Amendment is inapplicable, nothing in the Fourth Amendment can restrain a strip search of a student by a teacher?

MR. NODES: I believe that that would be correct, yes.

QUESTION: What is the basis for that argument? You are saying they are not unreasonable searches? Is that what it is? In terms of the text of the Fourth Amendment.

MR. NODES: As far as the text of the Fourth Amendment—I believe that the Fourth Amendment was directed at the state acting as the state. Now, in certain circumstances I believe that the state can take on a role which is traditionally held by private persons.

QUESTION: So what you are saying is, it is not unreasonable.

MR. NODES: It is not unreasonable—

QUESTION: Even a strip search is not unreasonable.

MR. NODES: Yes. That is not unreasonable. It would not be unreasonable for a private person, and in this instance it is not unreasonable for the state.

QUESTION: Are you saying that the school and the teachers and the authorities stand in the shoes of the parent?

MR. NODES: Yes, at least as far as the supervision and welfare of the student is concerned. The schoolteachers and administrators ensure that the students arrive at school properly. They ensure that they behave while they are in school. They maintain discipline.

If there is an injury or sickness, the schoolteacher or school administrator is the first person responsible for taking care of that. In many instances, a parent can't be contacted. The school makes the decision as to whether or not a doctor or a hospital will be called in.

QUESTION: Well, Mr. Nodes, we are dealing here with a public school, are we not?

MR. NODES: Yes, we are.

QUESTION: And there are laws requiring children to attend that school, whether they want to or whether their parents want them to or not. Isn't that so?

MR. NODES: That's correct.

QUESTION: And you contend that this isn't state action then, when the state acting in the school setting conducts a search? Is that your position?

MR. NODES: No, I would not say that there is no state action involved in this case. What I would say—

QUESTION: Now, we found state action, I suppose, for occupational and health safety inspections, and for welfare workers, and in other administrative agency searches, have we not?

MR. NODES: Yes, the Court has.

QUESTION: But you think somehow schools are different, even though the law requires the student to be there?

MR. NODES: Yes, I do, and maybe it isn't even though the law requires the student to be there, quite possibly. I believe it is because the law requires the student to be there, the state has intentionally taken on a function which the parent normally exercises. The state does have, obviously, the ultimate *parens patriae* function, to ensure the welfare of all students.

However, that function is normally taken over by the parent. When the state takes that function back and says for a period of time, and for as much as a third of the student's day, we will take custody of the student, and we will ensure that during this period the student's well-being is maintained, in addition to educating the student, then I believe it becomes reasonable for the person who has not only these functions but also these responsibilities to act under different standards than the state would normally act under.

QUESTION: Would that go to a reform school?

MR. NODES: I believe that a reform school—

QUESTION: Are you saying that the Fourth Amendment doesn't apply in the reform school?

MR. NODES: I believe that either my argument that the Fourth Amendment doesn't apply or that a lower standard is required would apply to a reform school, yes.

QUESTION: Why don't you take the position it is not involved in this case?

MR. NODES: I beg your pardon?

QUESTION: Why don't you take the position that the question is not involved in this case? Isn't it that you want the broadest rule you can get?

MR. NODES: No, I am not—

QUESTION: Isn't that what you are up to?

MR. NODES: No, no, I am not asking for the broadest rule I can get. I was attempting to answer—only answer Your Honor's question. I don't believe that that is necessary for this case.

However, I do believe that it is an example of the function which the state takes over. Your Honor used the term "reform

school." Very often the state takes custody of a juvenile even though the juvenile has done nothing wrong.

In New Jersey we have shelters for juveniles who are in need of supervision, and juveniles placed in these facilities can be there simply because their parents haven't taken care of them, and I believe that that would be similar to the school situation, where the state has taken over part of the function of the parent.

QUESTION: You are arguing the Fourth Amendment issue because the Court directed you to argue it. Is that not so?

MR. NODES: That's correct. We do believe, again, that if the Fourth Amendment does apply, that a standard lower than probable cause is warranted, and I think that although the *in loco parentis* arguments would also have application here, and although I think it is apparent that students have a lesser expectation of privacy while attending a public school than they would have on the street, I believe that very simply the educational system cannot properly operate if teachers are required to abide by a probable cause standard.

We must have discipline in the schools, and this discipline cannot be maintained by teachers who are encumbered by the same rules and regulations as police officers are.

