No. 01-332

In the Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY AND INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSEY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls; and DANIEL JAMES, a minor, by his next friend and mother, Leta Hager,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. SENATORS DON NICKLES AND JAMES INHOFE, GOVERNOR FRANK KEATING, U.S. REPRESENTATIVE WES WATKINS, THE ALLIED EDUCATIONAL FOUNDATION, and 30 CITIZENS OF POTTAWATOMIE COUNTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all 50 states, including many in Oklahoma. WLF devotes a substantial portion of its resources to supporting the Nation's campaign against drug abuse. To that end, WLF has appeared before this Court as well as other federal and state courts in cases involving drug testing. *See, e.g., Vernonia School District 47J v. Acton,* 515 U.S. 646 (1995); *National Treasury Employees Union v. von Raab,* 489 U.S. 656 (1989); *Willner v. Thornburgh,* 928 F.2d 1185 (D.C. Cir.), *cert. denied,* 502 U.S. 1020 (1991); *Loder v. City of Glendale,* 14 Cal. 4th 846, *cert. denied,* 522 U.S. 807 (1997). WLF also filed briefs in this case in both the district court and the court of appeals.

Frank Keating is the Governor of Oklahoma. U.S. Senator Don Nickles represents Oklahoma in the U.S. Senate. U.S. Representative Wes Watkins is a member of the U.S. House of Representatives from Oklahoma whose district includes the City of Tecumseh and Pottawatomie County. Representative Fred S. Morgan is the Minority Leader in the Oklahoma House of Representatives. Each has been a strong supporter of the right of local school boards to take whatever measures they believe, in their professional judgments, are appropriate to ensure that students do not use illegal drugs.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions. Most recently, AEF filed a brief in *U.S. Department of Housing and Urban Development v. Rucker*, No. 00-1770, arguing in support of government efforts to promote safety in public housing by cracking down on tenants and their household members who traffic in illegal drugs.

Cynthia Bell, Diana Buttram, Twila K. Carr, Elizabeth Cope, Adoris Craig, Doris Cranford, Frances L. Dare, Danita Dayton, Jeff DeWitt, Kari Etchieson, Susan Foote, Jamie Gates, Bobbette Hamilton, Lori Heffley, Caryl Hennen, Beth A. Jeffcoat, Sherri Johnson, Jimmy Jordan, Delitha A. Kolarik, Kimberly Lowe, Laurie Mallinson, Joanne Medley, Tawana Moery, Holly J. Phillips, Gary D. Rader, Lori Stacy, Don Warden, Natalie Wetzel, Pat Westervelt, and Jo Wilkins are citizens of Pottawatomie County, Oklahoma. All are either parents of students in the public school system, former parents, or employed in some capacity by the school system. All strongly support Petitioners' efforts to prevent and address drug use by students in the Tecumseh Public School District.

Amici curiae are well aware of the tragic consequences of adolescent drug use, and of data demonstrating that such drug use is a nationwide problem. They do not believe that the School Board should be required to wait until it has evidence that drug abuse is particularly rampant in Tecumseh, Oklahoma before it takes strong measures to discourage

drug use among students. Rather, in light of the nationwide nature of the drug problem, school boards should be permitted to adopt strong measures, such as student drug testing, without awaiting such evidence -- both to determine the extent of the problem and to prevent a major problem from developing.

Amici curiae are also aware that the costs of defending this suit have been a tremendous financial burden on Petitioners. Despite the Court's decision in *Vernonia* upholding student drug testing, Petitioners have been required to defend every aspect of their drug testing program, down to the most minute detail. *Amici* believe that the result of such judicial oversight of drug testing programs has been to discourage other school districts from adopting measures that might well prove effective in combating drug abuse -- for fear that adopting such measures would result in ruinous legal fees. Accordingly, *amici* support adoption of a bright-line constitutional rule in this case that will enable school districts to know what types of drug testing programs will not be subject to constitutional challenge. In that way, school districts can devote their resources to teaching students, rather than to paying legal fees.

Amici curiae are filing their brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court.

