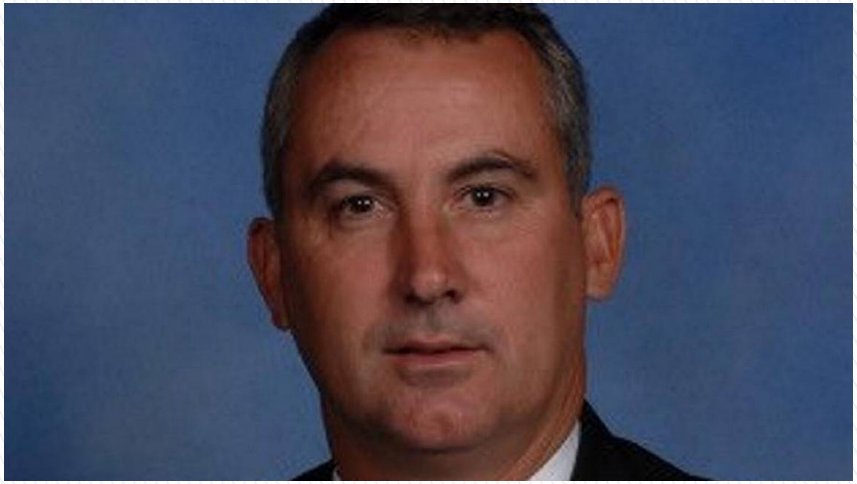
Drug Testing Teachers, Strip Searching Kids, and Kicking Dad Out of His Daughter's Volleyball Game: 3 Decisions from the Fed. Appellant Courts

Richard Fossey

Jackson v. McCurry (11th Cir. 2019)

- Jackson's daughter accused of harassing classmate in text messages.
- Asst. Principal Bo Oates searches EDJ's cell phone.
- Jackson allegedly threatens to sue.
- Confrontation with 2 coaches.
- Superintendent forbids Jackson from attending school board meetings, addressing school board. In letter, forbids Jackson from being on school campus except to attend daughter's volleyball game.
- Staff ejects Jackson from volleyball game.

Defendants in *Jackson v. McCurry*



Sandi Veliz

Superintendent McCurry

Sandi Veliz

Jackson v. McCurry (cont.)

- Jackson sues 5 school employees, claims 4 constitutional violations:

- 1) 4th Amend. Claim for cellphone search
- 2) 1st Amend. Claim for banning him from addressing school board
- 3) 1st Amend. Claim for banning him from campus.
- 4) 4th Amend. Claim for ejecting him from basketball game.

Jackson v. McCurry (cont.)

- District court dismisses Jackson's case & he appeals.
- 11th Circuit affirms. Individuals cannot be liable for constitutional violation unless they acted contrary to well established law.
- "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established ... constitutional rights of which a reasonable person would have known.'"

Jackson v. McCurry (cont.)

- **Cellphone search did not violate clearly established law.**
- the policies outlined in the school handbook prohibit both bullying and rude or disrespectful behavior towards other students.
- School had received reports that E.D.J. had used her cellphone in violation of school rules.

Jackson v. McCurry (cont.)

- **McCurry Did Not Violate Clearly Established Law When He Prohibited Jackson from Appearing on School Premises.**
- "[T]here is no clearly established right for parents to access school property to exercise their rights under the First Amendment."

Jackson v. McCurry (cont.)

- **McCurry Did Not Violate Clearly Established Law When He Prohibited Jackson from Addressing the School Board.**
- a meeting of the school board qualifies as a limited public forum. . . Board policy does not grant blanket permission to citizens to address the board. . . Instead, the board "limits discussion to certain topics and employs a system of selective access."

Jackson v. McCurry (cont.)

- [I]t was not Jackson's *view* that provided the rationale for McCurry's decision, but an *action* that Jackson allegedly threatened to take. And even if banning all who threaten litigation could be construed as discrimination against those who hold contrary views, such an interpretation was not so clearly established that we could say McCurry was "plainly incompetent" or "knowingly violate[d] the law."

