No. 01-332
In the
Supreme Court of the United States
October Term, 2001

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY, *et al.,*
Petitioner,
v.
LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, *et al.,*
Respondents.

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

BRIEF OF RESPONDENTS

Graham A. Boyd
*(Counsel of Recor*d)
American Civil Liberties Union
Foundation
85 Willow Street
New Haven, Connecticut 06511
(203) 787-4188

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Tinker v. Des Moines Indep. Com'ty Sch. Dist.,
393 U.S. 503 (1969)

Todd v. Rush County Schools,
139 F.3d 571 (7th Cir. 1998)

United States v. Arvizu,
534 U.S. __, 122 S.Ct. 744 (2002)

United States v. Brignoni-Ponce,
422 U.S. 880 (1975)

United States v. Knights,
__ U.S. __, 122 S.Ct. 587 (2001)

United States v. Martinez-Fuerte,
428 U.S. 543 (1976)

United Teachers v. Orleans Parish Sch. Board,
142 F.3d 853 (5th Cir. 1998)

Vernonia Sch. Dist. v. Acton,
515 U.S. 646 (1995)

West Virginia State Bd. of Ed. v. Barnette,
319 U.S. 624 (1943)

Wyoming v. Houghton,
526 U.S. 295 (1999)

Other Authorities

Todd Purdum, "Caution: Presidents at Play," N.Y. Times, Feb. 16, 1995

U.S. Department of Education, National Center for Education Statistics, Digest of Education Statistics 2000, *available at* http://nces.ed.gov /pubs2001/digest/dt039.html

"Dartmouth First Year Admissions," http://www.dartmouth.edu/~admissns/ admissions/index.html

"Recent Cases," 112 Harv.L.Rev. 713 (1999)

STATEMENT OF THE CASE

1. Before it began drug testing the "vast majority" of its students, Pet. App. 51a, Tecumseh High School boasted year after year of its tremendous success in controlling drug use. The petitioner District submitted annual federal funding applications, under a legal obligation to provide accurate information, in which it reported continuously low and decreasing drug use throughout the decade preceding its drug testing scheme. From 1989 to 1997, the District described the School as one with "very few" drug incidents, where "drug use [was] going down" and where drugs "have not identified themselves as major problems." J.A. 168, 171, 186.

Those "very few" drug incidents identified by the District rarely, if ever, occurred among the members of the Choir, Band, Academic Team or the School's other non-athletic activities. Tecumseh's teachers and School Board President all agree that the students participating in non-athletic extracurricular activities are distinctly less likely to use drugs than the student body as a whole. J.A. 100-01, 116, 119, 127. The results of the drug testing program underscore the virtual non-existence of drug use among non- athlete extracurricular students. Of the 505 high school students tested under the policy, only three tested positive, J.A. 42, 54, 107 -- and all of these students were athletes.[1]

Nor did the School ever develop a concern that its non-athletes faced any special risk of physical injury. In contrast to participants in dangerous sports like football, no student has ever been injured while engaged in activities of the Academic Team, Band, Choir, or Future Homemakers of America, J.A. 50, and the few alleged dangers conjured up by the District -- including such supposed hazards as Choir members tumbling off the stage, J.A. 78-79, or Band members colliding while they march in formation, J.A. 77 -- are contrived and speculative.[2] Indeed, the School Board discussions of the drug testing policy included no consideration at all of safety concerns. J.A. 155.

In early 1998, the School Board President encountered several parents who insisted that the School should do more to combat drug use. One parent in particular captivated the Board's attention with her passionate account of marijuana use by her son and by several of his teammates on the high school football team. J.A. 86-87; C.A. App. 565. As the Board began to

---

[1] The Solicitor General offers a misleading observation that several students who "were involved in non-athletic activities" have tested positive. Brief of U.S. at 6 n.3. In fact, the record only includes positive test results for two FFA (Future Farmers of America) members *who were also enrolled in athletic activities* and would have been tested (and caught) under an athletes-only policy of the sort considered in *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). As noted by the court of appeals, "in the 1998-99 year . . . two students, both also athletes, tested positive. And [in] the 1999-2000 year, only one student, apparently an athlete and not involved in any of the listed extracurricular activities, tested positive." Pet. App. 16a; *see also* J.A. 107; C.A. App. 570-74.

[2] The Solicitor General hypothesizes dangers of "working with cutlery or sharp instruments" in Future Homemakers of America competitions. Brief of U.S. at 18. This claim misrepresents the record. While Future Homemakers of America *classes* may use knives, C.A. App. 671, 678, these students are not subject to drug testing. The Future Homemakers of America extracurricular activities consist of such benign undertakings as "compet[ing] in a job interview competition, creed interpretation when they would memorize the FHA creed and [being] judged according to how expressively they say it," as well as "[i]llustrated talks when they would research and relate a topic" and "parliamentary procedure team." C.A. App. 672.

The Solicitor General also misses the mark in claiming the drug testing of non-athletes is justified because of "building a 15-foot-high human pyramid (as cheerleaders do)." Brief of U.S. at 18. The School considers cheerleading to be an athletic activity as evidenced by its requirement that cheerleaders and "pom pom" meet the full eligibility requirements of the Oklahoma Secondary School Activities Association (OSSAA), whereas Band, Choir and the other activities must meet only the non-athlete requirements of OSSAA. J.A. 45; *see also* C.A. App. 785 (initial "Student Athlete Drug Testing Policy" definition of "student athlete . . . includes athletes and cheerleaders"). Respondents have never sought to participate in cheerleading or any other athletic activity and have not challenged the application of the drug testing policy to these activities. J.A. 27.

consider drug testing as a response to these several vocal parents, the Board initially focused on the problem among athletes that the parents had identified. Pet. App. 52a n.2; J.A. 138. A sense of even-handedness, however, moved the Board President to suggest that the policy should be extended to others, not because of a drug problem or any special risks among these non-athletes, but because it seemed somehow unfair to single out the athletes. J.A. 89. In one fateful meeting, the Board President and others "all started naming off different organizations because each one of us has a different organization that's our pet." J.A. 89. They eventually settled upon inclusion of all students who "represent" the school before the public, reflecting a determination to signal to parents and the general public a "tough on drugs" attitude. J.A. 91.

Lacking any evidence of drug use among students involved in non-athletic extracurricular activities or any articulated safety concerns, the Board of Education nevertheless adopted the Student Activities Drug Testing Policy. *See* J.A. 193-205. Under the Policy, students participating in competitive extracurricular activities must submit to mandatory, suspicionless urinalysis tests and must also submit a list of current medical prescriptions. Pet. App. 4a-5a.[3]

Those who do not are barred from the covered activities, including Academic Team, Band, Choir, Show Choir, Color Guard, FFA, and Future Homemakers of America. Pet. App. 5a. Because extracurricular activities play such an important role in the life of Tecumseh students, the "vast majority" of the School's students participate in these activities and are subject to the drug test. Pet. App. 51a.

2. Lindsay Earls, now in her freshman year at Dartmouth, was a high school sophomore when her school implemented its new drug testing policy.[4] She excelled at extracurricular activities, building her talents, confidence and social skills. Rather than frequenting parties or focusing on dating, C.A. App. 182-84, she devoted herself to the school's Academic Team, Choir, Show Choir, and Marching Band. In order to pursue college music scholarships, J.A. 16, she depended upon being able to participate in the Choir and Band performances attended by college music directors. J.A. 134-35. Indeed, to meet her highest aspiration of attending a competitive college, she knew she would have to excel at a range of extracurricular activities. J.A. 16. With a schedule filled with school and activities, she was so removed from drug use that she had utterly no idea what drugs look like or who might use them. J.A. 108; C.A. App. 181.

Lindsay Earls values her modesty and propriety. The School's new policy put her in a difficult position, forcing her to relinquish her genuinely held privacy in order to remain in the extracurricular activities that were so central to her high school experience and so critical to her chances of a scholarship or admission to a competitive college like Dartmouth. *See* J.A. 97-98, 133-35; C.A. App. 448, 455, 780.

Her first experience in having the school collect her urine proved memorable. In early 1999, a principal's assistant came to Lindsay's class, and, in front of her teacher and classmates, ordered Lindsay to report to the school gymnasium for her drug test. J.A. 16-17. Because the school employs its own teachers to collect urine samples, Lindsay found herself urinating into a plastic vial while three faculty members listened from outside the stall for the "normal sounds of

---

[3] The Solicitor General again reveals a lack of familiarity with the record in suggesting that prescription drug information is provided only in sealed envelopes as part of the testing process. Brief of U.S. at 16-17. In addition to disclosing medications in the more controlled context of administering the drug test, all students filled out a list of prescription drugs at the beginning of the school year as part of the consent form for drug testing handed to teachers. *See* J.A. 205. Teachers necessarily viewed prescription drug information, since they were expected to sign the forms, J.A. 204, after reviewing them for completeness. J.A. 129. The record further shows that this prescription drug information was not treated confidentially. *See infra* at 24-25.

