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## NOTES

# PUTTING THE GLEE CLUB TO THE TEST: RECONSIDERING MANDATORY SUSPICIONLESS DRUG TESTING OF STUDENTS PARTICIPATING IN EXTRACURRICULAR ACTIVITIES

*Tamara A. Dugan\**

### I. INTRODUCTION

In 1995, in the case of *Vernonia School District 47J v. Acton*,<sup>1</sup> the United States Supreme Court held that suspicionless drug testing of public school students seeking to participate in extracurricular athletic activities was constitutional. While the Court had previously upheld suspicionless drug testing of railroad personnel involved in train accidents<sup>2</sup> and similar testing of federal customs agents that carry weapons or are involved in drug interdiction,<sup>3</sup> *Vernonia* was the Court's first consideration of the constitutionality of suspicionless drug testing of students in public schools.<sup>4</sup>

After the ruling in *Vernonia*, various state legislatures considered proposals intended to encourage not only the testing of student athletes, but also to support drug testing as a prerequisite for participation in any public school extracurricular activity in their state.<sup>5</sup> While none of these legislative proposals ultimately became law, local school boards in several states took the initiative to institute

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\* Candidate for J.D., Notre Dame Law School, 2003; A.B., Princeton University, 2000. This Note is dedicated to my parents and friends, who always encouraged me to keep going in everything that I did. I would like to thank Michael Shannon for all his helpful comments and edits throughout the process of writing my Note.

1. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

2. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

3. *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989).

4. See *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1270 (2001), *cert. granted*, 122 S. Ct. 509 (2001).

5. Between 1995, the year of the Supreme Court's decision in *Vernonia*, and 2000, the legislatures of Hawaii, New Jersey, Iowa, Georgia, and Montana all considered bills that would have explicitly permitted school boards within their state to conduct suspicionless drug testing of students participating in extracurricular activities. See H.B. 2853, 18th Leg., Reg. Sess. (Haw. 1995); A.B. 2727, 208th Leg., Reg. Sess. (N.J. 1998); S.F. 87, 78th Gen. Assem., 1st Sess. (Iowa 1999); H.F. 499, 78th Gen. Assem., 1st Sess. (Iowa 1999); H.B. 993, 145th Gen. Assem., Reg. Sess. (Ga. 1999); H.B. 81, 57th Leg., Reg. Sess. (Mont. 2000).

similar suspicionless drug testing programs at the district level.<sup>6</sup> Many of the policies adopted by these school boards have raised new constitutional questions. Although the Supreme Court's ruling in *Vernonia* made it apparent that the testing of student athletes was constitutionally permissible under certain circumstances, it remains unclear whether the Court's ruling extends to the testing of students that desire to join *non-athletic* extracurricular clubs or activities such as the glee club, academic clubs, or the Future Farmers of America.

District-level attempts to implement suspicionless drug testing as a prerequisite for extracurricular involvement have already faced numerous constitutional challenges—challenges that have produced divergent results within the federal judiciary. Following a recent Tenth Circuit decision striking down suspicionless testing of extracurricular participants, the Supreme Court granted certiorari to consider the matter further.<sup>7</sup> Assuming that the Court reaches the mer-

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6. School boards in Arkansas, Colorado, Indiana, Louisiana, Maine, New Jersey, Oklahoma, and Texas have approved suspicionless drug testing of students that are participating in extracurricular activities. See *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999) (upholding the drug testing policy of Cave City, Arkansas public schools that imposes random drug tests on all students in the district, with the penalty for a positive test being suspension from extracurricular activities), *vacated as moot* by No. 98-3227, 1999 U.S. App. LEXIS 13289 (8th Cir. June 15, 1999); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (striking down the drug testing policy of the Trinidad, Colorado school district that mandated drug testing for all students participating in extracurricular activities); *Todd v. Rush County Sch.*, 139 F.3d 571 (7th Cir. 1998) (upholding the policy of the Rush County, Indiana School Board that requires drug testing of all students participating in any extracurricular activity); Chris Gray, *Morial Pushes New Drug-Test Policy: City to Finance Pilot Program*, TIMES-PICAYUNE, Aug. 23, 2001, at 1, available at 2001 WL 26198416 (detailing drug testing, including random testing of students participating in extracurricular activities, in New Orleans schools); David Hench, *Painkiller Abuse Racks Rural County; Washington County Struggles in Vicious Cycle: A Bleak Economy Fosters Drug Use, Which in Turn Appears to Impede Growth*, PORTLAND PRESS HERALD, June 3, 2001, at 1A, available at 2001 WL 6491134 (stating that the Calais school board in Maine has instituted random drug testing for all students, with the penalty for testing positive being that the student is barred from participating in extracurricular activities); Jeffrey Gold, *Judge Bars Random Drug Test at High School Points to Privacy Violation for Athletes, Clubmembers*, RECORD (Bergen County, N.J.), Jan. 5, 2001, at A3, available at 2001 WL 5232333 (noting that Hunterdon Central Regional High School in Flemington, New Jersey conducted random drug tests of students on teams or in clubs—and even those who parked their cars at school—until a New Jersey Superior Court Judge issued an injunction prohibiting the continuation of the policy); *Earls v. Bd. of Educ.*, 242 F.3d 1264 (10th Cir. 2001) (ruling that the policy of the Tecumseh, Oklahoma school district requiring drug testing of all students who participate in any extracurricular activity is unconstitutional), *cert. granted*, 122 S. Ct. 509 (2001); *Gardner v. Tulia Indep. Sch. Dist.*, No. 2:97-CV-020-J, 2000 U.S. Dist. LEXIS 20253 (N.D. Tex. Dec 7, 2000) (holding that the policy of the Tulia, Texas school district to conduct drug testing of all students in grades seven through twelve who engage in extracurricular activities is unconstitutional). Public schools in Florida, Idaho, Michigan, North Carolina, Ohio, Wisconsin, and Wyoming have also initiated drug testing programs of one form or another. Amanda E. Bishop, Note, *Students, Urinalysis & Extracurricular Activities: How Vernonia's Aftermath Is Trampling Fourth Amendment Rights*, 10 HEALTH MATRIX 217, 218–19 (2000).

7. *Earls v. Bd. of Educ.*, 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 509 (2001).

its of the challenge presented in *Board of Education v. Earls*, there may soon be constitutional guidance on the issue upon which this Note focuses.

In the meantime, this Note offers a proposal for resolution of the suspicionless drug testing question. Part II discusses the constitutional requirements for suspicionless drug testing by explaining (a) the Supreme Court's ruling in *Vernonia*, (b) the divergent answers provided by the federal circuits to the question of whether *Vernonia* stands for the constitutionality of testing students who participate in non-athletic extracurricular activities, and (c) the Supreme Court's ruling in *Chandler v. Miller*—wherein, two years after *Vernonia*, the Court held that suspicionless drug testing of political candidates is unconstitutional.<sup>8</sup> Expanding upon the arguments presented in Part II, Part III explains that suspicionless drug testing of public school students who wish to participate in extracurricular activities is problematic—from both constitutional and policy-based standpoints. The Supreme Court may remedy these problems with its upcoming decision in the *Earls* case; if the Court declines to do so, however, this Note suggests that state legislatures should step in to alter the suspicionless drug testing procedures currently employed in certain public schools.

## II. THE CONSTITUTIONALITY OF SUSPICIONLESS DRUG TESTING

The Fourth Amendment to the United States Constitution—applicable to searches and seizures conducted by state officials by virtue of the Due Process Clause of the Fourteenth Amendment<sup>9</sup>—protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .”<sup>10</sup> It further provides that the warrants often necessary to validate those seizures cannot be issued without “probable cause” and must “particularly describ[e] the place to be searched, and the persons or things to be seized.”<sup>11</sup> According to one casebook on constitutional law, “[u]nder the monolithic approach to the Fourth Amendment which once obtained, the assumption was that every form of activity which constituted either a search or a seizure had to be grounded in the same quantum of evidence suggested by the Amendment’s ‘probable cause’ requirement.”<sup>12</sup> As more recent cases—such as

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8. *Chandler v. Miller*, 520 U.S. 305 (1997).

9. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (citing *Elkins v. United States*, 364 U.S. 206, 213 (1960)). In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), for example, the Supreme Court applied the requirements of the Fourth Amendment to the search of a public school student by school officials who suspected that the student had violated school rules. WILLIAM B. LOCKHART ET AL., *THE AMERICAN CONSTITUTION: CASES—COMMENTS—QUESTIONS* 328 (8th ed. 1996).

10. U.S. CONST. amend. IV.

11. *Id.*

12. LOCKHART ET AL., *supra* note 9, at 314.

*Camara v. Municipal Court*<sup>13</sup>—would suggest, however, courts do not always take such a mechanical approach in cases that touch upon Fourth Amendment rights.<sup>14</sup> In fact, “[t]he Supreme Court and the lower courts have upheld a rather broad range of administrative inspections and so-called regulatory searches even when conducted without a warrant and without the traditional quantum of probable cause.”<sup>15</sup> The Supreme Court’s decision in *Vernonia* exemplifies this fact.

#### A. *Vernonia School District 47J v. Acton: Upholding Suspicionless Drug Testing for Public School Athletes*

##### 1. Facts

At issue in *Vernonia* was the constitutionality of the Student Athlete Drug Policy adopted by School District 47J in Vernonia, Oregon.<sup>16</sup> That policy authorized random urinalysis drug testing of students who chose to participate in the District’s athletics program<sup>17</sup> and, in certain instances, directed school officials to suspend the eligibility of those athletes whose tests yielded positive results.<sup>18</sup> After James Acton, a seventh grader, refused to submit to the required

13. *Camara v. Mun. Court*, 387 U.S. 523 (1967) (ruling that probable cause exists to conduct housing inspections if reasonable administrative or legislative standards for inspecting an area are satisfied with respect to a particular dwelling and further explaining that warrants to conduct such inspections should normally be sought only after entry is refused by the homeowner—unless there has been a citizen complaint or there is another satisfactory reason for securing the area immediately).

14. LOCKHART ET AL., *supra* note 9, at 314 (“At least some Fourth Amendment activity should be judged under a balancing test, that is, by ‘balancing the need to search against the invasion which the search entails.’”).

15. *Id.* at 328.

16. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995).

17. *Id.* Under the dictates of the Vernonia policy:

Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of each season for their sport. In addition, once each week of the season the names of the athletes are placed in a “pool” from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing.

*Id.* at 650.

