

Casenote

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls: Supreme Court Approves Mandatory, Suspicionless Drug Testing Policy in Public High School

By a 5-4 vote in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,¹ the United States Supreme Court upheld the constitutionality of suspicionless drug testing of public school students who elect to participate in extracurricular activities.² The Court explained that the policy of suspicionless drug testing was “a reasonable means of furthering the School District’s important interest in preventing and deterring drug use among its schoolchildren.”³ The dissent argued that the cost of individual privacy is too high a price to pay in an effort to denounce drug abuse.⁴

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1. 536 U.S. 822, 122 S. Ct. 2559 (2002).
 2. 122 S. Ct. at 2562.
 3. *Id.* at 2569.
 4. *Id.* at 2578 (Ginsburg, J., dissenting).

I. FACTUAL BACKGROUND

Tecumseh High School, located in Tecumseh, Oklahoma, is part of the rural Pottawatomie County community located approximately forty miles southeast of Oklahoma City. Tecumseh Public Schools and the Board of Education of Tecumseh Public School District, defendants, operate the high school. Tecumseh High School offers a wide range of extracurricular activities such as sports teams, academic team, choir, marching band, Future Farmers of America, and Future Homemakers of America.⁵

The city faces a growing problem of drug use among its school-aged citizens. Tecumseh High School has faced an undeniable drug presence at the school since the 1970's. For example, police discovered evidence of marijuana near the school parking lot on one occasion. On another occasion, police discovered drugs or drug paraphernalia in a car driven by a member of the Future Farmers of America. Teachers and students reported that numerous students openly discuss drug use. While the evidence pointed to the distinct presence of drugs, the Supreme Court concluded that Tecumseh High School did not have an epidemic drug problem.⁶

In a preemptive move, the school district's administration decided to try to stem the drug problem before it worsened. In the fall of 1998, the Tecumseh School District adopted the Student Drug Testing Policy ("Policy"). The Policy required all students wishing to participate in school-sponsored extracurricular activities to submit to suspicionless drug testing. According to the Policy, refusal to consent to drug testing resulted in exclusion from all extracurricular activities. Policy terms required consenting students to undergo suspicionless drug testing prior to participating in extracurricular activities; to undergo random, suspicionless drug testing while participating in the activities; and to undergo suspicion-based drug testing while participating in the activities. Per Policy terms, students produced urine samples under the supervision of a faculty monitor. Via urinalysis, the drug testing procedure detected use of amphetamines, marijuana, cocaine, opiates, and barbituates.⁷

The first positive drug test started a three-stage response by the school. After the first positive drug test, the student's parents were contacted for a meeting. The student could continue participating in the extracurricular activity upon completion of two requirements: (1) proof

5. *Id.* at 2562-63.

6. *Id.* at 2563, 2567-68.

7. *Id.* at 2562-63, 2566.

that he received drug counseling within five days of the meeting and (2) submission to a second drug test within two weeks of the meeting. After the second positive drug test, the school suspended the student from participating in all extracurricular activities for a period of fourteen days, required the student to complete four hours of substance-abuse counseling, and required the student to submit to monthly drug tests. After the third positive drug test, the school suspended the student from participating in all extracurricular activities for either the remainder of the school year or eighty-eight days, whichever was longer. The Policy did not create any criminal liability. Policy terms required strict confidentiality for all test results. The school, storing test results in a separate file, disseminated the information on a “need to know” basis. The Policy expressly limited sanctions to the revocation of participation privileges in extracurricular activities.⁸

At the time of the suit, Lindsay Earls and Daniel James attended Tecumseh High School. Earls actively participated in the school-sponsored show choir, marching band, and academic team. While James did not participate in any extracurricular activities at that time, he sought to participate on the academic team.⁹ Earls and James, along with their parents, brought an action under 42 U.S.C. § 1983¹⁰ against the school district. Plaintiffs challenged the Policy both on its face and as it applied to their participation in school-sponsored extracurricular activities. Plaintiffs claimed that the Policy violated their Fourth Amendment right, as incorporated by the Fourteenth Amendment, to be free from unreasonable searches and seizures. Plaintiffs requested injunctive and declarative relief.¹¹

The United States District Court for the Western District of Oklahoma, applying the principles of *Vernonia School District 47J v. Acton*,¹² granted summary judgment in favor of the Tecumseh School District. Although the court found no indication of a drug epidemic in the school district, the court reasoned that there was “legitimate cause for concern” due to evidence of some drug history at the school.¹³ The court also reasoned that public schools present a “special need” due to the

8. *Id.* at 2566-67.

9. *Id.* at 2563. The Court chose not to fully address the issue of James’s standing to sue due to his failure to participate in any extracurricular activity at the time of the suit. *Id.* at 2563 n.1. As a party to the suit, Earls’s participation in extracurriculars satisfied standing requirements. *Id.*

10. 42 U.S.C. § 1983 (2000).