Jackson v. McCurry (cont.)

- ***School Authorities Did Not Violate Clearly Established Law by Removing Jackson from the Volleyball Game.***
- Under our caselaw, "[a] law enforcement official who reasonably but mistakenly concludes that reasonable suspicion is present is still entitled to qualified immunity."
- Smith's force on Jackson was *de minimus*.

Drug testing teachers

- Law is unclear. Several courts have ruled that school districts cannot compel teachers to submit to random, suspicionless drug testing.
- Sixth Circuit approved drug testing teachers when hired, promoted or transferred to new positions.

Friedenberg v. Palm Beach Sch. Dist. (11th Cir. 2018)

- School district required applicant for substitute teacher job to be tested for drugs. Applicant sues, but district court dismisses her case.
- On appeal, 11th Circuit rules that drug testing by public employer is a search for Fourth Amendment purposes, but drug testing is legal if government has a compelling need to test unrelated to law enforcement.

Friedenberg v. Palm Beach Sch. Dist. (cont.)

- "[I]t is readily apparent that the School Board has a compelling interest in ensuring that teachers—including substitutes—are not habitual drug users."

Friedenberg (cont.)

- The hard fact of life is that during school hours, bad things can happen to kids, and those front-line responders most directly supervising students—our teachers and substitute teachers—must be able to respond properly. It is not remote, idle, or fanciful to posit with some confidence that students, particularly teenagers, will engage in conflict at school. When students get into fights, a teacher will likely be in the best position to stop it, to diffuse it before it turns serious, or to seek help if the situation intensifies.

Friedenberg (cont.)

- Friedenberg argues risk is hypothetical.

- "We think she is wrong about the probabilities of harm, but, in any event, profoundly mistaken when we also consider—as we must—the gravity of the harm. We know with a high degree of confidence that serious problems will arise, that substitute teachers just like permanent teachers are the first and primary line of protection for minor students in the care of the public schools, and that an intoxicated guardian may well be unable to respond properly and promptly. "