18. *Id.* at 651. Justice Scalia explained the disciplinary process for policy violations as follows:

If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete’s parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next

testing, the District declined to let him participate in its football program.<sup>19</sup> Acton and his parents responded by filing suit in federal district court, seeking a judicial declaration that the Policy violated the U.S. Constitution and an injunction against further enforcement of the suspicionless testing regime.<sup>20</sup> The district court dismissed the action, but was later reversed by the United States Court of Appeals for the Ninth Circuit, which held that the Policy violated the Fourth and Fourteenth Amendments to the federal Constitution.<sup>21</sup>

## 2. Fourth Amendment Background and the Special Needs Exception

Upon granting certiorari, the Supreme Court had to consider whether the Vernonia testing policy comported with Fourth Amendment requirements.<sup>22</sup> At the outset of the Court's opinion, Justice Scalia noted that, according to the text of the Fourth Amendment, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"<sup>23</sup> In the law enforcement context, the Court went on to explain, "reasonableness generally requires the obtaining of a judicial warrant"—this, in turn, necessitates a showing of probable cause.<sup>24</sup> Not every search and seizure requires a warrant or a demonstration of probable cause, however.<sup>25</sup>

According to the Court, "[a] search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant requirement and probable-cause requirement impracticable.'"<sup>26</sup> Recognizing that it had, in an earlier case, "found such 'special

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athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

*Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 652. The court of appeals also determined that the testing policy of District 47J violated Article I, § 9 of the Oregon Constitution. *Id.*

22. At the outset of the majority opinion, Justice Scalia established that the Vernonia policy did, in fact, raise a Fourth Amendment question. *Id.* (relying upon the Court's previous ruling in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989), which said that state-compelled collection and testing of urine constituted a search that was subject to Fourth Amendment requirements).

23. *Id.* Whether a search is reasonable, Justice Scalia wrote, "is judged by balancing its intrusion against its promotion of legitimate government interests." *Id.* at 652-53 (citations omitted).

24. *Id.* at 653 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).

25. *Id.* ("[A] warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required . . ., probable cause is not invariably required either.")

26. *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

needs' to exist in the public school context,"<sup>27</sup> the Court declined to invalidate the Vernonia policy simply because it permitted school officials to obtain urine specimens from student athletes without a warrant and without any showing that probable cause to conduct the testing existed.<sup>28</sup> Instead, the Court went on to consider whether the type of testing at issue would survive a three-factor balancing test.

### 3. The *Vernonia* Balancing Test

As the Court had previously recognized in *Camara*, some searches should be judged by "balancing the need to search against the invasion which the search entails."<sup>29</sup> In *Vernonia*, the Court would examine the reasonableness of the suspicionless drug testing policy at issue in light of three related factors: (a) the nature of the privacy interest upon which the search intruded, (b) the character of the complained-of intrusion, and (c) the severity of the need met by the search.<sup>30</sup>

#### a. *The nature of the privacy interest at stake*

The first factor that the Supreme Court considered in determining whether the Vernonia drug test was reasonable—and thus constitutional—was the nature of the students' privacy interest upon which the test infringed.<sup>31</sup> In analyzing the

27. *Id.* Justice Scalia explained why special needs exist in the public school context as follows:

[I]n the public school context . . . the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based on probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in their schools."

*Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 341 (1985)).

28. *See id.*

29. LOCKHART ET AL., *supra* note 9, at 314 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967)); *supra* note 15. According to the *Vernonia* Court:

At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the [Fourth Amendment] was enacted, whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

*Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (internal quotations and citations omitted).

30. *See generally id.* at 654–65.

31. *Id.* at 654. According to the Court:

privacy interest at stake, the Court placed great weight upon the persons who were the subject of the testing policy—namely, children who “ha[d] been committed to the temporary custody of the State as schoolmaster.”<sup>32</sup> Given that children who attend public school are required to submit to mandatory physical exams and vaccinations as a condition of enrollment in school, Justice Scalia reasoned, “students within the school environment have a lesser expectation of privacy than members of the population generally.”<sup>33</sup>

In completing its review of the privacy interest infringed by the testing policy, the Court then considered the specific subset of the student population that was affected by the Vernonia test—athletes. According to the Court, the expectation of privacy maintained by student athletes is even less substantial than that of most other public school students.<sup>34</sup> Justice Scalia explained that the defining characteristics of interscholastic athletics—engaging in communal showering and dressing, undergoing a physical exam as a condition of team participation, obtaining proper insurance coverage, maintaining a minimum grade point average, and submitting to athletic training at the direction of a coach or athletic director—suggested that “students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”<sup>35</sup> Having determined that student athletes possessed a diminished expectation of privacy, the Court moved on to consider the second factor in its reasonableness test.<sup>36</sup>

*b. The character of the intrusion*

The Court next examined the “character of the intrusion” resulting from the testing regime at issue.<sup>37</sup> Pursuant to the Vernonia policy, student athletes were

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The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as “legitimate.” What expectations are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual’s legal relationship with the State.

*Id.* (internal citations omitted).

32. *Id.* The Court noted that, “Fourth Amendment rights . . . are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.” *Id.* at 656.

33. *Id.* at 657 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring)).

34. *See id.*

35. *Id.*

36. *See id.* at 658.

37. *Id.*



required to produce a urine sample in a restroom while being monitored by a member of the same sex.<sup>38</sup> In addition, students had to provide—prior to submitting a sample for testing—notice of the prescription medications that they were taking.<sup>39</sup> Test results were “disclosed only to a limited class of school personnel who [had] a need to know . . . and [were] not turned over to law enforcement authorities or used for any internal disciplinary function.”<sup>40</sup> While the Court did find that the medication disclosure requirement raised some cause for concern,<sup>41</sup> the majority ultimately concluded that the invasion of privacy wrought by the testing and disclosure requirements “was not significant.”<sup>42</sup> This was so, the Court reasoned, because the conditions surrounding the production of urine samples were “nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily.”<sup>43</sup> Furthermore, Justice Scalia wrote, the Court had “never indicated that requiring advance disclosure of medications is *per se* unreasonable.”<sup>44</sup> After finding little cause to worry about the minor intrusions that might accompany the Vernonia policy, the Court turned its attention to the third and final aspect of its reasonableness criteria.

*c. The severity of the need met by the search*

The final factor of the Court’s analysis into the reasonableness of the Vernonia testing program focused on “the nature and immediacy of the governmental concern at issue . . . and the efficacy of [the chosen] means for meeting it.”<sup>45</sup> This factor included three related elements, which the majority opinion addressed in succession: (i) the nature of the government’s interest, (ii) the immediacy of that interest, and (iii) the effectiveness of the government’s response.<sup>46</sup>

*i. Nature of the state’s interest*

Justice Scalia dealt first with the nature of the state’s interest in deterring drug use amongst student athletes. Previous decisions upholding suspicionless drug testing in other contexts had spoken of the “compelling state interest[s]”

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38. *Id.*

39. *Id.* at 660.

40. *Id.*

41. *Id.* at 659.

42. *Id.* at 660.

43. *Id.* at 658.

44. *Id.* at 659.

45. *Id.* at 660.

46. *See id.* at 660–63.

that justified the policies at issue, but the *Vernonia* Court was quick to point out that there was “no fixed, minimum quantum of governmental concern” that would automatically make a particular search compelling—let alone reasonable.<sup>47</sup> According to Justice Scalia, to be compelling, a governmental interest must only be “*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”<sup>48</sup>

The Court found the interest safeguarded by the *Vernonia* policy to be sufficiently important—if not compelling—for a number of reasons. First, Justice Scalia wrote, “[d]eterring drug use by our Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs . . . or deterring drug use by engineers and trainmen,” both of which the Court had previously considered to be compelling interests.<sup>49</sup> Second, “the effects of a drug-infested school are visited not just upon the users, but upon the student body and faculty,” all the while disrupting the education process.<sup>50</sup> Third, in the eyes of the Court, the state had a “special responsibility for the care and direction” of children.<sup>51</sup> Fourth—and perhaps most importantly<sup>52</sup>—the Court noted that the *Vernonia* policy targeted students who were particularly vulnerable to the deleterious effects of drug use. According to Justice Scalia, “it must not be lost sight of that this program is directed . . . 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.”<sup>53</sup>

## ii. Immediacy of the concern

### Having found *Vernonia*’s interest in deterring drug use by student athletes

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47. *Id.* at 661. The Court’s opinion suggested that a governmental interest need not necessarily be compelling to justify a search under the reasonableness standard. *See id.* at 660–61 (“In both *Skinner* and *Von Raab*, we characterized that government interest motivating the search as ‘compelling.’ . . . Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.”).

48. *Id.* at 661.

49. *Id.* (citing *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989) (finding a compelling governmental interest in keeping customs officials involved in drug interdiction drug-free), and *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 628 (1989) (finding a compelling governmental interest in ensuring that railroad employees do not use drugs)).

50. *Id.* at 662.

51. *Id.*

52. *But see id.* at 665 (“The most significant element in this case is . . . that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.”).

53. *Id.* at 662 (“Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District’s Policy have been demonstrated to pose substantial risks to athletes.”).

to be significant, the Court next considered the “immediacy of the District’s concerns.”<sup>54</sup> Here, the Court relied heavily upon the findings of the district court during the proceedings below. According to Justice Scalia:

[T]he District Court[] conclu[ded] that “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,” that “disciplinary actions had reached ‘epidemic proportions,’” and that “the rebellion was being fueled by alcohol and drug abuse as well as by the students’ misperceptions about the drug culture.”<sup>55</sup>

These findings were sufficient to convince the majority that the District had acted to curtail an immediate crisis<sup>56</sup>—one that was “of greater proportions” than those that had prompted the Court to find a special need for suspicionless drug testing in other circumstances.<sup>57</sup> All that remained for the Court’s consideration, then, was the effectiveness of the Vernonia policy.

### iii. Efficacy of the response

The Court wasted few words before reaching its conclusion that the District’s policy represented an effective response to the situation in District 47J. “As to the efficacy of this means for addressing the problem,” Justice Scalia’s majority opinion stated, “[i]t seems to us 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.”<sup>58</sup> With those words, the Court had completed its analysis of the third factor of its reasonableness test—the District had initiated an efficacious policy to address a governmental interest that was both important and of immediate concern.

## 4. Result

Although District 47J’s drug testing policy authorized warrantless drug tests in the absence of individualized suspicion of wrongdoing, the Supreme

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54. *Id.*

55. *Id.* at 662–63 (quoting *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

56. *Id.* at 662 (“We are not inclined to question—indeed, we could not possibly find clearly erroneous—the District Court’s conclusion . . .”).