11. 122 S. Ct. at 2563.

12. 515 U.S. 646 (1995).

13. 122 S. Ct. at 2563 (quoting *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 115 F. Supp. 2d 1281, 1287 (2000)).

extremely deleterious effects of drug use by adolescents. Considering the importance of deterring drug use by schoolchildren nationwide, the district court reasoned that the school district presented a sufficient "special need" to justify the reasonable attempt to thwart a legitimate concern.¹⁴ Furthermore, the district court approved the effectiveness of the Policy in targeting the large proportion of students who participate in extracurricular activities.¹⁵

Reversing the lower court, the United States Court of Appeals for the Tenth Circuit held that the Policy violated the Fourth Amendment. The court of appeals reasoned that the lower court properly evaluated the Policy in the context of the public school setting. Nonetheless, the court of appeals reasoned that a drug testing policy must be designed to actually redress an articulable drug problem. By the court's reasoning, the Policy's constitutionality hinged on whether the drug testing targeted a group with an identifiable drug problem. The court of appeals declared the Policy unconstitutional because the school district failed to demonstrate a drug problem within the group of students participating in extracurricular activities.¹⁶

The United States Supreme Court granted the school district's petition for certiorari and reversed with a slim majority of five justices.¹⁷

II. LEGAL BACKGROUND

The Fourth Amendment of the United States Constitution states,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁸

While the language is clear regarding the standard for issuance of warrants, it does not specify the determinative factors of unreasonableness for warrantless searches and seizures. The issuance of warrants under probable cause may prove impracticable when special needs exist beyond the normal law enforcement scenario. The Supreme Court's holding in *Earls* followed a relatively recent collection of Fourth Amendment jurisprudence on this subject.¹⁹ From border patrols to

14. *Id.*

15. *Id.*

16. *Id.* at 2563-64.

17. *Id.* at 2562, 2564.

18. U.S. CONST. amend. IV.

19. 122 S. Ct. at 2564-65.

public school settings, the question was whether suspicionless drug testing in special needs contexts violated the Fourth Amendment.²⁰ The following decisions demonstrate the Supreme Court's Fourth Amendment jurisprudential transition from requiring individualized suspicion to balancing private interests against national interests.

A. Trend from Individualized Suspicion Requirements to Suspicionless Searches

In 1967 the Supreme Court in *Katz v. United States*²¹ interpreted the Fourth Amendment's protection of an individual's reasonable expectation of privacy.²² Prior Fourth Amendment jurisprudence often focused on the area of the search rather than the person.²³ Rejecting this line of reasoning, the Court stated that "the Fourth Amendment protects people, not places."²⁴ In his concurrence, Justice Harlan reasoned that a person's "reasonable expectation of privacy" depends on the combination of subjective and objective factors.²⁵ The Fourth Amendment provides protection over matters that satisfy the following two elements: (1) individuals subjectively expect privacy over such matters and (2) society objectively recognizes the reasonableness of such privacy expectations.²⁶

In *Terry v. Ohio*,²⁷ decided the following year, the Supreme Court reasoned that the Fourth Amendment does not strictly forbid warrantless searches and seizures.²⁸ Addressing the constitutionality of a warrantless search by a police officer, the Court articulated the reasonable suspicion standard as "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."²⁹ The Court announced a dual inquiry to determine the reasonableness of a warrantless search: (1) whether the search was justified at its inception and (2) whether the scope of the search was reasonably related to the circumstances that initially justified the search.³⁰ This inquiry requires the balancing of govern-

20. *Id.*

21. 389 U.S. 347 (1967).

22. *Id.* at 350-51.

23. *Id.* at 351 nn.8-9.

24. *Id.* at 351.

25. *Id.* at 360-61 (Harlan, J., concurring).

26. *Id.* at 361 (Harlan, J., concurring).

27. 392 U.S. 1 (1968).

28. *Id.* at 30-31.

29. *Id.* at 27.

30. *Id.* at 19-20.

mental interest in the search against the resultant privacy invasion.³¹ Under the first prong of the inquiry, the Court reasoned that the searcher “must be able to point to specific and articulable facts” from which the searcher rationally inferred the search was justified.³² Under the second prong, the Court distinguished a limited search from a full search.³³ A full search incident to an arrest under probable cause justifies an extensive search of the person.³⁴ Absent probable cause, the searcher must conduct a limited search “strictly circumscribed by the exigencies which justify its initiation.”³⁵ The Court reasoned that Fourth Amendment protections are meaningful only to the extent that searches are objectively evaluated in light of all the circumstances.³⁶ While the constitutionality of a search does not hinge upon the issuance of a warrant, the constitutionality requires more than “inarticulate hunches” to justify a warrantless search.³⁷

