No. 01-332

In the Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY, ET AL., PETITIONERS

v.

LINDSAY EARLS, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Fourth Amendment prevents a public school district from requiring students who choose to participate in non-athletic interscholastic competitions to agree to random urinalysis testing for illegal drug use.

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INTEREST OF THE UNITED STATES

Drug use among the Nation's school children poses a grave threat not only to the lives of individual students and their families, but to the health of the Nation itself. The Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. 7101 *et seq.*, authorizes federal grants to local educational agencies for drug and violence prevention programs, including programs like the one at issue here, designed "to combat illegal alcohol, tobacco and drug use." 20 U.S.C. 7116(b)(2)(C).[1] The United States, primarily through the

[1] In fiscal years 1996 through 2001, Congress appropriated between $340 and $415 million annually for local drug and violence prevention

Department of Justice and Department of Health and Human Services, administers numerous other programs that seek to deter illegal drug use, particularly among youth. The United States participated as an amicus in *Vernonia School District 47J* v. *Acton*, 515 U.S. 646 (1995), which involved a challenge to a school district's random drug-testing policy for student athletes.

STATEMENT

1. Illegal drug use remains prevalent among the Nation's school children. In a survey conducted last year, 54% of 12th grade students and 45.6% of 10th grade students from 435 schools across America reported they had used an illegal drug during their lifetime. Public Health Service, Nat'l Institutes of Health, *Monitoring the Future: Nat'l Results on Adolescent Drug Use* Table 1 (2000). In the same survey, 24.9% of 12th grade students and 22.5% of 10th grade students said that they had used an illicit drug at least once in the past month. *Id.* Table 2; see Centers for Disease Control, *Youth Risk Behavior Surveillance—United States, 1999*, 49 Morbidity and Mortality Weekly Report 14 (June 9, 2000) (*Youth Risk Behavior*) (In 1999, 47.2% of high school students nationwide reported that they had used marijuana, and 26.7% of such students did so one or more times during the prior 30 days); Pet. App. 28a-29a n.2.[2]

At the same time, school children not only are more vulnerable to drug use than adults, but such abuse is much more likely to devastate their lives. Office of Nat'l Drug

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efforts. Under the Act, the school district in this case received annual grants for such efforts in the past four years totaling approximately $40,000.

[2] In the 1999 survey, 7.2% of students said that they had used marijuana on school property in the previous month. More than 30% of students reported that they had been offered or sold illegal drugs on school property in the prior year. *Youth Risk Behavior* at 18.

Control Policy, *Nat'l Drug Control Strategy: 2001 Annual Report* 10. Children who abuse drugs risk serious physical and psychological harm, as well as death. *Ibid.* They are less likely to achieve success in the classroom, and more apt to engage in criminal and other high-risk behavior, including driving while impaired and engaging in sexual acts that may result in unintended pregnancies or the transmission of disease. *Id.* at 10, 13. Drug use also has contributed to the rise in youth violence. Office of Applied Studies, Substance Abuse & Mental Health Services Admin., *Nat'l Household Survey on Drug Abuse Report* 2 (Nov. 9, 2001).

2. a. Tecumseh, Oklahoma, is a rural community about 40 miles southeast of Oklahoma City. Petitioners (collectively, the "school district") are a public school district in Tecumseh and its governing board of education. The school district administers Tecumseh High School, which has about 750 students in grades 9 through 12, as well as a middle school and elementary schools. Tecumseh High is a member of the Oklahoma Schools Secondary Activities Association (OSSAA), which sponsors and regulates competitions among public school students from across the State. Most Tecumseh students participate in extracurricular activities governed by the OSSAA, including not only sports but also cheerleading, band, choir, color guard, Pom Pom, Future Homemakers of America (FHA), Future Farmers of America (FFA), and the academic team. Pet. App. 2a-3a.

b. Like virtually every community in America, Tecumseh has experienced illicit drug use among its school children. The record in this case provides direct testimonial and other evidence of such abuse. For example, a school board president testified that marijuana use has been reported in the classroom at Tecumseh High. J.A. 96. Three teachers testified that they heard students talking about marijuana use, J.A. 115-116, 120-121; that they suspected that several students in their classes were abusing drugs, J.A. 119, 120,

125; and that they had reported students for drug use, J.A. 120, 127. Pet. App. 57a-58a & nn. 12-13.

Students too—including respondents themselves—have acknowledged drug use in Tecumseh schools. Lindsay Earls stated during a nationally televised program that there is "a widespread drug problem" at Tecumseh High. Pet. App. 58a n.14. Daniel James testified that he has seen "about twelve" students under the influence of illegal drugs, is aware of others who have abused such drugs, and knows of students who have entered drug rehabilitation programs. J.A. 122-124. In addition, school counselors met with students to discuss drug use more than 40 times between 1997 and 2000, J.A. 52-56, and drug dogs "hit" on students or their vehicles several times between 1997 and 1999. C.A. App. 633-636, 640-642, 644-646, 649-650; see J.A. 58-59.