57. *See id.* at 663 (comparing the situation in *Vernonia* with those at issue in *Skinner* and *Von Raab*).

58. *Id.*

Court ultimately sustained its constitutionality.<sup>59</sup> The Court based this result on its judgment that the policy met the Fourth Amendment's reasonableness requirement in light of the three-factor balancing test outlined above. In the words of Justice Scalia: "Taking into account all of the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional."<sup>60</sup>

The Court's opinion in *Vernonia* settled at least one thing—it left little room for student athletes to challenge their school's drug testing programs when those programs were motivated by evidence of a drug problem amongst participants in school-sponsored sports. Whether the Supreme Court's decision should be read more broadly than that, however, remains an open question.<sup>61</sup> Along these lines, the majority noted that it "caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."<sup>62</sup> In her concurrence, Justice Ginsburg was even more explicit:

The Court constantly observes that the School District's drug-testing policy applies only to students who voluntarily participate in interscholastic athletics. . . . I comprehend the Court's opinion as reserving the question whether

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59. *Id.* at 665. After resolving the Fourth Amendment question, the Court still had to contend with the Ninth Circuit's decision that District 47J had violated the rights of its student athletes under the Oregon Constitution. See *supra* note 21. Justice Scalia explained the Court's decision on that matter as follows:

The Ninth Circuit held that Vernonia's Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9, of the Oregon Constitution. Our conclusion that the former holding was in error means that the latter holding rested on a flawed premise. We therefore vacate [that] judgment . . . .

*Id.* at 666.

60. *Id.* at 664–65.

61. See, for example, the dissenting opinion of Judge Kenneth F. Ripple in *Todd v. Rush County Schools*, 139 F.3d 571 (7th Cir. 1998), wherein Judge Ripple suggested:

*Vernonia* is susceptible to several different interpretations: (1) that "special needs" justifying drug testing always exist in the public school context, and thus school authorities may require drug testing for any reason including controlling access to core classes; (2) that it is necessary to show a particularized governmental need to impose drug testing on a particular student population; (3) that drug testing is permitted in special scholastic environments in which the need is well identified and the privacy expectations are diminished.

*Todd v. Rush County Sch.*, 139 F.3d. 571, 572 (7th Cir. 1998) (Ripple, J., dissenting from denial of petition for rehearing en banc).

62. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.<sup>63</sup>

It would not be long before the federal courts would have to grapple with the uncertainty that remained following the Court's ruling in *Vernonia*.

### *B. Suspicionless Drug Testing of Participants in Non-Athletic Extracurricular Activities: Divergent Opinions*

Since the Supreme Court's decision in *Vernonia* to uphold suspicionless drug testing of public school students as a prerequisite for participation in athletic activities, various school districts have implemented suspicionless drug testing of students that participate in *any* extracurricular activity, rather than just athletics.<sup>64</sup> These policies—while almost identical across different school districts—have met inconsistent fates upon judicial review.

#### 1. Suspicionless Drug Testing of Students Participating in Extracurricular Activities Deemed Constitutional

Courts in the Seventh and Eighth Circuits have found suspicionless drug testing of students that engage in non-athletic extracurricular activities to be constitutional. Their decisions—all handed down between 1998 and 2000—are analyzed below in chronological order.

##### *a. Todd v. Rush County Schools*<sup>65</sup>

The Seventh Circuit's first post-*Vernonia* look at a suspicionless testing policy came in the 1998 case of *Todd v. Rush County Schools*. That case arose after the parents of four students at Rushville Consolidated High School in Rushville, Indiana challenged the constitutionality of the Rush County School Board's testing program on behalf of their children.<sup>66</sup> Under the Rush County program, high school students were "prohibit[ed] from participating in any extracurricular activities or driving to and from school unless [they] consented to a test for drugs, alcohol or tobacco in random, unannounced urinalysis examina-

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63. *Id.* at 666 (Ginsburg, J., concurring).

64. *See supra* note 6.

65. *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998), *reh'g denied*, 139 F.3d 571 (7th Cir. 1998).

66. *Todd*, 133 F.3d at 984.

tions.”<sup>67</sup> The policy prevented the use of test results in any disciplinary proceedings, but stated that students who tested positive could not participate in extracurricular activities or drive to and from school before passing a retest.<sup>68</sup>

Although the students objecting to the suspicionless testing policy in *Todd* only wanted to videotape the football team or to continue as members of the Library Club and the Future Farmers of America,<sup>69</sup> rather than participate in interscholastic athletics, the court of appeals found that *Vernonia* controlled its decision.<sup>70</sup> After stating the issue of the case, in fact, it took the court just over one page in the Federal Reporter to reach its conclusion.<sup>71</sup> The court recognized that the policy challenged in *Vernonia* only applied to student athletes, but stated that “students in other extracurricular activities, like athletes, ‘can take leadership roles in the school community and serve as an example to others.’”<sup>72</sup> The court continued:

“[P]articipation in interscholastic athletics is a benefit carrying with it enhanced prestige and status in the student community” and thus “it is not unreasonable to couple these benefits with an obligation to undergo drug testing.” Therefore, it is appropriate to include students who participate in extracurricular activities in the drug testing.<sup>73</sup>

In the eyes of the three-judge panel, “Rush County Schools’ drug testing program [was] sufficiently similar to the program[] in *Vernonia* . . . to pass muster under the Fourth and Fourteenth Amendments.”<sup>74</sup>

The parents of the affected students filed a petition for an en banc rehearing shortly after the panel issued its opinion.<sup>75</sup> Over the objections of Judge Ripple<sup>76</sup> and three of his colleagues, the court denied that petition.<sup>77</sup> While the

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67. *Id.*

68. *Id.*

69. *Id.* at 985.

70. *See id.* at 986. The court also relied upon its own ruling in *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988), which upheld random urinalysis requirements for athletes, including cheerleaders. *Id.*

71. *See id.* at 985–87.

72. *Id.* at 986 (quoting from the opinion of the district court below).

73. *Id.* (quoting *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1320 (7th Cir. 1988) (internal citation omitted)).

74. *Id.* at 986–87.

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

76. Judge Ripple authored one of the two dissenting opinions. He saw real distinctions between the policies at issue in *Vernonia* and *Todd*:

This case involves an attempt by a school district to subject to suspicionless testing a much broader group than the student athletes involved in the drug testing program in *Vernonia*. The interests of the Rush County school district are substantially different

Seventh Circuit was the first to uphold the application of a broad-ranging suspicionless drug testing policy to students after *Vernonia*, the Eighth Circuit would follow suit the next year.

*b. Miller v. Wilkes*<sup>78</sup>

In 1999, the Eighth Circuit heard a Fourth Amendment challenge to the Chemical Screen Test Policy promulgated by the school district in Cave City, Arkansas.<sup>79</sup> The policy at issue in *Miller v. Wilkes* permitted Cave City school officials to conduct random drug and alcohol testing—by means of a urine test—of all students in grades seven through twelve without individualized suspicion.<sup>80</sup> Those students who tested positive faced a twenty-day probationary period before being tested again. Any student who failed the second test was “banned from participating in extracurricular school activities for a period of one year.”<sup>81</sup> Moreover, students who wished to participate in extracurricular activities but refused to consent to drug testing were also barred from those activities. One student who fell into this latter category, Pathe Miller,<sup>82</sup> sought declaratory and injunctive relief against enforcement of the policy in a federal district court.<sup>83</sup> Chief Judge Susan Webber Wright granted summary judgment in favor of the school district in the United States District Court for the Eastern District of Arkansas, prompting Miller to lodge an appeal—and the court of appeals to undertake a *de novo* review of the case.<sup>84</sup>

After pointing out that the Supreme Court had found the public school environment to provide the “requisite ‘special needs’” to allow a suspicionless search to be considered reasonable and constitutional, the *Miller* court applied

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from the ones at stake in *Vernonia*. There is, of course, the residual interest of the district in protecting students from illicit drugs. But, unlike the situation in *Vernonia*, there is no showing of a particularized need because of a “state of rebellion” in the school, and certainly no showing that the targeted group, all students participating in any extracurricular activity, presents a particularized need.

*Id.* at 572 (Ripple, J., dissenting).

77. *Id.* at 571.

78. *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), *vacated as moot* by No. 98-3227, 1999 U.S. App. LEXIS 13289 (8th Cir. June 15, 1999).

79. *Miller*, 172 F.3d at 576.

80. *Id.*

81. *Id.* at 577.

82. *Id.* (“Pathe Miller has averred that he wishes to participate, and would participate, in such school activities as the Radio Club, prom committees, the quiz bowl, and school dances, among others.”).

83. *Id.*

84. *Id.*

the *Vernonia* balancing test,<sup>85</sup> weighing “‘the scope of the legitimate expectation of privacy’ and ‘the character of the intrusion that is complained of’ against ‘the nature and immediacy of the governmental concern . . . and the efficacy of [the search] for meeting it.’”<sup>86</sup> The court’s analysis of the second balancing factor—which led the court to find the character of the intrusion to be insignificant<sup>87</sup>—“closely track[ed] the *Vernonia* Court’s treatment of [that same] factor.”<sup>88</sup> This made sense, given that the procedure for collecting urine samples under the Cave City policy was virtually identical to the one employed in District 47J.<sup>89</sup> The first and third factors would warrant slightly more attention, however.

At the outset of its discussion of the privacy interest enjoyed by Cave City students, the court of appeals noted that its analysis of the first *Vernonia* factor was “informed . . . by the Supreme Court’s conclusion that children in the public school setting have a lower expectation of privacy than do ordinary citizens.”<sup>90</sup> The court brushed aside Miller’s contention that the *Vernonia* Court had ruled as it did specifically because the policy at issue there targeted *athletes* in particular.<sup>91</sup> “As with athletics,” Chief Judge Bowman wrote, “there are features of extracurricular but non-athletic school activities that will lower the privacy ex-

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85. The court of appeals explained its reliance on *Vernonia* as follows:

[A]s in *Vernonia*, neither a warrant issued upon a finding of probable cause nor individualized suspicion of drug or alcohol use is required for the School District’s searches to be constitutional. But in the absence of such protections against an unconstitutional search, and in cases like this where the search in question could not have been anticipated by the Framers of the Constitution, the search must be shown to be reasonable under a balancing test devised by the Supreme Court.

*Id.* at 578 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)).

86. *Id.*

87. *Id.* at 580.