In 1976 the Supreme Court in *United States v. Martinez-Fuerte*³⁸ considered the balancing of national interests versus the right to individual privacy.³⁹ Trending away from individualized suspicion, the Court held that warrantless, suspicionless searches did not violate the Fourth Amendment when the purpose of the searches was to promote a legitimate, national interest that outweighed minimal intrusions into individuals’ privacy.⁴⁰ The case involved multiple suspicionless searches of vehicles as they passed through a stationary border patrol facility.⁴¹ Rather than limiting its inquiry to the facts of the specific searches, the Court considered broad-ranging evidence of the nationwide impact of illegal immigration.⁴² The Court agreed that individualized suspicion is usually a necessary component of a proper search or seizure under the Fourth Amendment.⁴³ However, the Court expressed that “the Fourth Amendment imposes no irreducible requirement of such suspicion.”⁴⁴ Given this flexibility, the Court focused on the reasonable-

31. *Id.* at 20-21.

32. *Id.* at 21.

33. *Id.* at 25-26.

34. *Id.* at 25.

35. *Id.*

36. *Id.* at 21.

37. *Id.* at 22.

38. 428 U.S. 543 (1976).

39. *Id.* at 555.

40. *Id.* at 562.

41. *Id.* at 545-50.

42. *Id.* at 551.

43. *Id.* at 560.

44. *Id.* at 561.

ness of the search as the determinative element.⁴⁵ Considering the wide national scope from which the Court judged the case, reasonableness hung in the balance between national public interests and the private interest of the defendant.⁴⁶ The Court declared the searches reasonable because the national interests so outweighed the private interests.⁴⁷

Three years later, the Supreme Court again addressed a suspicionless search of a vehicle in *Delaware v. Prouse*.⁴⁸ The Court repeated the balancing test it used in *Martinez-Fuerte*.⁴⁹ In this case, a law enforcement officer conducted a routine license and registration stop of a motor vehicle. The officer proffered no articulable reason to suspect wrongdoing by the driver. During the investigation, the police officer discovered marijuana in the vehicle. Defendant argued that the evidence of the marijuana was inadmissible because the officer collected it during an illegal, suspicionless search.⁵⁰

The Court reasoned that “the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”⁵¹ Fourth Amendment protection does not dissipate merely because people willingly embark from their homes into the public.⁵² Individuals do not expect to abandon their privacy interests merely because they operate automobiles under governmental regulation.⁵³ By these implications, the balance of privacy issues tips more favorably toward individual privacy rights rather than governmental concerns.⁵⁴ Therefore, the Court held that the authorities may not conduct individual license and registration checks absent some “articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered.”⁵⁵ Apparently, the lack of proper licensing and registration does not have the requisite nationwide consequences to justify such privacy intrusions.

45. *Id.* at 561-62.

46. *Id.* at 562.

47. *Id.*

48. 440 U.S. 648 (1979).

49. *Id.* at 654.

50. *Id.* at 650-51.

51. *Id.* at 654.

52. *Id.* at 662-63.

53. *Id.* at 662.

54. *Id.* at 663.

55. *Id.*

In two 1989 cases, *Skinner v. Railway Labor Executives' Ass'n*⁵⁶ and *National Treasury Employee Union v. Von Raab*,⁵⁷ the Supreme Court continued its balancing analysis in the context of special needs.⁵⁸ *Skinner* involved a regulation promulgated by the Federal Railroad Administration ("FRA") that required suspicionless drug and alcohol testing of railroad employees who were involved in specific railroad accidents or violations. The FRA argued that statistical data showed that a large number of railroad accidents involved the use of drugs or alcohol by railroad employees. In response to this data, the FRA sought to implement blood and urine testing to deter drug and alcohol use by railroad employees even without individualized suspicion.⁵⁹ The Court recognized that reasonableness in a traditional search in the criminal context depends on the issuance of a warrant.⁶⁰ However, such a standard need not be met in narrowly-defined special needs circumstances.⁶¹ Thus, when important governmental interests may be hindered by the requirement of individualized suspicion, then a minimally intrusive search may be deemed reasonable absent suspicion.⁶² According to this test, the Court agreed that the national interest of railroad safety overshadowed the privacy interests of those individuals who chose to work in the railroad industry.⁶³

Following the same rationale, the Court balanced the national interests versus individual privacy interests in *Von Raab*.⁶⁴ In an effort to maintain the safety and security of its drug interdiction program, the United States Customs Service implemented a suspicionless drug testing policy for any employee seeking transfer to a position that involved direct contact with drugs, the use of firearms, or access to classified material.⁶⁵ The Court considered the policy in light of the facts that the Customs Service did not contemporaneously face a drug problem in its ranks and that the drug testing did not implicate any criminal prosecutions.⁶⁶ The Court reasoned that certain circumstances permit the government to attempt to "prevent the development of

56. 489 U.S. 602 (1989).