Those reports of drug use include incidents involving students who participate in competitive activities governed by the OSSAA. For example, a voice teacher testified that she has had students tell her about drug use among students in the choir, and has observed choir students who appeared to be impaired. J.A. 125-126. An FHA supervisor testified that students talk freely in class about marijuana use. J.A. 115. School counselors have reported several instances of drug use among band members, and other incidents of drug use among students in vocal. J.A. 52-56. An FFA supervisor testified that he has suspected drug use among members of FFA, and has overheard students discuss drug use. C.A. App. 204-205. In addition, students enrolled in sports, FFA, band, and vocal have been caught with or disciplined for drugs. J.A. 44; see also J.A. 78, 81, 99, 101, 105.

c. The community has tried to deter drug use in a number of different ways. For example, the school district has observed "Red Ribbon Week" each year, during which anti-drug rallies are held and students are urged to pledge to remain drug-free. The school district participates in a "Grim

Reaper" program designed to inform students about the perils of drug use. The school district has stepped up surveillance activities, and uses drug dogs to sweep school property. Pet. App. 59a n.20. In addition, since at least 1995, the school district has considered implementing a student drug-testing policy, as an added deterrent. C.A. App. 123.

In 1998, discussions over whether to enact such a policy intensified as "people all over the community" began to become more "aware" of a drug problem at Tecumseh High. Pet. App. 58a; C.A. App. 123-125; J.A. 85. After a February 1998 school board meeting at which a parent admitted her own child's drug use, J.A. 86, marijuana was found hidden in the school parking lot and in a student's car, J.A. 101-103, 140. In August 1998, after receiving more calls for action, the school district convened a special community meeting at which a proposed drug-testing policy was discussed. J.A. 137-139. No one who attended that meeting was reported to have objected to suspicionless drug-testing of school children. C.A. App. 78. Shortly thereafter, the school district adopted the drug-testing policy at issue in this case.

d. The policy applies to all students who participate in interscholastic competitions governed by the OSSAA, including both athletic and non-athletic activities. J.A. 193. Before a student is allowed to enroll in such an activity, he must return a consent form signed by him, his parent, and his coach, agreeing to be bound by the policy. J.A. 203-204. The policy authorizes three forms of urinalysis testing for illegal drugs. First, all students are tested as part of the annual physical examination required for a sport or, for non-athletes, before participation in OSSAA competitions. Second, random tests are conducted each month based on names drawn from the pool of all students covered by the policy. Third, any covered student who is suspected of drug use may be tested at any time. J.A. 196-197.

During tests, students are accompanied into a restroom by an adult monitor of the same sex and asked to provide a urine sample from behind a "closed stall." J.A. 198. Monitors examine the specimen for temperature and tampering, and give students a form on which the student may list any medications being taken. School district employees "shall not" view that list. J.A. 199. The specimen and medication list are sent to an independent laboratory, which tests for amphetamines, cannaboid metabolites, cocaine, opiates, barbituates, and benzodiazepines. An initial "positive" may be reported only if it is confirmed by a second test using the gas chromatography/mass spectrometry technique. *Ibid.*

Positive test results are disclosed only to the parent, student, principal, and coach, and not to law enforcement. A first offense results in drug counseling and another drug test in two weeks, but the student may continue to participate in OSSAA-governed activities. Students who test positive a second time are suspended from OSSAA activities for two weeks, and must agree to drug counseling and random drug tests for the rest of the year. A third strike, or any refusal to submit to a drug test, bars the student from OSSAA activities for the remainder of the school year. J.A. 201-202. Students may appeal test results to the superintendent and continue to participate in OSSAA activities. J.A. 200. No suspensions from school or academic sanctions may be imposed for violating the policy. J.A. 193.[3]

3. In 1999, respondents, Tecumseh High students who desire to participate in non-athletic interscholastic competitions governed by the school district's policy, brought this

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[3] The policy has been implemented in three years. During the 2000-2001 school year, for example, 642 initial tests were given. Eleven students tested positive, four of whom were involved in non-athletic activities. During that same year, 205 random tests were conducted and six students tested positive, one of whom was involved in a non-athletic activity. C.A. Pet. Reh'g 5 n.3.

Section 1983 action seeking declaratory and injunctive relief from enforcement of the policy on the ground that it violates the Fourth Amendment.[4] On cross-motions for summary judgment, the district court granted summary judgment for the school district. Pet. App. 50a-81a. Following the same "special needs" analysis applied in *Vernonia School District 47J* v. *Acton*, *supra*, the court held that the school district has shown a "legitimate cause for concern" (Pet. App. 61a) to justify its policy, and that the school district's need outweighs the diminished expectations of privacy that students have in the public school setting, particularly given the "minimal" intrusion involved in testing. *Id.* at 78a.