QUESTION: Mr. Nodes, assume for a moment that the New Jersey court is correct in saying that the Fourth Amendment applied, that a reasonable suspicion standard was the appropriate standard for review. Do you think that that means individualized suspicion under the New Jersey rule, or would that mean, for example, that if the school authorities suspected there were drugs being used in the restrooms, they could install two-way mirrors or listening devices based on a generalized suspicion?

MR. NODES: Your Honor, I think that that probably would be determined by the type of investigation which they were attempting to conduct. I am not sure exactly how far they could go with minor school violations.

QUESTION: Well, I was curious to know what you thought the New Jersey rule was, whether it required individualized suspicion or something else.

MR. NODES: I believe that the New Jersey court was, because of the contours of this case, talking about individualized sus-

picion, and they simply weren't faced with a standard where a school had to take care of a situation, for instance, where knives were being brought to school every day, and they might have to search students coming into the school to make sure there were no knives being brought in. That could raise a whole new set of problems, but the New Jersey court didn't have to deal with those questions in this case.

QUESTION: Mr. Nodes, you are not adopting the New Jersey court standard, and I would be interested to know your answer to Justice O'Connor's question. Supposing the school had reasonable suspicion that the restroom was being used to smoke in, as was the case here. Could they put in two-way mirrors?

That you can answer yes or no.

MR. NODES: I believe that they could put in two-way mirrors. I believe other things—

QUESTION: Under your standard, they clearly could.

MR. NODES: Yes, they could. I believe even if the Fourth Amendment applied under the reasonable suspicion standard they could, or they could search students on their way into the restroom.

QUESTION: Why would you need reasonable suspicion of anything under the Fourth Amendment to put two-way mirrors in a restroom? That is—you know, why is that a violation of the Fourth Amendment at all, to do that?

MR. NODES: I am not sure that it would be.

QUESTION: No, I am not either.

QUESTION: You don't think there is any expectation of privacy in a restroom?

[General laughter.]

MR. NODES: There are many—

QUESTION: That is a serious question.

MR. NODES: I understand.

QUESTION: Apparently you don't.

MR. NODES: I understand that, but I would assume that the two-way mirrors would replace the mirrors which would already be up in the men's room, and I assume that that would

be the mirrors in front of which you normally stand to comb your hair or make sure that your clothing is appropriate, and things like that. I don't believe that the more private areas of a men's room are going to have mirrors, two-way or otherwise. So that was the assumption that I was making in my question—I mean, in my answer.

In this case, we believe that the problem with the standard as enunciated by the New Jersey Supreme Court—again, assuming the Fourth Amendment applies—is that the court acted as if it were actually operating under a probable cause standard and as if it were actually evaluating the actions of a police officer. The court first drew a line between a good hunch and a reasonable suspicion. They admitted that there was probably a good hunch, but said that there wasn't a reasonable suspicion.

I believe it is very hard to draw a line of this type, and as I said before, I believe that at the very least there was a reasonable suspicion in this case. However, I think more importantly what the Court should be looking to is a common sense approach to the problems that schoolteachers face each day while trying to maintain order and discipline in schools.

And I don't believe that if the courts are going to evaluate situations like this with the strictness that they evaluate police officer searches, that it is going to be possible for teachers, first of all, to know what they can and cannot do, and secondly, for them to be able to maintain any order and discipline.

I think that a much more common sense approach is needed in judicial review of the standard, assuming that a reasonable suspicion standard is adopted. I believe that the vice principal in this case did take a very reasonable and did take a very common sense approach to ensuring that both school regulations were followed and that a student wasn't punished unnecessarily, and that the New Jersey Supreme Court rather should have condoned this action, and viewed in this light the actions of the school vice principal were totally appropriate and should have been affirmed by the New Jersey Supreme Court.

I would reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well. Ms. De Julio?

ORAL ARGUMENT OF LOIS DE JULIO ON BEHALF OF THE RESPONDENT

MS. DE JULIO: Mr. Chief Justice, and may it please the Court, throughout the course of this litigation, the juvenile respondent has maintained that the search of her purse by the vice principal of her high school violated her Fourth Amendment rights, and that as a result the evidence which was seized from her could not be admitted against her in a criminal proceeding.

The state of New Jersey suggests that no constitutional violation occurred because the Fourth Amendment does not apply to searches conducted by school personnel.