88. *Id.* at 579.

89. Compare *id.* (noting that, under the Cave City policy, the students were permitted to produce their urine samples in bathroom stalls), with *Vernonia*, 515 U.S. at 658 (noting that the *Vernonia* policy allowed males to produce samples at a urinal along a wall and females to produce theirs in an enclosed stall).

90. *Id.* at 578 (citing *Vernonia*, 515 U.S. at 656).

91. See *id.* at 578–79. The court of appeals explained:

Pathe argues that the policy in *Vernonia* applied only to student athletes was more significant to the Supreme Court in reaching its decision than was the fact that the policy applied to students who were attending public school. We read the case differently. The Court did say that “legitimate privacy expectations are *even less* with regard to athletes.” That is not to say, however, that it is only the student who seeks to engage in extracurricular school sports activities whose legitimate expectation of privacy is so diminished that a search such as this one *can* stand up to constitutional scrutiny.

*Id.* (internal citations omitted).



pectation of those who opt to participate to a point below that of fellow students."<sup>92</sup> Accordingly, the court found that students who choose to participate in those activities "have a legitimate expectation of privacy that is diminished to a level below that of the already lowered expectations of non-participating students."<sup>93</sup>

Having already found that students who wanted to join extracurricular activities had a lessened expectation of privacy—and that the testing was of a relatively noninvasive character—the court of appeals shifted its attention to the third factor in the *Vernonia* balancing test. As to the nature of the school district's concern, the court asserted: "The nature of the government concern is no different here than it was in *Vernonia*."<sup>94</sup> Chief Judge Bowman reached this conclusion with little trouble after defining the problem broadly as "substance abuse in public schools."<sup>95</sup> As to the immediacy of the problem, however, the court of appeals was constrained to admit that "there is not the same 'immediacy' here as there was in *Vernonia*."<sup>96</sup> The lack of the sort of immediate crisis that had plagued District 47J ultimately turned out to be of little consequence—according to the court, "it [did] not mean that the need for deterrence is not imperative."<sup>97</sup> Finally, as to the effectiveness of the Cave City policy, the court found no "reason to doubt the efficacy of the random testing policy as a measure to discourage drug and alcohol abuse and thus to prevent such abuse from becoming a problem in the Cave City schools."<sup>98</sup>

Based upon its consideration of the *Vernonia* factors, the court of appeals

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92. *Id.* at 579. Judge Bowman continued:

Notwithstanding that they may not be as rigorous as those relating to student athletic programs, extracurricular clubs and activities will have their own rules and regulations for participating students that do not apply to students who do not wish to take part in such activities. As with student athletes, someone will monitor the students for compliance with the rules that the clubs and activities dictate.

*Id.*

93. *Id.*

94. *Id.* at 580.

95. *Id.*; *cf. supra* notes 49–53 (discussing the nature of the state interest in *Vernonia* as being affected not just by its concern for the students and the education process in general, but also by the fact that the *Vernonia* policy targeted athletes in particular because of their increased susceptibility to deleterious effects of drug use).

96. *Miller v. Wilkes*, 172 F.3d 574, 580 (8th Cir. 1999) ("There is no 'immediate crisis' in Cave City public schools," nor is there any "record evidence of any drug or alcohol problem in the schools."), *vacated as moot* by No. 98-3227, 1999 U.S. App. LEXIS 13289 (8th Cir. June 15, 1999).

97. *Miller*, 172 F.3d at 580 ("We do not believe . . . that this difference must necessarily push the Cave City policy into unconstitutional territory . . .").

98. *Id.*

concluded that Cave City's interest in preventing drug use among students who participated in extracurricular activities was sufficiently important to justify the suspicionless drug testing policy at issue.<sup>99</sup> This ruling was eventually vacated as moot because Pathe Miller, the student challenging the drug testing policy of his high school, graduated and was no longer subject to the school's authority.<sup>100</sup> Nevertheless, the reasoning of the court's initial opinion remains valuable as an indicator of how—absent further guidance from the Supreme Court—the Eighth Circuit might approach the issue of suspicionless drug testing of students in the future.

c. *Joy v. Penn-Harris-Madison School Corp.*<sup>101</sup>

After the Eighth Circuit vacated its substantive ruling in *Miller*, the Seventh Circuit was once again the only federal circuit with valid case law supporting the constitutionality of suspicionless drug testing as a condition of participation in non-athletic extracurricular activities. Even that precedent seemed shaky, however, given that four Seventh Circuit judges had questioned the wisdom of the *Todd* decision in 1998.<sup>102</sup> As fate would have it, three of those same judges were charged with the task of reviewing a very similar case in 2000.<sup>103</sup>

During the same year the Seventh Circuit handed down its ruling in *Todd*, the Penn-Harris-Madison School Corporation instituted a policy that permitted "random, suspicionless drug testing of students involved in extracurricular activities and of students driving to school."<sup>104</sup> Judge Ripple, who authored one of the dissents to the court's denial of rehearing in *Todd*, delivered the opinion of the three-judge panel in the case that examined the constitutionality of that policy two years later.<sup>105</sup> Unlike the *Todd* decision, the opinion in *Joy v. Penn-Harris-Madison School Corp.* included an analysis of the school district's testing policy under the *Vernonia* balancing factors.<sup>106</sup>

The court of appeals looked first at the nature of the students' privacy in-

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99. *Id.* at 581 ("Weighing the minimal intrusion on the lowered expectation of privacy against the district's concern and the essentially unchallenged efficacy of its policy, we conclude that the School District's interest is 'important enough to justify the particular search at hand.'").

100. *Miller v. Wilkes*, No. 98-3227, 1999 U.S. App. LEXIS 13289 (8th Cir. June 15, 1999), vacating as moot 172 F.3d 574 (8th Cir. 1999).

101. *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000).

102. See *supra* notes 76-77 and accompanying text.

103. The panel that heard *Joy v. Penn-Harris-Madison School Corp.* consisted of Judges Flaum, Ripple, and Rovner. *Joy*, 212 F.3d at 1053. Before considering the *Vernonia* balancing factors, the panel reiterated its disagreement with the *Todd* decision: "We do not believe that the result in *Todd* is compelled by the Supreme Court's decision in *Vernonia*." *Id.* at 1062-63.

104. *Id.* at 1054.

105. *Id.*

106. See generally *id.* at 1064-66.

terest. Although “[p]ublic high school students have a lesser expectation of privacy than the general public,” Judge Ripple wrote, “students do not shed their constitutional rights at the schoolhouse door.”<sup>107</sup> This fact was important to the court, because it permitted the panel to distinguish between the privacy interest retained by student athletes and that enjoyed by participants in non-athletic extracurricular activities. According to the court, “unlike the athletes in *Vernonia*, [Penn-Harris-Madison] students who participate in extracurricular activities or who drive to school do not subject themselves to more explicit and routine loss of bodily privacy as a necessary component of their participating in the activities in question.”<sup>108</sup> This led the court to determine that “the expectation of privacy for students in extracurricular activities or with parking permits, although less than the general public, is still greater than the expectation of privacy for athletes.”<sup>109</sup>

Once it found that the Penn-Harris-Madison (PHM) challengers had greater privacy expectations than the *Vernonia* student athletes, the court of appeals moved on to consider the character of the intrusion created by the PHM policy. Here the court could discern little difference between the PHM policy and that of District 47J in *Vernonia*; accordingly, Judge Ripple quickly “conclude[d] that the character of the intrusion [was] not overly invasive.”<sup>110</sup>

Having discussed the first two factors of the *Vernonia* test, the court of appeals next concentrated upon the three interrelated elements of the third factor—the “[n]ature of the governmental concern,”<sup>111</sup> the “immediacy of the governmental concern,”<sup>112</sup> and the “efficacy of the means”<sup>113</sup> chosen to address that concern. First, the court noted, “PHM [did] not explain[] how drug use affects students in extracurricular activities differently than students in general.”<sup>114</sup> Second, the district failed to “establish[] that any immediate problem with drugs or alcohol exist[ed] for its students in extracurricular activities.”<sup>115</sup> Third—and finally—the court did not believe the school had made any showing that the

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107. *Id.* at 1063 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

108. *Id.* (“Unlike the students in *Vernonia*, these students . . . do not subject themselves, by virtue of their participation in these activities, to regulations that further reduce their expectation of privacy.”).

109. *Id.*

110. *Id.* at 1063–64.

111. *Id.* at 1064.

112. *Id.*

113. *Id.* at 1065.

114. *Id.* at 1064.

115. *Id.* at 1065 (“In the circumstances here, we think that PHM was required to show a correlation between drug use and students in extracurricular activities, or other evidence of a particularized need, before implementing its suspicionless drug testing policy for those particular student groups.”).

program would actually work. According to Judge Ripple, “there [was] no showing that the students subject to testing [were] the ones that [had to] be tested to resolve the perceived problems.”<sup>116</sup>

Had the court been writing on a clean slate in *Joy*, it would have struck down the school district’s policy insofar as it applied to extracurricular participants.<sup>117</sup> The court ultimately *upheld* the constitutionality of that policy in light of the Seventh Circuit’s recent decision in *Todd*,<sup>118</sup> but the judges made clear that they “believe[d] that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity.”<sup>119</sup> As the next portion of this Note indicates, Judges Flaum, Ripple, and Rovner are not the only jurists who feel this way.

## 2. Suspicionless Drug Testing of Students Participating in Extracurricular Activities Deemed Unconstitutional

Prior to 2001, the Supreme Court of Colorado<sup>120</sup> and a federal district court in Texas<sup>121</sup> both invalidated suspicionless drug testing programs targeting high school students who engaged in extracurricular activities. Two more federal courts have weighed in with similar decisions in the past year.

### a. *Tannahill v. Lockney Independent School District*<sup>122</sup>

In mid-January of 2000, the parents of Brady Tannahill, a sixth-grade student in the Lockney Independent School District, refused to sign the parental consent form that would have permitted the District to perform a suspicionless urinalysis test on their son.<sup>123</sup> Pursuant to the District’s policy—which applied to *all* sixth- through twelfth-grade students at the time—students such as Tan-

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116. *Id.*

117. *Id.* (“With respect to random testing of those who participate in extracurricular activities, we believe that, according to the methodology employed by the Supreme Court in *Vernonia*, there has been an inadequate showing that such an intrusion is justified.”).

118. *Id.* at 1066. *See also id.* at 1067 (“On the basis of the doctrines of stare decisis and precedent, we are constrained to affirm the judgment of the district court insofar as it permits the use of random drug testing of students who desire to engage in extracurricular activities.”).