ARGUMENT

I. Schools Have A Compelling Interest in Preventing Student Drug Use

The tragic consequences of adolescent drug use are well known and should not require extended discussion.[2] Youthful bodies and minds are more vulnerable than those of adults to the adverse effects of drugs. Addiction is more likely to result when drug use begins at an early age, and the prospects of recovery from addiction are often poor. Drug use is strongly correlated to various kinds of harmful behavior including violent conduct, automobile collisions, and unsafe sexual practices. Students must necessarily come into contact with a criminal element in order to obtain drugs and may themselves engage in drug dealing or other criminal activity in order to finance drug purchases. Drug-using students have inferior academic performance and are more likely to drop out of school. In short, as this Court recognized in the *Vernonia* decision, it is hard to imagine a school district having a more compelling interest than the prevention of drug use among its students.

Drug use remains all too common among adolescents. Annual surveys of a national sample of high school seniors have been conducted by the Institute for Social Research at the University of Michigan since 1975, with funding from the U.S. Department of Heath and Human Services. Since 1991, this survey has included a cross-section of eighth and tenth

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[2] See generally Yifrah Kaminer, *Adolescent Substance Abuse*, in Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994), at 415-37.

grade students. The most recent report of this survey, known as the Monitoring the Future survey, was announced only a few days ago.[3] The study shows that illicit drug use at all three grade levels is down slightly from recent peak levels reached in 1996-7, but still remains at an unacceptably high level and is no longer declining. In fact, there was an increase in past-year illicit drug use by 10th and 12th graders, and past-year use is higher in all categories than was reported at the time the *Vernonia* case was submitted to the Court.

- Over 41 percent of twelfth graders, 37 percent of tenth graders, and nearly 20 percent of eighth graders reported past-year illicit drug use. Most of these student also reported current drug use (within the past 30 days).

- For eighth and tenth graders, these usage levels are nearly twice those reported in 1991 and within 2 or 3 percentage points of the highest levels ever reported.

- In comparison to the 2000 study, past-year illicit drug use by eighth graders is flat, and it is up 0.8 percentage points for tenth graders and 0.6 percentage points for twelfth graders.

In our view, the extent and serious harms of adolescent drug use would justify a school district's decision to require drug testing of all students, particularly if the results were used to encourage students to obtain counseling and treatment

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[3] Available at http://www.monitoringthefuture.org. A chart from the survey, showing long-term drug-use trends, is attached hereto as an Appendix.

rather than to expel them from school. Certainly drug use is at least as harmful and prevalent as the communicable diseases that are the object of mandatory student vaccination programs. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

In this case, the school district's testing program was limited to students participating in competitive extracurricular activities, in part because of a concern that a broader program would be struck down by the courts. This limitation in scope does not invalidate the school's general interest in preventing drug use among its students or require justification in terms of some unique interest that applies only to drug use by students participating in these activities. Governments can attempt to solve problems on a step-by-step basis, taking into account such factors as resource limitations, legal risk, and public acceptance. *Cf. Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

Similarly, the school district's selection of drugs to be tested should not be subject to any particular scrutiny. This is the sort of decision that should be entrusted to the judgment of local policymakers. *See Michigan Department of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990). In particular, the exclusion of alcohol from the testing program should not be grounds for invalidation. Although alcohol abuse is a serious problem in many schools, local authorities are in the best position to determine an appropriate response. Alcohol use may be more easily detected without testing because of its odor on the breath, and alcohol testing may be

less efficacious because it is more rapidly metabolized than many other drugs.[4]

II. The Distinctions Between This Case and *Vernonia* Do Not Justify a Different Result

The principal basis for the majority opinion in the court of appeals was a finding that the drug problem in Tecumseh, Oklahoma, was not as serious as that in Vernonia, Oregon. We think the parties are in a better position to explicate the facts relating to drug abuse contained in the record below. However, this Court should also take judicial notice of the extent of drug use by young people nationwide. In our view, a school district should not have to prove that it has a particularly severe drug problem in order to justify a testing program.