The great majority of state and lower federal courts that have considered this question have agreed with the Supreme Court of New Jersey that searches conducted by school personnel do come within the ambit of the Fourth Amendment, and we would submit that this conclusion is constitutionally required.

As a matter of historical fact, it is true that the framers of the Constitution adopted the Fourth Amendment in response to the repression that they had experienced at the hands of the king's colonial revenue agents. The compulsory government-sponsored system of education which we now have simply did not exist at the time, so it is unlikely that the framers considered either including or excluding school personnel from the ambit of the amendment.

QUESTION: What would be your view, Ms. De Julio, about the same factual situation in a private school, not a public school?

MS. DE JULIO: Your Honor, I would submit that that would be outside the scope of the Fourth Amendment, since the Fourth Amendment has never been applied to purely private action.

QUESTION: In other words, there is no state action then?

MS. DE JULIO: No, Your Honor.

QUESTION: Then you are going to have two different rules on searches.

MS. DE JULIO: Yes, Your Honor, you would. You would have—

QUESTION: All parochial and private schools will have one rule, and the public schools another.

MS. DE JULIO: That would be correct, Your Honor. The Fourth Amendment has never been applied to purely private action, even though in certain cases, for example, the case of a search by an employer of an employee, there might certainly be significant—

QUESTION: I suppose it isn't relevant to this case, but is it possible that that might lead parents who want their children to be in schools where cigarettes aren't floating around and drugs aren't being used to take their children out of public schools and put them in private schools?

MS. DE JULIO: Your Honor, I think that that is somewhat oversimplifying the situation for two reasons. One is that the standard promulgated by the court below does not prevent public school officials from conducting searches when they are reasonably necessary for the pursuit of their educational responsibilities and when there are some reasonable grounds to believe that the student is either engaging in criminal conduct or has violated some school rule that would disturb or disrupt safety and order in the school.

We would submit that that is a very workable, flexible standard, and is—

QUESTION: Ms. De Julio, do you think there is any school rule not related to safety that would justify a search of a child's pockets or purse or lunch bag or whatever?

MS. DE JULIO: I would have to concede that there might be. It is difficult to know the many circumstances which might arise. I would certainly submit that the offense of smoking in the restroom would not be the type of infraction which would in itself justify the search of a student.

The threat to safety and school order is simply not at the level that would warrant such an extreme intrusion into the area of personal privacy.

QUESTION: What about smoking marijuana in a restroom?

MS. DE JULIO: Certainly smoking marijuana or use of drugs, because of the dangers to the student, might very well justify a search under proper circumstances.

QUESTION: You would distinguish marijuana from tobacco then on the basis that marijuana is more harmful, or on the basis that probably smoking marijuana might be a crime?

MS. DE JULIO: I would suggest that both factors would be taken into consideration. Obviously, many dangerous activities also violate the law. So there are times when both of those considerations would converge.

QUESTION: Well, suppose there was the same report as occurred in this case, except the report was that the student was smoking marijuana in the restroom, and that that is contrary to not only school rules but to the law.

Now, would that furnish whatever cause might be required to search the purse?

MS. DE JULIO: Well, Your Honor, it would certainly be the type of infraction that might justify a search. The question—

QUESTION: Of the purse.

MS. DE JULIO: Well, that would be a second question.

QUESTION: The inference would be, if you are smoking marijuana maybe you have got it in your purse. Is that it?

MR. DE JULIO: Well, I think the information would have to be evaluated, as we do with the police.

QUESTION: Well, let's evaluate it on the facts of this case. They call a student in. She denies that she was smoking marijuana at all. She never smokes marijuana. And the official says, "Well, I would like to"—the teacher says, "You were smoking. Now, I want to look in your purse." And she says, "No." And so he searches it anyway.

Now, would that be reasonable suspicion? If the reasonable suspicion standard is the proper one, would it be satisfied in that situation?

MS. DE JULIO: I think not, simply because the information did not implicate that the marijuana was being possessed by her either in her clothing, her purse, or anywhere else. Even with regard to the police, the police may observe a criminal violation taking place. That does not necessarily lead immediately to the conclusion that a search can be conducted.

QUESTION: Ms. De Julio, at most we are talking about probable cause, not mathematical certainty. What about Mr. Nodes's argument that if you see someone puffing on a cigarette, it is a reasonable inference that he has got more on his

person where that came from, whether it is marijuana or tobacco?