4. The court of appeals reversed. Pet. App. 1a-45a. The court agreed that this case is governed by the "analysis in *Vernonia*," but it held that a different result was required than in *Vernonia*. *Id.* at 9a. The court of appeals recognized "that, like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students." *Id.* at 21a. In addition, the court recognized that the character of the intrusion in this case is "virtually identical" to that in *Vernonia*, because of the similarities in the testing process under both policies. *Id.* at 22a. However, the court held that, unlike *Vernonia*, the nature and immediacy of the government concern at issue here "tips the balancing analysis decidedly in favor of [respondents]." *Ibid.* In particular, the court faulted the evidence of the underlying drug problem in this case. *Id.* at 14a-18a.

Judge Ebel dissented. Pet. App. 28a-45a. He would have upheld the school district's policy under *Vernonia*. In his view, "*Vernonia* does not require that a school district allow illegal drugs to gain a stronghold among its schoolchildren before it may take steps to eliminate them through random

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[4] Respondents do not challenge the policy as applied to students involved in interscholastic athletics.

drug testing." *Id.* at 38a. As he explained, "[i]llegal drugs * * * are nearly impossible to eliminate once they have garnered a foothold in our communities, schools, and homes." *Id.* at 38a-39a. Further, Judge Ebel reasoned that the evidence of drug use in this case was comparable to that in *Vernonia*. *Id.* at 38a. Judge Ebel also concluded that "the majority place[d] too little weight on the fact that the testing here is limited to extracurricular activities, where the students have voluntarily submitted themselves to additional supervision and regulation." *Id.* at 39a-40a.

SUMMARY OF ARGUMENT

In response to increasing community concern over illicit drug use in Tecumseh schools, petitioners adopted a random drug-testing policy for all students who wish to participate in extracurricular interscholastic competitions, including non-athletic activities. That policy is reasonable, and thus satisfies the Fourth Amendment, under the same considerations that this Court looked to in upholding the random drug-testing policy for student athletes in *Vernonia School District 47J* v. *Acton*, 515 U.S. 646 (1995).

A. The privacy interests in this case are identical to those in *Vernonia*. As *Vernonia* reaffirmed, privacy interests are greatly diminished in the public school context. In that regard, the "most significant" (515 U.S. at 665) consideration identified in *Vernonia*—that the policy was adopted by a school district fulfilling its guardianship responsibilities to its students—is just as forceful here. In addition, as was true with respect to the student athletes in *Vernonia*, the already-diminished expectations of the general study body at Tecumseh High are further diminished with respect to students who participate in an interscholastic competition covered by the school district's policy. Students who participate in such activities, athletic or not, are subject to added academic and conduct requirements.

B. The character of the intrusion complained of in this case is, if anything, less significant than in *Vernonia*. The manner of testing, the information that is obtained, and the uses to which such information is put are the same here as in *Vernonia*, except in two respects. The policy here requires that *all* students be permitted to provide specimens from behind a "closed stall," whereas the policy in *Vernonia* only required that female students be permitted to do so. In addition, unlike *Vernonia*, the policy here expressly requires that information concerning prescription medications remain confidential. In *Vernonia*, this Court characterized the degree of intrusion involved in testing as "negligible" and "not significant." 515 U.S. at 558, 660. It is even less significant here.

C. The court of appeals erred in concluding that the government concern at issue in this case was insufficient to justify the limited intrusion into students' diminished privacy interests. As this Court recognized in *Vernonia*, the government has a compelling interest in deterring, not just detecting, drug use among school children. The perils of student drug use are numerous and well-documented. The court of appeals was wrong to suggest that the school district's interest is materially different here on the ground that student athletes face a higher risk of injury from drug use than students covered by the policy in this case, many of whom face comparable risks. Quite apart from its interest in minimizing the risk of injury from drug use, the school district also has a strong interest in ensuring that those students who represent Tecumseh High and their community at interscholastic competitive events do so drug-free.

The court of appeals also erred in concluding that the government's concern was not sufficiently "immediate." First, this Court's drug-testing cases make clear that, although a "demonstrated problem of drug abuse" may "bolster[]" the

government's interest, such evidence is "not in all cases necessary to the validity of a testing regime." *Chandler* v. *Miller*, 520 U.S. 305, 319 (1997). In that regard, the record in *Vernonia* by no means establishes a constitutional floor for justifying a student drug-testing policy. Second, the record of the drug problem at Tecumseh, including among students covered by the policy, is much closer to the actual evidence of drug use in *Vernonia* than the court of appeals acknowledged. Third, the court failed to give appropriate deference to the first-hand judgments of local school administrators as to the severity of the drug problem and need for action. Fourth, the court failed to appreciate that *deterring* drug use so that it does not take root and spread is every bit as important, if not more so, as detecting drug use at a school that already has a drug epidemic.

