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SHEDDING THEIR RIGHTS: THE FOURTH AMENDMENT AND SUSPICIONLESS DRUG TESTING OF PUBLIC SCHOOL STUDENTS PARTICIPATING IN EXTRACURRICULAR ACTIVITIES

Kimberly Menashe Glassman*

Although public school students do not "shed their constitutional rights... at the schoolhouse gate,"¹ it is well established that students have a decreased expectation of privacy while under the protection, guidance, and supervision of the public school system.² The question is, where do we draw the line? At what point does a search become so intrusive as to infringe upon the Fourth Amendment rights of American public school children?

The Fourth Amendment provides: "The right of the people to be secure in their persons... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause..."³ Over time, the Supreme Court developed a "special needs" exception to the Fourth Amendment.⁴ This exception permits warrantless searches "when ‘special needs exist beyond the normal need for law enforcement, mak[ing] the warrant and probable cause requirement impracticable.’"⁵ The Supreme Court applied this exception

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³ U.S. CONST. amend. IV.


⁵ Id. at 619 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1998)). The Supreme Court began to develop the special needs exception in Camara v. Municipal Court, 387 U.S. 523 (1967), by condoning a warrantless search pursuant to a municipal health code despite a traditional showing of probable cause. Id. at 537-39. The Court reasoned the state's health and safety interest in conducting the search outweighed the homeowner's privacy interests. Id. at 539. By relaxing the probable cause standard and replacing it with a reasonableness test, the Court established the framework for special needs analysis. Id.;
to public schools, noting the need to strike a balance between students' legitimate expectations of privacy and the need of school officials to maintain discipline and order.  

In *Vernonia School District 47J v. Acton*, the Supreme Court upheld the school district's drug testing program, which authorized random, suspicionless testing of all students participating in interscholastic athletics. The Supreme Court validated the drug testing scheme after the school district revealed widespread drug use among student athletes. Since *Vernonia*, both the Seventh and Eighth Circuits have extended this holding, permitting random, suspicionless drug testing of *all* students who participate in extracurricular activities.

*see also Griffin*, 483 U.S. at 872-73 (upholding the search of a probationer’s home using a special needs analysis which replaces probable cause with reasonableness as grounds for a search).

6. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (discussing the application of the special needs exception to public schools); *see also Vernonia*, 515 U.S. at 661-62 (discussing the special need of school officials to drug test their athletes).


8. *Id.* at 664-65.

9. *Id.* at 662-63; *see also Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1356-57 (D.Or. 1992) (indicating the levels of drug use among athletes observed by teachers). The district court made the following findings:

[G]lamorization and use of drugs and alcohol became more blatant. All of the teachers who testified at trial expressed how appalled and helpless they felt as students increasingly expressed their attraction to, and vocal defense of, the use of drugs. Students boasted about drug use and regaled one another with stories of the latest “high” or “party”. Class decorum suffered. . . . Outbursts of profane language during class, rude and obscene statements directed at other students, and a general flagrant attitude that there was nothing the school could do about their conduct or their use of drugs or alcohol typified a usual day. Organizations formed within the student drug culture taking such names as the “Big Elks” or the “Drug Cartel.” . . . Drug paraphernalia was confiscated on schools grounds, and open use of drugs was observed at a local cafe across the street from the high school.

Drug and alcohol use also invaded the sports program. Students consumed alcohol on a bus after a game. Others stole alcohol from a store after a track meet . . . . [S]uspected drug use contributed to the injury of a wrestler who failed to execute a basic maneuver. When visiting the hotel room of the student the next day the smell of marijuana permeated the area . . . . [D]rug use affected certain football players in that they ignored or forgot well-drilled safety routines . . . .

The evidence amply demonstrated that the administration was at its wits end and that a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion.

*Id.* at 1356-57.

10. Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999), vacated as moot, No. 98-3227, 1999 U.S. App. LEXIS 13289, at *1 (8th Cir. June 15, 1999). The appellant was no longer a student in the school district and could not be subjected to the policy. *Id.* at 582. Since
In March 2001, the Tenth Circuit rejected a similar policy, holding that simply choosing to participate in an activity does not eliminate a student's expectation of privacy.\textsuperscript{11} Although drug testing may be an effective deterrent in preventing teen drug use, the constitutionality of extending these drug testing programs to a wider body of students is unclear.\textsuperscript{12} Such policies invade students' privacy rights without showing any reason to believe that they or their peers are using drugs.\textsuperscript{13}
This Comment examines the “special needs” exception to the Fourth Amendment and its application to the public school system. This Comment first discusses the Supreme Court's application of the Fourth Amendment to public schools and the expansion of suspicionless drug testing to include interscholastic athletes. Then, it examines suspicionless drug testing in other contexts. Next, this Comment reviews the Seventh and Eighth Circuit interpretations of Vernonia to allow suspicionless drug testing of all students participating in extracurricular activities. This Comment then examines the split between the Circuits by discussing the Tenth Circuit's holding that subjecting all students who participate in extracurricular activities to random, suspicionless drug testing is unconstitutional. This Comment next analyzes various circuit court decisions and argues that the Tenth Circuit properly determined that random, suspicionless drug testing of all students who participate in extracurricular activities, without some initial showing of drug use among these students, violates students' rights under the Fourth Amendment. Finally, this Comment explores the public policy considerations raised by this issue and determines that other means exist to address drug use by school aged children.

I. APPLYING THE FOURTH AMENDMENT TO PUBLIC SCHOOLS—DETERMINING WHAT LEVEL OF PRIVACY IS REASONABLE FOR CHILDREN ATTENDING SCHOOL

When a school district establishes a random drug testing policy, there is an inherent risk that students will be tested without any particularized suspicion of drug use.14 Although many courts do not find the drug test

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14. See Earls, 242 F.3d at 1273-1275 (noting that only four of the students tested under this policy tested positive for drug use, indicating that there was little, if any reason to believe that there was a drug use problem among students participating in extracurricular activities); Todd, 133 F.3d at 985 (allowing drug testing despite the school district's lack of showing drug use among the students to be tested); see also Vernonia, 515 U.S. at 667 (O'Connor, J., dissenting) (stating that the authorization of random drug testing of student athletes will subject students "whom have given school officials no reason whatsoever to suspect they use drugs at school . . . to an intrusive bodily search.

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students were shown to be using drugs); Miller, 172 F.3d at 580 (upholding policy permitting drug testing of all students participating in extracurricular activities while indicating that the school district did not show an immediate crisis of drug use among these students); Todd, 133 F.3d at 985-86 (upholding drug testing program requiring consent to drug testing as a prerequisite to participate in any extracurricular activity without showing a particularized drug problem among students who participate in these activities). Cf. Earls, 242 F.3d at 1277-78 (striking down the school district's drug testing as unconstitutional because it did not reveal any evidence that students participating in extracurricular activities were using drugs, negating a showing of special need).
itself to be intrusive, the privacy issues at stake remain high.\textsuperscript{15} Merely being between the ages of thirteen and eighteen can subject an otherwise innocent student to unnecessary drug testing, sending the message that school children should not and cannot be trusted.\textsuperscript{16} In \textit{Vernonia}, The Supreme Court expanded the “special needs” exception to allow suspicionless drug testing of interscholastic athletes after the school district displayed a compelling need to drug test its athletes.\textsuperscript{17} In so holding, the Supreme Court decreased the constitutional standard for searches conducted by school officials to include suspicionless drug testing of a portion of the student body.\textsuperscript{18}