MS. DE JULIO: Well, Your Honor, I think in the facts of this case that isn't necessarily the proper inference to be drawn. There were a number of students in the girls' restroom, one of whom did candidly acknowledge that she was smoking.

I think that the inference that all of them possessed tobacco cigarettes, or in the alternative hypothetical, that they all possessed marijuana in their purse, would not be reasonable. It may well have been, and may have been the case, that perhaps they were all passing one cigarette around, and no one possessed anything.

QUESTION: Don't you recognize the difference that marijuana is contraband and cigarettes are not?

MS. DE JULIO: Certainly that is a very important difference in this case, and the problem with the search conducted here is that even if the information had been that the student was seen tucking a package of cigarettes into her purse, there was no reason for the principal to locate and seize that package.

QUESTION: Well, is it customary in New Jersey schools for students to pass one tobacco cigarette around to several different people?

MS. DE JULIO: Your Honor, I believe that occurs with a fair amount of frequency, or so I am told. But I think that the problem here is simply that the search was for something which was not against school rules to possess, was not illegal or contraband per se, and also had—

QUESTION: Well, it was a violation of the rule to smoke in the location of the restroom, was it not?

MS. DE JULIO: Yes, certainly it was.

QUESTION: What if the school official just said, "Hand over any cigarettes that you have," and the student handed them over, and the school official confiscated them? Is that a violation of the Fourth Amendment?

MS. DE JULIO: Well, I guess it would be there the question of whether the student's consent to relinquish the materials was a knowing and voluntary one. Assuming that it were, then I suppose it would be—

QUESTION: Well, suppose it is not. Is that a violation then of the Fourth Amendment?

MS. DE JULIO: I believe that it would be, since the—

QUESTION: And if a third grader is chewing gum in school, in violation of the teacher's established rule of preventing that, would it be a violation of the Fourth Amendment if the teacher confiscated the child's gum?

MS. DE JULIO: Well, I think in that circumstance the rule may be that the student is not permitted to possess bubble gum in school. The problem here in this particular school, and I certainly think—

QUESTION: Well, let's assume that's the rule. May the teacher then search the child's pocket, or confiscate the gum?

MS. DE JULIO: Well, again, I would certainly break down a bubble gum situation in that it may not be a serious enough threat to school order to warrant a search, but if it were a situation where the item was—for example, the case involving firecrackers. The item was certainly one that could jeopardize safety and order in the school.

QUESTION: What about a crib sheet, evidence of cheating on a test?

MS. DE JULIO: That might under proper circumstances, yes, support a reasonable search. Again, the contours of the search under the New Jersey court standard—the search has to be reasonable in light of the purpose.

QUESTION: Incidentally, Ms. De Julio, I gather you don't agree with your colleague that even a probable cause standard would be satisfied here, assuming the applicability of the Fourth Amendment.

MS. DE JULIO: No, we do not believe that the information which the principal had satisfies even the lesser standard of reasonable grounds, and certainly the extent of the search went far beyond any scope that would be constitutionally permitted, even if he had arguably had reasonable grounds to open the purse.

QUESTION: Incidentally, am I correct that as a matter of state law, consent is no justification unless those consenting have been told they didn't have to?

MS. DE JULIO: There is a component in the New Jersey standard for consent search that the individual be aware that he has a right to refuse. With regard to a student, I am—

QUESTION: That is a matter of state law, is it?

MS. DE JULIO: Yes, Your Honor. The student in New Jersey is required by state law to submit to the authority of teachers, so it would be doubtful that a student could realize that he could refuse, because under a state statute I am not sure that he could. And that fact, the fact that students are by law required to submit to the authority of a teacher, we submit, is one of the most important reasons why school officials must be considered governmental action for Fourth Amendment purposes.

A private citizen could stop a child on the street, ask to see what he had in his pockets, and the child could say no and walk away. But in the school context, the lawful authority, the teacher, the school administrator, can compel the student to submit to the intrusion of a search, and the student has no recourse but to submit.

This is exactly the type of governmental harassment which we submit the framers of the Fourth Amendment designed the amendment to protect against.

QUESTION: May we come back to the standard for just a moment? You used the term "reasonable grounds." Do you distinguish that from "reasonable suspicion"?