[4] Respondent Lacey Earls, the younger sister of Lindsay Earls, was added as a plaintiff after entry of judgment in the district court. Pet. App. 80a. She remains a student at Tecumseh High School. After filing this suit, respondent Daniel James was forced to transfer from the School District when his application to continue at Tecumseh High School as a non-resident was denied. He is now enlisted in the United States Air Force.

urination." J.A. 150. One of the faculty monitors joked that the process seemed like an exercise in "potty training." J.A. 17. Lindsay, in turn, felt embarrassed. J.A. 17. When she emerged from the stall, Lindsay was required to watch as one of her teachers took the vial in hand, feeling Lindsay's urine sample to ensure that it was the proper temperature and holding Lindsay's urine up in the light to inspect its color and clarity. J.A. 150-51. This collection and close examination of bodily fluid by a teacher whom Lindsay would regularly see at school is hardly equivalent, as the School maintains, to the normal process of using a public restroom. Further, the testing process itself imposes upon students a presumption of guilt, leaving the student to prove his or her innocence by producing a "clean" urine specimen. While Lindsay's drug test confirmed that she had not used drugs, J.A. 35, any student taking the test had to face the fear and uncertainty that an erroneous test result could impose an unfair stigma. J.A. 18.

Lindsay would later learn that her school had failed to ensure the protection of private information about prescription drug use submitted under the drug testing policy. For example, the Choir teacher looked at students' prescription drug lists and left them where other students could see them. J.A. 129-32. The results of a positive drug test, too, were disseminated to as many as thirteen faculty members at a time, J.A. 105-06, and these test results generally became known to other students when a student suddenly was suspended from his or her activities shortly after administration of a drug test.

The School left Lindsay only one option if she wished to safeguard her privacy concerns: exclusion from extracurricular activities. For Lindsay, like many American school children, extracurricular activities have become an integral part of the educational experience. Banishment from the Choir, Show Choir, Band and Academic Team would have imposed a stigma that would have been devastating. In order to preserve a very normal notion of privacy, Lindsay would have had to cut herself off from much of her school's life. Beyond the isolation, Lindsay's exclusion from her extracurricular activities would have imposed a serious hurdle in gaining admission to a competitive college like Dartmouth. Pet. App. 21a; *see also* "Dartmouth First Year Admissions," *available at* http://www.dartmouth.edu/~admissns /admissions/index.html. Good grades alone simply do not suffice. Finally, Lindsay faced the loss of the opportunity to earn graded class credits, which may be used to raise grades in classes associated with extracurricular activities. Pet. App. 71a.

The extracurricular activities found so vital by Lindsay Earls also serve as the most effective means of preventing students from using drugs, committing crime, becoming pregnant, or dropping out of school. *See* Brief of *Amici Curiae* American Academy of Pediatrics (AAP), *et al*. In recognition of this stark reality, the AAP has opposed policies like Tecumseh's for several years: rather than depriving children of the very lifelines which keep them out of trouble and away from drugs, the AAP recommends medical evaluation based on individualized indications of drug abuse. *Id.*; *see also* C.A. App. 519 (Board President agrees that activities like Choir are "an important way to keep [students] off drugs" because "if they are kept busy with activities from school they don't have as much time on their hands to go and mingle and drive up and down the street, things like this"). The illusory benefits of suspicionless drug testing could well explain the fact that only a "handful" of the 15,000 school districts across the nation "have taken up drug testing," according to an attorney for the National School Boards Association. C.A. App. 856.

Lindsay Earls, along with the other respondents, filed suit in August 1999, challenging the constitutionality of the School's mandatory, suspicionless drug testing of students targeted solely because they participate in non-athletic activities such as the Choir, Band, and Academic Team. J.A.7-29. Respondents did not challenge the Policy insofar as it applies to athletes, or insofar as it provides for drug testing upon reasonable, individualized suspicion. J.A. 28. The students sought injunctive and declaratory relief only. *Id.*

3. The district court, ruling on cross motions for summary judgment, entered judgment in favor of the School. The district court looked to *Vernonia Sch. Dist. v. Acton*, 515

U.S. 646 (1995), in which the Court upheld a drug testing policy of athletes who acted as the "leaders" of the "drug culture" in a "drug-infested school," who faced the risk of serious injury during their athletic activities, and who had lowered privacy expectations because of physical exams and a practice of communal undressing and showering. 515 U.S. at 649. Despite finding that drug use at Tecumseh schools was not a major problem, Pet. App. 57a, and despite noting many of the remarkable differences between the student athletes involved in *Vernonia* and the students in this case, Pet. App. 65a, 76a-77a, the district court relied heavily on its concern about the prevalence of drugs in society as a whole and in schools across the nation in finding the drug test at Tecumseh's schools constitutional. Pet. App. 61a-62a.

4. The court of appeals reversed, Pet. App. 27a, finding the search unreasonable in light of the legal principles announced by the Court in the primary cases concerning the Fourth Amendment in the school context: *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and *Vernonia*. The court recognized the familiar rule that the school context gives rise to a special need to dispense with the warrant and probable cause requirements of the Fourth Amendment, while generally retaining the need for individualized reasonable suspicion before a search. *See T.L.O.*, 469 U.S. at 340. The court then found the record in this case did not meet the *Vernonia* standard for eliminating individualized suspicion altogether.

In establishing the nature of the governmental concerns giving rise to the test, the court of appeals fully recognized the importance of deterring drug use among students in America's schools. Pet. App. 22a. However, the court also noted that the extracurricular activities at issue in this case did not involve the sort of safety concerns that the Court highlighted in upholding the drug testing of student athletes in *Vernonia*. Pet. App. 23a. The court further held that where, as here, the evidence clearly indicates that drug use among the group targeted for drug testing is "negligible," Pet. App. 19a, the immediacy of the governmental concern is significantly diminished. Pet. App. 24a. On this point, even the dissenting judge acknowledged "[t]he immediacy of the school district's concern is, as noted by the majority, the weakest part of the school district's case." Pet. App. 38a. In recognition of the decreased governmental concern, the absence of safety risks involved, and the lack of efficacy of testing a group unlikely to use drugs, the court of appeals found this testing scheme unconstitutional under the Fourth Amendment. Pet. App. 24a-25a.

SUMMARY OF ARGUMENT

Tecumseh High School's decision to subject the vast majority of its student body to suspicionless drug testing goes far beyond anything authorized by the Court in *Vernonia* and cannot be reconciled with the Fourth Amendment principles that the Court has consistently applied, even in the school context.

Given the careful line drawn by the Court in *Vernonia*, the School is simply wrong to assume that a broader license was implied. This is not a case about student athletes. It is a case about students who engage in extracurricular activities that do not present any special risk of physical injury in a school district that has consistently denied any significant drug problem. In order to defend the challenged drug testing policy, both the School and the Solicitor General argue, in essence, that the mere fact of running a public school justifies suspension of the Fourth Amendment right to individualized suspicion before a search, at least when the specter of drugs is invoked. That result would leave no principled limitation to prevent drug testing all 23.7 million students[5] in junior and senior high schools throughout the nation -- approximately ten percent of all United States residents. Never has any court ruling endorsed a suspicionless search

---

[5] *See* U.S. Department of Education, National Center for Education Statistics, Digest of Education Statistics 2000, Chapter 2: Elementary and Secondary Education, Table 39, *available at* http://nces.ed.gov/pubs2001/digest/dt039.html (providing 1998 grade-by-grade statistics showing a total of 23,697,353 public school students in grades six through twelve).

of such a significant segment of the population.

Two fundamental principles of the Court's Fourth Amendment jurisprudence control any evaluation of whether a search of students is reasonable under the Fourth Amendment. First, in striking the balance between a student's privacy and a school's disciplinary needs, a school may generally forego the requirements of a warrant or probable cause only if the school has a reasonable suspicion that the *individual* student being searched has committed some wrong. *T.L.O.*, 469 U.S. at 333 n.2. Blanket searches are presumptively invalid. Second, as the only exception ever allowed to the *T.L.O.* rule -- *i.e.*, the sole instance of permitting suspicionless searches in a school -- the Court in *Vernonia* upheld a generalized search of students only upon showing a number of demonstrated and specific circumstances establishing a governmental interest reaching beyond the school's everyday needs.

In *Vernonia* the school targeted athletes because they were the epicenter of the problem in a school with mounting disciplinary problems, the "leaders" of a "rebellion" with proven drug histories engaged in hazardous activities who acted as role models for other students. Moreover, these same athletes had the lowest privacy expectations of any group of students, given their submission to intrusive physical examinations and their communal showering and disrobing in the locker room. Here, in contrast, non-athletes have no history of drug use or discipline problems, engage in no dangerous activities, and there is no indication that their social behavior is mimicked by other students. In fact, the Tecumseh School Board, by targeting activities like the Band, Choir, and the Future Homemakers of America, have picked the students least likely to use drugs, least likely to incur or cause injuries, and least likely to provoke drug use among other students. Finally, the non-athletes who bring this case have never submitted to any privacy intrusions of the sort facing the *Vernonia* athletes. In short, every single factor (aside from the mere fact of being students) that justified drug testing in *Vernonia* is absent here. By disregarding these factors that were so critical in *Vernonia*, the challenged Policy effectively converted a rare Fourth Amendment exception into a routine and indefensible norm.

Tecumseh's hasty decision to drug test its non-athletes resembles the "symbolic" attempt to drug test candidates struck down in *Chandler v. Miller*, 520 U.S. 305 (1997). There, the Court stressed the absence of any evidence of drug use among the targeted group, as well as the state's failure to demonstrate that the group engaged in any activity involving concrete, immediate harm. *See id*. at 318-19. Like the Georgia legislature in *Chandler*, the Tecumseh School Board here is an elected body, responsive to a political imperative to appear tough on drugs, but ultimately lacking a demonstrated governmental interest to justify a programmatic search of innocent individuals.