\textbf{A. The Constitutionality of Searches in Public Schools}

In \textit{New Jersey v. T.L.O.},\textsuperscript{19} the Supreme Court, while holding that school personnel are bound by the Fourth Amendment, noted that the “special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause.”\textsuperscript{20} In this case, a teacher found two students smoking in a restroom and took the students to the principal’s office.\textsuperscript{21} While there, the assistant vice principal searched T.L.O.’s purse and found a pack of cigarettes and evidence of marijuana use.\textsuperscript{22} T.L.O. confessed to selling marijuana at school and the State brought charges against her in the
Juvenile and Domestic Relations Court of Middlesex County.\textsuperscript{23} T.L.O. moved to suppress the evidence found in her purse and claimed that the unlawful search tainted her confession.\textsuperscript{24} The Juvenile Court denied T.L.O.'s motion to suppress and the Supreme Court affirmed.\textsuperscript{25}

In upholding this search, the Supreme Court used a balancing test, seeking to strike a balance between the government's need to maintain control and safety in schools and the privacy rights of the students involved.\textsuperscript{26} The Court concluded that the standard of reasonableness for school children is one that "stops short of probable cause."\textsuperscript{27} The Court stated that school officials "need not obtain a warrant before searching a student who is under their authority."\textsuperscript{28} The Court further held that searches by school officials will be permissible when "the measures adopted are reasonably related to the objectives of the search and [are] not excessively intrusive in light of the age and sex of the student and the nature of the infraction."\textsuperscript{29} The Court gave deference to school personnel, stating that, ordinarily, searches will be valid as long as there is a reasonable belief that the search will reveal evidence of criminal activity or a violation of school rules.\textsuperscript{30}

The reasonableness of a search by school personnel depends on the context in which it occurs.\textsuperscript{31} To determine the standard of reasonableness, the necessity of the search is balanced against the invasion of privacy that the search creates.\textsuperscript{32} In so holding, the Supreme Court left school personnel with the discretion to determine when it was reasonably necessary to search a student under its control.\textsuperscript{33}

\textsuperscript{23} Id. at 329.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 329, 333 (citing State ex rel. T.L.O., 178 N.J. Super. 329 (1980)). The Juvenile Court stated that a school official can validly search a student based on "a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies." Id. at 329. The Supreme Court determined that the search did not violate the Fourth Amendment. Id. at 333.
\textsuperscript{26} Id. at 341.
\textsuperscript{27} See id.
\textsuperscript{28} Id. at 340.
\textsuperscript{29} Id. at 342.
\textsuperscript{30} Id. at 341-42.
\textsuperscript{31} Id. at 337.
\textsuperscript{32} Id. (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).
\textsuperscript{33} Id. at 340-41.
B. Suspicionless Drug Testing of Interscholastic Athletes is Valid Under a Special Needs Analysis

After school personnel observed a rapid escalation of drug use and reasoned that "athletes were the leaders of the drug culture," the Vernonia School District adopted The Student Athlete Drug Policy, authorizing random urinalysis of interscholastic athletes.\(^{34}\) The school district initiated its drug testing program after less intrusive means failed to decrease the drug abuse problems evident among athletes.\(^{35}\) Under this policy, students wishing to participate in interscholastic athletics were required to sign a consent form agreeing to drug testing and to obtain written consent for the testing from their parents.\(^{36}\)

The Supreme Court upheld this policy, noting the significant concerns that the school district sought to address.\(^{37}\) The Court pointed out the exceptional public health need to deter drug use by adolescents, specifically because their minds and bodies are still developing.\(^{38}\) The Court further noted the particular concerns regarding drug use among athletes, specifically the risk of physical harm facing athletes and their

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34. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648-50 (1995). The school district revealed that students were speaking out about the drug culture and that "there was nothing the school could do about it." \(\text{Id.}\) at 648. Furthermore, the number of disciplinary referrals more than doubled, students were increasingly disruptive in class, and more students were suspended. \(\text{Id.}\) at 649. The district court found that student athletes were the "leaders of the drug culture." \(\text{Id.}\) (citing Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D.Or.1992)). The district court made specific findings that student athletes were using drugs and alcohol. \(\text{Acton},\) 796 F. Supp. at 1357. School personnel testimony revealed drug and alcohol use by athletes, including: students drinking alcohol on a bus following a game, students stealing alcohol after a track meet, an injury to a wrestler caused by suspected drug use, the smell of marijuana coming from a student's hotel room, and a failure to execute "well-drilled" safety routines. \(\text{Id.}\). The Supreme Court relied heavily on these facts in upholding Vernonia's drug testing program. \(\text{Vernonia},\) 515 U.S. at 662-63.

35. \(\text{Vernonia},\) 515 U.S. at 649. The school district first responded to the increased drug use by offering "special classes, speakers, and presentations designed to deter drug use," and did not turn to drug testing until these efforts failed. \(\text{Id.; see also Acton,}\) 796 F. Supp. at 1357 (stating that the school first attempted to address the drug use problem with educational programs and did not institute drug testing until it became apparent that "unless [they] took immediate action, the problem was going to get far worse . . .").

36. \(\text{Vernonia},\) 515 U.S. at 650. The school tested its athletes at the beginning of each season for their sport and, once the season began, placed the names of the athletes in a pool where they blindly drew names of athletes for random testing. \(\text{Id.}\)

37. \(\text{Id.}\) at 661 (noting the significant concerns raised by adolescent drug use); see also \(\text{Acton},\) 796 F.Supp at 1356-1357 (describing testimony from Dr. DuPont regarding the harmful consequence of drug use on one's "motivation, memory, judgment, reaction, coordination and performance").

38. \(\text{Vernonia},\) 515 U.S. at 661-662.
competitors in contact sports. The Court examined the specific privacy concerns facing athletes and stated that by "choosing to 'go out for the team' [the students] voluntarily subjected themselves to a degree of regulation even higher than that imposed on students generally." When comparing the significant concerns facing the school district and the decreased privacy expectations already encountered by athletes, the Court concluded that this policy was reasonable under the Fourth Amendment.

The Supreme Court established a three-part balancing test to determine when suspicionless searches are reasonable in public schools. The Court first considered "the nature of the privacy interest upon which the search . . . at issue intrudes." Second, the Court examined the "character of the intrusion that is complained of." Finally, the Court took into account the "nature and immediacy of the governmental concern at issue . . . and the efficacy of this means for meeting it."

In examining the nature of the privacy interest, the Court described the traditional role of the school system as "custodial and tutelary." In upholding the drug testing policy, the Court acknowledged that schools must exercise a great deal of supervisory responsibility over the students under its control. The Court then found that the character of the intrusion that the students complained of was negligible. Finally,

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39. Id. at 662.
40. Id. at 657. The Supreme Court analogized student athletes to adults working in a "closely regulated industry," stating that athletes have "reason to expect intrusions upon [their] normal rights and privileges, including privacy." Id.
41. Id. at 664-65.
42. Id. at 652-60.
43. Id. at 654.
44. Id. at 658.
45. Id. at 660.
46. Id. at 655. The Supreme Court stated that this custodial authority permits a "degree of supervision and control that could not be exercised over free adults," and that "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. (quoting New Jersey v. T.L.O., 469 U.S. 325, 339 (1985)).
47. Id.
48. Id. at 658. Examining the character of the intrusion, the Supreme Court considered the high level of privacy ordinarily given to excretory functions, along with how the student produced the urine sample, how school personnel monitored its production, and the type of information such testing disclosed. Id. Since the students produced samples in a manner virtually identical to what normally occurs in a public restroom and the test only revealed illegal drug use, the Court found that the privacy interests compromised were negligible. Id. Male students who produced samples at a urinal, remained fully clothed, and school officials supervised them from behind. Id. Female students produced samples in a closed stall and were monitored on the outside by
the Court determined that the nature and immediacy of the school's concern justified drug testing as an efficacious means of addressing the problem.\textsuperscript{49} After examining each aspect of this test, the Court concluded that the Vernonia policy was both reasonable and constitutional.\textsuperscript{50}