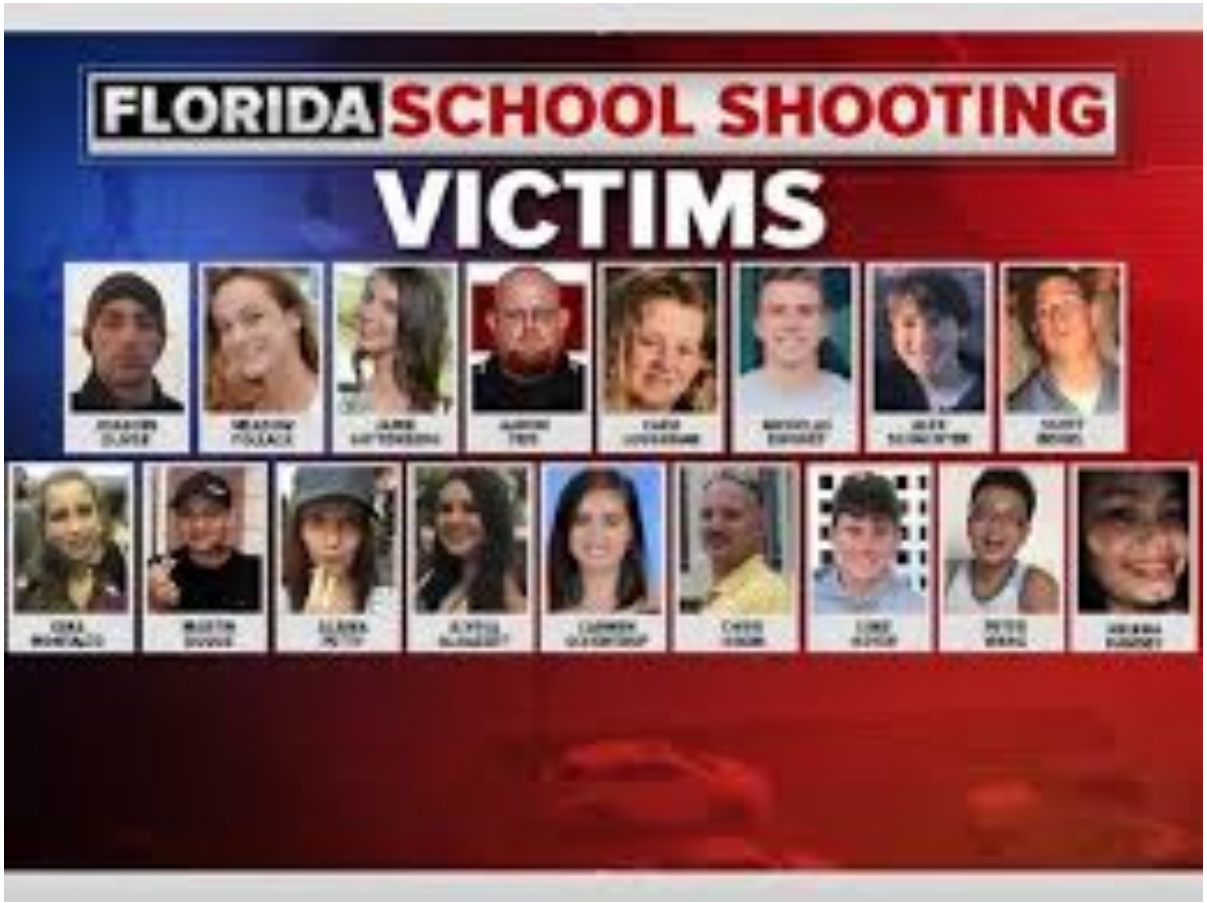
Friedenberg (cont.)

- "[A]t the end of the day, there is no real distinction between the responsibilities assumed by substitute teachers and full-time classroom teachers except for the amount of time they spend in the classroom."
- Like regular teachers, ***substitute teachers "are the first responders in the classroom,*** and serve as the primary (and frequently only) caretakers for young children under the government's guardianship during the time they are at work. " Thus, "[t]heir basic obligations are the same: to safeguard and teach those in their care."

Friedenberg (cont.)

- ***Diminished expectation of privacy***, search minimally intrusive:
- Friedenberg has a diminished expectation of privacy interest owing to the unique Fourth Amendment context of the public schools. Plainly, the School Board has made only a minimal intrusion on that privacy interest. It has done so in the service of a serious and compelling need. And the testing regimen appears to us [to] be reasonably effective and altogether reasonable.