D. Balancing those considerations, the Court should conclude that the drug-testing policy in this case is reasonable and thus constitutional. Adopting a different approach would create a standardless inquiry under which the constitutionality of each school's drug-testing policy would turn on finely-drawn distinctions over the state of the record of drug use at that particular school, or among a particular class of students, or whether a destructive problem is already out of control. There is no reason to invite such fact-intensive litigation in every case, or to demand a school-specific inquiry into what is clearly a pervasive national problem. The Court should leave school administrators with flexibility to adopt common-sense, drug-deterrence measures like the policy at issue in this case.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PROHIBIT THE SCHOOL DISTRICT'S RANDOM DRUG-TESTING POLICY

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures." The "state-compelled collection and testing of urine" is a "search" within the Fourth Amendment. *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652 (1995). The general rule is that to be reasonable, and thus constitutional, a search must be based on individualized suspicion of wrongdoing. This Court has recognized an exception to that rule, however, for searches based on "special needs, beyond the normal need for law enforcement, mak[ing] the warrant and probable-cause requirement impracticable." *Id.* at 653 (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)); see *National Union Treasury Employees* v. *Von Raab*, 489 U.S. 656, 666 (1989); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

In *Vernonia*, this Court reaffirmed that "such 'special needs' * * * exist in the public school context," and may justify suspicionless drug testing of students. 515 U.S. at 653. That case involved a Fourth Amendment challenge to an Oregon school district's policy, which authorized random urinalysis tests of student athletes. In deciding whether that policy was constitutional, the Court considered (1) the nature of the privacy interests at issue; (2) the character of the intrusion involved; and (3) the nature and immediacy of the government concern at issue, and the efficacy of the chosen means for meeting it. Balancing those factors, the Court held that the policy was "reasonable and hence constitutional." *Id.* at 665. As explained below, a proper balancing of the same considerations leads to the identical

conclusion with respect to the substantially similar policy at issue in this case.[5]

A. As In *Vernonia*, The Privacy Interests Of Students Subject To Testing Are Greatly Diminished By The School Setting And Activities In Which They Have Chosen To Participate

1. In *Vernonia*, this Court emphasized that "[t]he most significant element" in upholding the challenged drug-testing policy was the nature of the privacy interests at issue. 515 U.S. at 665. In particular, the Court stressed "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." *Ibid.*; see *Chandler*, 520 U.S. at 316 (the public school context was "critical" in *Vernonia*, because of the State's guardianship responsibilities to students). The same goes for the student drug-testing policy in this case and, just as in *Vernonia*, that fact weighs heavily in favor of finding that the school district's policy is constitutional.

Under the Fourth Amendment, an examination of the legitimacy of the privacy interests at stake must begin with the setting in which the challenged intrusion arises. "What expectations are legitimate varies * * * with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or

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[5] The Court has conducted the same balancing analysis in considering suspicionless drug-testing policies adopted by federal employers, see *Von Raab*, *supra* (upholding United States Customs Service's policy of urinalysis drug testing for employees transferred to drug-interdiction or firearm-carrying positions); *Skinner*, *supra* (upholding Federal Railroad Administration's policy of urinalysis drug and alcohol testing for rail employees involved in train accidents or who violate safety rules), and by the States, see *Chandler* v. *Miller*, 520 U.S. 305, 316 (1997) (holding unconstitutional state law requiring candidates for state public office to certify that they have passed a urinalysis drug test).

in a public park." *Vernonia*, 515 U.S. at 654 (citation omitted). The school setting of this case necessarily affects the legitimate expectations of privacy. See *New Jersey* v. *T.L.O.*, 469 U.S. 325, 339 (1985); *id.* at 348 (Powell, J., joined by O'Connor, J., concurring) ("In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally.").

As the Court observed in *Vernonia*: "Central, in our view, to the present case is the fact that the subjects of the [challenged drug-testing policy] are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." 515 U.S. at 654. "[A] public school system" acts "as guardian and tutor of children entrusted to its care." *Id.* at 665. As a common-sense matter, it must do so. As this Court has recognized, a "proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *Id.* at 655 (quoting *T.L.O.*, 469 U.S. at 339); see *id.* at 680 (O'Connor, J., dissenting) ("schools have traditionally had special guardianlike responsibilities for children"). Public schools do not stand in the same shoes as the parents of the children who fill their classrooms. *Id.* at 655. But when children enter the schoolhouse gates, they submit themselves to the temporary custody and control of their teachers and other school administrators, and must abide by their rules.

In short, the public school context greatly diminishes the legitimate expectations of privacy of students from intrusions implicating the Fourth Amendment. And from that standpoint, the students covered by the drug-testing policy here have the same diminished expectations as the students covered by the policy in *Vernonia*.