\textbf{C. Suspicionless Drug Testing in Other Contexts}

\textit{1. Putting School Children in the Same Class as Railway Workers and Customs Officials}

In 1989, the Supreme Court upheld two suspicionless drug testing schemes, noting that drug tests are searches within the meaning of the Fourth Amendment and that, at times, special needs warrant the use of random drug testing.\textsuperscript{51} In \textit{Skinner v. Railway Labor Executives' Ass'n},\textsuperscript{52} a female who listened for sounds of tampering. \textit{Id.} The test only looked for a standard list of drugs; the school did not create a particularized list for each student. \textit{Id.} The testing facility only disclosed the results to a limited number of school personnel and did not disclose the information to law enforcement. \textit{Id.}

Only one court has held that the manner of obtaining a urine sample was overly intrusive and unreasonable under the Fourth Amendment. \textit{Anable v. Ford}, 653 F. Supp. 22, 41 (W.D. Ark. 1985). In \textit{Anable}, the court examined the validity of a suspicion-based drug testing policy. \textit{Id.} The school had reason to believe that the students were using drugs and offered them a drug test to prove their innocence. \textit{Id. at 27.} If any student refused the drug test they were deemed guilty and suspended from school for one semester. \textit{Id.} Under this testing policy, female students “were required to squat in the open and to urinate into a vial so that the staff member could verify that the sample was genuine and not dipped from the toilet.” \textit{Id.} The court concluded that such a test is not proper and that “requiring a teenaged student to disrobe from the waist down while an adult school official, even though of the same sex, watches the student urinate in the ‘open’ into a tube is an excessive intrusion upon the student’s legitimate expectations of privacy. . . .” \textit{Id. at 41.} The court held that the drug test used was not reasonable under the circumstances because the urinalysis employed in this school was “excessively intrusive in light of the age and sex of the students and the lack of need therefor.” \textit{Id. at 44.} It is important to note that the district court decided this case before any of the Supreme Court decisions regarding drug testing, all of which found that the manner of obtaining the urine samples was not overly intrusive. However, the test utilized in this school district was much different from those the Supreme Court approved. \textit{See, e.g., Vernonia}, 515 U.S. at 658.

\textsuperscript{49} \textit{Vernonia}, 515 U.S. at 662-63. The Supreme Court noted the high levels of known drug use by student athletes and the significant risks that drug use can have on adolescents and, more specifically, on athletes, including: the probability of injury, increased heart rate, and increased blood pressure. \textit{Id. at 662.} The Court reasoned that the drug testing was particularly efficacious because it assures that athletes do not use drugs and the school did not resort to drug testing until other, less intrusive means, failed. \textit{Id. at 649, 663; see also supra notes 34-38 and accompanying text.}

\textsuperscript{50} \textit{Vernonia}, 515 U.S. at 665.


\textsuperscript{52} 489 U.S. 602 (1989).
the Court held that safety regulations, promulgated by the Federal Railroad Administration (FRA) which mandate alcohol and drug testing following certain train accidents, without a warrant or individualized suspicion, did not violate the Fourth Amendment. The Court asserted that the governmental interest in ensuring the safety of railway employees and prospective passengers ""presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."" Given these facts, the Court focused on the safety concerns at issue compared with the privacy expectations of employees in an already highly regulated industry.

Prior to enacting this program, the FRA revealed evidence that drug or alcohol use played a role in at least twenty-one significant train accidents. The FRA enacted this program to address a specific safety problem facing the railway industry. The Court reasoned that the privacy interests and the intrusion involved were minimal in contrast to the substantial governmental interests and threats to public safety.

53. Id. at 620. The regulation mandates toxicological testing following a "major train accident," an "impact accident," a "fatal train incident," or a "passenger train accident." FRA Control of Alcohol and Drug Use, Post Accident Toxicological Testing, 49 C.F.R. §§ 219.201(a)(1)-(4) (2001). The regulation defines a "major train accident" as an accident involving "(i) [a] fatality; (ii) [a] release of hazardous material lading from railroad equipment accompanied by (A) [an] evacuation; or (B) [a] reportable injury resulting from the hazardous material release; . . . or (iii) [d]amage to railroad property of $1,000,000 or more." Id. §§ 219.201(a)(1)(i)-(iii). The regulation defines an "impact accident" as an accident "resulting in (i) [a] reportable injury; or (ii) [d]amage to railroad property of $150,000 or more." Id. § 219.201(a)(2)(i)-(ii). The regulation defines a "fatal train incident" as "[a]ny train incident that involves a fatality to any on-duty railroad employee." Id. § 219.201(a)(3). The regulation defines a "passenger train accident" as a "[r]eportable injury to any person in a train accident . . . involving a passenger train." Id. § 219.201(a)(4). The regulation exempts from toxicology testing any "collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing" and any collision "attributable to a natural cause." Id. § 219.201(b).


55. Id. at 624.

56. Id. at 607. In 1985, the FRA passed regulations dealing with drug and alcohol use on railroads. Id. at 608.

57. Id. at 606. Without using post-accident testing, the FRA identified "34 fatalities, 66 injuries and over $28 million in property damage . . . that resulted from the errors of alcohol and drug-impaired employees in 45 train accidents and train incidents during the period 1975 through 1983." Id. at 608 (quoting 49 Fed. Reg. 24,254 (June 12, 1984)).

58. Id. at 624. In this instance, the government interest of protecting the safety of railway passengers outweighed the privacy interests of those tested by this program, and strict adherence to the warrant and probable cause requirements would frustrate the government's purpose. Id. The Court stated that the governmental interest involved would be "placed in jeopardy by a requirement of individualized suspicion." Id.
Court paid special attention to the risks involved, stating, "employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others."\(^{59}\) The Court specifically focused on the safety sensitive nature of railway employees' jobs and their relationship to the public in maintaining safe conditions.\(^{60}\)

The Supreme Court announced its decision in *National Treasury Employees Union v. Von Raab*\(^ {61}\) on the same day that it announced *Skinner*.\(^ {62}\) In *Von Raab*, the Court upheld the Customs Service's drug testing program as reasonable under the Fourth Amendment.\(^ {63}\) This program required suspicionless drug testing of employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms.\(^ {64}\)

The Court employed the same reasoning utilized in *Skinner*, stating that when there is a demonstrated special need to intrude upon ordinary Fourth Amendment rights, the Court must "balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."\(^ {65}\) In *Von Raab*, as in *Skinner*, the purpose of drug testing was to deter drug use by employees in safety sensitive positions.\(^ {66}\) The Court recognized the safety and public interests involved, stating, "[t]he public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs. The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm. . . ."\(^ {67}\) The Court also pointed out that customs officials already have decreased privacy expectations, commenting that "successful performance of their duties depends uniquely on their judgment and dexterity," and that such employees, "cannot reasonably expect to keep from the Service personal information that bears directly on their fitness."\(^ {68}\) Similar to *Skinner*, the

\(^{59}\) Id. at 628.

\(^{60}\) Id.


\(^{62}\) *Skinner*, 489 U.S. at 602.

\(^{63}\) *Von Raab*, 489 U.S. at 664.

\(^{64}\) Id.

\(^{65}\) Id. at 665-66.

\(^{66}\) Id. at 666.

\(^{67}\) Id. at 670.