The Fourth Amendment was born of colonial fury at British writs of assistance – general orders for the king's deputies to enter any place at any time in search of contraband. *See Vernonia*, 515 U.S. at 669 (O'Connor, J., dissenting). At the founding the targeted evil was alcohol, rather than narcotics, but little else differs. Colonists raised an outcry against allowing tax collectors to interrogate citizens regarding annual alcohol consumption. The modern practice of drug testing without individualized suspicion constitutes a more sophisticated but no less intrusive search. *T.L.O.*, *Vernonia*, and *Chandler* make clear that the suspicionless search remains an anathema unless the government makes out a strong, particularized case of need -- a circumstance plainly not present for a generalized search of all non-athlete extracurricular students lacking any history of drug use and despite the fact that they engage in no activities that make drug use peculiarly dangerous.

ARGUMENT

I. SEARCHES IN THE SCHOOL CONTEXT, INCLUDING URINALYSIS DRUG TESTING, MUST PRESUMPTIVELY BE BASED UPON INDIVIDUALIZED REASONABLE SUSPICION OF WRONGDOING

State-compelled urinalysis is a "search" subject to the demands of the Fourth Amendment. *See, e.g.*, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, __ U.S. __, 122 S.Ct. 587, 591 (2001)(quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

The Court's two cases concerning searches in the school context -- *T.L.O.* and *Vernonia* -- stand as two ends of a spectrum. At one end is *T.L.O.*, which defines the general rule. Under *T.L.O.*, a school need not obtain a warrant or establish probable cause to search, but any search must be based on "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." 469 U.S. at 340-41. *T.L.O.* thus reaffirms that, even in the school context, individualized suspicion is the central defining element of a reasonable search. It is a compromise that has effectively preserved the disciplinary authority of school officials, while striving to protect student privacy from overzealous intrusions.

At the other end of the spectrum is *Vernonia*, which permitted a school with particularly urgent needs to randomly drug test student athletes, a group described by the Court as having particularly diminished privacy expectations. In the Court's view, this combination justified a departure from the *T.L.O.* rule, but nowhere did the Court suggest that *Vernonia* overruled or undermined *T.L.O.* The starting point for evaluating the reasonableness of any school search remains individualized suspicion. Conversely, a school may conduct generalized searches only upon showing a combination of heightened need and lowered privacy of the sort found in *Vernonia.*

The Court in *T.L.O.* did not, of course, close the door entirely to more sweeping school searches -- indeed, the holding in *Vernonia* demonstrates that such searches are permitted upon a showing of a need beyond the ordinary needs of school administration. Still, *T.L.O.* noted rightly that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[, even if] the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)); *see also Chandler*, 520 U.S. at 313 ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing"). This bedrock Fourth Amendment principle has been applied by the Court in numerous cases, both before and since *T.L.O.* *See*, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 24-25 (1967)(pat-down search); *see also Maryland v. Buie*, 494 U.S. 325 (1990)(protective search of suspect's house during arrest); *Michigan v. Long*, 463 U.S. 1032 (1983)(protective search of glove compartment); *United States v. Brignoni-Ponce*, 422 U.S. 880 (1975)(border patrol search of vehicles); *Adams v. Williams*, 407 U.S. 143 (1972)(protective weapons search of suspect's person).

Contrary to petitioners' approach, this Court has always been sensitive to the critical constitutional divide separating searches based on some individualized suspicion and searches entirely lacking in any individualized suspicion. For example, in *O'Connor v. Ortega*, 480 U.S. 709, 728 (1987), this Court invoked *T.L.O.* to uphold the warrantless search of a government employee's office based on reasonable individualized suspicion. But the Court has not read that decision as opening the door to suspicionless drug testing of government employees, which is permitted only under narrow circumstances involving diminished privacy expectations and a serious risk to public safety. *See Von Raab*, 489 U.S. at 668-71; *see also Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)(probationers present special need); *Knights*, 122 S.Ct. at 591 (continuing to look to a finding of individualized suspicion as the primary, most reliable indicium of reasonableness).

On this spectrum between *T.L.O.* and *Vernonia*, this case falls decidedly on the *T.L.O.*

end of the scale. The programmatic purpose of the drug testing here is closely akin to the everyday needs of a school -- encouraging a group of well behaved students to continue to behave. By contrast, in *Vernonia* the Court found a congruence of at least six circumstances, which in combination justified suspension of the need for individualized reasonable suspicion: (1) student athletes were "the leaders of the drug culture," 515 U.S. at 649; (2) these athletes were imitated as role models by other students, *see id.* at 663; (3) the rampant and unchecked substance abuse by these athletes fueled an "immediate crisis" in a "drug-infested school," *id.* at 649, 662-63; (4) disciplinary problems had reached "epidemic proportions," *id.*; (5) drug use by these athletes could and did cause severe injury on the playing field, *see id.* at 663; and (6) these athletes have even less of a legitimate privacy expectation than other students, because of communal undressing and showering required for athletic participation and because athletes are subject to preseason physical exams, *see id.* at 657. In view of these circumstances, the majority concluded that the school district's policy was constitutional, but cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* at 665.

In Tecumseh High School, the members of the Choir, Band and other such activities share *none* of the six characteristics that justified suspicionless drug testing of athletes in *Vernonia.* They exhibit no history of drug use; they are not role models for other students' social behavior; the school itself has demonstrated only a minimal level of drug use and, indeed, describes its discipline problems as minimal and well controlled by pre-existing measures; no risk or history of drug related injuries exists; and the members of the Choir, Band and other such activities do not receive physical exams or engage in communal undressing or showering of the sort practiced among *Vernonia*'s athletes. As we demonstrate in detail below, the elements of governmental need and lack of privacy found in *Vernonia* are *all* absent here. There is thus no justification for abandoning the requirement of individualized suspicion set forth in *T.L.O.* It provides the school ample leeway to discipline and control its students, while ensuring that students like Lindsay Earls do not face unreasonable and intrusive searches merely for joining the extracurricular activities that most schools and parents embrace and encourage.

As part of a school's responsibility to its students and their parents, it must act "within the limits of the Bill of Rights." *T.L.O.*, 469 U.S. at 334 (quoting *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)). If students learn that authorities may casually disregard the "scrupulous protection of Constitutional freedoms of the individual," this will "strangle the free mind at its source" and "teach youth to discount important principles of our government as mere platitudes." *T.L.O.*, 469 U.S. at 334 (quoting *Barnette*, 319 U.S. at 637). Schools are where the civic democratic spirit is renewed; schools are not institutions of coercion and captivity. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)(education should instill in students "the very foundation of good citizenship"). Indeed, while the Court has taken "notice of the difficulty of maintaining discipline in the public schools today," it has also held that "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy . . . . We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *T.L.O.*, 469 U.S. at 338-39.

The kind of unsubstantiated anecdotal evidence of drug use that the District puts forth in support of a special need for drug testing could be conjured from the halls of every high school in America. If every student in every school is subject to testing, the need devolves from being special to merely routine – a lesson to all students that the Constitution is a mere platitude, that no rights are inalienable, and that liberty is available only at the whim of state authorities. As the Court has explained, "the care this Court took to explain why the needs in *Skinner*, *Von Raab*, and *Vernonia* ranked as 'special'" would be "wasted" if such broad justifications could be invoked to justify exceptions to the Fourth Amendment's normal preference for individualized suspicion. *Chandler*, 520 U.S. at 322.

II. THE DISTRICT'S DRUG TESTING POLICY, WHICH IMPOSES AN INTRUSIVE SEARCH AND SEIZURE OF URINE UPON NON-ATHLETES WITH NO HISTORY OF DRUG USE WHO ENGAGE IN NO DANGEROUS ACTIVITIES, DOES NOT MEET THE *VERNONIA* SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT'S STANDARD OF INDIVIDUALIZED REASONABLE SUSPICION

In *Tinker v. Des Moines Indep. Com'ty Sch. Dist.*, 393 U.S. 503, 506 (1969), the Court stressed that students do not "shed their constitutional rights . . . at the schoolhouse gate." Among the most basic of students' rights is the Fourth Amendment, which "generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler*, 520 U.S. at 308. This crucial requirement of individualized suspicion may be waived only in "closely guarded," *id.* at 309, and "limited" circumstances "where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Id.* at 314 (internal quotation marks omitted).

On occasion, the Court has allowed "certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000)(internal quotation marks omitted). But, in order to override the Fourth Amendment's normal requirements, the government need must rise beyond a generalized desire to deter misconduct, including drug use. *See Chandler*, 520 U.S. at 318. To survive constitutional scrutiny, therefore, the School's Policy must be designed to serve a special need, beyond the normal need for school discipline that prompted the Court in *T.L.O.* to find the warrant and probable cause requirements inapplicable in schools. It plainly is not.

In *Vernonia*, the Court identified four factors to be balanced in evaluating the constitutionality of the challenged school drug testing policy: (1) the nature of the privacy interest upon which the search intrudes; (2) the nature and character of the intrusion; (3) the nature and immediacy of the governmental interest at issue; and (4) the efficacy of the drug testing scheme as a means for addressing the drug problem. *Vernonia*, 515 U.S. at 654, 658, 660. Petitioners fail to carry their burden of making a showing under these *Vernonia* factors that the District's suspicionless drug testing of non-athletes promotes an important and immediate governmental interest sufficient to outweigh the privacy intrusion at issue here.