2. In *Vernonia*, the Court observed that the already-diminished privacy expectations of school children "are even *less* with regard to student athletes." 515 U.S. at 657

(emphasis added). For example, students who participate in high school athletics typically use communal facilities such as locker rooms, and may be required to change and shower in each other's presence. *Ibid.* In addition, "[b]y choosing to 'go out for the team,' [students] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Ibid.* Here too, the students covered by the school district's policy, who participate in non-athletic interscholastic competitions, occupy a comparable position to the student athletes in *Vernonia*.

As both courts recognized below, "like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students." Pet. App. 21a; see *id.* at 65a-66a (district court). For example, students who sign-up for competitive activities covered by the school district's policy must comply with rules and regulations not applicable to other students. The OSSAA subjects them to added academic requirements concerning such matters as class attendance and credits and, in particular, obligates them to act in a manner that does not discredit their schools. C.A. App. 80-81, 104-105. Various extracurricular squads also subject members to their own sets of rules. Pet. App. 66a. Further, as is true with respect to team sports, the activities of non-athletic extracurricular groups are monitored by faculty sponsors, imposing an added degree of supervision not experienced by other students. *Ibid.*

In addition, Tecumseh High students who participate in non-athletic interscholastic activities take overnight trips for competitions or related events. J.A. 44-45. The accommodations during such overnight trips often require students of the same sex to undress and share restroom and bathing facilities. See J.A. 109-113. To be sure, non-athletic activities typically do not entail the degree of "communal undress" (*Vernonia*, 515 U.S. at 657) to which students must submit as part of some team sports, but they nonetheless often require

students to compromise their privacy interests in a comparable fashion and to a degree that students who do not participate in such activities may avoid.

Moreover, just like the student athletes in *Vernonia*, Tecumseh students who participate in non-athletic activities covered by the policy *voluntarily* assume those added requirements and intrusions when they sign-up or try-out for the activity. And, of course, they may avoid those requirements—including drug testing—by choosing not to participate. See *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring) (citing *United States* v. *Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (Friendly, J.)). As the school district's policy underscores, "[p]articipation in school-sponsored extra-curricular activities at the Tecumseh Public School District is a privilege." J.A. 193. Students who choose to avail themselves of that privilege "have reason to expect intrusions upon normal rights and privileges, including privacy." *Vernonia*, 515 U.S. at 657. That expectation alone seriously undercuts their Fourth Amendment claim demanding to be excused from the school district's random drug-testing policy.

B. The "Intrusion Complained Of" In This Case Is, If Anything, Less Significant Than In *Vernonia*

The next consideration is "the character of the intrusion that is complained of." *Vernonia*, 515 U.S. at 658. "[T]he degree of intrusion [caused by urinalysis testing] depends upon the manner in which production of the urine sample is monitored." *Ibid.* In *Vernonia*, the Court observed that the intrusion was "negligible," where urine samples were collected under conditions "nearly identical to those typically encountered in public restrooms." *Ibid.* Boys provided specimens at a urinal along a wall while clothed, and were observed by a male monitor only from behind; girls provided specimens from a closed stall with a female monitor standing

outside. *Ibid.* Under the policy in this case, *all* specimens—from both boys and girls—"must be collected in a restroom or other private facility behind a closed stall," while a monitor of the same sex is standing outside. J.A. 198. Therefore, the policy here actually involves a *lesser* degree of intrusion than the one in *Vernonia*.

In *Vernonia*, the Court also weighed the degree of intrusion in terms of the information disclosed by the tests, and found that it was "not significant." 515 U.S. at 660. In reaching that conclusion, the Court emphasized that the tests "look[ed] only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic"; that "the drugs for which the samples are screened are standard, and do not vary according to the identity of the student"; that "the results of the tests are disclosed only to a limited class of school personnel who have a need to know"; and that the results "are not turned over to law enforcement authorities or used for any internal disciplinary function." *Id.* at 658. As the court of appeals recognized, the drug-testing policy in this case is "virtually identical" to the policy in *Vernonia* in terms of "the information obtained, and the use to which that information is put." Pet. App. 22a.

Indeed, in this respect as well, the degree of intrusion in this case is less significant than in *Vernonia*. In *Vernonia*, the only concern that the Court noted was that the policy could be construed to require students "to identify *in advance* [of any positive result] prescription medications they are taking." 515 U.S. at 659. The Court observed, however, that such concern would be ameliorated if students were permitted to provide such information "in a confidential manner—for example, in a sealed envelope delivered to the testing lab." *Id.* at 660. Unlike the policy in *Vernonia*, the policy here explicitly calls for such confidential treatment. See J.A. 199 ("The medication list shall be submitted

to the lab in a sealed and confidential envelope and shall not be viewed by district employees.").