\(^{68}\) Id. at 672.
Supreme Court focused on the government interests at stake as well as the risks to the public if any of the individuals subject to drug testing were in fact using drugs.69

2. A Limitation on Suspicionless Drug Testing

In Chandler v. Miller,70 the Court struck down Georgia’s mandatory drug testing program for individuals running for state office.71 There was no evidence that Georgia had a particular problem of drug abuse among candidates for public office.72 The Court stated that although a demonstrated drug problem is not required to uphold a drug testing scheme, it does tend to reveal a special need for a suspicionless search.73 The Court noted that the special needs exception requires a substantial showing of a need to conduct drug testing; one that is significant enough to “override the individual’s acknowledged privacy interest . . . .”74 In this instance, Georgia did not show that it had a significant interest to drug test individuals running for state office.75 Since running for elected office is not a safety sensitive position, the Supreme Court refused to uphold this suspicionless drug testing scheme.76

D. Going Beyond Athletes – Suspicionless Drug Testing for Students Participating in All Extracurricular Activities

Although Vernonia “caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts,” the Supreme Court did not indicate how far drug testing in public schools could extend.77 Relying on Vernonia, the Seventh Circuit,

69. Id. at 670-71.
71. Id. at 322-23. Under this program, candidates for state office had to “present a certificate from a state-approved laboratory . . . reporting that the candidate submitted to a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the results were negative.” Id. at 309.
72. Id. at 318.
73. Id. at 319. Cf Von Raab, 489 U.S. at 666-68 (upholding drug testing for customs officials, without a specific showing of drug use, due to the safety sensitive nature of their positions).
74. Chandler, 520 U.S. at 318.
75. Id. at 319 (stating that the requirement is “not well designed to identify candidates who violate antidrug laws. Nor is the scheme a credible means to deter illicit drug users from seeking election to state office”).
76. Id. at 323. The Court noted that Georgia revealed no pressing crisis or evidence of a drug problem among candidates for office, which had been revealed in Vernonia with respect to student athletes. Id. at 316, 319. The Court also noted that drug use among candidates does not jeopardize public safety. Id. at 323.
in *Todd v. Rush County Schools*, upheld the Rush County Schools’ drug testing program. This program required all students wishing to participate in any extracurricular activity to consent to random suspicionless urinalysis testing for “alcohol, unlawful drug, and cigarette usage. . . .” The court found the school district’s interest in deterring drug use compelling and found no difference between athletics and other extracurricular student organizations. Concluding that the “reason[s] compelling drug testing of athletes also applies to testing of students involved in extracurricular activities,” the Seventh Circuit relied heavily on the fact that participation in extracurricular activities is a privilege. With drug use among teenagers on the rise, the school district was seeking a means to prevent drug abuse among its students.

In *Miller v. Wilkes*, the Eighth Circuit came to a similar conclusion, when it upheld a program that mandated student and parental consent to random drug testing before the school permitted a student to participate in any activity outside the regular curriculum. The Eighth Circuit reasoned that the school district had a compelling interest in deterring drug use and that a random testing program effectively satisfied that need. In applying the three-part *Vernonia* test, the Eighth Circuit found

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78. Todd v. Rush County Schs., 133 F.3d 984, 986-87 (7th Cir. 1998). The Seventh Circuit first considered suspicionless drug testing in *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988). In *Schaill*, the Seventh Circuit upheld the school requirement that interscholastic athletes must consent to random urinalysis testing to be eligible to compete in interscholastic sports. *Id.* at 1310.

79. *Todd*, 133 F.3d at 985.

80. *Id.* at 986. The court reasoned that participants in extracurricular activities, like athletes, take “leadership roles in the school community and serve as an example to others.” *Id.* The court looked to its earlier decision in *Schaill*, which upheld random drug testing of school athletes, and stated that “participation in interscholastic athletics is a benefit carrying with it enhanced prestige and status in the student community.” *Id.* (quoting *Schaill*, 864 F.2d at 1320). The court reasoned that the participants in other extracurricular activities have the same increased prestige as athletes, making those students indistinguishable from athletes. *Id.*

81. *Id.* at 986; see also Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1061 (7th Cir. 2000).

82. *Todd*, 133 F.3d 986 (stating that the program was designed to deter drug use); see also Ida Chipman, *Random Testing Reduced Drug Abuse in Schools*, SOUTH BEND TRIBUNE, Sept. 10, 2000 (stating that drug testing “gives kids a reason to say no,” and argues that drug use decreased after drug testing began). But see NATIONAL CENTER FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2001 WITH URBAN AND RURAL HEALTH CHARTBOOK (2001) (showing that drug use among school-aged children has remained static throughout the 1990s).


84. *Id.* at 581.
that the balance fell in favor of the school district.\footnote{Id. at 578-581.} First, the court noted that students have less privacy protections than ordinary citizens.\footnote{Id. at 578.} Next, the Eighth Circuit examined the character of the intrusion involved and concluded that the urinalysis testing used was no more intrusive than the test approved in \textit{Vernonia}.\footnote{Id. at 579.} Finally, considering the nature and immediacy of the concern and the efficacy of the school district’s policy, the court reasoned that drug abuse is currently a serious problem facing schools and suspicionless drug testing a portion of its students is an effective means to address the concern.\footnote{Id. at 580-81. The court noted that the problem facing the school district was not as immediate as that facing \textit{Vernonia}. \textit{Id.} However, the court concluded that drug use itself was a serious enough concern for any school district and that drug testing was an effective means to address the problem. \textit{Id.}}

The Seventh Circuit revisited this question in \textit{Joy v. Penn-Harris-Madison School Corp.} where, relying on \textit{stare decisis}, a panel of the Seventh Circuit upheld the Penn-Harris-Madison (PHM) School Corporation’s drug testing scheme.\footnote{Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1066 (7th Cir. 2000).} This policy required consent to random drug testing as a condition to participate in extracurricular activities.\footnote{Id. at 1066.} Under PHM’s policy, any student who refused to consent was automatically assumed to admit to drug or alcohol use.\footnote{Id. at 1056.} In applying the three-part \textit{Vernonia} test in \textit{Joy}, the court indicated that the PHM’s policy did not meet the criteria set forth in \textit{Vernonia}.\footnote{Id. at 1063-65.} In considering the nature of the privacy interest, the \textit{Joy} court reasoned that participation in extracurricular activities does not create the same decreased expectation of privacy that exists with student athletes.\footnote{Id. at 1063.} Examining the nature of the government’s concern, the court stated, “the
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School has not proven, or even attempted to prove, that a correlation exists between drug use and those who engage in extracurricular activities. . . .”94 Nevertheless, a three-judge panel of the Seventh Circuit upheld this analysis relying on the principle of stare decisis and the court’s recent decision in Todd.95

By focusing on the voluntary nature of extracurricular groups, the Seventh and Eighth Circuits extended Vernonia to allow random suspicionless drug testing of students involved in non-athletic extracurricular activities. Most recently, however, the Tenth Circuit reached the opposite conclusion, creating a split among the circuits.96 In

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94. Id. at 1064.
95. Id. at 1066. The judges in Joy stated:

As the previous sections make clear, the judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity. Nevertheless, we are bound by this court's recent precedent in Todd. Given that the opinion in Todd was issued only two years ago, that the facts of our case do not differ substantially from the facts in Todd, that the court in Willis reaffirmed the basic principles in Todd, and that the governing Supreme Court precedent has yet to address the matter, we believe that we must adhere to the holding in Todd and affirm the district court's grant of summary judgment for the School as it relates to testing students involved in extracurricular activities.

Id.