A. The Nature Of The Privacy Interest Of Non-Athletes Here Is Considerably Stronger Than The Privacy Interests Of Athletes In *Vernonia*

Respondents do not take issue with the unexceptional proposition, relied on so heavily by petitioners, that "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). Neither does this truism justify the suspicionless drug testing of all students. What is required under this prong of the *Vernonia* test, and what the record here does not support, is the proposition that Tecumseh's non-athlete students have taken actions to reduce their privacy expectations beyond those of most other students. To the contrary, the privacy expectations of non-athletes here are manifestly greater than those of the student athletes in *Vernonia.*

1. Student athletes accede to a number of significant privacy intrusions not imposed on other students. The district court correctly recognized that the analysis in *Vernonia* relied upon the fact that "athletes have even less of a legitimate privacy expectation [than other students], because an element of communal undressing is inherent in athletic participation, and because athletes are subject to preseason physical exams and rules regulating their conduct." Pet. App. 63a (citation omitted). In sharp contrast, none of the non- athletic activities covered by Tecumseh's scheme require communal showering or disrobing in front of other students. *Id.* at 65a; J.A. 63-64, 145-46. Similarly, the Policy, by its terms, exempts non-athletes from

submitting to the annual physical examination required for athletic activities. J.A. 196; *see* Pet. App. 65a; J.A. 63-64, 144-45.

As the district court found, the only manner in which plaintiffs' privacy expectations may differ from those of the general student body involves imposition of "extra" regulations, as discussed in *Vernonia*, 515 U.S. at 657. Pet. App. 66a. However, Tecumseh's non-athletes are largely exempt from the distinctive "extra" regulations listed in *Vernonia*: (1) submitting to preseason physicals; (2) acquiring insurance coverage; (3) maintaining a minimum grade point average; and (4) complying with "any rule of conduct, dress, training hours and related matters as may be established for each sport by the head coach[.]" *Id*. Here, non-athletes take no physicals, acquire no insurance coverage, J.A. 64, and are not subject to coaches' control over their conduct, dress, or schedule. The only extra "regulation" is the need to maintain passing grades in order to participate in competitions – a measure that is not even an "extra" rule, since it applies to all students who go on field trips or leave the campus for any reason, J.A. 104, and it certainly does not intrude on students' privacy. In sum, the grand total of measures that supposedly set respondents apart as having lower privacy expectations amounts to nothing more than a widely applied expectation that students pass their classes.

2. The District does not dispute that athletes alone are required to communally shower, undress, and undergo physical examinations. Instead, the District points to use of "public-like" restrooms occasionally used during overnight travel and "modest students [who have] ingeniously discovered how to disrobe in and out of their Choir uniforms on a school bus full of other students." Pet. Br. at 34. The contrast to the athletes in *Vernonia* and athletes at Tecumseh High School remains striking. These "public-like" restrooms allow for students' privacy while showering, in contrast to communal showers used by athletes. The modest Choir students are able to change in and out of Choir uniforms on a school bus without actually being nude like the athletes disrobing completely in a locker room. C.A. App. 295-96. Nothing in the actions of the non-athletes compares to the physical examinations undergone by athletes including, for male athletes, a hernia examination in which their genitals are directly manipulated. J.A. 149. Petitioners conclude that the non-athletic activities are "not for the bashful," Pet. Br. at 34 (quoting *Vernonia*, 515 U.S. at 657), but they can point to nothing as a basis for their conclusion.

The claim that students face onerous privacy intrusions from "the rules and regulations of the OSSAA," which can "deem a student ineligible 'whose conduct or character outside the school is such to reflect discredit upon the school'" (Pet. Br. at 35-36 (citing J.A. 194)), is vastly overstated. As the District has admitted, this vague "rule" of generalized good conduct has never once been applied to any student at any Oklahoma school. J.A. 46. Petitioners would have the Court find that this vague, never applied regulation is akin to participating in a closely regulated industry. Pet. Br. at 36.

3. The fact of "volunteering" for extracurricular activities does not, as petitioners claim, forfeit students' privacy expectations. The Tenth Circuit correctly concluded: "We do not believe that voluntary participation in an activity, without more, should reduce a student's expectation of privacy in his or her body. Members of our society voluntarily engage in a variety of activities every day, and do not thereby suffer a reduction in their constitutional rights." Pet. App. 20a. For instance, a range of clubs and non-competitive activities, many of which involve off-campus travel and meetings after school, are, as the District admits, "privileges and are voluntary." J.A. 61-62.

The notion that the special needs exception to the Fourth Amendment can rest on choosing an activity, rather than upon a governmental need, finds no support in the case law. For instance, the electoral candidates in *Chandler* chose to run for office, yet the lack of a governmental special need was constitutionally fatal to the State's drug testing program. The plaintiffs in *Skinner* and *Von Raab*, too, chose to hold particular employment, but this factor played no role in the Court's consideration of those cases.

Here, the "choice" to participate in extracurricular activities is of grave consequence to Tecumseh's students. *See Lee v. Weisman*, 505 U.S. 577, 595 (1992)(striking down school prayer at high school graduation where, although student could choose not to attend graduation, decision is not voluntary in meaningful sense because of "forfeiture of . . . intangible benefits"). Extracurricular activities help students stay in school and teach important personal and vocational lessons. In addition, cutting off the opportunity for extracurricular competition harms students by lowering their chances of gaining admission and winning scholarships to universities. J.A. 97-98, 133-35; C.A. App. 780; *see also* Brief *Amici Curiae* of American Academy of Pediatrics, *et al*. For the School to label such activities "voluntary" ignores the penalty suffered by those unable to participate. If forfeiting one's constitutional rights becomes the price for participating in any activity beyond legally compelled classroom attendance, then only the most withdrawn and uninvolved students will enjoy the protection of the Bill of Rights.

B. The Nature Of The Privacy Intrusion Is Significant

1. The brief history of drug testing litigation reveals a marked judicial ambivalence about the extent to which providing a urine sample intrudes upon reasonable expectations of privacy. Petitioners offer a mechanical application of *Vernonia*: if the urine collection and confidentiality policy there passed muster, then the School here has acted appropriately (regardless of the other *Vernonia* factors). Yet, Justice Scalia, author of the *Vernonia* decision, has deemed state-compelled urinalysis "particularly destructive of privacy and offensive to personal dignity," a "demeaning bodily search," and a "needless indignity." *Von Raab*, 489 U.S. at 680, 684, 685 (Scalia, J., dissenting). Similarly, the Court in *Skinner* stated that "[t]here are few activities in our society more personal and private than the passing of urine." 489 U.S. at 617 (internal quotation marks omitted).

Certainly, where approximately ten percent of Choir students have come forward to the Choir teacher with concerns about the drug test, Pet. App. 68a n.38, where one or more students may have dropped Choir entirely because of their embarrassment over the test, *id.*, and where students "giggled and snickered" during testing, *id.*, it can safely be inferred that the District's scheme is an invasion of privacy well beyond routine restroom use.

The judicial ambivalence and students' reaction are consistent with the way society itself deals with the passing of urine. The necessity of using public restrooms is reconciled with subjectively powerful feelings that urination is a private matter by construction of familiar social conventions -- we do not generally converse or even make eye contact while using a public restroom. Once outside, conversation resumes but, while in the restroom, people generally create a sense of privacy by not engaging with others and expecting that others will not engage with them.

When Lindsay Earls provided her urine sample, the usual conventions of non-interaction were necessarily broken down. It was made explicit that a teacher whom she knew well and saw daily would be listening actively to her urination. Pet. App. 69a n.39. She knew that the teacher would closely examine her urine, viewing its color and feeling its temperature. *Id.* She knew that other students would be aware of the same. Even if no one laid eyes on her as she passed urine, the carefully constructed conventions of public restrooms were abolished.

The contrast to providing a urine sample in a medical office is telling. There, a patient knows that no one is listening outside the door. White coats, lab equipment, and the assurance that friends and teachers are not in the room with the patient all construct a familiar, comforting social convention. The nature of the medical relationship is, by design, confidential and is not part of an effort to ferret out bad conduct. The point is to help the patient, not to detect wrongdoing by the patient. *See generally* Brief of *Amicus Curiae* American Academy of Pediatrics, *et al.*

At a level of both subjective and objectively reasonable feelings, a drug testing regime conducted by a school is intrusive. It would become tolerable, if ever, only through repetition.

And this, too, should concern the Court. If a urine test becomes a rite of societal passage, then adults will have ever less room to complain of its intrusiveness. As the Court pointed out in *Brown v. Bd. of Educ.*, public schools foster the ideals of democracy, but under Tecumseh's drug testing program, the school fosters the expectation that privacy is of no value. And as that expectation becomes ingrained, the Fourth Amendment and the notion of privacy itself risks becoming ever more vulnerable to an inquisitive government. *See Von Raab*, 489 U.S. at 687 (Scalia, J., dissenting)(widespread drug testing would result in "a coarsening of our national manners that ultimately give the Fourth Amendment its content").