57. 489 U.S. 656 (1989). The Supreme Court decided *Skinner* and *Von Raab* on the same day.

58. *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 668.

59. 489 U.S. at 606-09.

60. *Id.* at 619.

61. *Id.*

62. *Id.* at 624.

63. *Id.* at 624-28.

64. *Id.* at 668.

65. *Id.* at 660-61.

66. *Id.* at 660, 666.

hazardous conditions” even absent individualized suspicion.⁶⁷ In such a special needs context, the Court ruled that the government’s sufficiently compelling interests justified the minimally intrusive search.⁶⁸

B. Similar Trend from Individualized Suspicion Requirements to Suspicionless Searches in the Context of Public Schools

In 1985 the Supreme Court in *New Jersey v. T.L.O.*⁶⁹ addressed the proper standard for assessing the legality of student searches conducted by public school officials.⁷⁰ The Court sharply disagreed with New Jersey’s argument that the Framers intended the Fourth Amendment to limit only searches and seizures by law enforcement officers; conversely, protections against unreasonable searches and seizures indeed apply to searches conducted by public school officials.⁷¹ However, the Court also addressed the special setting in which public school officials operate.⁷² The informality of the student-teacher relationship lends itself to an easing of normal search and seizure strictures.⁷³ The Court recognized that the school setting often requires “swift and informal disciplinary procedures.”⁷⁴ The Court determined that school officials may conduct warrantless searches of students provided that the school’s interests in maintaining a safe educational environment outweigh the students’ privacy expectations.⁷⁵

Having generally approved warrantless student searches, the Court then addressed the standard under which warrantless searches would be judged.⁷⁶ The Court reasoned that the legality of a student search would depend on its reasonableness under all the circumstances.⁷⁷ Under the twofold inquiry established in *Terry*, the Court reasoned that a proper search must be justified at its inception and its scope must be reasonably related to the circumstances that originally prompted the search.⁷⁸ Ordinarily, the Court will consider a search justified at its inception when reasonable grounds exist to suspect that the search will

67. *Id.* at 668.

68. *Id.*

69. 469 U.S. 325 (1985).

70. *Id.* at 327.

71. *Id.* at 333-35.

72. *Id.* at 340.

73. *Id.*

74. *Id.*

75. *Id.* at 340-41.

76. *Id.* at 341.

77. *Id.*

78. *Id.*

produce evidence of a violation of school rules or the law in general.⁷⁹ Under the second inquiry, the Court will deem the scope of the search permissible provided the search is closely linked to its original objectives and is not excessively intrusive given the student's gender and the nature of the infraction.⁸⁰

Ten years after the Court in *T.L.O.* approved warrantless searches of schoolchildren by public school officials, the Supreme Court approved a public school district's suspicionless drug testing policy of student athletes in *Vernonia School District 47J v. Acton*.⁸¹ Responding to an epidemic of drug use and disciplinary problems in its schools, the Vernonia School District instituted a drug-testing program that based extracurricular athletic eligibility on students' submission to suspicionless drug testing.⁸² The school district focused the drug-testing program on the student athletes because the school district determined that the athletes were the leaders of the drug problem.⁸³ Asserting that the constitutionality of the policy depended on its reasonableness,⁸⁴ the Court conducted the same kind of national versus private interests inquiry considered in previous cases.⁸⁵ The school setting introduced an additional element that public schools are entrusted as guardians of schoolchildren.⁸⁶ The reasonableness of the searches was corollary to what constituted a reasonable search by a student's guardian in the same circumstances.⁸⁷ Recognizing that students do not "shed their constitutional rights . . . at the schoolhouse gate,"⁸⁸ the Court reasoned that a reasonable guardian would undertake such a search given the circumstances of pervasive, outward drug use by the student athletes.⁸⁹ The Court followed the reasoning that probable cause and warrants are unnecessary in public schools because the special needs of "swift and informal disciplinary procedures" make such traditional requirements impractical.⁹⁰

79. *Id.* at 341-42.

80. *Id.* at 342.

81. 515 U.S. 646 (1995).

82. *Id.* at 648-49.

83. *Id.* at 649.

84. *Id.* at 652.

85. *Id.* at 660-61.

86. *Id.* at 654-56.

87. *Id.* at 665.

88. *Id.* at 655-56 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

89. *Id.* at 665.

90. *Id.* at 653 (quoting *T.L.O.*, 469 U.S. at 341).