96. Earls v. Bd. of Educ., 242 F.3d 1264 (10th Cir. 2001), cert. granted, 122 S. Ct. 509 (2001). District courts in Texas have recently dealt with suspicionless drug testing schemes. See Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919, 931 (N.D. Tex. 2001) (holding that the school district did not show “sufficient special needs to justify suspicionless drug testing. . . .”); Gardner v. Tulia Indep. Sch. Dist., No. 2:97-CV-020-J, 2000 U.S. Dist. LEXIS 20253 at *12 (N.D. Tex. Dec. 7, 2000) (reaching a conclusion similar to that of the Tenth Circuit Earls court in striking down a suspicionless drug testing scheme). In Tannahill, the court struck down a drug testing policy that applied to the entire student population of junior and senior high school students as unreasonable under the Fourth Amendment. Tannahill, 133 F. Supp. 2d at 930. The court noted that the school district had not revealed significant evidence of drug abuse. Id. The court further reasoned that “[a]tending school is not akin to participation in a highly regulated industry. . . .” Id. at 930. In Gardner, a Texas district court struck down a drug testing program that included all extracurricular activities, noting that the policy reached eighty percent of the student body and that there was no indication of vast drug abuse among these students. Gardner, 2000 U.S. Dist. LEXIS 20253, at *6-7; see also Jim Yardley, Family in Texas Challenges Mandatory School Drug Test, N.Y. TIMES, Apr. 17, 2000, at A1 (discussing the Tannahill lawsuit, noting that the school’s policy required all students to submit to testing and that refusal resulted in the same punishment as a positive test result). The Tannahill lawsuit has received a great deal of media attention and reflects the controversy surrounding this issue. See David Stevens, Father Say [sic] He’s Outcast for Fighting Drug-Test Policy: Many Residents in Small Town Unhappy with Lawsuit Filed Against School District, DALLAS MORNING NEWS, Mar. 30, 2000 at 27A. Mr. Tannahill, the father who initiated this lawsuit, was the only parent to object to the school’s policy. Id. Many Lockney residents objected to the lawsuit, one saying “we’ve got 400 kids we’re trying to help, and one person [is] trying to spoil everything.” Id. Another resident
Earls v. Board of Education,\(^7\) the Tenth Circuit stated that “[w]e do not believe that voluntary participation in an activity, without more, should reduce a student’s expectation of privacy in his or her body.”\(^8\) Applying the Vernonia test, the Tenth Circuit reasoned that although the privacy interest itself was minimal, the school district did not reveal any evidence of particularized drug use by students participating in extracurricular activities.\(^9\) The court determined the school’s drug testing policy was not efficacious and, thus, violated the students Fourth Amendment rights.\(^{10}\) The court held that before a school district could compel student and parental consent to random drug testing as a requirement to join an extracurricular school activity, it must demonstrate “some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.”\(^{101}\) The Tenth Circuit was not willing to extend drug testing without a showing of an actual special need.\(^{102}\)

II. THE TENTH CIRCUIT PROPERLY ANALYZED VERNONIA TO REQUIRE EVIDENCE OF A SPECIAL NEED BEFORE SUBJECTING STUDENTS TO SUSPICIONLESS DRUG TESTING

A. Drug Testing Participants in All Extracurricular Activities Does Not Follow From the Established Special Needs Analysis

1. Distinguishing Safety Sensitive Public Employees from Public School Students

In Skinner v. Railway Labor Executives Ass’n\(^{103}\) and National Treasury Employers Union v. Von Raab,\(^{104}\) the Supreme Court allowed random

\(^{97}\) 242 F.3d 1264 (10th Cir. 2001), cert. granted, 122 S. Ct. 509 (2001).

\(^{98}\) Id. at 1276.

\(^{99}\) Id. at 1275-77. The Tenth Circuit stated that the method of testing and records obtained were virtually identical to the procedure upheld in Vernonia and found the invasion of privacy was insignificant. Id. at 1276.

\(^{100}\) Id. at 1277.

\(^{101}\) Id. at 1278.

\(^{102}\) Id; see also Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095, 1110 (Colo. 1998) (striking down a similar drug testing policy as violating the Fourth Amendment of the United States Constitution).

suspicionless drug testing for public employees in safety-sensitive positions. The Court believed that preventing a train accident or an unintentional shooting certainly created a special need to ensure a drug free environment. The safety-sensitive nature of these positions makes drug testing imperative for both the employees and the general public.

In Von Raab, the Supreme Court stressed that customs officials are the first line of defense against drug smuggling. It is essential that those persons responsible for drug interdiction are not themselves involved in drug use. The Court noted that drug smugglers are not shy about bribing officials and that the position itself often involves a significant element of danger. These conditions directly threaten the safety of customs employees, and it is imperative that they are both physically and mentally competent to handle the position.

The same public health and safety concerns that apply to customs officials apply to railway employees. Railway employees conduct passenger trains, where drug use can significantly jeopardize public safety. The FRA proved that conducting a train while under the influence of drugs or alcohol can cause serious accidents and the loss of life. The significant safety interests at stake override the privacy invasions of railway employees.

This same degree of concern for public safety does not exist in non-athletic extracurricular activities. Athletes, often involved in contact sports, are more prone to injuries if they are using drugs. The effects of

107. Skinner, 489 U.S. at 606-08 (describing the safety concerns regarding railway employees); Von Raab, 489 U.S. at 668-70 (discussing the significant concerns that could arise if customs officials, "our Nation's first line of defense" against drug smuggling, were using drugs).
108. Von Raab, 489 U.S. at 668.
109. Id. at 670.
110. Id. at 669.
111. See id. at 669-70 (noting the compelling interest in "ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment").
112. Skinner, 489 U.S. at 606 (discussing the safety concerns that arise when train conductors use drugs).
113. Id. at 606-07; see also supra notes 53-58 and accompanying text.
115. Id. at 624.
drug use, including increased heart rate and blood pressure, can have serious ramifications in athletic activities. In this sense, athletes, like

added risks drug use creates for athletes, including slowed reactions, lessened awareness of pain, increased heart rate, increased blood pressure, reduced sweating, increased body temperatures, and masking “the normal fatigue response,” all which can lead to serious injury when combined with athletic competition. *Id.* Drugs and alcohol can have a detrimental affect on “motivation, memory, judgment, reaction, coordination, and performance.” Acton v. Vernonia Sch. Dist., 796 F. Supp. 1354, 1357 (D. Or. 1992) vacated by, 575 U.S. 646 (1995); Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919, 930 (N.D. Tex. 2001) (stating that “attending school is not akin to participation in a highly regulated industry . . . ). Moreover, the academic studies of a student, while very important, do not embody the immediate and severe life and death repercussions as do the decisions of these employees”); see also Random Tests of Students in Special Activities Still Open Question, 10 DRUG DETECTION REPORT 180 (Nov. 30, 2000) (stating that extracurricular activities “are importantly distinguished from sports because of the emphasis that has been placed on the possibility that individuals under the influence of drugs could be hurt while engaged in sports . . . ”).

117. Vernonia, 515 U.S. at 662; see also The National Clearinghouse for Alcohol and Drug Information, Drugs of Abuse, available at http://www.health.org/ govpubs/rpo926/ (last visited Nov. 8, 2001) (providing definitions and effects of various drugs). For example, stimulants such as cocaine cause “increased heart and respiratory rates, elevated blood pressure, dilated pupils and decreased appetite; high doses may cause rapid or irregular heartbeat, loss of coordination, collapse; may cause perspiration, blurred vision, dizziness, a feeling of restlessness, anxiety, delusions.” *Id.* Inhalants, including gas in aerosol cans, known as “huffing,” causes “loss of muscle control, slurred speech, drowsiness or loss of consciousness.” *Id.* Cannabis, including marijuana, causes “impaired memory, concentration, knowledge retention; loss of coordination . . . fragmentary thoughts, [and] disoriented behavior. . . .” *Id.* Although these side effects can have dramatic physical effects on any teenager, they can be more severe in active athletic competition. See Brief for Appellant at 17-20, Earls v. Bd. of Educ., 242 F.3d 1264 (10th Cir. 2001) (No. Civ-99-1213-R). In Earls, the ACLU argued that the school district’s drug testing policy did not remedy a threat to safety because the students involved engaged in “no hazardous activities whatsoever. . . .” *Id.* at 17. The ACLU also argued that in Skinner, Von Raab, and Vernonia, the Supreme Court relied heavily on the safety concerns as a basis for justifying random drug testing. *Id.* at 18. Furthermore, the ACLU argued that in Chandler, the Supreme Court specifically found that the lack of safety concerns rendered the policy unconstitutional. *Id.* at 19. In contrast to the safety-sensitive areas where the Court validated drug testing, non-athletic extracurricular activities do not “raise tangible safety issues.” *Id.* at 20. The ACLU argued:

The suggestion that such activities as Academic Team, Band, or Choir are dangerous at all, let alone dangerous enough to override ordinary Fourth Amendment protections, strains Tecumseh’s credibility beyond the breaking point. In fact, these activities are even less dangerous than some ordinary classes, where activities such as chemistry experiments or the use of power tools in shop class might become dangerous due to impairment. It is undisputed that no student has ever been injured while engaged in competitions of the Academic Team, Band, or Choir, and the few alleged dangers conjured up by the District—including such supposed hazards as Choir members tumbling off the stage, Band members colliding while they march in formation, and ringing bells while standing outside Wal-Mart—are obviously contrived and speculative. Indeed, the District candidly admits that safety concerns played no role in its decision to target non-athletes in its scheme.
railway employees and customs officials, are involved in a safety-sensitive activity. \textsuperscript{118} By comparison, non-athletic activities do not have such safety concerns, and they cannot be analogized to the safety-sensitive positions the Supreme Court has considered when upholding drug testing. \textsuperscript{119}

In addition, prior to \textit{Skinner}, the railway industry and its employees were already highly regulated; these additional regulations did not further interfere with the privacy rights of railway employees. \textsuperscript{120} Similarly, in \textit{Von Raab}, the Court noted the decreased privacy expectations that customs officials already endured by the nature of their position. \textsuperscript{121} This is highly distinguishable from students participating in non-athletic extracurricular activities, who do not have the same decreased expectations of privacy that exist in athletics. \textsuperscript{122} Athletes must

\textit{Id.} at 20 (citations omitted). These arguments reveal the characteristics that distinguish athletic from non-athletic activities. The lack of safety concerns involved in non-athletic extracurricular activities removes them from the special needs exception that the Court has carved out of the Fourth Amendment. \textit{Id.} at 17.

\textsuperscript{118} \textit{Id.} at 18 (stating that “in Vernonia, safety was [of] pivotal importance in the Supreme Court’s finding of a special need for a drug testing regime aimed specifically at athletes engaging in risky sport activities”).

\textsuperscript{119} \textit{Id.} at 20.

\textsuperscript{120} \textit{Skinner}, 489 U.S. at 626 (stating that because the FRA regulations already required blood tests, urine testing was no more invasive than the already permitted regulations). The Court did point out that urine testing, in itself, does raise different concerns because excretory functions are traditionally shielded by great privacy. \textit{Id.} Since the employees provided urine samples “in a medical environment, by personnel unrelated to the railroad employer,” the Court viewed it as similar to the already required physical examinations. \textit{Id.} at 626-27.

\textsuperscript{121} \textit{Nat’l Treasury Employees Union v. Von Raab}, 489 U.S. 656, 672 (1989) (stating that employees involved in drug interdiction can reasonably expect background checks and inquiry into their fitness and dexterity, which can be impaired by drug use).

\textsuperscript{122} \textit{See Vernonia}, 515 U.S. at 657. A situation similar to a locker room setting that might lead to a decreased expectation of privacy, does not exist with non-athletic extracurricular activities, such as a debate team or the chess club. \textit{See Trinidad Sch. Dist. No.1 v. Lopez}, 963 P.2d 1095, 1106, 1110 (Colo. 1998) (invalidating the school district’s random drug testing policy as unconstitutional under the United States Constitution, stating that members of the marching band, unlike athletes, did not have to shower and change in a communal setting, and therefore, did not have the same decreased privacy expectation as athletes). Examples of non-athletic extracurricular activities include: Student Council, Honor Society, Drama Club, Quiz Bowl, 4-H Club, Choir, Key Club, Band, Mock Trial, Future Farmers of America, Future Business Leaders of America. \textit{See, e.g.}, South Terrebonne High School Extracurricular Activities, \textit{available at} http://www2.cajun.net/~gator/extracurricular.extracurricular.html (last visited Feb. 8, 2002), Sheldon High School Extracurricular Activities, \textit{available at} http://www.sheldon.k12.ia.us/extracurricular.htm (last visited Feb. 8, 2002). These activities do not typically involve a physical examination or locker room setting, making them distinguishable from athletics. \textit{Trinidad}, 963 P.2d at 1106, 1110.
obtain a physical examination before participating in the interscholastic season and often must submit a urine sample as part of the examination.\textsuperscript{123} In contrast, non-athletic activities do not require a physical examination as a prerequisite to participate.\textsuperscript{124} The Supreme Court noted that there is a decreased level of privacy inherent in athletics because of the locker room setting.\textsuperscript{125} However, unlike interscholastic athletes, most extracurricular activities do not involve "a communal state of undress" that would decrease students' expectations of privacy.\textsuperscript{126}

The Supreme Court specifically focused on the distinguishing factors between athletic and non-athletic activities in upholding the drug testing program in \textit{Vernonia}.\textsuperscript{127} The Seventh and Eighth Circuits failed to recognize the essential characteristics upon which the Supreme Court relied.\textsuperscript{128} Instead, the courts grouped athletic and non-athletic extracurricular activities together, ignoring the well-established requirements of the special needs exception to the Fourth Amendment.\textsuperscript{129} In \textit{Todd}, the Seventh Circuit stated that the reasons "compelling drug

\textsuperscript{123} \textit{Vernonia}, 515 U.S. at 657 (stating that athletes must submit to a preseason physical exam that includes giving a urine sample); Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988) (stating that participants in the athletic program have to produce a urine sample as part of a required medical examination).

\textsuperscript{124} See Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1063 (7th Cir. 2000) (stating that students participating in non-athletic extracurricular activities "do not subject themselves to more explicit and routine loss of bodily privacy as a necessary component of their participating in the activities in question"). The court also noted that although extracurricular activities do have rules that the students must follow, "those rules do not require the same surrender of physical privacy as required of the student athletes in \textit{Vernonia}.") \textit{Id}.

\textsuperscript{125} \textit{Vernonia}, 515 U.S. at 657 (discussing the "state of communal undress" inherent in the locker room setting). Cf. \textit{Trinidad}, 963 P.2d at 1106-1107 (stating that the marching band is not in the same class as athletics when it comes to decreased privacy because band members "do not undergo the type of public undressing and communal showers required of student athletes").

\textsuperscript{126} \textit{Vernonia}, 515 U.S. at 657. The Supreme Court stated that athletes have a decreased expectation of privacy than other students because athletes "suit up" before the game and "shower and change afterwards." \textit{Id}. The Court indicated that this state of communal undress inherent in the locker room decreased the level privacy that student athletes could expect. \textit{Id}. Drug testing, they reasoned, would not infringe any farther on students' privacy rights than the locker room setting and the physical examinations that were already a part of interscholastic athletics. \textit{Id}.

\textsuperscript{127} \textit{Id}. at 657-62 (applying its three-part test, the Supreme Court weighed the specific issues facing the school district against student athletes privacy interests); see also supra notes 34-38 and accompanying text.

\textsuperscript{128} Miller v. Wilkes, 172 F.3d 574, 582 (8th Cir. 1999), \textit{vacated as moot}, No. 98-3227, 1999 U.S. App. LEXIS 13289, at *1 (8th Cir. June 15, 1999); Todd v. Rush County Schs., 133 F.3d 984, 986 (7th Cir. 1998).