119. *Id.* at 1066.

120. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (1998) (en banc) (finding unconstitutional “suspicionless urinalysis drug testing of all sixth through twelfth grade students participating in extracurricular activities”).

121. *Gardner v. Tulia Indep. Sch. Dist.*, No. 2:07-CV-020-J, 2000 U.S. Dist. LEXIS 20253 (N.D. Tex. Dec. 7, 2000) (finding unconstitutional a district policy mandating “random suspicionless drug testing of all students in grades 7–12 who engage in any extracurricular activity”).

122. *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001).

123. *Id.* at 923.

nahill were to be "susp[en]ded] from participation in all extracurricular activities for [twenty-one] days."<sup>124</sup> If their refusal continued, or if they consented and then tested positive, students could be forced to attend alternative schooling and "disqualif[ied] from participating in any activity or receiving any honors for the year."<sup>125</sup> After the Tannahills filed suit in United States District Court for the Northern District of Texas, the District agreed to stay enforcement of its policy until the courts had resolved the case.<sup>126</sup>

Taking its cue from the Supreme Court's *Vernonia* decision, the district court evaluated the Tannahills' Fourth Amendment claim under the three-factor balancing test.<sup>127</sup> Judge Cummings first examined "the extent of the students' privacy rights under the Fourth Amendment."<sup>128</sup> Noting that "students who do not participate in athletics are not subject to the same daily 'communal undress' or public showering as student athletes," the court determined that the students subject to testing in the Lockney Independent School District had higher expectations of privacy than the athletes in *Vernonia*.<sup>129</sup> The court next considered the second factor—"the intrusion upon students' privacy interests by the method of testing."<sup>130</sup> Judge Cummings found the process for collecting urine samples in the instant case to be sufficiently similar to that employed by District 47J in *Vernonia* to conclude that "the method of testing impose[d] a low intrusion on students' privacy interests."<sup>131</sup> The district court then turned to the final factor, which it identified as "whether the District has demonstrated a compelling state interest to support its program of suspicionless drug testing."<sup>132</sup> According to the court, there was no evidence that "the District faced a drug problem of 'epi-

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124. *Id.* at 922.

125. *Id.* at 923.

126. *Id.*

127. *See generally id.* at 928–30. The court also noted that a 1989 decision by the U.S. District Court for the Southern District of Texas, later affirmed by the Fifth Circuit Court of Appeals, "appear[ed] to be controlling on the question at bar." *Id.* at 924. In *Brooks v. East Chambers Consolidated Independent School District*, the district court struck down "a school district's mandatory, suspicionless drug testing program for all students in grades 7–12 who participated in extracurricular activities" in part because there had been little evidence in that district of a student drug problem. *Id.* (citing *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991)). The Lockney Independent School District argued that *Brooks* had been overruled by subsequent decisions, but the district court declined "to make such a determination," opting instead to evaluate the District's policy according to the standards laid down in *Vernonia* and related cases. *Id.* at 925.

128. *Id.* at 928.

129. *Id.* at 929 ("The students subject to drug testing in the Lockney School District comprise a much broader segment of the student population than the group of student athletes in *Vernonia*. Their expectations of privacy are higher.").

130. *Id.*

131. *Id.*

132. *Id.*

demic proportions' as encountered in the 'drug infested' Vernonia schools."<sup>133</sup> The Lockney policy, Judge Cummings wrote, "at best . . . attempt[ed] to generally reduce drug use by students [because it was] not specifically targeted to the special needs of a drug crisis or safety-sensitive job functions."<sup>134</sup>

After discussing each of the *Vernonia* factors, the district court performed the required balancing. Judge Cummings explained his thinking as follows:

Balancing the factors considered above, including students' increased expectation of privacy over that of student athletes, the unobtrusiveness of the method of testing, and the near dearth of evidence demonstrating a need to be met by the search, this Court finds that the District's drug testing program is unreasonable and hence unconstitutional under the Fourth Amendment.<sup>135</sup>

His conclusion that "the District ha[d] failed to demonstrate a sufficient special need to justify suspicionless drug testing"<sup>136</sup> came just days before the Tenth Circuit issued a similar ruling in *Earls v. Board of Education*.<sup>137</sup>

*b. Earls v. Board of Education*<sup>138</sup>

As was the case in the Lockney Independent School District, there was little evidence of widespread drug usage by students in Oklahoma's Tecumseh Public School District.<sup>139</sup> Nevertheless, the District adopted a Student Activities Drug Testing Policy in 1998.<sup>140</sup> That policy "require[d] drug testing of all students who participate[d] 'in any extra-curricular activity such as [Future Farmers of America], [Future Homemakers of America], Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics.'"<sup>141</sup> The policy further provided

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133. *Id.* at 929–30 ("Furthermore, a study conducted in 1998 before implementation of the policy indicated that drug use was generally lower in the District than in other Texas schools.")

134. *Id.* at 930.

135. *Id.*

136. *Id.* at 931.

137. The *Tannahill* decision was issued on March 1, 2001, *id.* at 919; the Tenth Circuit handed down its ruling on March 21, 2001, *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1264 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 509 (2001).

138. *Earls v. Bd. of Educ.*, 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 509 (2001).

139. *Earls*, 242 F.3d at 1272 ("[T]he evidence of drug use among those subject to the [Tecumseh] Policy is far from the 'epidemic' and 'immediate crisis' faced by the Vernonia schools and emphasized in the Supreme Court's [*Vernonia*] opinion. . . . Rather, the evidence of actual drug usage, particularly among the tested students, is minimal . . .").

140. *Id.* at 1266.

141. *Id.* (quoting the Tecumseh policy). Under the policy, "[e]ach student seeking to participate in such activities must sign a written consent [form] agreeing to submit to drug testing prior to participating in the activity, randomly during the year while participating, and at any time while participating upon reasonable suspicion." *Id.* Since the drug testing policy before the court of

that students who did not consent to random testing—or those who failed drug tests—would be barred from further participation in extracurricular activities.<sup>142</sup> Test results were to be placed in confidential files, were not to be disclosed to law enforcement authorities, and, under the policy, could not form the basis for any academic sanctions.<sup>143</sup>

The parents of two Tecumseh High School students who wanted to participate in non-athletic extracurricular activities objected to the District's suspicionless testing program insofar as it applied to non-athletes. Accordingly, they filed a federal civil rights action against the Board of Education of the Tecumseh Public School District and the District itself, alleging that the policy violated the students' constitutional rights.<sup>144</sup> After the United States District Court for the Western District of Oklahoma granted the school district's motion of summary judgment, the plaintiffs appealed to the Tenth Circuit.<sup>145</sup>

At the outset of its decision, the court of appeals announced that it would use the Supreme Court's *Vernonia* ruling as its primary guide.<sup>146</sup> Writing for the majority, Judge Anderson stated: "[W]e agree that the District has demonstrated that there is a special need for a relaxation of the Fourth Amendment's standards in this case, and conclude that the constitutionality of the Policy [must] be determined by balancing the factors set forth in *Vernonia*."<sup>147</sup> With that, the court proceeded to consider each factor in turn.

Examining the nature of the privacy interest at stake for the students, the court observed that there were "aspects of participating in extracurricular activities which do legitimately lower a student's expectation of privacy."<sup>148</sup> Like athletes, Judge Anderson wrote, students who engage in extracurricular activities "agree to follow the directives and adhere to the rules set out by the coach or other director of the activit[ies]" in which they participate.<sup>149</sup> Accordingly, the majority concluded that, "like athletes, participants in other extracurricular activities have a somewhat lesser expectation of privacy than other students."<sup>150</sup>

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appeals in *Earls* only applied to students who participated in extracurricular activities, it was narrower in scope than the one at issue in *Tannahill*, see *supra* text accompanying note 124, but broader than the athlete testing program detailed in *Vernonia*.

142. See *Earls*, 242 F.3d at 1268.

143. *Id.*

144. See *id.* at 1266.

145. *Id.*

146. *Id.* at 1270 (noting that *Vernonia* is the only Supreme Court case dealing with suspicionless drug testing of public school students).

147. *Id.*

148. *Id.* at 1276.

149. *Id.* (explaining that "[t]his inevitably requires that their personal freedom to conduct themselves is, in some small way, constrained at least some of the time").

150. *Id.*

As previous courts had done,<sup>151</sup> the *Earls* court wasted little time considering the second *Vernonia* factor—the character of the intrusion complained of. The court of appeals determined that Tecumseh’s urinalysis testing procedures were “virtually identical” to those used in *Vernonia* and, as such, “reach[ed] the same conclusion as did the Supreme Court.”<sup>152</sup> In the eyes of the majority, “the invasion of privacy was not significant.”<sup>153</sup>

The court’s view of the Tecumseh policy—at least in light of the first two balancing factors—did not differ substantially from that expressed by the *Vernonia* Court. The third *Vernonia* factor “tipped the balancing analysis decidedly in favor of the plaintiffs,” however.<sup>154</sup> In the majority’s estimation, the “nature and immediacy of the governmental concern at issue . . . and the efficacy of [the chosen] means for meeting it”<sup>155</sup> were simply not as compelling in the instant case as they had been in *Vernonia*. First, Judge Anderson noted that “the Court in *Vernonia* [had] emphasized the particular dangers to athletes caused by drug usage.”<sup>156</sup> According to the court of appeals, however, this concern was not applicable to all extracurricular participants:

While there may indeed be some extracurricular activities that involve a safety issue comparable to that of athletes, there are other students involved in extracurricular activities and therefore subject to the Policy who can hardly be considered a safety risk. . . . Thus, safety cannot be the sole justification for testing all students in competitive extracurricular activities . . . .<sup>157</sup>

Second, the majority suggested that Tecumseh’s reliance on “the fact that all extracurricular students are subject to less supervision than students in classrooms when they are staying after school to meet and/or practice” was also misplaced.<sup>158</sup> According to Judge Anderson, like extracurricular participants, “[s]tudents who do not participate in any extracurricular activities are, at times, less supervised than they are in the classroom.”<sup>159</sup> That being said, the court

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151. See, e.g., *supra* note 110 and accompanying text.

152. *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1276 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 509 (2001).

153. *Earls*, 242 F.3d at 1276 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995)).

154. *Id.*

155. *Id.* (quoting *Vernonia*, 515 U.S. at 660).