C. The Court Of Appeals Erred In Concluding That The Government Concern In This Case Is Of A Different Constitutional Dimension Than The One In *Vernonia*

The remaining consideration is "the nature and immediacy of the governmental concern at issue here, and the efficacy of [the challenged] means for meeting it." *Vernonia*, 515 U.S. at 660. Even though the "governmental concern" at issue and "means for meeting it" are essentially the same here as in *Vernonia*, the court of appeals concluded that "[t]his factor tips the balancing analysis decidedly in favor of [respondents]." Pet. App. 22a. In reaching that conclusion, the court emphasized that the policy here applies to non-athletic activities, and that the record of drug use here does not rise to the level of that in *Vernonia*. Neither of those distinctions is of constitutional dimension.

1. *The Policy's Application To Non-Athletes Does Not Render The Government Concern Any Less Significant.* Here, as in *Vernonia*, "[t]hat the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted." 515 U.S. at 661. "Deterring 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, which was the governmental concern in *Von Raab*, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner*." *Ibid.* (citations omitted); see 20 U.S.C. 7102(2) ("The widespread illegal use of alcohol and other drugs among the Nation's secondary [and elementary] school students * * * constitutes a grave threat to such students' physical and mental well-being, and significantly impedes the learning process."). The compelling nature of the government

interest in deterring drug use in schools is alone sufficient to justify a drug-testing policy like the one at issue here.

Although it did not question the government's interest "in deterring drug use among students," the court of appeals suggested that that concern was less forceful here than in *Vernonia* on the ground that the risk of injury posed by drug use to student athletes is greater than to students engaged in the non-athletic activities covered by the policy in this case. Pet. App. 22a. To be sure, the linebacker faces a greater risk of serious injury if he takes the field under the influence of drugs than the drummer in the halftime band. But at the same time, the risk of injury to a student who is under the influence of drugs while playing golf, cross country, or volleyball (sports covered by the policy in *Vernonia*) is scarcely any greater than the risk of injury to a student who is drug-impaired while building a 15-foot-high human pyramid (as cheerleaders do), handling a 1500-pound steer (as FFA members do), or working with cutlery or sharp instruments (as FHA members do). See J.A. 21, 51, 75-76, 79-81. Moreover, students who participate in extracurricular activities, athletic or not, risk harm from drug use not just when they are competing, but at any time during the trips or overnight stays that they often take in connection with events. See pp. 14-15, *supra*.[6]

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[6] The court of appeals acknowledged that some of the extracurricular activities in this case "involve a safety issue comparable to that of athletics," but argued that the school district's policy nonetheless was overinclusive in that it also covered extracurricular activities (*e.g.*, academic team) that did not pose such a safety risk and was underinclusive in that it did not apply to regular school activities (*e.g.*, shop class) that might pose such a risk. Pet. App. 23a. But that also was true of the policy in *Vernonia*, which applied not only to wrestlers but to golfers, and which did not extend to shop class. In seeking to deter drug use among their students, school administrators need not act with the sort of precision demanded by a "narrow tailoring" analysis. Rather, the touchstone under

Apart from the risk of injury to students who compete in OSSAA-governed events under the influence of drugs, the school district has another weighty interest in ensuring that students who participate in such events do so drug-free: when students step onto the auditorium stage for an academic "Quiz Bowl," the fairground for an FFA event, or the basketball court for Pom Pom, they do so on behalf of Tecumseh High. As the policy itself states, "[s]tudents who participate in [covered] activities are respected by the student body and are representing the school district and the community." J.A. 193. Whatever the risk of injury from competing under the influence of drugs, the school district has a strong interest in seeing that those who represent Tecumseh High are not an "embarrassment" to the school and community, not to mention themselves. J.A. 78.

In a similar vein, in *Vernonia*, this Court recognized that the "'role model' effect" of student athletes bolstered the government's interest in testing student athletes. 515 U.S. at 663. So too here. Cheerleaders, for example, are just as likely to be role models as football players. And, as the record reflects, students who engage in non-athletic interscholastic competitions at Tecumseh High are held in "high esteem" by their fellow students. C.A. App. 995. Indeed, the success of a non-athletic team—such as Tecumseh's academic team, which was state champion in 1997 and 1998, *ibid.*—may actually call more attention to the members of that team than to members of sports teams with less success. The school district has an heightened interest in ensuring that those students do not use drugs.

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the Fourth Amendment is reasonableness. And, as discussed, the school district here, like the one in *Vernonia*, had ample reason—including safety concerns—for targeting students who choose to participate in extracurricular competitions for random drug testing.

At the same time, student athletes are no more entitled to protection from drugs, nor less entitled to legitimate concerns of privacy, than students who participate in non-athletic activities covered by the policy. Drawing a distinction between such students demeans both the volleyball player and the cheerleader by suggesting that one has a greater claim to privacy or is more deserving of protection from dangerous drugs than the other. There is, in short, no basis for adopting a constitutional dividing line based on whether a student chooses to participate in an interscholastic activity that is athletic, or one that is non-athletic.