\textsuperscript{129} \textit{Miller}, 172 F.3d at 582; \textit{Todd}, 133 F.3d at 986.
testing of athletes also applies to testing of students involved in extracurricular activities."\textsuperscript{130} The \textit{Todd} court ignored the specific factual findings upon which the Supreme Court relied in \textit{Vernonia} and, instead, upheld the drug testing program simply because these students opted to participate in extracurricular activities.\textsuperscript{131} In \textit{Joy}, a panel of the Seventh Circuit reached a different conclusion stating that "there is no correlation between students involved in extracurricular activities and drug abuse."\textsuperscript{132} The court nonetheless upheld the drug testing policy because of the recent precedent set in \textit{Todd}.\textsuperscript{133}

Similarly, the Eighth Circuit did not take notice of the Supreme Court's factual findings in \textit{Vernonia}.\textsuperscript{134} In \textit{Miller}, the Eighth Circuit stated that "students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished to a level below that of the already lowered expectation of non-participating students."\textsuperscript{135} The court acknowledged that participants in extracurricular activities are bound by the rules of the activity in which they participate, as are

\textsuperscript{130} \textit{Todd}, 133 F.3d at 986; see also W. Bradley Colwell, \textit{Beyond Vernonia: When Has a School District Drug Testing Policy Gone Too Far?} 131 EDUC. LAW REP. 547, 552-53 (1999) (arguing that the Seventh Circuit's decision in \textit{Todd} did not apply \textit{Vernonia} when it upheld the drug testing policy). Colewell stated:

The \textit{Todd} court appeared to provide a less than exhaustive legal analysis . . . . [T]he court did not apply the three-tier \textit{Vernonia} test . . . . Moreover, it failed to discuss Fourth Amendment principles or case law regarding legitimate expectation of privacy, consent, or individualized reasonable suspicion. The \textit{Todd} court only minimally supported its affirmation of the school district policy when it stated the reason compelling the testing was valid because 'successful extracurricular activities require healthy students.' Further, the court reiterated that extracurricular activities are a 'privilege' and 'voluntary,' therefore implying that students who wish not to be tested can forgo participation in such activities . . . . In sum, the Seventh Circuit did little to strengthen legally the notion of testing all extracurricular participants. The court failed to even minimally apply binding Supreme Court precedent and relied on a case that was clearly distinguishable.

\textit{Id.} (quoting \textit{Todd}, 133 F.3d at 986).

\textsuperscript{131} See \textit{Todd}, 133 F.3d at 986 (noting that the drug testing program only applies to students who chose to join an extracurricular activity). \textit{Cf.} Earls \textit{v. Bd. of Educ.}, 242 F.3d 1264, 1276 (10th Cir. 2001), \textit{cert. granted} 122 S. Ct. 509 (2001) (stating that the voluntary nature of participation alone does not lessen a student's expectation of privacy).

\textsuperscript{132} \textit{Joy v. Penn-Harris-Madison Sch. Corp.}, 212 F.3d 1052, 1064 (7th Cir. 2000).

\textsuperscript{133} \textit{Id.} at 1063. The court stated, "'[i]f we were reviewing this case based solely on \textit{Vernonia} and \textit{Chandler}, we would not sustain the random drug, alcohol, and nicotine testing of students seeking to participate in extracurricular activities. Nevertheless, we believe that the doctrines of stare decisis and precedent require our adherence to \textit{Todd} . . . ." \textit{Id.}

\textsuperscript{134} \textit{Miller}, 172 F.3d at 579.

\textsuperscript{135} \textit{Id.}
However, the court failed to examine any specific decreases in privacy that arise in non-athletic extracurricular activities.\textsuperscript{137} The Tenth Circuit agreed that students participating in non-athletic extracurricular activities have a "somewhat lesser privacy expectation," but indicated that it was different from that applied to athletes.\textsuperscript{138} The Tenth Circuit, by examining the nature and immediacy of the concern and the efficacy of the chosen solution, did not focus as heavily on the privacy expectations as it did on the third prong of the \textit{Vernonia} test.\textsuperscript{139}

\textbf{2. The Limitation of Chandler – Requiring a Showing of a Special Need}

While the Supreme Court held that a special need to conduct suspicionless drug testing exists for public school interscholastic athletes,\textsuperscript{40} railway employees,\textsuperscript{141} and customs officials,\textsuperscript{142} it struck down suspicionless drug testing of candidates for public office.\textsuperscript{143} In \textit{Chandler v. Miller}, the Supreme Court held that drug testing candidates running for public office does not fall within the special needs exception to the Fourth Amendment.\textsuperscript{144} Contrary to the holdings in \textit{Vernonia}, \textit{Skinner}, and \textit{Von Raab}, the Court distinguished \textit{Chandler} by stating that this policy was neither an effective means to "identify candidates who violate antidrug laws," nor a "credible means to deter illicit drug users from seeking election to state office."\textsuperscript{145} The Court concluded by recognizing that where public safety is not sincerely an issue, the "Fourth Amendment precludes the suspicionless search . . . ."\textsuperscript{146} \textit{Chandler}

\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} (stating that a school employee monitored participants in all extracurricular activities for compliance with the groups and the schools rules.) \textit{Cf.} \textit{Vernonia v. Sch. Dist. 47J v. Acton}, 515 U.S. 646, 661-662 (examining the specific privacy and safety concerns involved in athletics).
\textsuperscript{138} \textit{Earls v. Bd. of Educ.}, 242 F.3d 1264, 1275-76 (10th Cir. 2001), \textit{cert. granted} 122 S. Ct. 509 (2001). The Tenth Circuit stated that students participating in non-athletic activities choose to adhere to some additional rules and regulations, including, meeting the same scholastic standards as athletes. \textit{Id.} at 1276.
\textsuperscript{139} \textit{Id.} at 1275-77.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.} at 319.
\textsuperscript{146} \textit{Id.} at 323.
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represents the first instance that the Supreme Court struck down a suspicionless drug testing scheme.\textsuperscript{147}

The Chandler Court rejected the state’s arguments that illegal drug use questions “an official’s judgment and integrity; jeopardizes the discharge of public functions . . . and undermines public confidence and trust in elected officials . . . . [It] serves to deter unlawful drug users from becoming candidates. . . .”\textsuperscript{148} The Court asserted that the interests at stake were not “important enough to override the individual’s acknowledged privacy interest.”\textsuperscript{149} This holding reiterated the requirement of a special need that is “sufficiently vital to suppress the Fourth Amendment’s normal requirement[s]” before a valid suspicionless drug testing scheme may be instituted.\textsuperscript{150} In Chandler, the fact that elected officials take leadership roles was not a sufficient justification to invade their Fourth Amendment rights.\textsuperscript{151}

By noting that the state showed neither a particularized drug problem nor specific safety concerns, the Chandler Court left open the possibility that suspicionless drug testing of students participating in extracurricular activities may not survive further constitutional scrutiny.\textsuperscript{152} In upholding other suspicionless drug testing policies, the Supreme Court primarily relied on evidence that safety was a “substantial and real” concern.\textsuperscript{153} The majority of extracurricular activities, such as Debate Team or Chess

\textsuperscript{147} Id. The Supreme Court has heard four cases on random drug testing policies and upheld the policy in every instance except Chandler. Chandler, 520 U.S. at 309 (striking down a drug testing policy that required candidates for elected office to submit to random testing); Vernonia, 515 U.S. at 665-66 (upholding suspicionless drug testing of public school interscholastic athletes); Skinner, 489 U.S. at 633 (upholding suspicionless drug testing of railway employees following certain train accidents); Von Raab, 489 U.S. at 668 (upholding suspicionless drug testing of customs officials who carried firearms or were responsible for drug interdiction).

\textsuperscript{148} Id. at 318.

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 323.