The Court announced a three-pronged inquiry to analyze the reasonableness of suspicionless searches: (1) the nature of the privacy interest involved, (2) the character of the intrusion, and (3) the nature and immediacy of the state's concern combined with the effectiveness of the means chosen to meet that concern.⁹¹ The Court reasoned that students, especially student athletes, have lower privacy expectations than adults because students are subjected to controls from school authorities.⁹² They are required to submit to vaccinations, and specifically for athletes, they have communal undress.⁹³ Next, the Court deemed the character of the intrusion "negligible" because the policy terms provided for urine-collection methods no more intrusive than a public restroom.⁹⁴ Finally, the Court concluded that the government had an extremely important interest for conducting the search considering the harms of nationwide drug use, the specific harms to the student athletes' bodies, and the harms of promoting drug use to other students through the "role model" effect.⁹⁵ Reasoning that students have a decreased expectation of privacy, that the search was relatively unobtrusive, and that the need to conduct the searches was severe, the Court upheld the constitutionality of the policy.⁹⁶

Noting the limited nature of the holding based upon the government's duties as guardian and tutor of public school children, the Court in *Vernonia* warned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."⁹⁷

III. RATIONALE OF THE COURT

In *Earls*, the Court again faced the issue of suspicionless drug testing of public school students.⁹⁸ The Court's reasoning focused on the *Vernonia* three-pronged inquiry: (1) the nature of the privacy interest

91. *Id.* at 654, 658, 660.

92. *Id.* at 655-57.

93. *Id.*

94. *Id.* at 658.

95. *Id.* at 661-65.

96. *Id.* at 664-65.

97. *Id.* at 665. Executing this warning in *Chandler v. Miller*, 520 U.S. 305, 309 (1997), the Supreme Court refused to extend its prior approval of suspicionless drug testing to a Georgia statute requiring public office candidates to submit to drug testing. While the Court continued to recognize the need for suspicionless drug testing in special needs contexts, it did not agree that such special needs exist in the context of elected officials. *Id.* at 321-22. Distinguishing *Von Raab*, the Court reasoned that the constant evaluation of public officials versus the secluded environment of the customs agents eliminated the need to conduct a one-time drug test prior to taking office. *Id.*

98. 122 S. Ct. at 2562.

allegedly compromised by the drug testing policy, (2) the character of the intrusion, and (3) the nature and immediacy of the government's concerns combined with the effectiveness of the Policy in meeting those concerns.⁹⁹ Due to the similarities between the cases, the Court compared *Earls* to *Vernonia* throughout its analysis.¹⁰⁰

First, the Court considered the nature of the privacy interest affected by the drug testing Policy.¹⁰¹ *Earls* argued that the precedent in *Vernonia* should not extend to nonathletes because students participating in nonathletic extracurricular activities have stronger privacy expectations than athletes.¹⁰² The Court did not recognize such a bright line distinction in *Vernonia*, which merely noted the diminished privacy expectations of student athletes.¹⁰³ Rather, the Court focused on privacy expectations in the context of "the school's custodial responsibility and authority."¹⁰⁴

The Court considered the students' privacy interests in the context of the public school setting.¹⁰⁵ The drug testing Policy applied to minors committed to the temporary custody of the state via the school system.¹⁰⁶ In this context, the Court reasoned that the reasonableness of the government's actions must be evaluated and compared to the actions of a reasonable guardian or tutor.¹⁰⁷ Schoolchildren are regularly subjected to stricter controls than adults.¹⁰⁸ As the temporary guardian of schoolchildren, the state has the responsibility to maintain "discipline, health, and safety" in its schools.¹⁰⁹ This obligation results in privacy intrusions "undertaken in furtherance of the government's responsibilities."¹¹⁰

Beyond the generally diminished privacy expectation of students, students who elect to participate in nonathletic, competitive extracurricular activities voluntarily submit to privacy intrusions similar to athletes.¹¹¹ Some extracurricular activities require occasional travel

99. *Id.* at 2565-69.

100. *Id.*

101. *Id.* at 2565.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* (quoting *Vernonia*, 515 U.S. at 665).

111. *Id.* at 2565-66.

and communal undress.¹¹² Every extracurricular activity requires its participants to follow rules that do not apply to the general student body.¹¹³ Similar to adults who choose to work in a closely regulated industry, students who elect to participate in extracurricular activities expect heightened intrusions into their privacy based on that voluntary decision.¹¹⁴ Accordingly, the Court concluded that students directly affected by the Policy had limited privacy expectations.¹¹⁵

Second, the Court considered the character of the privacy intrusion under the terms of the Policy.¹¹⁶ Focusing on the distinct requirements of the Policy, the Court analyzed the procedure for collection of urine samples, the confidentiality of test results, and the actions taken after a student's failure of a drug test.¹¹⁷