156. *Id.*

157. *Id.* at 1277 (noting that “[i]t is difficult to imagine how participants in vocal choir, or the academic team, or even the [Future Homemakers of America] are in physical danger if they compete in those activities while using drugs, any more than any student is at risk from simply using drugs”).

158. *Id.*

159. *Id.* The court substantiated its assertion that non-extracurricular participants were some-



asserted that “neither a concern for safety nor a concern about the degree of supervision provides a sufficient reason for testing the particular students whom the District chose to test under the Policy.”<sup>160</sup>

It was not just the District’s argument about the nature of the governmental concern at issue that troubled the court of appeals. “[G]iven the paucity of evidence of an actual drug abuse problem among those subject to the Policy,” the majority continued, “the immediacy of the District’s concern is greatly diminished.”<sup>161</sup> The absence of a genuine drug problem at Tecumseh High School troubled the court for another reason as well. According to Judge Anderson, “without a demonstrated drug abuse problem among the group being tested, the efficacy of the District’s solution to its perceived problem is similarly greatly diminished.”<sup>162</sup>

Upon weighing these portions of the final factor along with the first two balancing factors, the court of appeals concluded that the Tecumseh policy—insofar as it required participants in non-athletic extracurricular activities to submit to random, suspicionless urinalysis exams—did not meet the Fourth Amendment’s reasonableness standard.<sup>163</sup> Furthermore—much like Judge Ripple had suggested in his *Todd* dissent<sup>164</sup>—the Tenth Circuit voiced concern over the potential slippery slope that might follow judicial validation of broad-based,

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times less supervised than they would normally be in the classroom setting as follows:

[T]hey are [less supervised] in the hallways between classes, at lunch, [and] immediately before and after school while they are entering and leaving school premises. . . . Moreover, . . . there are other student organizations and groups which take field trips, meet after school, and otherwise engage in precisely the same kinds of less supervised activities as those in extracurricular activities subject to drug testing under the Policy.

*Id.*

160. *Id.*

161. *Id.*

162. *Id.* Judge Anderson distinguished the efficacy of District 47J’s policy from that of the Tecumseh Public School District’s as follows:

While the Court in *Vernonia* had no trouble identifying the efficacy of a drug testing policy for athletes when the athletes were at the heart of the drug problem, we see little efficacy [here] in a drug testing policy which tests students among whom there is no measurable drug problem.

*Id.*

163. *Id.* at 1278.

164. See *Todd v. Rush County Sch.*, 139 F.3d 571, 572 (7th Cir. 1998) (“[T]he panel’s formula permits . . . widespread testing on the ground that ‘successful extracurricular activities require healthy students.’ This rationale admits of no principled limitation.”). See also *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000) (“The danger of the slippery slope continues to haunt our jurisprudence.”).

random testing schemes in the absence of identifiable exigencies.<sup>165</sup> To guard against the accompanying denial of students' constitutional rights, the court suggested the imposition of the following requirement:

[A]ny district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem. "Special needs must rest on demonstrated realities."<sup>166</sup>

In his dissenting opinion, Judge Ebel took issue with this line of reasoning. He suggested that, "[n]otwithstanding the majority's statement that no special need from random, suspicionless drug testing must be demonstrated by the school district in [these cases], the majority appear[ed] to reimpose a special needs requirement toward the end of its opinion."<sup>167</sup> Such a requirement, Judge Ebel argued, "mandates a more detailed demonstration than was ever [called for] in . . . *Vernonia*."<sup>168</sup> According to Judge Ebel's view, Supreme Court precedent establishes that special needs are inherently present in the public school context; in light of this fact, courts should not impose the traditional special needs test in suspicionless drug testing cases.<sup>169</sup> Instead, the dissent suggested, judges should immediately "proceed to the required *Vernonia* balancing analy-

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165. See *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1278 (10th Cir. 2001) ("Unless a district is required to demonstrate [some identifiable drug abuse] problem, there is no limit on what students a school may randomly and without suspicion test. Without any limitation, schools could test all of their students simply as a condition of attending school."), *cert. granted*, 122 S. Ct. 509 (2001).

166. *Earls*, 242 F.3d at 1278 (quoting *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 857 (5th Cir. 1998)).

167. *Id.* at 1281 (Ebel, J., dissenting). According to Judge Ebel:

[B]y reimposing a special needs requirement at the end of its opinion, and thereby requiring a school district to demonstrate an "identifiable drug abuse problem among a sufficient number of those subject to the testing," the majority has both reneged on its earlier holding that a school district need not demonstrate a special need for random, suspicionless drug testing in the public school context and required more of the school district in this case than was ever required in . . . *Vernonia*.

*Id.* at 1283.

168. *Id.*

169. *Id.* at 1279 ("[A] public school district need not demonstrate a particularized 'special need' to randomly test students engaged in extracurricular activities for illegal drug use. The 'special needs' test, which is used in non-school settings to justify suspicionless searches, is dispensed with (or deemed satisfied) in a school setting . . .").

sis.”<sup>170</sup> We may soon know which of these approaches the Supreme Court prefers; in the meantime, however, there is another Supreme Court opinion regarding special needs and suspicionless drug testing to consider.

### C. *Chandler v. Miller: Refining the Scope of Constitutional Suspicionless Drug Testing*

In 1997, just two years after its ruling in *Vernonia*, the Supreme Court considered the scope of constitutionally permissible suspicionless drug testing from another angle. In *Chandler v. Miller*,<sup>171</sup> the Court struck down a Georgia law that required candidates for designated state offices to certify that they had taken a urinalysis drug test within thirty days of qualifying for nomination or election—and that the test result was negative.<sup>172</sup> Since the suspicionless Georgia testing program constituted a search for purposes of its constitutional analysis, the Court considered whether the testing fell within the “special needs” exception to the Fourth Amendment requirement that searches be based on “individualized suspicion of wrongdoing”<sup>173</sup>—the same exception that, under *Vernonia*, permits suspicionless drug testing of student athletes.<sup>174</sup>

During the course of its opinion, the *Chandler* Court elaborated on the conditions required for a search to fall within the special needs exception. According to Justice Ginsburg’s opinion for the majority, “[o]ur precedents establish that the proffered special need for drug testing must be *substantial*—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”<sup>175</sup> Applying this understanding of the special needs exception to the facts at hand in *Chandler*, the Court found that, while Georgia’s

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170. *Id.* at 1280. Judge Ebel disagreed with the majority about the ultimate result of the balancing process as well:

I find this to be a difficult case, and acknowledge that the balancing of the *Vernonia* factors is far from easy. Given the weight that I believe is properly afforded each factor set forth in *Vernonia*, however, I would find that the Policy survives the constitutional balancing test and should therefore be upheld.

*Id.* at 1285; *see generally id.* at 1283–85 (detailing Judge Ebel’s view of the proper balancing of interests).

171. *Chandler v. Miller*, 520 U.S. 305 (1997).

172. *Id.* at 308.

173. *Id.* at 313. As the Court’s ultimate conclusion would demonstrate, absent special needs, suspicionless drug testing policies cannot satisfy the Fourth Amendment’s reasonableness requirement.

174. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

175. *Chandler*, 520 U.S. at 318 (emphasis added) (internal citation omitted).

drug testing program was “relatively noninvasive,”<sup>176</sup> the State had produced no evidence of a drug use problem among its politicians or candidates for state political office.<sup>177</sup> Additionally, as potential candidates could abstain from using illegal drugs before the thirty-day testing window, the Georgia law served as an ineffective method for detecting drug use among the tested population.<sup>178</sup>

According to the Supreme Court, “where the risk to public safety is substantial and real, blanket suspicionless searches less calibrated to the risk may rank as ‘reasonable’ . . . . 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.”<sup>179</sup> In light of the dearth of evidence produced to show that the tested population had a drug abuse problem—and the testing’s lack of effectiveness at identifying drug users—the Court concluded that Georgia had not demonstrated that its testing program fell within the special needs exception to the normal requirement that reasonable searches be conducted on the basis of individualized suspicion.<sup>180</sup>

It has now been five years since the Supreme Court’s ruling in *Chandler*—and seven since *Vernonia* came down. The circuit courts, unsure of the precise implications of those two high court rulings, are once again looking to the justices of the Supreme Court for guidance on the issue of suspicionless drug testing regimes.<sup>181</sup>

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176. *Id.*

177. *Id.* at 319. The *Chandler* Court underscored the need for demonstrating that the tested population has a drug abuse problem, noting that such a demonstration had been made in prior cases upholding suspicionless drug testing. On this point, the Court stated:

A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program. Proof of unlawful drug use may help to clarify—and to substantiate—the precise hazards posed by such use. Thus, the evidence of drug and alcohol use by railway employees engaged in safety-sensitive tasks in *Skinner* and the immediate crisis prompted by a sharp rise in students’ use of unlawful drugs in *Vernonia* bolstered the government’s and school officials’ arguments that drug-testing programs were warranted and appropriate.

*Id.* (internal citations omitted).

178. *Id.* at 319–20.

179. *Id.* at 323.

180. *Id.* As Georgia’s suspicionless testing program did not fall within the special needs exception, the Court ruled that the testing program violated the Fourth Amendment. *See id.*

181. *See Earls v. Bd. of Educ.*, 242 F.3d 1264, 1287 (10th Cir. 2001) (Ebel, J., dissenting) (“[P]erhaps the Supreme Court will grant a writ of certiorari to resolve the split among the circuits that we have today created on the important constitutional issue presented in this case.”), *cert. granted*, 122 S. Ct. 509 (2001); *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1067 (7th Cir. 2000) (“The scope of *Vernonia* remains undecided today. Until we receive further guidance from the Supreme Court, we will stand by our [opinion] that the special needs exception must be

### III. CURTAILING SUSPICIONLESS DRUG TESTING FOR STUDENTS PARTICIPATING IN EXTRACURRICULAR ACTIVITIES

#### A. Constitutional Arguments

Based upon the Court's reasoning in *Vernonia*,<sup>182</sup> the application of that decision by various federal courts to the testing of students as a condition of participation in non-athletic extracurricular activities,<sup>183</sup> and the Court's analysis in *Chandler*,<sup>184</sup> it seems likely that the Supreme Court will rule in *Earls* that suspicionless drug testing of students who desire to participate in non-athletic extracurricular activities is unconstitutional. In particular, one would expect the Court to pay close attention to its *Vernonia* and *Chandler* rulings as it evaluates the constitutionality of conducting suspicionless drug testing on students who seek to participate in the school band, an academic club, or the Future Farmers of America.