MS. DE JULIO: Your Honor, I don't believe that the New Jersey Supreme Court intended to distinguish from "reasonable suspicion" or "reasonable cause." The school case literature, of which there is now a large number of reported decisions, about equally use the term "reasonable cause," "reasonable grounds," or "reasonable suspicion."

All of those terms have been used and have a body of case law.

QUESTION: You would accept "reasonable suspicion," would you?

MS. DE JULIO: I don't believe that there is any meaningful difference, or that there was intended to be any meaningful difference. The New Jersey Supreme Court, I believe, adopted "reasonable grounds" because that standard had been used by several prominent cases in the area and was one that was

recognized and understood by persons involved with the school search issue.

QUESTION: Would you ever require probable cause?

MS. DE JULIO: Yes, Your Honor. I think that the New Jersey Supreme Court very clearly stated that as the intensity of the intrusion increases, the standard of reasonable grounds may very well approach or become that of probable cause. Certainly in the area of strip searches, I would submit that the search cannot be reasonable unless there is probable cause at a minimum, and even then, of course, there may be problems with the proper scope of the search.

But I think the New Jersey Supreme Court recognized that the term "school search" could encompass a broad spectrum of intrusions. Some, as is with the case with the police, are rather minimal, stopping a student in the hallway and asking a question, but at the opposite end, of course, there could be much more intrusive searches into purse, pockets, clothing, and of course perhaps the ultimate indignity of a strip search.

So, we would submit that, as formulated, the reasonable grounds test covers a certain portion of the intrusions, but that as the intrusion becomes more severe, we are talking about probable cause at the ultimate end.

QUESTION: Having in mind the facts of this case, what more would have been required in your view to satisfy the requirement to make the search of the purse?

MS. DE JULIO: In this case, I don't believe that a search could be properly made, since it had no relationship to the offense.

QUESTION: Well, suppose three teachers observed the girl smoking, actually smoking, and brought her into the principal's office and said, "As soon as we called her attention to her smoking in violation of the rules, she put the cigarette out and put it in her purse."

What then? Would they be permitted to search the purse?

MS. DE JULIO: Well, Your Honor, certainly the information would implicate the purse, but again I think that we are talking about a situation where the fact of a search may just have been completely inappropriate under the circumstances.

QUESTION: Well, would it be appropriate in these circumstances? Or are you telling us that they must go down and get a policeman and go to a magistrate and get a warrant?

MS. DE JULIO: No, Your Honor. Certainly I am not saying that. In this particular case, we are talking about an infraction which was complete in itself. To borrow Justice Marshall's example, if the student had been cursing in the hallway, the infraction is complete in itself. There would be no basis to conduct a search because there is nothing that a search could contribute to the—

QUESTION: But here the girl denied that she had cigarettes.

MS. DE JULIO: She denied that she smoked. And certainly the question of whether she smoked or not would not have been determined by the discovery or the failure to discover cigarettes in her purse. To take the opposite approach, if the principal had opened her purse and had not found a package of cigarettes, if he had found nothing in her purse, that would not have acquitted her of the infraction.

QUESTION: That may be so, but what if he had found them, like he did? Do you mean that doesn't support the inference that she was smoking?

MS. DE JULIO: No, Your Honor, simply because under school rules it was proper to smoke in certain areas of the school, and—

QUESTION: Well, I know. I am not suggesting that possession would infringe a school rule, but if the young lady denies that she was smoking, and that she never smoked, and then it turns out she has got cigarettes in her purse, you don't think that supports the inference that she had been smoking?

MS. DE JULIO: It may support it somewhat, but I don't believe that it is determinative, simply because she could have been carrying someone else's cigarettes, and I think we are talking about a chain of inferences. Certainly there are any number of things which might in some way contribute to proof, but when we are talking about a chain of inferences, we have already gone three steps away from the infraction at hand.

It is not permitted for the police to go searching or to obtain a warrant when they have some amorphous idea that there might

be something that would be evidential. They cannot go into the house of a suspect and take away everything in the house on the theory that some of it might at some point prove evidential.

QUESTION: May I ask this question? We are talking about standards a good deal. Ordinarily police officers or otherwise trained state personnel make the judgments as to whether there are reasonable grounds, reasonable suspicion, probable cause. Is it your view that teachers should be held to the same standard of good judgment as police officers?

MS. DE JULIO: I think so, Your Honor.