Comparing the collection procedure to the approved actions in *Vernonia*, the Court concluded that the method of urine collection was "even less problematic."¹¹⁸ Urine collection implicates privacy interests due to the great privacy most often afforded to such an excretory function.¹¹⁹ Therefore, the determination of reasonableness hinged on "the manner in which production of the urine sample [was] monitored."¹²⁰ Here, the Policy mandated that a faculty member, stationed outside a closed restroom stall, facilitate the collection of urine by listening for normal urination sounds and then handling the sample to maintain an accurate chain of custody.¹²¹ This collection method, which allowed the student to perform the excretory function in a closed stall, actually provided enhanced privacy beyond the "negligible" intrusion approved in *Vernonia*, which provided no such privacy.¹²²

Under the character of the intrusion analysis, the Court then analyzed the Policy's requirement of confidentiality.¹²³ The Policy dictated that student drug-test results, kept separately from educational records, be released only on a "need to know" basis.¹²⁴ Despite general allegations

112. *Id.* at 2566.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 2566-67.

117. *Id.*

118. *Id.* at 2566. Urine collection procedures for the instant Policy allowed for additional privacy via the use of a closed bathroom stall. *Id.*

119. *Id.*

120. *Id.* (quoting *Vernonia*, 515 U.S. at 658).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

of careless safeguarding of private information, the Court concluded that allowing school employees to view the records on a “need to know basis” did not increase the character of the intrusion into students’ privacy.¹²⁵

The Court also reviewed the actions taken following a positive test result.¹²⁶ Of key significance to the Court was that test results were neither released to law enforcement agencies nor used as a basis for disciplinary functions.¹²⁷ Rather, the consequences of failing a drug test focused on (1) prohibiting participation in extracurricular activities and (2) stemming further drug use.¹²⁸ Under the Policy, a student could continue participating in extracurricular activities despite two failed drug tests.¹²⁹ The student would be banned from participating in current-year extracurricular activities only after failing a third drug test.¹³⁰ The Court noted that the “limited uses” of the test results reduced the significance of the privacy intrusion.¹³¹ In summary, because the Policy mandated a “minimally intrusive” urine collection, confidential record keeping, and narrowly tailored consequences, the Court concluded that the invasion of privacy was not significant.¹³²

Lastly, the Court considered “the nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting” those concerns.¹³³ The Court recognized its previous articulation of the importance of the government’s concern regarding the prevention of drug use by school-aged children.¹³⁴ The state’s concern is magnified by the fact that the evil of drug use affects the very children for whom the state acts as guardian.¹³⁵ Viewing the drug epidemic from the national perspective, the Court reasoned that the substantial harm of drug use by schoolchildren satisfied the necessary immediacy for the Policy.¹³⁶ Judicial and social policy dictate that schools should not be forced merely

125. *Id.* There was an allegation that a choir teacher carelessly handled prescription drug information. *Id.* The Court reasoned that a choir teacher would have a “need to know” prescription drug information regarding students. *Id.* The Court did not simply disregard this allegation due to its failure to involve drug test results. *Id.* Rather, the Court concluded that one example of allegedly careless behavior by school staff does not increase the character of the privacy intrusion. *Id.*

126. *Id.* at 2566-67.

127. *Id.*

128. *Id.* at 2567.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* (citing *Vernonia*, 515 U.S. at 660).

134. *Id.* (citing *Vernonia*, 515 U.S. at 661-62).

135. *Id.*

136. *Id.* at 2568.

to respond to drug problems rather than prevent them.¹³⁷ While the presence of an identifiable drug problem is not always a required element of a constitutional drug policy, a demonstrated drug problem supports the showing of a special need for suspicionless testing.¹³⁸ The Court refused to articulate a constitutional definition of a drug problem for which the Court would approve a drug-testing program.¹³⁹

Earls argued that drug testing of nonathletes does not implicate safety concerns.¹⁴⁰ The Court specifically rejected the argument that precedent required that an approved drug-testing program be aimed at an articulable safety concern.¹⁴¹ Recognizing “that safety factors into the special needs analysis,”¹⁴² the Court noted that drug use impacts all schoolchildren, whether athletes or nonathletes.¹⁴³ Additionally, the Court rejected the overarching argument that all drug testing be based on individualized suspicion because such testing would be less intrusive upon individual privacy rights.¹⁴⁴ First, the Court intimated that individualized suspicion might be more intrusive due to its reliance on overburdened teachers to target suspected drug users.¹⁴⁵ The likelihood of unfairly targeting unpopular groups and the resultant lawsuits could quell the administration’s desire to carry out the testing program.¹⁴⁶ Second, the Court reemphasized the longstanding notion that “reasonableness under the Fourth Amendment does not require employing the least intrusive means”¹⁴⁷ because such a requirement would impose too great a hindrance on search and seizure powers.¹⁴⁸ The Court concluded that the failure to employ individualized suspicion does not create a presumption of unreasonableness.¹⁴⁹

In conclusion, the majority held that the implementation of a drug testing policy aimed at students who elect to participate in extracurricular activities “is a reasonable means of furthering the school district’s important interest in preventing and deterring drug use among its

137. *Id.*

138. *Id.* at 2567-68.