2. *The School District Was Not Required To Allow Drug Use At Tecumseh To Worsen Before Adopting Its Policy.* Although the court of appeals recognized that "there was clearly some drug use at the Tecumseh schools," Pet. App. 19a, it doubted the "immediacy" of the school district's concern in addressing that problem because "the evidence of drug use among those subject to [its policy] is far from the 'epidemic' and 'immediate crisis' faced by the Vernonia schools." *Id.* at 14a; see *id.* at 24a. The court further held that "any 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 will actually redress its drug problem." *Id.* at 25a. That analysis is flawed on several different levels and, if embraced by the Court, would seriously undercut local efforts to address the pervasive national problem posed by drugs.

a. First, as this Court's drug-testing cases confirm, the record in *Vernonia* by no means establishes the constitutional floor for justifying a random drug-testing program. Indeed, as the Court explained in *Vernonia*, the record in that case suggested an "immediate crisis of *greater* proportions than existed in *Skinner*, where [the Court] upheld the

Government's drug-testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. And of *much greater* proportions than existed in *Von Raab*, where there was no documented history of drug use by any customs officials." 515 U.S. at 663 (citations omitted and emphasis added); see *Skinner*, 489 U.S. at 607; *Van Raab*, 489 U.S. at 673. Thus, far from raising the bar, *Vernonia* reaffirms that the government may establish a sufficiently important—and immediate—interest in adopting a random drug-testing program short of demonstrating that a societal drug problem has infiltrated a particular group of individuals.

Von Raab underscores the point. In that case, this Court specifically rejected the notion that, to justify its drug-testing program, the Customs Service was required to show drug use among the specific employees to be tested. Instead, the Court recognized that the government has a compelling interest in preventing drug use among the individuals to be tested; that there was no doubt that drug use was "one of the most serious problems confronting our society today"; and that there was "little reason to believe that American workplaces are immune from this pervasive social problem." 489 U.S. at 674. In those circumstances, the Court stated, "[i]t is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context." *Id.* at 675 n.3. Without more, the government's undeniably compelling interest in deterring drug use among school children similarly justifies the school district's effort in this case to prevent drugs from spreading (further) to the students subject to its policy.

Chandler v. *Miller* is not to the contrary. There, the Court—pointing to *Vernonia*—observed that "[a] demonstrated problem of drug abuse" may "*bolster[]*" the gov-

ernment's arguments that a drug testing program is "warranted and appropriate," but—citing to *Von Raab*—also recognized that such evidence is "not in all cases necessary to the validity of a testing regime." 520 U.S. at 319 (emphasis added). In *Chandler*, this Court invalidated a Georgia law requiring candidates for state office to certify that they had tested negative for illegal drugs. Quite unlike this case or *Vernonia*, however, in *Chandler* there not only was "no evidence" of any drug problem among individuals subject to testing, but the State affirmatively disavowed that such a problem existed. *Id.* at 319, 321. Rather, the State defended the program largely based on its "symbolic" need, and not its "'special [need]', as that term draws meaning from [the Court's] case law." *Id.* at 322.

This case illustrates the problem with the court of appeals' approach. As discussed (at 2), illegal drug use remains pervasive among America's school children. Even if drug use were not yet a crisis in Oklahoma, the government would certainly have a compelling interest in preventing that crisis from occurring. But Oklahoma is not immune from the problem. It has one of the ten highest rates in the country of reported marijuana use among students ages 12 through 17. See Office of Applied Studies, Substance Abuse & Mental Health Services Admin., *1999 Nat'l Household Survey on Drug Abuse Report* App. A, Figure A.5. The record in this case further establishes that illicit drugs have reached Tecumseh school children, including those covered by the challenged policy. See pp. 3-4, *supra*. Against that backdrop, the school district was not required under this Court's precedents to wait until drug use became an epidemic before acting to save its children.

b. Second, the evidence of drug use at Tecumseh High in fact paints a much more disturbing picture than the one portrayed by the court of appeals, including with respect to students covered by the policy. The court of appeals

characterized the record of "actual drug use" in this case as "minimal," Pet. App. 14a, and respondents similarly claim an "almost complete absence of any drug problem at all in Tecumseh," Br. in Opp. 15. That view cannot be reconciled with the record evidence, discussed above, that the school district adopted its policy in response to increasing calls for action by parents and concerned community members, and following reports by teachers, students, and parents of suspected or actual drug use among Tecumseh students (including those covered by the policy), and the discovery of drugs on school property. See pp. 3-4, *supra*.[7]