QUESTION: Whatever the standard?

MS. DE JULIO: Whatever the standard, because I think first of all that the educators operate in a much more—an easier environment than the police do. The police are frequently on the street dealing with strangers and circumstances that are changing from minute to minute.

The educator deals with a group of students whom he probably knows very well, whom he will continue to see on a daily basis, and in many instances has a far better basis to make an informed judgment. Also in many instances if he suspects, has a hunch that something is going on that he feels might be a violation of the law or school rules, the student will be back in the classroom on a regular basis. The teacher can simply continue to make observations and see if that hunch—

QUESTION: Does knowing the student well enable one to make a judgment as to what is reasonable cause or what is probable cause, reasonable suspicion, do you think?

MS. DE JULIO: One of the factors which the New Jersey court pointed to in assessing whether reasonable grounds exist is the age, school record, and past history of the student, and I think that those are tools which sometimes the police are able to utilize in their determinations of probable cause. But I think it would be, of course, appropriate to evaluate those criteria in determining whether reasonable grounds existed.

QUESTION: Does New Jersey provide any special training for teachers with respect to making these judgments?

MS. DE JULIO: Well, I believe that New Jersey provides a great deal of ongoing training for teachers in a myriad of fields, both academic and professional.

QUESTION: Of course.

MS. DE JULIO: This would perhaps become part of it. But I would like to call Your Honor's attention to a recent recommendation of the National School Board Association. They recommended that law-related education as a program be adopted by schools because they have found that it is very effective in preventing delinquency and contributing to a safer school environment.

QUESTION: How many teachers are there in New Jersey, roughly?

MS. DE JULIO: I don't know, Your Honor. Quite a large number.

QUESTION: But in this case it was the vice principal. It wasn't a teacher.

MS. DE JULIO: It was a vice principal. Yes.

QUESTION: Suppose the teacher reports to the vice principal that a particular young man, student, a male student has been threatening other students with a knife and perhaps brings that student into the office. Would you say the same thing, they could not ask him to produce the knife or conduct a pat-down search? Not a strip search, a pat-down search.

MS. DE JULIO: I think that under those circumstances a pat-down search might be appropriate, yes. Certainly when weapons are involved, the immediate threat—we recognize that with regard to the police, and permit frisks when the circumstances suggest that there is a weapon and that there is a danger of harm. But, again, I think we have to make a distinction—

QUESTION: Well, what makes the—the fact that somebody saw the person threatening someone with a knife, how does that support the inference that it might be in his pocket?

MS. DE JULIO: Well, again, the nature of the information would have to be—would have to suggest that conclusion.

QUESTION: I know, but does it or doesn't it?

MS. DE JULIO: I think if the information were fresh that, you know, this was seen right away, the inference—

QUESTION: What was wrong with the inference about the cigarettes?

MS. DE JULIO: Well, again—

QUESTION: The information was very fresh.

MS. DE JULIO: The fact of the students being in, first of all, being together in the restroom, that the cigarettes were not being seen being taken out or removed, they were being consumed, and also the fact that possession of cigarettes, again, was not prohibited by school rules. There was no reason to seize them. Whereas a knife I would assume would be prohibited by rules in every school, and a teacher would be well within his or her rights to seize a knife, even if it was seen just being displayed and not being used in a threatening manner toward another student.

QUESTION: Getting back to this case, is there anything in the record where the principal said, "If we don't find cigarettes in your purse, we will drop the charges"?

MS. DE JULIO: Absolutely not, Your Honor, and I would submit that in the face of the eyewitness testimony of the teacher, the principal could not have ignored the infraction based upon the failure to find cigarettes in the purse.

I would also suggest that the principal, if he cared to investigate further, could have very simply questioned the other girls in the restroom. One of those girls was present in his office and had candidly admitted that she was smoking.

QUESTION: Of course, Ms. De Julio, a lot of Fourth Amendment law is based on second-guessing of what people right on the spot did. This would have been more reasonable. This would have been a little better. But really the test is whether this particular reaction was reasonable. It was not whether it was the best, or whether something could have been proved or not.

MS. DE JULIO: That is certainly true, and I am only suggesting that in response to the concern that what else could the principal have done to be fair. Certainly it is quite correct that hindsight is better than foresight, but once again I think that we have to recognize that we are not dealing here with an exigent situation.