2. Tecumseh's drug testing scheme provides no effective protection against the disclosure of confidential information. Tecumseh's policy allows notification of school personnel who have an unspecified "need to know," a variable term defined by school officials on a case-by-case basis. C.A. App. 606-07. Because in practice, the District reveals test results to all coaches and activity sponsors, and not just to athletic directors as in *Vernonia*, 515 U.S. at 651, the number of individuals notified quickly becomes excessive. *See supra* at 6 (potential disclosure to thirteen school employees). The required disclosure of students' confidential prescription medication information to school personnel would itself raise a red flag but, more disturbingly, the school has been careless in protecting that information: for example, the Choir teacher looked at students' prescription drug lists and left them where other students could see them. J.A. 129-32. The *Vernonia* Court stated that just this kind of compelled disclosure of medical information "raises some cause for concern," explaining that:

> In *Von Raab*, we flagged as one of the salutary features . . . the fact that employees were not required to disclose medical information unless they tested positive, and even then, the information was supplied to a licensed physician rather than to the Government employer.

Vernonia, 515 U.S. at 659 (citation omitted).

C. Tecumseh Has Not Demonstrated Safety Concerns Amounting To A Real And Immediate Interest Sufficient To Override Students' Fourth Amendment Rights

The School's Policy fails most decisively under the prong of the *Vernonia* test requiring that the suspension of Fourth Amendment norms comes in response to a real and immediate problem. A real and immediate interest can rest upon some combination of demonstrated drug use among the targeted group and the group members' performance of hazardous activities. We first address the lack of safety concerns underlying the drug testing of non-athletes.

1. By drug testing hundreds of students who undertake no hazardous activities whatsoever, the School ignores the well-settled conclusion that the concern for safety forms the cornerstone of special needs jurisprudence. Beginning with the companion cases, *Skinner* and *Von Raab*, the Court has emphasized that the departure from the usual requirement of individualized suspicion grew from a particularized and ultimately superseding need to protect the public from a tangible and significant threat:

> Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, employees who are subject to testing . . . can cause great human loss before any signs of impairment become noticeable to supervisors or others.

Skinner, 489 U.S. at 628 (citation omitted). Nothing less than "surpassing safety interests" in *Skinner*, *id.* at 634, or "extraordinary safety and national security hazards" in *Von Raab*, 489 U.S. at 674, were held sufficient to override the usual protections of the Fourth Amendment. Where,

as here, the governmental need is not grounded in any appreciable history of drug use, showing a need based on safety concerns is all the more critical.

In *Vernonia*, safety was again of pivotal importance in finding a special need for a drug testing regime aimed specifically at athletes engaging in risky sport activities. The Court cautioned against petitioners' tactic here of assuming that the risk of injury from the activity giving rise to drug testing was unimportant to the *Vernonia* decision: "[I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." *Vernonia*, 515 U.S. at 662. Justice Ginsburg's concurrence again emphasized the unique safety concerns faced by student athletes. *Id.* at 666. And only this past Term, Justice Kennedy described *Vernonia* as resting, not merely upon generalized concern for student drug use, but upon the specific harms facing the students actually targeted under the *Vernonia* policy:

> [W]e sustained the [drug testing] policy as furthering . . . the policy's ultimate goal: "deterring drug use by our Nation's schoolchildren," and *particularly by student-athletes, because "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.*"

Ferguson v. City of Charleston, 532 U.S. 67, 87 (2001) (Kennedy, J., concurring)(emphasis added)(quoting *Vernonia*, 515 U.S. at 661-62).

Nor were the safety concerns in *Vernonia* based upon mere speculation: the Court noted a severe injury and various omissions of safety procedures and misexecutions attributable to documented drug use among athletes. *Vernonia*, 515 U.S. at 649; *see also id.* at 662 ("the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes"). At least implicitly, the Court recognized that, just as schools can protect themselves from the risk of athletes' injury by routinely examining student athletes for heart problems, hernia or asthma, a school can screen for drug use because it, too, poses a heightened danger for students engaged in vigorous physical activity.

Consonant with this precedent, the Court's most recent drug testing case struck down a suspicionless search of candidates for state office, with the eight-Justice *Chandler* majority emphasizing:

> We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable" -- for example, searches now routine at airports and at entrances to courts and other official buildings. *But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.*

Chandler, 520 U.S. at 323 (emphasis added).

Every court to address drug testing has uniformly looked to safety as a crucial factor in applying the special needs test. For instance, the remand of the Court's decision in *Von Raab* called for an examination of the safety sensitivity of certain agency employee positions, 489 U.S. at 678-79, leading the lower court to allow drug testing for armed drug interdiction agents (as instructed by this Court), while barring drug tests of animal handlers, clerks and other employees not engaged in safety sensitive tasks, *Nat'l Treasury Employees Union v. Hallett,* 756 F.Supp. 947 (E.D. La. 1991). Indeed, no court has ever upheld a drug testing program for individuals whose activities do not affect safety, except for a Seventh Circuit case whose reasoning has been

questioned even within that Circuit. *See Joy v. Penn- Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000) (criticizing *Todd v. Rush County Schools*, 139 F.3d 571 (7th Cir. 1998)).[6]

2. In analyzing the safety concerns at issue here, the words of the Court in *Chandler* are again *apropos*: "Notably lacking in [petitioners'] presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule. Nothing in the record hints that the hazards [petitioners] broadly describe are real and not simply hypothetical . . . ." *Chandler*, 520 U.S. at 318-19.

The court of appeals concluded that the evidence showed no appreciable risk of injury due to participation in non-athletic activities subject to drug testing. Pet. App. 23a. The district court did not disagree. Pet. App. 59a-60a. The School Board did not even consider safety as a rationale for including non-athletes in its policy. J.A. 155. Principal James Blue confirmed that in his many years as principal, there had been no drug-related injuries or deaths. C.A. App. 162. Nonetheless, petitioners now list the following hypothetical safety concerns: (1) Band members "perform extremely precise routines with heavy equipment and instruments in close proximity to other students"; and (2) some FFA competitions involve large animals. Pet. Br. at 43. Notably, the District makes no claims at all of dangers for the Choir, Future Homemakers of America or Academic Team. Turning then to the claimed dangers of Band, the Board President flatly contradicted the argument now made by the District's attorneys, affirming that "any danger of [Band members] seriously injuring themselves or other people [was] not a reason for this drug testing policy for the Band." J.A. 77. The prospect of Band students walking into one another, even if one is carrying a trombone and the other a snare drum, bears more resemblance to the normal high school activities of walking through a crowded hallway on the way to class than to being tackled by a linebacker during a football game. Indeed, the School admits that it has no knowledge of any injuries caused by participating in the Choir, Band, Future Homemakers of America or Academic Team. J.A. 50.

Petitioners end up resting their safety argument on the fact that one FFA student and one FFA adult judge have suffered minor injuries during the past thirty years when large livestock have escaped the control of a student. Pet. Br. at 39; J.A. 81. This is surely a rate of injury considerably lower than occurs in any high school athletic program. If the School is genuinely concerned that drug impairment would cause a student to lose control of an animal, it defies logic that the School would allow smaller children to handle precisely these same animals, knowing that the animals will predictably "get loose." J.A. 80. Moreover, handling of livestock is a regular class activity, not triggering drug testing unless also pursued in competitions. C.A. App. 693. Finally, whatever the degree of risk posed by large livestock competitions, it does not justify drug testing all FFA students, much less all extracurricular students. Many FFA students engage in competitions posing no imaginable safety hazard: speech, floriculture, horticulture, and small animal competitions. J.A. 79, 117-18.

Finally, petitioners argue that the lack of supervision of students during overnight travel raises a safety issue for non-athletic competitive activities. Pet. Br. at 43-46. This red herring should be dismissed out of hand. First, no drug tests are imposed upon the numerous students who travel off-campus for reasons other than extracurricular competitions, including field trips by the Student Council, the FFA class trips to Kansas City and St. Louis, Future Homemakers of America field trips to ring bells outside Wal-Mart, the Band class trip to Six Flags amusement park in Texas, the math club trips to Six Flags and to a Colorado ski resort, field trips by the Beta

---

[6] The Eighth Circuit mimicked *Todd*'s flawed reasoning in *Miller v. Wilkes*, 172 F.3d 574, 578 (8th Cir. 1999), focusing overwhelmingly "on the privacy side of the scale." That decision has since been vacated. 1999 U.S. App. Lexis 13289 (June 15, 1999). Petitioners expend some effort in their brief to explain the positions of lower courts on drug testing. Pet. Br. at 29-33. They neglect to mention the several recent cases striking down student drug testing. The court of appeals in this case, however, reviews these rulings accurately and in detail. Pet. App. 26a n.14. Petitioners also mistakenly suggest that the Fifth Circuit has upheld drug testing of school teachers, Pet. Br. at 33, when the opposite is true, *see United Teachers v. Orleans Parish Sch. Board*, 142 F.3d 853 (5th Cir. 1998).

Club, French Club, Spanish Club, and Mu Alpha Theta organization, off-campus reporting by school newspaper members, workshops and fund raising activities by yearbook members, community events by members of the Leadership activity, and a variety of field trips associated with academic classes, including a visit to a local prison. J.A. 39 (admitting allegation of Compl. ¶¶34(b-c, e)), 40 (admitting allegations of Compl. ¶34(i-m) and ¶35), 45, 62, 83; C.A. App. 559-61, 671. The District admits that these students, none of whom are subject to drug testing, "sometimes share sleeping accommodations during [their] travel; and that during such travel students are sometimes allowed free time to journey into the surrounding area without adult supervision." J.A. 62. Moreover, the School maintains an open campus, C.A. App. 510, allowing *every* student to drive to Shawnee, a nearby town, for their daily lunch break. C.A. App. 512. Petitioners suggest that the School's safeguards against drugs (cameras, guards, etc.) are uniquely unavailable for students traveling to competitions, Pet. Br. at 45, but the record is clear in showing that virtually all students leave campus for a variety of reasons.