11th Circuit Mindful of Parkland Shootings in 2018



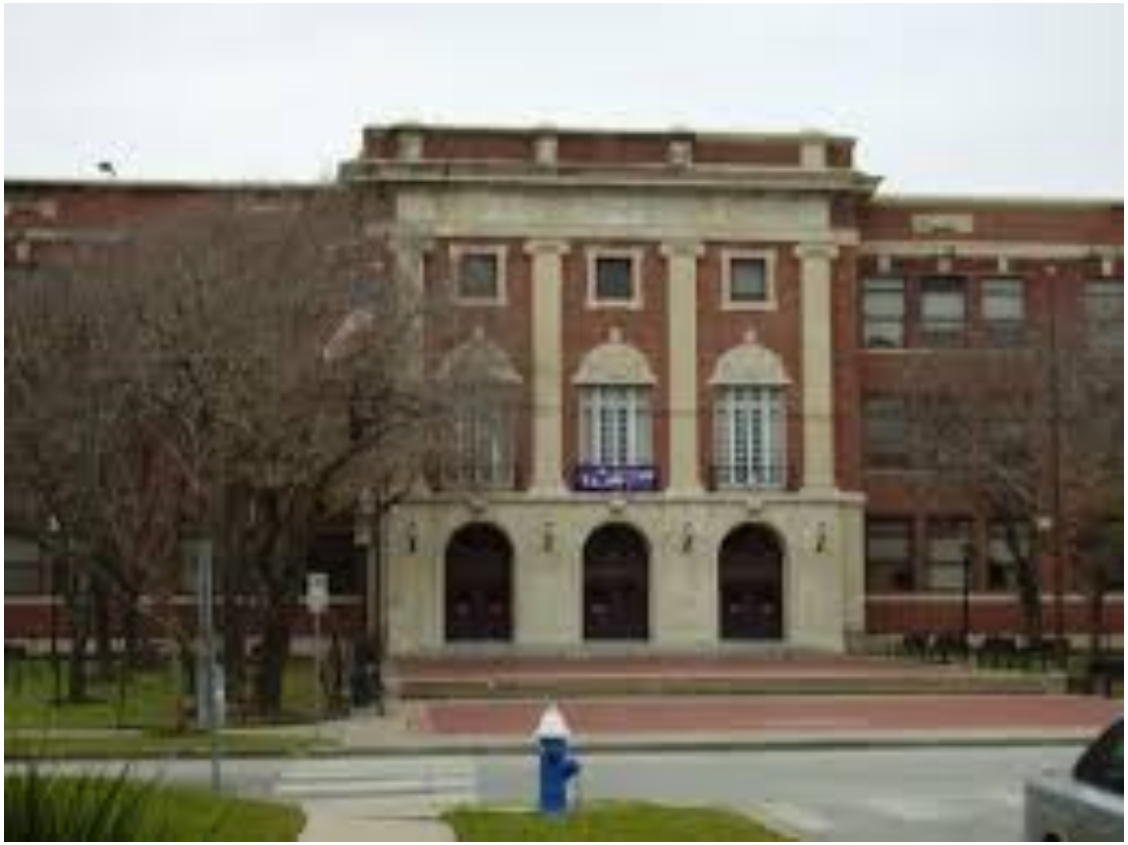
Why is *Friedenberg* important?

- Teachers are first responders.
- Compellig need for unimpaired teachers.
- Diminished expectation of privacy
- Drug testing minimally intrusive.
- Different reasoning from Kanawha case.
- Lays groundwork for case involving random drug testing of regular classroom teachers.

Littell v. Houston ISD (5th Cir. 2018)

- $50 went missing at Lanier Middle School.
- Search of students' belonging turned up nothing.
- School police officer suggested money might be in students' underwear.
- Asst. Principal Verlinda Higgins took 22 sixth-grade girls to female school nurse. Nurse conducted underwear search of girls.
- HISD policy permitted search of outer clothing based on reasonable suspicion.
- HISD Policy did not mention strip searches.

Littell v. Houston ISD (cont.)



Littell (cont.)

- Fifth Circuit bases decision on Safford USD v. Redding (U.S. 2009). Strip searches are "embarrassing, frightening, and humiliating."
- Therefore, "both subjective and reasonable societal expectations of privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification."
- **Only justifiable if school officials suspect that object of search is dangerous or would pose a threat to other students.**

Littell (cont.)

- Fifth Circuit: search must be based on reasonable suspicion that item is on a particular student and that item is in student's underwear or is dangerous to other students.
- Under that standard, search violated Fourth Amendment. Indeed, HISD conceded that the search was unconstitutional.

Littell (cont.)

- Can school district be sued for constitutional violation on "failure to train" theory?
- Yes. Risk that school employee would conduct unconstitutional search was or should have been highly predictable consequence of school district not training administrators on constitutional constraints on student searches.
- School cannot rely on employee coming pre-equipped with legal knowledge.

Littell (cont.)

- Plaintiff must show school district failed to train its employees and that the failure to train caused the unconstitutional search.
- It was probable to conclude that assistant principal would not have ordered the strip search had she known the search violated the constitution.