139. *Id.* at 2568.

140. *Id.* The Court in *Vernonia* articulated the safety concerns of athletes using drugs while participating in strenuous activities. 515 U.S. at 662.

141. 122 S. Ct. at 2568.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 2568-69.

147. *Id.* at 2569.

148. *Id.* (citing *Martinez-Fuerte*, 428 U.S. at 556-57 n.12; *Skinner*, 489 U.S. at 624).

149. *Id.* (citing *Skinner*, 489 U.S. at 624).

schoolchildren.”¹⁵⁰ Recognizing the expansion of the precedent in *Vernonia*, the Court noted that the overriding question in both *Vernonia* and *Earls* focused narrowly on the constitutionality of drug testing programs in the context of public schools’ custodial obligations.¹⁵¹ Reversing the Tenth Circuit Court of Appeals, the Supreme Court upheld the constitutionality of the Policy.¹⁵²

Joining the majority, Justice Breyer authored a concurring opinion as well.¹⁵³ The stated purpose of the concurrence was to “emphasize several underlying considerations . . . consistent with the Court’s opinion.”¹⁵⁴ First, Justice Breyer addressed the overall need for drug testing in schools.¹⁵⁵ He noted that empirical evidence shows that the nation faces a serious drug problem in its schools.¹⁵⁶ Efforts to curb drug use through “supply side interdiction” have proven unsuccessful.¹⁵⁷ The role of public schools has increased beyond the narrow realm of pure academia into more parental roles of feeding students, providing child-care and medical services, and ensuring a safe environment.¹⁵⁸ Focusing on curbing drug demand rather than drug supply, the Policy represented a different approach to stemming student drug use.¹⁵⁹ While the success of the Policy is uncertain, Justice Breyer concluded it was not unreasonable from a constitutional perspective.¹⁶⁰

Second, Justice Breyer addressed the “privacy-related burden” that the Policy imposed on the students.¹⁶¹ Of key importance was the use of public meetings through which the community could express concerns about the issues ranging from the basic purposes of the Policy to the specific methods of urine sample collection.¹⁶² Additionally, the Policy offered students and parents the opportunity to avoid testing by simply electing not to participate in extracurricular activities.¹⁶³ Finally, Justice Breyer noted that the requirement of individualized suspicion could actually produce a civil liberties dilemma.¹⁶⁴ Such a requirement

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 2569-71 (Breyer, J., concurring).

154. *Id.* at 2569 (Breyer, J., concurring).

155. *Id.* (Breyer, J., concurring).

156. *Id.* at 2569-70 (Breyer, J., concurring).

157. *Id.* at 2570 (Breyer, J., concurring).

158. *Id.* (Breyer, J., concurring).

159. *Id.* (Breyer, J., concurring).

160. *Id.* at 2571 (Breyer, J., concurring).

161. *Id.* at 2570-71 (Breyer, J., concurring).

162. *Id.* at 2571 (Breyer, J., concurring).

163. *Id.* (Breyer, J., concurring).

164. *Id.* (Breyer, J., concurring).

would not further the objectives of the Fourth Amendment to an appreciable extent beyond the established prohibition against unreasonable searches and seizures.¹⁶⁵ Having articulated these underlying considerations consistent with the majority opinion in which he joined, Justice Breyer concluded that “the Constitution does not prohibit the [Policy’s] effort” to stem drug use.¹⁶⁶

Justice Ginsburg, joined by Justices O’Connor, Stevens, and Souter, authored a dissenting opinion that described the Policy as unreasonable, capricious, and perverse due to its targeting of students least likely to use drugs.¹⁶⁷ The dissent, focusing primarily on the factual circumstances of the case, reasoned that the constitutionality of student searches depends on the reasonableness of the searches under all of the circumstances.¹⁶⁸ The dissent opined that the precedent in *Vernonia* should not extend to the instant case due to the dissimilar factual circumstances.¹⁶⁹ While the Court in *Vernonia* was concerned with the safety of specific student athletes using drugs, the majority in the instant case was concerned with student safety on a much broader scale.¹⁷⁰ The dissent reasoned that drug-testing policies should be closely tailored to address actual drug problems.¹⁷¹ Empirical evidence shows that students who participate in extracurricular activities are significantly less likely to use drugs.¹⁷² Focusing drug testing on those students could have two negative effects: (1) privacy invasion of those students in need of the least deterrence and (2) potentially “steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.”¹⁷³ Overall, the dissent recognized that the school district had the honorable intention of communicating its stand against student drug use.¹⁷⁴ That laudable and defensible goal, however, should not supersede Fourth Amendment protections.¹⁷⁵

165. *Id.* (Breyer, J., concurring).