Nationwide statistics show illicit drug use to be rampant among high school and middle school students, extending to all regions of the country and classes of society. There is no reason to believe that any school district in the country would be exempt from concern about this problem. While drug use survey data is not broken down by state and county, the demographic and geographic data included in the Monitoring the Future survey cited above establish a wide distribution of illicit drug use. Unfortunately, Oklahoma is not an oasis from this national scourge. In Oklahoma City, only forty miles from Tecumseh, 64.2 percent of arrested adult males

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[4] Eric Wish & Bernard Gropper, *Drug Testing by the Criminal Justice System: Methods Research, and Applications*, in Drugs and Crime 348 (Michael Tonry & James Q. Wilson, eds., 1990).

tested positive for one or more illicit drugs, a rate nearly as high as in much larger cities such as New York or Washington.[5]

The majority opinion of the court of appeals also sought to distinguish *Vernonia* on the ground that the school district's interest in preventing drug use among students participating in athletics was stronger than for those students participating in other kinds of extracurricular activities. We urge the Court to reject this invidious distinction. The risk of immediate physical harm to a drug-using athlete is only one of many valid and weighty interests the district has in preventing illicit drug use by students. The long-term harm to academic achievement and risk of addiction are certainly strong enough interests to justify testing of non-athletes as well as athletes.

To the extent justification is required, students who participate in competitive extracurricular activities are subject to less supervision from parents and school officials than are students during the normal school day. The Court should take judicial notice of the fact that out-of-town trips by students in this age group are often occasions for misconduct, including experimentation with alcohol and illicit drugs. Moreover, these activities are optional, and school officials can require consent to testing as a condition of participation without denying any student the fundamental education to which he or she may be entitled.

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[5] U.S. Bureau of Justice Statistics, *Criminal Justice Sourcebook 1999*, at 380.

In its evident hostility and strict scrutiny, the opinion of the court of appeals majority places a heavy burden on school districts that wish to initiate drug testing programs. They must be prepared to litigate, with depositions and other discovery, the precise nature of the drug problem facing their students. In addition to the expense and distraction of such litigation, there is the inevitable risk to student privacy as the district tries to put on the record every incident of past drug use that it can prove. It must also be prepared to litigate every feature of the testing program, including which students are tested and why. Finally, it faces the prospect of paying the plaintiffs' attorneys fees if it loses, as was ordered by the court of appeals below in this case. No wonder so many schools take the easy way out and drop plans for drug testing whenever legal objections are voiced. We submit that this sort of judicial hostility to student drug testing is a perversion of this Court's decision in *Vernonia*. We suggest that the Court should not only reverse the decision below but also make clear that decisions on when and how to conduct student drug testing programs should be made by school authorities and not by lower court judges.

III. Student Drug Testing Is Reasonable In Light of Other Widely Accepted Administrative Searches

Although this Court's *Vernonia* decision should be dispositive, the reasonableness of student drug testing is further demonstrated when compared with other sorts of suspicionless searches that have been approved by this Court or are widely accepted.

First, the testing program has no law enforcement purpose or effect. A positive test results in counseling and

followup testing. The most severe sanction, after three positive tests, is suspension from extracurricular activities for the rest of the year. No information is provided to law enforcement authorities. This program is unlike checkpoints for contraband or drunk drivers or airport security screening, which can result in criminal prosecution if unlawful conduct is detected.

Second, the testing program is minimally intrusive. It determines whether the tested individual has recently used an illicit drug. Information about prescription drug use is kept confidential. Otherwise, there is no exposure of personal information that the student might wish to keep confidential. It is thus less intrusive than court house and airport security screening, which often exposes the contents of luggage, briefcases, and handbags to the eyes of screening personnel and often other members of the traveling public.

Third, participation in the program is required as a condition of an optional extracurricular program. It is true, of course, that many students may regard such activities as an important adjunct to their formal education. The same could be said, however, for travel on airplanes, which may be a practical necessity for many travelers even though it is nominally a voluntary activity. Of course, automobile checkpoints are in no sense voluntary, and many individuals are required to enter court houses and other government buildings where they are subject to security screening.

Fourth, the harm to be prevented is substantial. Although not as dramatic as a terrorist attack, the toll of illicit drug use on our youth and our nation as a whole is devastating. Indeed, trafficking in narcotics to meet the

demand for illicit drugs in this country is a well-known source of funding for international terrorist groups.

In sum, student drug testing programs are at least as reasonable as most other widely accepted administrative searches in terms of constitutionally relevant criteria.

CONCLUSION

For the foregoing reasons *amici curiae* Washington Legal Foundation, *et al.,* respectfully request that the judgment of the U.S. Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted,

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