#### 1. The Implications of *Vernonia*

Under the reasonableness test provided by the Court in *Vernonia*, suspicionless drug testing of students participating in non-athletic extracurricular activities should not be deemed constitutional. Although the intrusion committed against the tested student's privacy interest is the same for both athletic and non-athletic extracurricular participants,<sup>185</sup> the first and third *Vernonia* factors suggest that the policy at issue in *Earls* cannot withstand judicial scrutiny. Analysis of those factors—the privacy interest implicated by conducting drug tests and the effectiveness of suspicionless drug tests in addressing the nature and immediacy of the governmental concern—should reveal that testing students participating in non-athletic extracurricular activities presents a factually, and therefore *constitutionally*, distinct scenario from that surrounding the testing of student athletes.

With respect to the first factor, there are notable differences between the privacy interests of students engaging in athletics and those participating in other activities. The *Vernonia* Court has already told us as much: While students

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justified according to the methodology set forth in *Vernonia*.”).

182. See generally *supra* Part II.A.

183. See generally *supra* Part II.B.

184. See generally *supra* Part II.C.

185. The intrusion committed against the student tested for athletic and non-athletic extracurricular participation is the same because the testing of both segments of the student population is conducted via urinalysis testing.

have a lesser expectation of privacy than the population at large, the legitimate privacy interests of athletes are even more diminished than those of the ordinary student.<sup>186</sup> Consequently, participation in a school band, chess club, or other non-athletic extracurricular activity does not reduce a student's expectation of privacy to the same degree that participation in an athletic activity would.<sup>187</sup> Extracurricular clubs and activities do not require communal undress and showering, a preseason physical exam, or the procurement of health insurance—factors that the *Vernonia* Court cited as evidence of an athlete's diminished expectation of privacy.<sup>188</sup>

Non-athletic extracurricular involvement does share some of the characteristics of athletic participation that the Court identified in *Vernonia*, of course. For instance, such involvement is voluntary and requires adherence to rules and regulations as a condition of participation.<sup>189</sup> Nevertheless, these factors do not reduce the expectation of privacy enjoyed by non-athletic participants to the same low level as that which is retained by student athletes; without more, they appear insufficient to make "reasonable" the governmental imposition of a suspicionless search upon an individual.<sup>190</sup>

Differences are even more apparent with regard to the third *Vernonia* factor—which necessitates consideration of the efficacy of drug testing as a means of addressing the nature and immediacy of the governmental concern. In weighing this element, the *Vernonia* Court reasoned that deterring drug use was an important governmental interest not only for all students, but also for athletes in particular.<sup>191</sup> According to Justice Scalia's opinion, the risk of bodily harm among athletes as a result of drug use is "particularly high."<sup>192</sup> For instance, drugs such as amphetamines have especially dangerous effects on users who engage in any type of exercise.<sup>193</sup> Participation in non-athletic extracurricular

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186. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995); *supra* Part II.A.3.a.

187. See, e.g., *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1063 (7th Cir. 2000); *supra* note 109 and accompanying text.

188. *Vernonia*, 515 U.S. at 657; *supra* note 35 and accompanying text.

189. *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1276 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 509 (2001).

190. Consider a hypothetical requirement that licensed drivers consent to random, suspicionless drug tests as a condition for keeping their licenses: Although drivers who obtain government-issued licenses voluntarily submit to a pre-established system of rules and regulations, it hardly seems reasonable to allow the government power to conduct random drug tests upon them. *But cf.* *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding the constitutionality of stopping motorists at "sobriety checkpoints" along public highways for the purpose of removing drunk drivers from the road).

191. *Vernonia*, 515 U.S. at 662; *supra* note 53 and accompanying text.

192. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995).

193. *Id.* ("Amphetamines produce an 'artificially induced heart rate increase, peripheral vasoconstriction, blood pressure increase, and masking of the normal fatigue response,' making them a 'very dangerous drug when used during exercise of any type.'") (quoting Hawkins, *Drugs and*

activities, however, does not—by itself—create a risk of injury to the drug user, or his or her fellow activity participants, beyond that normally associated with drug use.<sup>194</sup>

Besides arguing that there was a heightened risk of physical injury to athletes, the Court in *Vernonia* also noted that the athletes of the Vernonia School District were the leaders of the District's drug problems—not only significantly engaging in drug use themselves, but, through the “role model effect,” encouraging other students to do so as well.<sup>195</sup> An “immediate crisis” had erupted in the District 47J, the Court explained, because “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion.”<sup>196</sup> Hence, the Vernonia School District tailored its drug-testing policy so as to impact only those students who were most influential in causing the District's “immediate crisis”—athletes who were leading the drug-use movement and whose own drug use presented a significant physical harm to themselves and to other students.<sup>197</sup>

In contrast, drug use by members of the math club or the glee club does not carry with it any danger to the user or to others greater than that involved with drug use by a student not participating in extracurricular activities. As physical exertion is not a defining characteristic of most non-athletic extracurricular activities, participants in these activities are no more likely to injure themselves or others than student drug users that do not engage in extracurricular activities. Additionally, a policy imposing suspicionless drug tests on all participants of

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*Other Ingesta: Effects on Athletic Performance*, in H. APPENZELLER, *MANAGING SPORTS AND RISK MANAGEMENT STRATEGIES* 90, 90–91 (1993).

194. See *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1064 (7th Cir. 2000) (noting that the Penn-Harris-Madison schools had not “explained how drug use affects students in extracurricular activities differently than students in general”); *supra* note 114 and accompanying text.

195. *Vernonia*, 515 U.S. at 663; *supra* note 58 and accompanying text.

196. *Vernonia*, 515 U.S. at 662–63 (internal quotation marks omitted); *supra* note 55 and accompanying text.

197. Supreme Court rulings on the constitutionality of suspicionless drug tests before *Vernonia* likewise stressed that risk of physical harm to the drug-using party, or to others by the drug-using party, was crucial in establishing that the government had a sufficient interest in compelling individuals to undergo suspicionless drug tests. For instance, in *Skinner v. Railway Labor Executives' Ass'n*, a case in which the Court upheld suspicionless drug testing for railroad employees, the Court stated:

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 under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others.

*Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989) (internal citation omitted).

extracurricular activities would not target the segment of the student body responsible for a school district's drug problem. Drug use appeared to be a defining trait of the athletes of the Vernonia School District,<sup>198</sup> but it is improbable that members across a diverse spectrum of non-athletic extracurricular activities would share this common trait—especially not to the exclusion of students that chose not to participate in extracurricular activities at all.

## 2. The Implications of *Chandler*

On its face, *Chandler* concerns suspicionless drug testing of political candidates, rather than students. Nevertheless, its factual premise in some ways bears greater resemblance to the testing of students participating in non-athletic extracurricular activities than does the factual premise of *Vernonia*. Significantly, the policy at issue in *Chandler* targeted a group that the state could not demonstrate to have a substance abuse problem.<sup>199</sup> This led the Supreme Court to determine that the state's proffered need was only "symbolic."<sup>200</sup> Because the need was not "'special,' as that term draws meaning from [the Court's] case-law," the *Chandler* Court concluded, the suspicionless testing policy could not meet the requirements of the Fourth Amendment.<sup>201</sup>

As was the case in *Chandler*, it seems highly unlikely that most school districts could demonstrate that a diverse group of students, participating in a variety of non-athletic extracurricular activities, has a drug abuse problem such that a special need for conducting suspicionless drug tests on these students exists.<sup>202</sup> Indeed, none of the federal cases detailed in this Note confronting the issue of suspicionless drug testing include findings that students who engage in non-athletic extracurricular activities are more likely than other students to use illegal drugs. For this reason, the Court in *Earls* will likely rule that suspicionless testing of the targeted group is an ineffective means of deterring drug use—much like it did in *Chandler* with respect to political candidates.

### B. Policy Considerations

In addition to the constitutional considerations presented in this Note as to why suspicionless drug testing of extracurricular participants should not be up-

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198. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662–63 (1995); *supra* note 55 and accompanying text.

199. *Chandler v. Miller*, 520 U.S. 305, 319 (1997); *supra* note 177 and accompanying text.

200. *Chandler*, 520 U.S. at 322.

201. *Id.*

202. *But see supra* note 169 and accompanying text (laying out Judge Ebel's view to the contrary).



held, there are also policy arguments that support striking down such testing. Foremost among these considerations is the inadequacy of the response by the school board to a student who tests positive for drug use as a result of suspicionless drug testing.

### 1. Inadequate Response to Known Instances of Drug Usage

Pursuant to many suspicionless drug testing policies—including the one currently before the Supreme Court—the penalty for a student whose test yields a positive result is simply suspension from all extracurricular activities.<sup>203</sup> Positive test results are not turned over to law enforcement authorities, and no further disciplinary or academic sanctions are imposed upon students who test positive.<sup>204</sup> These penalty systems threaten to reduce the potential effectiveness that suspicionless drug testing might otherwise have on student drug usage by (a) removing troubled students from school guidance and (b) freeing up more time for students to use drugs.

#### *a. Removal from school guidance*

The authors of suspicionless drug testing policies probably hope that the prospect of random testing will convince students to give up their drug habits in order to ensure their eligibility for extracurricular activities. School districts ought to take into account, however, the likelihood that some students—perhaps because they are addicted, or perhaps because they value drugs above extracurriculars—either cannot or will not stop using drugs. In circumstances where the penalty for a positive drug test is discontinued extracurricular participation, a student who is already using illegal drugs may be inclined to withdraw from participating in extracurricular activities in order to avoid submitting to a drug test, or—in the event that the student tests positive—be forced to terminate his or her extracurricular involvement. Under either scenario, the student would become further removed from the positive support and guidance that his or her school has to offer. As a result, school personnel may have more difficulty securing treatment options for the drug-abusing student.<sup>205</sup>

It would make more sense if, in addition to penalizing students for their substance abuse, these policies also facilitated school-initiated counseling or other methods to keep those with problems under district control. Assuming the courts are correct in their assessment of the unique tutelary and supervisory

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203. See, e.g., *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1268 (10th Cir. 2001), cert. granted, 122 S. Ct. 509 (2001); *supra* notes 142–43 and accompanying text.

204. See, e.g., *Earls*, 242 F.3d at 1268; *supra* note 143.

205. See *Bishop*, *supra* note 6, at 240.

powers of public schools,<sup>206</sup> perhaps school districts ought to use them to ensure that students with drug problems get the help they need.