166. *Id.* (Breyer, J., concurring).

167. *Id.* at 2571-78 (Ginsburg, J., dissenting).

168. *Id.* at 2572 (Ginsburg, J., dissenting) (citing *T.L.O.*, 469 U.S. at 341).

169. *Id.* (Ginsburg, J., dissenting).

170. *Id.* at 2575-76 (Ginsburg, J., dissenting).

171. *Id.* at 2576-77 (Ginsburg, J., dissenting).

172. *Id.* at 2577 (Ginsburg, J., dissenting).

173. *Id.* (Ginsburg, J., dissenting).

174. *Id.* at 2578 (Ginsburg, J., dissenting).

175. *Id.* (Ginsburg, J., dissenting).

IV. IMPLICATIONS

Two sides emerged from the same standard of “reasonableness.” The primary distinction between the two sides’ fact-specific analyses is their perspective on safety interests. Those arguing from a national perspective, satisfied by evidence of drug use on a national scale, may approve the testing of all students in all schools. Those arguing from an individual student perspective, however, demand student-specific evidence of safety concerns. Given the vast dichotomy of these positions, it is unlikely that the two sides will ever meet.¹⁷⁶

Due to the recent nature of the decision, few courts have commented on its analysis. In *Joye v. Hunterdon Central Regional High School Board of Education*,¹⁷⁷ the Appellate Division of the Superior Court of New Jersey expressed its willingness to follow the decision in *Earls* regarding its constitutional analysis.¹⁷⁸ The court noted that it need not address the constitutionality of the program because the parties focused solely on the strictures of the New Jersey state constitution.¹⁷⁹ Conceding the applicability of the decision in *Earls*, privacy proponents argued for greater privacy protections via the state constitution.¹⁸⁰ While the court recognized that in criminal matters the New Jersey state constitution provides greater protection than the Fourth Amendment to the United States Constitution, the court also noted that New Jersey courts typically follow the Supreme Court’s analysis of drug testing.¹⁸¹ The arguments presented in *Joye* suggest that future arguments by privacy activists will focus on tighter privacy controls at the state level to thwart the authority of *Earls*.

One article queried whether the decision in *Earls* will lead to a significant increase in public school drug testing policies.¹⁸² Following the precedent in *Vernonia*, many school districts approved drug-testing policies.¹⁸³ Notably, the instant school district consciously decided to

176. Lawrence J. Tenenbaum & Laura J. Granelli, *Random Drug Testing of Students and the Right to Privacy*, 228 N.Y. L.J. 4-7 (2002). “[T]he debate over whether *Earls* is a sharp blow to student privacy or an appropriate tool for school to fight illegal drug use is likely to be a difficult one for school districts across the nation for many school years to come.” *Id.*

177. 803 A.2d 706 (2002).

178. *Id.* at 710.

179. *Id.*

180. *Id.*

181. *Id.* at 713-14.

182. Cobby A. Caputo, *Public Schools and Drug Testing: What’s Next?*, 18 TEX. LAW. 24, August 19, 2002.

183. *Id.*

extend drug testing beyond the established precedent in *Vernonia*.¹⁸⁴ *Earls* will undoubtedly color the structure of future drug testing policies.¹⁸⁵ School districts, taking heed of the policy elements highlighted in *Earls*, will likely consider the intrusiveness of the proposed policy, the manner in which data is stored and used, the use of public forums, and, while not dispositive, the articulable presence of a drug problem in the district.¹⁸⁶

Logically, the next anticipated step is the implementation of school-wide, suspicionless drug testing as a condition of attendance.¹⁸⁷ While that issue was not before the Court in *Earls*, the Court's reasoning from a nationwide perspective leaves room for its approval.¹⁸⁸ It is clear that five of the current members of the Court viewed safety concerns from a national perspective.¹⁸⁹ Approving suspicionless drug testing through a fact-specific analysis, the Court in *Earls* stated, "The nationwide drug epidemic makes the war against drugs a pressing concern in every school."¹⁹⁰ Continuing, the Court stated, "The safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike."¹⁹¹ Faced with statistics showing the growth of a nationwide drug epidemic, the Supreme Court likely will soon decide whether such a broad sweeping program is a "reasonable means of furthering [a] School District's important interest in preventing and deterring drug use among its schoolchildren."¹⁹²

BRYAN E. BATES

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. 122 S. Ct. at 2568. "Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this [Policy]." *Id.*

190. *Id.* at 2567.

191. *Id.* at 2568.

192. *Id.* at 2569.