At the same time that it underestimated the drug problem at Tecumseh High, the court of appeals arguably exaggerated the record of drug use in *Vernonia*. See Pet. App. 32a (Ebel, J., dissenting) (The actual "evidence in *Vernonia* of drug use by student athletes, or even by other students attending either the school in question or other schools in the respondent school district, was quite limited."); see *id.* at 32a-34a, 41a. In other words, even accepting the court of appeals' characterization of the record in this case, the evidence of drug use in this case is not materially different from that in *Vernonia*. Moreover, in evaluating that evidence, it is important to recognize that, as this Court reiterated in *Vernonia*, a person impaired by drug use "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.'" 515 U.S. at

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[7] Respondents have pointed to certain statements in applications filed by the school district for funding under the Safe and Drug-Free Schools and Communities Act. See J.A. 163-192. For example, those forms state that illegal "drugs * * * are present [at Tecumseh]" but, compared to alcohol and tobacco, "have not identified themselves as major problems at this time." J.A. 191; see J.A. 180, 186. As the district court explained, those statements must be read in context and, more to the point, comprise only a part of the evidentiary record developed in this litigation. See Pet. App. 60a n.23.

664 (quoting *Skinner*, 489 U.S. at 628 (citation omitted)); see also *Von Raab*, 489 U.S. at 674. Indeed, drug users go to considerable lengths to conceal their activities. In all likelihood, therefore, the prevalence of drug use at Tecumseh High is actually greater than what the record discloses.

c. Third, the court of appeals failed to accord appropriate deference to the judgments of local school officials as to the severity of the problem and need for action. The local board of education—in which parents of school children typically are represented—occupies a far better vantage point to gauge the threat posed by illegal drugs to their own schools and children than federal appellate judges. See *Vernonia*, 515 U.S. at 665; *Board of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 863 (1982) (plurality opinion) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."). The school district in this case adopted its drug-testing policy only after it had tried other anti-drug measures and had held community meetings to receive input on its proposed policy. The court of appeals erred in substituting its judgment for that of the school district as to the immediacy of the drug threat faced by Tecumseh students.

d. Fourth, as Judge Ebel explained, the court of appeals failed to take into account the unique dangers posed by illegal drugs and, in particular, the added difficulties in addressing a drug problem after drugs have become deeply entrenched in a community or its schools. See Pet. App. 38a-39a ("Illegal drugs exact a tremendous toll on their victims, and are nearly impossible to eliminate once they have garnered a foothold in our communities, schools, and homes."). In that regard, given the pervasive nature of the drug problem in schools nationwide and the incalculable damage inflicted on students and communities by illegal drugs, school administrators should have the same leeway to adopt the type of drug-testing policy at issue in this case to *maintain* a

drug-free school as they do to adopt such a policy in an overdue effort to *recreate* one. Preventing drugs from "spreading" to a school is just as important as saving a drug-infested school, and much easier to do. Indeed, in *Vernonia*, this Court discussed the need to deter drug use, not just detect it. Schools across the Nation have a uniform interest in employing drug testing to deter drug use without regard to how much drug use is, in fact, detected. In short, schools have an interest in preventing irreparable damage before it occurs.

D. Under A Proper Balancing, The School District's Drug-Testing Policy Is Reasonable And Thus Constitutional

Balancing the foregoing factors leads to the same result here as in *Vernonia*: the school district's policy "is reasonable and hence constitutional." 515 U.S. at 665. Indeed, as discussed, the "most significant element" (*ibid.*) in *Vernonia*—the government's guardianship responsibilities to children in the public school context—is present in equal measure here, and the "the intrusion complained of" here is, if anything, less significant than in *Vernonia*. The only consideration that could alter the mix is the nature and immediacy of the government concern at issue. Whatever the differences between the record of drug use in this case and in *Vernonia*, the school district was more than justified in deciding that it was time to adopt an added deterrent in the form of random drug testing of covered students.

A contrary conclusion would plunge the administrators of the Nation's public schools into a Fourth Amendment regime in which virtually any random drug-testing policy could be subjected to costly, fact-intensive litigation in which the constitutionality of one policy versus another would turn on finely drawn distinctions between, for example, how many marijuana cigarettes were discovered at one school as opposed to another; how many members of the football team

had been caught for or suspected of drug use as opposed to members of the cheerleading squad; or whether it was more dangerous for a student to wrestle another student under the influence of drugs or to handle a steer. Neither students nor schools would benefit from such a microscopic approach to the "special needs" analysis of *Vernonia*.

There is no need to require such case-specific, and ultimately standardless, inquiries into efforts to address a national problem like drug use in our schools. The government has a compelling interest in preventing the spread of this "pervasive societal problem" (*Von Raab*, 489 U.S. at 675 n.3), and schools across the country have an equally compelling interest in ensuring that they do not become engulfed by that problem. Efforts to draw fine distinctions about the incidence of drug use in one school versus another will only frustrate implementation of needed solutions. The Court should leave schools flexibility to adopt reasonable measures, like the policy in this case, to prevent illicit drugs from gaining a stronger hold on their communities, and protect school children from the life-altering perils of drug use.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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