Second, the drug test cannot be credibly viewed as responding to the dangers of leaving campus, since many students who never end up traveling for competitions must take the drug test upon signing up for a competitive activity. Some are fortunate enough to travel to out-of-state competitions, but many engage in such purely local activities, J.A. 117, or competitions hosted by Tecumseh -- activities that raise none of the supervisory concerns claimed by petitioners.

Third, the District made no showing that drugs were likely to be used on the trips for competitions or had even once been found on such a trip. Since special needs must rest upon a "concrete danger demanding departure from the Fourth Amendment's main rule," *Chandler*, 520 U.S. at 319, the District's one plausible safety issue turns out to be nothing more than another *post hoc* rationalization for a policy proposed and implemented without reference to students' safety. Petitioners' counsel have embraced the need to protect traveling students as a safety-related rationale for the policy, but this reason was never considered by the Board, and the enacted Policy has little nexus to the claimed hazards of off-campus travel.

The District seeks to respond to the record here with a claim that *Vernonia*, while explicitly addressing the demonstrated hazards faced by the plaintiff football player and his many teammates, implicitly endorsed the drug testing of a handful of golf players who engage in a sport petitioners suggest is hazard free. Pet. Br. at 42 n.25; *but see* Todd Purdum, "Caution: Presidents at Play," N.Y. Times, Feb. 16, 1995, §A, at 1 (former U.S. Presidents injure spectators with errant golf balls). With reasonableness being the ultimate touchstone, a line between athletes and non-athletes makes sense. The *Vernonia* decision concerns an overwhelming majority (if not complete unanimity) of athletes proven to use drugs, proven to engage in dangerous activities, and proven to be subject to injury in those activities. Here, the overwhelming majority (if not complete unanimity) of non-athlete students engage in perfectly safe activities.

D. Tecumseh Has Not Demonstrated A Level Of Drug Use Amounting To A Real And Immediate Interest Sufficient To Override Students' Fourth Amendment Rights Against General Searches

Given the lack of safety concerns as a foundation for drug testing here, a current drug problem among the students being tested becomes indispensable in demonstrating a real and immediate governmental interest. This inquiry into past drug use makes sense, given that random drug testing ousts the usual Fourth Amendment requirement of individualized suspicion. We first address the lack of any evidence of drug use among the non-athletes targeted by the School's Policy -- a fact that alone suffices to conclude that the District fails to meet the "real and immediate interest" prong of the *Vernonia* test. Next, we demonstrate that drug use and discipline problems in the School as a whole were minimal. Finally, we address petitioners'

argument that the District need not prove any *current* problem so long as it articulates goals of generalized deterrence of drug use.

1. Based on a record of undisputed facts, the court of appeals concluded that evidence of "drug use . . . among students subject to the testing Policy was negligible," indicating none of the "discipline problems" found in *Vernonia*. Pet. App. 19a. The district court and the dissenting judge in the court of appeals did not disagree with this assessment.[7]

As petitioners admit, the participants in non-athletic activities are "not the leaders of any drug culture," J.A. 64-65, as was true of the athletes in *Vernonia*, 515 U.S. at 662-63. The record shows, moreover, that the School has never even suspected drug use by a single one of the non-athletes subject to this drug testing policy. All witnesses agree that the non-athletes subject to the School's drug testing are distinctly less likely to use drugs as compared to other students. The School Board President, for example, observed that the majority of students who use drugs or alcohol do not join extracurricular activities, J.A. 100-01, while all three activity teachers who testified in this case -- individuals who have the greatest daily contact with these students -- agree that drug use among extracurricular participants is lower than among the student body as a whole. The Choir teacher has never caught a Choir member with drugs in 29 years of teaching, and asserts that drug users tend not to join. J.A. 125, 127. The Future Homemakers of America teacher observed that the students who talked about drugs in her classes were "kids that I don't think would have had any desire to compete" in Future Homemakers of America competitions, J.A. 116, and so she has never suspected an extracurricular Future Homemakers of America student of using drugs. C.A. App. 673. Likewise, the FFA teacher, although noting that some of his *class* members have occasionally been "listless," proffered no instance of suspected drug use among extracurricular students and stated that FFA activity participants were less likely than other students to use drugs. J.A. 119. Only three athletes have tested positive in the entire two years of the drug-testing program's operation. J.A. 107; C.A. App. 570-74. The record is utterly barren of any evidence of drug use by the non-athlete students targeted under the District's challenged policy.[8]

In order to suggest that drug use does exist among the non-athlete students subject to this Policy, petitioners assert: "Respondent James also talked to twelve students about their own drug use, half of which he believed were engaged in extracurricular activities." Pet. Br. at 7. The record does not support this inventive use of deposition testimony. James' testimony makes clear that the *only* activity engaged in by these twelve drug-using students is "HOPE, if you can call that an extracurricular activity." J.A. 124. HOPE, or Life Guides as it is also known, is a youth group run by a non-faculty member; it is not a competitive activity and is not subject to drug testing. Record, Defs.' Statement of Uncontested Fact in Support of S.J. Motion, ¶34. James further stated that all of the students he knows to use drugs "hang out in the park." J.A. 124. When asked if "these people who hang out in that park, are they the people who do extracurricular activities," James replied, "none of them." J.A. 124.

The Court's inquiry into drug use as a justification for a special need finding should end with the conclusion that no drug use has been shown or suspected among the students who engage in non-athletic extracurricular activities. The relevant analysis of drug use should focus

---

[7] The district court concluded that the evidence presented by the District and discussed herein demonstrated that there was no "drug problem of epidemic proportions, or a student body in a state of rebellion," Pet. App. 61a, and reached no conclusions on the level of drug use among non-athletes subject to the drug testing policy. *Id.* at 77a. The dissent in the court of appeals took a similar approach, conceding that drug use in the school generally fell short of the *Vernonia* "crisis" and pointing to no evidence of drug use by non-athletes. Pet. App. 38a.

[8] Petitioners point to an interrogatory response claiming that school counselors "would testify" to students having sought counseling over drug use. As the court of appeals rightly concluded, "[t]he circumstances and details surrounding these incidents do not appear to have been developed more fully with additional evidence, nor is there any indication that any of the students, at least at the high school level, were involved in extracurricular activities." Pet. App. 16a-17a.

on the students actually targeted by the policy. In a similar vein, the Court in *Skinner* examined drug and alcohol use among train drivers subject to drug and alcohol testing, not all railroad employees, 489 U.S. at 602, and in *Von Raab* examined drug use among the drug interdiction officers subject to drug testing, not all Customs Service employees, 489 U.S. at 656. But, as we show below, even petitioners' attempt to show a drug problem in the overall student population fails to find credible support in the record.

2. The court of appeals concluded and the record confirms that evidence of drug use in the school as a whole was "minimal," Pet. App. 14a, far short of the "epidemic" use found in *Vernonia*, 515 U.S. at 663.[9] Petitioners seek to inflate the evidence, pointing selectively to snippets of the record to hypothesize a school-wide, decades-long drug problem. Again, the record shows otherwise.

Only two sources evaluate the school's overall drug use in an evenhanded manner, unbiased by the process of litigation. First, the school has spoken for itself under a legal obligation to tell the truth in a context where it has no incentive to exaggerate or minimize drug use. In its annual application for funds under the Safe and Drug-Free Schools and Communities program, the District was directed to submit an analysis of current use, as follows: "Needs should be identified using *objective measures* (dat[a] bases), *rather than using subjective measures (opinions)*." J.A. 176 (emphasis added). The District complied with these instructions, making use of "annual drug use and violence surveys," a tool it deemed to provide "useful information" and a means "to more objectively evaluate the extent of drug, alcohol and tobacco use among our students." J.A. 186. *See* C.A. App. 366 (Assistant Superintendent testified forms contained accurate information).

As far back as 1989, the District surveys found "continued use and abuse of alcohol." J.A. 164. The District's own observations at the time confirmed survey reports that it had "very few" drug incidents over the previous two years. J.A. 165. The following year found alcohol use "steady" but drug use "going down," with drug education having such a "positive impact" that the District had "very few" drug incidents. J.A. 168. The District reached identical conclusions in 1991, J.A. 171, and then in the 1993 application, the District concluded that less than five percent of its students had used marijuana or any other drug. J.A. 176. This figure is dramatically below the national surveys showing almost half of students nationally having used drugs. *See* Brief of U.S. at 2, and sources cited therein.

In 1995, the District further elaborated on its assessment, stating, "the use of the surveys has provided us with information concerning alcohol as our number one problem. Our students express that the main use is alcohol on the weekends. We have not found other types of illegal or controlled substances to be a major problem although they do exist." J.A. 180. The District concluded, "it is our belief that most youth do not use drugs." J.A. 181. Again in 1996, the District found tobacco and alcohol to be "our number one problems," while other drugs still had "not identified themselves as major problems at this time." J.A. 186.

Notably, in each of the two years preceding enactment of the drug testing policy, the District reached identical conclusions of minimal drug use and minimal disciplinary problems. Alcohol and tobacco remained the "number one problem," and other drugs were not "major problems." J.A. 186, 191. As for petitioners' claim that discipline problems might justify its drug testing Policy, the District reported that "[m]inimal problems have been experienced due to violence, safety and discipline problems," J.A. 186, 192, and that "discipline policies in place at each site have been effective in dealing with the problems." J.A. 192.