Smoking in the restroom is certainly an infraction of school rules and is certainly a problem that the school had to deal with, but it just simply does not rise to the level of a student possessing a weapon and threatening other students, or selling drugs in the restroom.

There was no immediate harm. It was not a situation, as the police frequently have to contend with, where a split-second decision had to be made.

QUESTION: Well, I suppose you do agree in general, though, that a school needs to respond quickly and informally to violations of its rules by the students, do you not?

MS. DE JULIO: Certainly, but I—

QUESTION: How do you think it would impact then on that interest of the school to require the assistant principal to drop everything and go down to the police station and get somebody to authorize a search?

MS. DE JULIO: I am not suggesting that that should be a requirement. We have not at any point during this appeal here argued that a teacher should be required to get a warrant.

In this particular circumstance, I think what I am trying to—the distinction that I am trying to draw is between infractions of school rules which have to be dealt with in some way but which do not implicate a search and which simply are not serious enough.

In day to day life there are many adults who smoke cigarettes in places where it is not legal to do so, but it would be difficult for a police officer to justify seizing an adult that he sees coming out of an elevator smoking a cigarette illegally and conducting a search.

The level of the infraction, the level of harm, the level of jeopardy is just simply not such that we would authorize that type of conduct.

Certainly if the—another New Jersey case, *State in the Interest of G.C.*, where the principal was told by a student that another student was selling drugs in the restroom, the court found that the principal acted perfectly reasonably in apprehending that student and searching her and seizing those drugs.

That is the kind of threat where a search may be immediately required and where a school administrator would be found to have acted perfectly reasonably.

QUESTION: Suppose the vice principal had been apprehensive about the Fourth Amendment problem and said to the girl, "Sit down," picked up the phone, called the mother, said, "Come over to the school." The mother said, "I can't get there for 15 minutes." The girl was required to sit there. Is she under arrest?

MS. DE JULIO: No, Your Honor, I don't believe that she is under arrest.

QUESTION: Can he require her to stay there?

MS. DE JULIO: Yes, I believe under New Jersey law certainly he can.

QUESTION: If when the mother got there she took the purse and opened it, would the mother be violating the Fourth Amendment?

MS. DE JULIO: No.

QUESTION: What is the difference between the mother and the teacher in your view?

MS. DE JULIO: Well, the difference is, I think, the difference between private action and governmental action. There have been cases which have recognized that private citizens—

QUESTION: Only the state action factor is different. Is that it, in your view?

MS. DE JULIO: Yes, Your Honor, I think—with regard to the Fourth Amendment.

QUESTION: In other words, the parent has an inherent right to open the purse of the girl, but there is no inherent right on the part of the teacher?

MS. DE JULIO: Certainly the Fourth Amendment would not be violated by the parent conducting a search herself or himself.

QUESTION: Haven't you got a little bit of state action mixed in with the mother's action when the mother is there at the command or request of the state, and the mother is responding to the state's inquiry?

MS. DE JULIO: Well, certainly, if it were found that there had been any coercion or attempt to mislead or in some way implicate the parent as a tool of law enforcement, there might be, and the New Jersey Supreme Court recognized that in certain school searches if police instigation were found, or some attempt to circumvent the Fourth Amendment, that might be dealt with as a Fourth Amendment problem.

But in a purely parental situation, where a parent, acting as a parent, searches a student, searches their child, that evidence would not be proscribed by the Fourth Amendment, even if it had been seized under circumstances that we would not perhaps find to be proper, such as the employer breaking into the desk of an employee. That might violate certain criminal statutes, but it would not prevent the state from utilizing that evidence in some—

QUESTION: Would you have any problem with metal detectors such as those we have outside the Court being at the schoolhouse door?

MS. DE JULIO: Well, certainly that is well outside the facts of this case, but assuming that hypothetically the cases allowing the use of a metal detector on a general basis, such as the airport, or that line of cases, are based upon the idea that the individual is voluntarily seeking the service that makes it necessary for him to go through the gate.

Here, with students, they are compelled to attend school, so by forcing them to walk through a metal detector—which is a more minimal intrusion into privacy, certainly—but the element of choice is simply not there.

An adult can choose to take a plane or not, knowing that a metal detector is one of those things he will have to submit to, but a child is required to go to school, and cannot refrain.

QUESTION: Even if you had an epidemic of use of knives in a particular school, no metal detector?