*b. Freeing up time for more drug use*

Another potential side effect to many suspicionless drug testing regimes flows from their narrow focus and shortsighted penalty provisions. If school policy does nothing more than force drug users to quit their extracurricular activities, its most important effect might be to free up more time for students to use drugs after school—during hours which they might otherwise be engaged in productive extracurricular activities. This could serve to exacerbate current drug problems, as well as to make those problems more difficult to overcome. After all, barring a student from participating in an activity that could reveal an undiscovered talent or passion, or which might provide a glimpse of opportunities available to the student besides drug use, hardly seems like good public policy.

## 2. The Slippery Slope Toward Testing All Students

Just because the new, post-*Vernonia* breed of suspicionless drug testing programs might not go far enough toward correcting drug problems where they now exist does not mean that these policies are not overbroad in terms of which students they target. Early suspicionless testing programs focused solely upon student athletes.<sup>207</sup> After the Supreme Court upheld the constitutionality of such testing in *Vernonia*, however, school districts began implementing policies to test athletes *and* non-athletes who participated in school-related extracurricular activities.<sup>208</sup> If the Court permits these policies to continue, it will only be a matter of time before more schools seek to expand suspicionless drug testing further—perhaps to cover the entire student body.<sup>209</sup> In fact, districts in Arkansas

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206. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (“[T]he nature of [the State’s] power over schoolchildren is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”).

207. See, e.g., *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988) (upholding random urinalysis testing of student athletes); *Vernonia Sch. Dist. 47 J v. Acton*, 515 U.S. 646 (1995) (upholding a similar policy).

208. See, e.g., *Earls v. Bd. of Educ.*, 242 F.3d 1264 (10th Cir. 2001) (striking down random testing policy applicable to all participants in extracurricular activities), *cert. granted*, 122 S. Ct. 509 (2001).

209. Consider, for example, this exchange between the Seventh Circuit panel that decided *Joy* and the attorney for the school district:

THE COURT: So the slippery slope argument ought to be very much in our minds. I mean, you’ll be back here in another year with another school district who wants to test everybody. And you will say there is no principled distinction between the holding you

and Texas have already done so.<sup>210</sup> The testing policies of these districts raise the danger that student drug testing may be on a slippery slope leading to the testing of ever greater segments of the student population and the corresponding diminishment of the privacy rights of students.<sup>211</sup> The courts will likely have to step in at some point; perhaps now is the time.

### 3. A Symbolic Response

Finally, policies like the one at issue in *Earls* do not appear to put the focus where it should be—upon students that schools have reasonable grounds to believe are using drugs. As mentioned above, these policies bear greater resemblance to the Georgia law struck down by the *Chandler* Court than to the drug testing program that the Court let stand in *Vernonia*.<sup>212</sup> To target a clearly defined group with a history of drug problems is one thing; to require random testing of groups not known to possess any abnormal inclination toward drug usage is another.<sup>213</sup> Consider the Supreme Court's assessment of the since-invalidated Georgia statute:

What is left, after close review of Georgia's scheme, is the *image* that the State seeks to protect. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. . . . But Georgia asserts no evidence of a drug problem among the State's elected officials. . . . The need revealed, in short, is symbolic . . . .<sup>214</sup>

That language seems equally applicable to the efforts of some school districts with respect to suspicionless drug testing of extracurricular participants. The

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get today and the next case. It's just a matter of time till it gets here. Right?  
COUNSEL: Absolutely, your honor.

*Joy v. Penn-Harris-Madison Sch. Dist.*, 212 F.3d 1052, 1066 (7th Cir. 2000) (quoting from the oral argument).

210. See *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999) (upholding a policy that allowed school officials to test randomly all seventh- through twelfth-grade students in Cave City, Arkansas), *vacated as moot* by No. 98-3227, 1999 U.S. App. LEXIS 13289 (8th Cir. June 15, 1999); *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001) (invalidating policy that allowed random testing of all sixth- through twelfth-graders).

211. See *Bishop*, *supra* note 6, at 218.

212. *Supra* Part III.A.2.

213. Compare *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding the school district's program targeting a group with a demonstrated history of drug abuse), *with Chandler v. Miller*, 520 U.S. 305 (1997) (striking down the State's policy targeting a group that did not have such a history).

214. *Chandler*, 520 U.S. at 321–22 (emphasis added).

prospect of schools enacting measures that do little more than make them look concerned with one societal problem or another ought to concern us—at least where those policies threaten to impinge upon the civil liberties of schoolchildren.

In *Chandler*, Chief Justice Rehnquist suggested that the rest of the Court had ventured into the realm of making policy judgments when it struck down the Georgia drug testing law.<sup>215</sup> Perhaps his argument that “[n]othing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the members of [the Supreme] Court”<sup>216</sup> was correct. If nothing else, however, legislators ought to think about requiring school boards to demonstrate a real need before they draft symbolic policies that have little, if any, practical effect on drug use among students.

### C. Action by State Legislatures

Despite the unanswered constitutional questions surrounding suspicionless drug testing of extracurricular participants, school boards in several states have seen fit to implement programs that permit such testing.<sup>217</sup> If the Supreme Court fails to rule that these regimes are unconstitutional, state legislators should consider ways in which they could change the system for the better.

#### 1. Legislative curtailment of suspicionless drug testing

Perhaps the Court will follow the Chief Justice’s guidance from *Chandler* and decide that—as he suggested there—it is not for the courts to question the types of policy decisions that are best handled by our nation’s legislatures.<sup>218</sup> Even if this happens, it should not deter elected representatives from tackling the issue themselves. In light of the concerns presented in this Note regarding the negative ramifications of these policies, state legislatures should act to curtail the implementation of suspicionless drug testing if the Supreme Court does not. No matter how the Court rules, it should not prevent legislators from concluding that testing programs similar to the one at issue in *Earls* are bad public policy. State legislatures could—and perhaps should—take action to prevent the continued enforcement of these programs against non-athletic extracurricular participants.

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215. *Id.* at 328 (Rehnquist, C.J., dissenting).

216. *Id.*

217. *See supra* note 6.

218. *See Chandler v. Miller*, 520 U.S. 305, 328 (1997) (Rehnquist, C.J., dissenting).

## 2. Make suspicionless drug testing policies more effective

Given the constitutional and policy concerns surrounding these tests, one would hope that most people would not label the politician who decided to ban them “soft on drugs”—but it is ultimately up to legislators to decide how they will approach the issue. Perhaps some will conclude that it is not politically feasible to prohibit public schools from conducting suspicionless drug tests. If they are not comfortable with the prospect of banning suspicionless testing, however, legislators should at least take steps to ensure that school districts’ testing policies become more effective at reducing student drug use.

### *a. Enact uniform policies that include parental notification requirements*

Rather than leaving it to local school boards to implement drug testing policies, state legislatures could act to ensure passage of uniformly-enacted testing policies that have the beneficial effect of reducing student drug use. In furtherance of that end, state law could require that if a student tests positive through the school’s suspicionless drug testing program, an appropriate school official—a school counselor, the school principal, or perhaps the student’s homeroom teacher—will confer with the parents of the tested student and provide them with the student’s test result. Thus, parents would be made aware of their children’s drug use so they can more effectively monitor students at home—as well as assist them in receiving rehabilitative treatment.

### *b. Provide an appropriate response to positive test results*

Additionally, the penalty of removing a student who tests positive from all extracurricular participation is not sufficient to combat student drug use.<sup>219</sup> Rather than preventing a student from participating in extracurricular activities, these policies should allow the student who tests positive the option of continuing his or her extracurricular participation, provided that he or she receives counseling through the school or through a treatment program selected by his or her parent. In addition to counseling, follow-up drug tests should be administered at regular intervals in order to monitor whether the student’s drug use has

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219. As the testing in the *Earls* case currently before the Supreme Court demonstrates, the penalty for a student who tests positive is simply discontinued participation in extracurricular activities. The student is driven further away from the potentially protective and rehabilitative environment offered by the advisors, counselors, teachers and support staff of his or her school. Furthermore, the student, who is no longer able to participate in the band or the glee club, will have even more time to spend in pursuit of his or her drug abuse problem. Suspicionless drug testing that does not encourage rehabilitative behavior has the potential to compound—rather than improve—the drug problem faced by our nation’s children. *See supra* Part III.B.1.

ceased. If the student's follow-up drug tests do not reveal drug use—and the student has received counseling as dictated by school policy—then the student should be allowed to return to extracurricular participation in good standing. In the absence of these measures, suspicionless drug testing of extracurricular participants stands as an empty symbol of school action to counter student drug use, a symbol that is unlikely to prevent such use from continuing.

#### IV. CONCLUSION

During this term, the Supreme Court could decide whether students who seek to participate in non-athletic extracurricular activities—such as Future Farmers of America, the academic team, and the band—must submit to suspicionless drug testing to be eligible. If it reaches the constitutional issue presented in *Board of Education v. Earls*, the Court will likely look to the reasoning employed in two of its prior opinions—the 1995 decision in *Vernonia School District 47J v. Acton*, in which the Court upheld suspicionless drug testing for athletes in a school district with a significant drug problem exacerbated by athlete drug use, and the 1999 decision in *Chandler v. Miller*, in which the Court held that suspicionless drug testing of state political candidates was unconstitutional—in ruling on the decision of the Tenth Circuit in *Earls* to strike down the suspicionless drug testing program.

Moreover, the Court will likely consider the three elements presented in *Vernonia* to analyze whether the drug test constitutes a reasonable search: the nature of the privacy interest implicated by conducting suspicionless drug testing on extracurricular participants, the character of the intrusion that accompanies the urinalysis drug test, and the efficacy of the drug testing program in addressing the nature and immediacy of the governmental concern at issue.<sup>220</sup> Using these criteria, the Court will likely establish that the testing of athletes presents a constitutionally significant set of circumstances, one that simply is not present in the testing of all students that engage in any form of extracurricular activities. As such, the Court will likely find that the drug testing policy at issue in *Earls* is unreasonable and, therefore, unconstitutional.

In the event that the Court does not strike down suspicionless drug testing of extracurricular participants, state legislatures should act to curtail the occurrence of such testing within the public schools of their state. By preventing students who test positive for drug use from engaging in extracurricular activities, the school is not only failing to advance the goal of reducing student drug use by providing the student with increased opportunities to engage in such use, but also is not supporting any rehabilitative effort to help the student obtain treat-

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220. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–66 (1995); see *supra* Part II.A.3.

ment. Legislation at the state level could remedy this problem and provide schools with guidance for implementing meaningful student drug prevention measures.