Petitioners' brief makes no mention of its own prior statements in the federal applications, and the United States in its brief seeks to shunt aside these key admissions as

---

[9] The district court makes no effort to quantify the level of drug use overall, other than to find it to be less than "epidemic." Pet. App. 61a.

somehow unreliable. Brief of U.S. at 23 n.7. On the contrary, what should be viewed as less reliable are the self-serving statements generated as part of this litigation. The federal reports are the single most reliable indication of the school's own view of the scope or severity of its drug problem *at the time it implemented its drug testing policy*. The Solicitor General calls for "appropriate deference to the judgments of local school officials as to the severity of the problem," U.S. Br. at 24, and this is precisely why the federal reports by local school authorities should be credited and why the post-enactment contentions of the School's lawyers deserve little weight.

Second, beyond the federal reports, the School maintained a record of drug-related incidents prior to this present litigation. These records were no haphazard collection of anecdote, but were tied to a strict District policy that "[a]ny case involving violation of th[e] policy [prohibiting drug use, distribution or possession] is to be reported immediately to the principal or school official in charge," who would then impose specific disciplinary measures. J.A. 191. The records of these disciplinary reports show only two drug-related incidents. First, in the 1997-98 school year, immediately prior to the District's adoption of its Policy, the record shows that one student was disciplined for "small particles and seeds of marijuana" found in a car. Pet. App. 58a; J.A. 103; C.A. App. 581. The student was not an extracurricular participant, was not drug tested as a result of this incident, and is now in good standing. C.A. App. 580-84. Second, several marijuana cigarettes were found by a drug dog under a log at the boundary of an unfenced school parking lot that was easily accessible to the general public. J.A. 101-02. The school never determined that the cigarettes belonged to a student, and no student was disciplined. *Id.* The Assistant Superintendent, who drafted the drug testing policy, confirmed that, to his knowledge, no other drug incidents had occurred beyond the two documented in the School's disciplinary records. J.A. 140.

Rather than relying on the School District's own surveys, reports and disciplinary records, petitioners prefer to piece together anecdotes and rumor. This same effort previously led the court of appeals to conclude that the School District made "assertions [that] involve distortions of the record in this case." Pet. App. 18a n.9.

Petitioners' narrative of Tecumseh drug use relies largely on the deposition testimony of Dean Rogers, the School Board President. Petitioners make no suggestion that the Board or District relied on Ms. Rogers' anecdotal accounts in formulating or enacting the Policy. Without revisiting each of these second- or third-hand accounts, a few instances suffice to demonstrate the kind of use petitioners make of the record. For instance, as evidence of a drug problem in the 1970's, petitioners refer, without elaboration, to "a Band student who offered another Band student 'pills.'" Pet. Br. at 4. Ms. Rogers did indeed testify that her daughter had been offered pills on the school bus by another Band member three decades ago, but she also acknowledged that she did not know whether the pills were aspirin, narcotics, or something else entirely. J.A. 72.

Similarly, Ms. Rogers' claims to have found drug paraphernalia in her home during the late 1970s, apparently left behind by a friend of her son who played high school football. She did not find any drugs. J.A. 92. The "paraphernalia" consisted of items that she believes could be used for "marijuana, LSD, or crack." *Id.* According to her testimony, however, she had no idea how LSD is consumed, *id.* (no paraphernalia is needed); and it is quite unlikely that she found a crack pipe in 1978, since crack was not used with any frequency in the United States until the mid 1980's. Ms. Rogers testified, as well, that her son confessed his own marijuana and Quaalude use to her almost twenty-five years ago. J.A. 92, 100.

Much more to the point is the sort of information that actually came before the Board. While that information may have been less dated, it was no more persuasive. At best, it suggested a minimal amount of drug use, none of it connected to the non-athletes engaged in

extracurricular activities,[10] much of which apparently occurred outside of school,[11] and all of which took place during a time when the school district submitted annual forms to the federal government reporting "very few" drug incidents.

3. Petitioners and the Solicitor General respond to the absence of any evidence of drug use among non-athlete extracurricular students and the scant evidence of drug use by students overall, claiming that none of this matters. They argue that aspirations for a drug-free school justify prophylactic drug testing. As well intentioned as this goal may be, it presupposes a radical reformulation of Fourth Amendment law: under this theory, a school should be allowed to conduct general searches when it has *no* reason to believe it faces a current problem because deterrence and preservation of the school's good reputation alone justify putting aside the protections of the Fourth Amendment against general searches. As we show below, a history of drug use has always played an important part in evaluation of a special need, and the suggestion that the Court should dispense with showing *any* real and immediate governmental concern would invite drug testing of every student in every school, running directly contrary to *Vernonia* and every other special needs or school case previously decided by the Court.

a. Petitioners suggest and the Solicitor General argues strenuously that *Von Raab* stands for the proposition that drug testing regimes should be upheld despite the absence of prior drug use among those being tested. Pet. Br. at 22-23; Brief of U.S. at 21. Yet, the Court has made clear that such reliance on the Court's decision in *Von Raab* is misplaced:

> Hardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context. As the Customs Service reported in announcing the testing program, [Customs employees], more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use. We stressed that drug interdiction had become the agency's primary enforcement mission, and that the employees in question would have access to vast sources of valuable contraband. Furthermore, Customs officers had been the targets of bribery by drug smugglers on numerous occasions, and *several had succumbed to the temptation.*

Chandler, 520 U.S. at 321 (internal quotation marks, alterations, and citations omitted)(emphasis added).

Here, students like Lindsay Earls share none of the characteristics of the armed customs agents in *Von Raab*. These choir girls and school debaters are a world apart from a group of federal agents who routinely faced and some of whom had fallen prey to drug-fueled corruption. *Von Raab* stands only for the proposition that, in the absence of a history of drug use, a special need nonetheless may be founded upon exposure to or corruption by drugs, coupled with serious threats to public health and safety.

---

[10] Petitioners point to the testimony of three teachers. Pet. Br. at 5. Mr. Sterling suspected drug use by students in FFA class "probably three or four times" during the "last five years," C.A. App. 711-12, on nothing more substantial than their "listless" attitude and in only "one situation . . . the aroma of pot," J.A. 119, though he never found drugs or disciplined any of these classroom students. *Id.* Mrs. Daugherty initiated only a single drug-related disciplinary referral in 29 years of teaching and never caught a student with drugs. J.A. 127. The third teacher, Mrs. Evans, did not testify to having ever disciplined or caught a student for drug use, observing only that she overheard some students talking about marijuana in her class. J.A. 115-16.

[11] As a high school peer counselor, respondent Daniel James was particularly likely to encounter students using drugs, and testified that he had observed or been told of some drug use by twelve students. Petitioners make much of this testimony. However, as the district court correctly noted, Daniel was referring to drug use at parties he had attended, rather than at school or at official school functions. Pet. App. 58a n.14. Further, none of these students engaged in extracurricular activities. *Id.*; *see also* J.A. 124.

As a final effort to square the record of minimal drug use in this case with the Court's finding in *Vernonia* of a drug "epidemic," petitioners and the Solicitor General invite the Court to ignore its own words in favor of a reexamination of the details of the lower court record in *Vernonia*. Pet. Br. at 25; Brief of U.S. at 23-24. They argue that the Court should now pay no heed to its factual descriptions in *Vernonia*, all of which were relied upon and quoted by the court of appeals in the present case: the "sharp increase in drug use," "more disciplinary problems," the fact that "athletes were the leaders of the drug culture," the "administration was at its wit's end," "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," disciplinary actions were "epidemic," there was a "threefold increase in classroom disruptions and disciplinary reports," "the staff's direct observations of students using drugs," and a "rebellion fueled by alcohol and drug abuse." Pet. App. 10a-11a (quoting *Vernonia*, 515 U.S. at 649). The School would dispense with these repeated and consistent statements as unsupported by the record from the *Vernonia* district court. But the Court's own opinion unmistakably relies upon historical drug use among the targeted students as a critical element in its decision. As stated by the court of appeals in the present case, "[o]ne cannot read [*Vernonia*] and not appreciate that those factual findings regarding the existence of a documented drug problem among students subject to the drug testing were very important to the majority." Pet. App. 11a n.5.

b. This Court's Fourth Amendment jurisprudence does not support the notion that a governmental desire to promote lawful conduct can alone justify intrusive, suspicionless searches in the absence of a specific safety rationale. This is not because deterrence is unimportant. It is because a holding that deterrence alone is sufficient to override the Fourth Amendment command of individualized suspicion would allow the exception to swallow the rule. Thus, in *Vernonia*, the Court referred to the "nature and immediacy of the governmental concern at issue . . . ." 515 U.S. at 660. The test is not disjunctive; the school is obliged to show both that the nature of the concern is important *and* that the concern is immediate. In embracing the single goal of generalized deterrence, the District neglects the "immediacy" requirement. Pet. Br. at 48-49; *see also* Brief of U.S. at 18 (the "interest in deterring drug use in schools is alone sufficient to justify a drug-testing policy like the one at issue here").

General deterrence alone cannot be the rationale for putting aside Fourth Amendment norms, especially where the government lacks immediate safety concerns. Most any misconduct would be better deterred if the State were empowered to search any of us at any time. The fear of discovery would undoubtedly lead to greater compliance with government rules. But the Fourth Amendment was enacted to stand against precisely this dangerous logic. The same could be said of the government's ambition to deter drug trafficking in *Edmond*. The wider the net cast by a search, the greater the deterrence -- but the greater also the danger of contravening the Fourth Amendment.