MS. DE JULIO: Well, certainly there would have to be some showing that this particular tool was necessary, but apart from that, again, I think that the distinguishing factor, the factor which makes that type of search possible and constitutionally permissible in an airport and not in a school is the element of voluntariness.

QUESTION: What about searching purses, as takes place in this building?

MS. DE JULIO: Well, once again, the individuals who enter this building do so—

QUESTION: Is that the only difference, that they enter the building voluntarily?

MS. DE JULIO: I think that that is certainly a significant difference.

QUESTION: What about a prison? Would you say you can't have metal detectors at a prison because the people going to prison aren't going there voluntarily?

MS. DE JULIO: Well, Your Honor, certainly the difference between a prison and a school is a critical factor in the analysis. This Court last term found that inmates have no expectation of privacy in their cells based upon the nature, goals, and operations of a penal institution.

I don't believe that any of the factors which were utilized in the Court's analysis of a prison have application in a school. First of all, we are not talking about confining people who have committed crimes and shown that they are dangerous.

QUESTION: But it at least suggests that your voluntariness analysis is not good for all cases.

MS. DE JULIO: Well, I think it is a factor that has to be taken into consideration. Prison—

QUESTION: You are a respondent here. How voluntarily have you come?

MS. DE JULIO: I personally have come voluntarily, although certainly someone would have had to appear on behalf of the respondent. That I think is a voluntary assumption on my part.

But I think that the prison analogy fails also because the lack of rights is part of the punitive feature of prison, whereas certainly in an educational context respecting the constitutional rights of students is considered part of the educational purpose of schools.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

REBUTTAL ARGUMENT OF ALLAN J. NODES ON BEHALF OF THE PETITIONER

MR. NODES: Mr. Chief Justice, and may it please the Court, I believe that the analysis which was just given concerning the distinction between a student in a public school and a student in a private school has some importance in evaluating the differences between a juvenile and an adult.

Last term in *Schall* v. *Martin* this Court noted that juveniles are continuously under some form of custody or another, and this does not mean custody with total liberty, and it doesn't mean custody except when a student attends a public school. What it really means is that they are under that form of custody and the amount of custody which will ensure their safety and their well-being, and that is why society insists on adult supervision of juveniles, and that is why society insists that the juveniles do be under continual custody.

QUESTION: Mr. Nodes, may I ask you a question on that? Supposing a juvenile, a young lady in this case, was riding in an elevator with a law enforcement officer, and she smoked in his presence. Would he be free to search her purse in the elevator?

MR. NODES: I don't know if a search of the purse would be at all—I don't know if there is any kind of a violation that has occurred under your hypothetical.

QUESTION: There is a no smoking sign in the elevator. There is a city ordinance against smoking. I should have made that clear.

MR. NODES: I think the violation would be smoking a cigarette, and in that case there would be really no relevance at all to whether or not she had additional cigarettes.

QUESTION: What if she denied she smoked? Just like this girl did.

MR. NODES: It would be very difficult. If he was the same person who observed her, there is no question of his credibility. He doesn't have to do this to check his own credibility.

QUESTION: Then in this case the vice principal could search the purse, but not the teacher who saw her in the restroom. Is that what you are saying?

MR. NODES: I think that the vice principal could search the purse. I think there would probably be less need for the teacher to search the purse, or if the vice principal had directly seen it, there would be less reason for him to do it. And I think that is something that—

QUESTION: What if the officer in my example took her to the station, and then the person at the station says, "I would like to search your purse"? Could he have done it?

MR. NODES: I believe the further you become removed from individual direct observation, the more need for proof of credibility there is, and the more need for credibility proof you have, the more necessary the search.

QUESTION: Is there anything in this record to show that the vice principal didn't trust the teacher's veracity?

MR. NODES: No, there isn't anything to show that he didn't trust the teacher's veracity. What there is, is there is evidence to show that he was willing to give the student the benefit of every doubt, and we feel that that is something which is appropriate and which he should not be criticized for, at the very least.

But whether the Fourth Amendment is held inapplicable or whether a lower standard is applied, we feel that what is necessary is that teachers be given an immediate and effective means of conducting searches and performing other disciplinary factors, and we believe that either by ruling the Fourth Amendment inapplicable or by holding a much lower standard than probable cause to be appropriate, that this can be accomplished.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.]