E. The School's Drug Testing Policy Is Not Effective In Addressing A Proven Problem

Addressing the final prong of the *Vernonia* analysis, it is not enough that the government merely articulate a real and immediate interest: the proposed scheme must also effectively further that proffered interest. *Vernonia*, 515 U.S. at 660; *see also Edmond*, 531 U.S. at 42-43 (overturning a road block for lack of a "close connection" between the group searched and the government's concern); *Chandler*, 520 U.S. at 314 (noting the "documented link" in precedents between the tested group and the safety concern at issue); "Recent Cases," 112 Harv.L.Rev. 713, 716 (1999)(noting that suspicionless drug testing is reasonable under Supreme Court precedent "only to the extent that there is a recognizable correlation between the targeted group and the problem to be addressed"). The Policy here is not responsive to any identified problem of drug use or safety, least of all *in the group actually being tested*. *See Edmond*, 531 U.S. at 42 (striking down generalized seizure despite truism that "traffic in illegal narcotics creates social harms of

the first magnitude"). A proper governmental drug testing program must focus with some precision on the group for which specific evidence indicates a particularized need.

1. The District misconstrues the need to show the efficacy of a drug testing program. More than simply demonstrating that the drug tests are conducted competently, the program design must be reasonably calculated to prevent harm caused by drug use. A program that singles out students based on the likelihood that they do not use drugs and are not engaged in dangerous activities,[12] while leaving alone the disengaged, disinterested students who are more likely to use drugs, can hardly be deemed effective. Indeed, the Policy serves to deter these disengaged students from joining the Choir, Band or other such positive activities, encouraging them instead to remain idle and therefore more prone to destructive behavior. For this reason, the involuntary drug testing of school children has been opposed by both pediatricians and teachers. *See* Brief of *Amici Curiae* American Academy of Pediatrics, *et al*.

Vernonia upheld a specifically targeted policy: "It seems . . . self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." 515 U.S. at 663. In the instant case, by contrast, the District's policy makes no pretense of tailoring the scope of its solution to the problem at hand. It defies logic to suggest that a scheme aimed at the students least likely to be drug users could be an effective means of curbing drug use at the High School.

Further, both the need and the efficacy for drug testing athletes in *Vernonia* grew from the fact that many students mimic the drug-taking behavior of athletes. *See Vernonia*, 515 U.S. at 663. The non-athlete students targeted here, in sharp contrast, are hardly role models for the social behavior of other students. As in virtually every high school, Tecumseh's athletes, rather than students in its Choir or Academic Team, are the "cool kids" whose social behavior other students strive to emulate. The Choir teacher confirms this view,[13] and the district court refused to find otherwise. Pet. App. 76a. While some students may admire Academic Team members for their ability to excel in quiz bowl competitions, there is no evidence that the Academic Team sets the standard for *social* activities within the school.

Finally, the proffered test does not screen for alcohol or tobacco, J.A. 70 -- the most commonly used and lethal drugs in the school and its self-professed "number one problem," J.A. 186, 191, or for LSD, Ecstasy, or steroids, J.A. 70, 141. Of the six drugs the test does screen for, only marijuana remains detectable in urine for a long enough period that the test would likely discover its use. J.A. 70, 142. The limitations of the drug test in detecting substances other than marijuana pose a perverse incentive for students who do use drugs to shift from marijuana to use of more dangerous drugs like heroin or cocaine. *See* Brief of *Amici Curiae* American Academy of Pediatrics, *et al.*

2. The most telling hallmark of lack of efficacy comes in the District's acknowledgment that its Policy serves, in no small measure, purely *symbolic* purposes. Pet. Br. at 46 n.27; *see also* Brief of U.S. at 19 ("school district has a strong interest in seeing that those who represent [it] are not an 'embarrassment' to the school and community").

As *Chandler* demonstrates, a drug-testing program that fails to respond to demonstrated problems of drug use or safety can stem instead from a symbolic desire to project a public image of being "tough on drugs." Where, as here, a governmental body imposes suspicionless drug testing not because of an identifiable problem, but rather as part of a generalized opposition to

---

[12] Many activities posing significantly greater dangers than the Choir, Band and the like take place in the classroom and are not subject to drug testing. *See, e.g.,* J.A. 62-63 (driving vehicles in Drivers' Education class, using power cutting tools in Agriculture classes, using certain chemicals in chemistry class); J.A. 152-53 (welding in mechanics class).

[13] When asked, "Who would be the cool students that everybody wants to imitate?", the Choir teacher responded, "I would like to say the Choir students, but I really think it's probably the jocks." J.A. 129.

drug use, the teaching of *Chandler* is clear: drug testing in the name of symbolism simply cannot trump the Fourth Amendment's assurance that all of us, absent specific reason to believe we have committed some wrong, will be spared the invasive indignity of a governmental search.

Tecumseh readily admits that it imposes drug tests on non-athletes who "represent" the school in public for the following reasons: (1) "send[ing] a message to the community about the school's tough on drugs stance," J.A. 91; C.A. App. 361; (2) "projecting . . . a drug-free image," J.A. 154; (3) avoiding "embarrassment to the school" J.A. 78; (4) continuing the Choir's, Band's, and Academic Team's records of winning competitions, J.A. 79; and (5) fostering the appearance of fairness to athletes subject to testing. J.A. 89.

In *Chandler*, the Court ruled that the desire to project a drug-free image is not a legitimate reason for suspicionless testing. 520 U.S. at 321. In striking down Georgia's drug testing of candidates for public office, the Court stressed the sharp divide between symbolic and special needs: "What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse." *Id*. Absent any "evidence of a drug problem among the State's elected officials" or performance of "high-risk, safety- sensitive tasks," the governmental "need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law." *Id.*

Like Georgia's desire to display its commitment to the struggle against drugs, the District's purposes of sending a tough-on-drugs message to the community and of projecting a drug-free image are wholly symbolic, not special, needs. Similarly, the desire to avoid embarrassment stems far more from the concern of safeguarding Tecumseh's image rather than of safeguarding its students from any drug problem. Finally, the District's unwarranted expansion of its scheme to non-athletes in order to appear fair to athletes underscores the scheme's symbolic rather than substantive purpose. Non-athletes were added to Tecumseh's policy, which initially targeted only athletes, with no deliberation whatsoever as to whether these students had any history of drug use, J.A. 155: instead, board members reeled off "pet" organizations to subject to testing. J.A. 89. Tecumseh's desire to lend its actions the gloss of evenhandedness cannot serve to subject to search a broad group of non-athlete students never suspected of drug use. In sum, not one of the District's proffered interests is cognizable as a legitimate reason for suspending Fourth Amendment protections.

III. THE SCHOOL'S CALL FOR CLEAR GUIDANCE IN DESIGNING DRUG TESTING REGIMES DOES NOT JUSTIFY ABANDONING THE FOURTH AMENDMENT PROTECTION AGAINST GENERAL SEARCHES

Petitioners (and their *amici*) insist that, even lacking any evidence of drug use and special dangers, the Court should chart new territory in creating a bright line rule that would effectively allow drug testing of any student in any extracurricular activity, or perhaps any student at all.

First, as the Court recently pointed out, the reasonableness component of the Fourth Amendment is necessarily "abstract" and not easily "reduc[ed] to 'a neat set of legal rules.'" *United States v. Arvizu*, 534 U.S. __, 122 S.Ct. 744, 751 (2002)(quoting *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996), and *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). The special needs doctrine, in particular, involves an evaluative process, the details of which are worked out by the lower courts: "courts must undertake a context- specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 510 U.S. at 314; *see also Ferguson*, 532 U.S. at 81 ("In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose"). For instance, following the decisions in *Skinner* and *Von Raab*, it was clear that drug testing in the governmental workplace must be based on some measure of safety sensitivity, but litigation has been needed to clarify the parameters of workplace drug testing for safety sensitive positions.

Perhaps most fatal to petitioners' insistence on the need for a bright line rule is the fact that *T.L.O.* itself requires a school to make a number of judgments concerning reasonableness, and school officials have functioned effectively under that standard since 1985. *T.L.O.* offers no bright line or mechanical rules, but it leaves schools entirely capable of managing their discipline problems without undue fear of litigation.

The Court should not accept petitioners' invitation to chart new territory by allowing for a generalized drug test while dispensing entirely with the need to show any history of drug use or significant safety concerns. Petitioners echo the district court's reliance upon all-embracing statements regarding the ill effects of drugs in society and schools in general. Pet. App. 61a-62a. Even if one were to accept the frail premise that drug testing deters drug abuse (and petitioners have failed to adduce any evidence on this point), the district court's approach would transform the special needs doctrine into a blank check for privacy intrusions in the name of fighting drugs. The Court twice rejected that approach just last Term. *See Edmond*, 531 U.S. 32; *Ferguson*, 532 U.S. 67. Generalizations about the nation's schools cannot substitute for a reasoned analysis of the facts relating specifically to Tecumseh. These are precisely the kinds of vague governmental needs that the Court sought to guard against through *Chandler*'s requirement of a "concrete danger demanding departure from the Fourth Amendment's main rule." 520 U.S. at 319.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Graham A. Boyd

(*Counsel of Record*)
American Civil Liberties Union Foundation
85 Willow Street
New Haven, Connecticut 06511
(203) 787-4188

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Dated: February 6, 2002