\textsuperscript{153} Id.; see also Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649-650 (1995) (acknowledging the serious challenges facing the school district, the known drug use by athletes, and the failure of other less intrusive means to deter drug use); Skinner v. Ry. Labor Executives Ass’n, 489 U.S. 602, 606 (1989) (discussing the safety concerns facing the railway industry following train accidents caused by drug and alcohol use); Nat’l Treasury Employees Union v. Von Raab, 515 U.S. 646, 670-671 (1989) (noting the significant role that Customs officials play as our first line of defense against drug smuggling and the significant need to prevent drug use by these employees).
Club, do not involve physical contact between students that creates the same safety concerns that are prevalent in athletic competition.\textsuperscript{154}

The Seventh and Eighth Circuits failed to acknowledge the specific safety concerns involved in athletic competition.\textsuperscript{155} The Eighth Circuit simply stated that the possibility of harm was enough to find the drug testing scheme constitutional, even though school officials admitted that there was no immediate crisis facing the school system.\textsuperscript{156} The Seventh Circuit reasoned that “successful extracurricular activities require healthy students,” but did not address any specific safety concerns involved.\textsuperscript{157} By ignoring this significant facet of the special needs analysis, the Seventh and Eighth Circuits exceeded the scope of the Supreme Court’s standard in a manner that should be considered unconstitutional.

The Tenth Circuit properly recognized this point, stating, that “[i]t is difficult to imagine how participants in vocal choir, or the academic team, or even the Future Homemakers of America are in physical danger if they compete in those activities while using drugs. . . .”\textsuperscript{158} The court noted the safety concerns involved in these activities are no different than those involved in curricular activities not subject to the testing policy, such as working in wood shop or science laboratories, however, the school did not attempt to extend testing to all students based on

\textsuperscript{154} Earls v. Bd. of Educ., 242 F.3d 1264, 1277 (10th Cir. 2001), cert. granted 122 S. Ct. 509 (2001) (stating that students involved in non-athletic extracurricular activities are not in physical danger if the compete while using drugs); see also Brief for Appellant at 17-20, Earls v. Bd. of Educ., 242 F.3d 1264 (10th Cir. 2001) (No. Civ-99-1213-R) (arguing that there is no risk of immediate harm in non-athletic extracurricular activities).

\textsuperscript{155} Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1065 (7th Cir. 2000) (stating that the school did not reveal any immediate safety concerns regarding students participating in extracurricular activities); Todd v. Rush County Schs., 133 F.3d 984, 986 (7th Cir. 1998); see also Miller v. Wilkes, 172 F.3d 574, 580-81 (8th Cir. 1999), vacated as moot, No. 98-3227, 1999 U.S. App. LEXIS 13289, at *1 (8th Cir. June 15, 1999) (indicating that drug use in itself is significant enough of a problem that schools have a compelling interest in preventing it before it starts, but not addressing any specific safety issues with respect to students participating in extracurricular activities); see also Recent Cases: Constitutional Law - Fourth Amendment - Seventh Circuit Holds that Random Suspicionless Drug Testing of Participants in Extracurricular Activities Does Not Violate the Fourth Amendment - Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998), Cert. Denied, 119 S. Ct. 68 (1998), 112 HARV. L. REV. 713, 715-16 (1999) (stating that “[t]he Seventh Circuit failed to address the critical distinctions between the targeted groups in Vernonia and Todd and thus erroneously likened Rush County’s drug testing program to the one in Vernonia”).

\textsuperscript{156} Miller, 172 F.3d at 580-81.

\textsuperscript{157} Todd, 133 F.3d at 986.

\textsuperscript{158} Earls, 242 F.3d at 1277.
safety risks. That being the case, extending testing to participants in extracurricular activities without a showing of a genuine special need was unreasonable under the Fourth Amendment.

**B. Comparing the Circuits: Drug Testing Participants in Extracurricular Activities**

In both *Todd v. Rush County Schools* and *Miller v. Wilkes*, the Seventh and Eighth Circuits followed *Vernonia*’s holding that the intrusion on students’ privacy was minimal compared with the governmental interest and the efficacy of the drug testing policies. In contrast with *Vernonia*, however, these two cases focused on the desire to prevent drug use, but not on the specific needs of the schools involved, the drug problems they faced, or the special safety concerns that the Supreme Court focused on with regard to athletes. In doing so, neither the Seventh or Eighth Circuit satisfied the third prong of the *Vernonia* test – the nature and immediacy of the concern and the efficacy of the solution. Therefore, these courts sanctioned an invasion of these students’ privacy rights.

Significantly, in *Joy v. Penn-Harris-Madison Corporation*, the most recent decision on the issue, a panel of the Seventh Circuit indicated that it did not agree with its earlier judgment but that they were bound by *stare decisis*. The court said, “the judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity. Nevertheless, we are bound by this court’s recent precedent in *Todd*.†† The panel stated that it would adhere to the Seventh Circuit’s

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159. *Id.* The court further reasoned that if the dangers of drug use were the only safety concern, then the logical solution would be to test all students. *Id.* at 1277 n.12. The school district instead narrowed its searches to participants in extracurricular activities, revealing that the policy “is not motivated simply by health care concerns.” *Id.*

160. 133 F.3d 984 (7th Cir. 1998).


162. See *Id.* at 579-81; *Todd*, 133 F.3d at 986.

163. *Todd*, 133 F.3d at 986 (stating that the “linchpin” of the drug testing program was to “protect the health of the students involved”). The Seventh Circuit did not mention any specific drug problem affecting these students, simply the need to protect them just in case they happened to be using drugs. *Miller*, 172 F.3d at 580 (stating that there is no evidence demonstrating a drug problem in this school district).


166. *Id.* at 1066.

167. *Id.*
previous holding because the facts in *Joy* were substantively similar to those in *Todd*, decided two years earlier. The panel also followed the earlier decision because the Supreme Court had not yet addressed the issue. In applying the *Vernonia* test in *Joy*, the Seventh Circuit revealed its doubt that the program in *Joy* met the standards set forth in *Vernonia*. This doubt within the Seventh Circuit further reveals the conflict regarding this issue.

In *Vernonia*, the Supreme Court allowed suspicionless drug testing following a showing of a valid special need; the school found that high drug use among student athletes creates a substantial threat to the students. Neither the Seventh nor Eighth Circuit looked for actual evidence of drug use among students participating in extracurricular activities before upholding the schools’ drug testing programs. The

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168. *Id.* The court later stated that the doctrine of *stare decisis* required them to affirm the district court judgment. *Id.* at 1067; see also supra note 95.

169. *Joy*, 212 F. 3d at 1066.

170. *Id.* at 1065.

171. *Id.*; see also *Willis* v. Anderson Cmty. Sch. Corp., 158 F.3d 415 (7th Cir. 1998), (striking down a school policy that required suspicionless drug testing of all students suspended for three or more days for fighting). The court held that the policy did not fit within the special needs exception of the Fourth Amendment. *Id.* at 424. The school argued that data establishing a “nexus between illegal substances and violent behavior” was enough to create the reasonable suspicion that a student suspended for fighting was using an illegal substance. *Id.* at 418. The court rejected this argument, stating that a suspicion-based system would address the school’s concern. *Id.* at 424. The court also rejected the argument that students suspended for fighting were similarly situated to participants in extracurricular activities because one voluntarily engages in misconduct. *Id.* at 422. The court reasoned that in the context of extracurricular activities, drug testing is part of the “bargain a student strikes in exchange for the privilege of participating in favored activities.” *Id.* In comparison, the court stated that “this degree of consideration — and certainly this appreciation of the consequences” does not exist in the “typical fight between fifteen-year-olds.” *Id.* It is especially interesting Judge Cummings, the judge who wrote the decision in *Todd*, also agreed with the decision in *Willis*. *Id.* at 417; see also *Todd* v. Rush County Schs., 133 F.3d 984, 984 (7th Cir. 1998). The court implied that participants in “favored” extracurricular activities have a different attitude than students who get into fights, a “disfavored” activity, *Willis*, 158 F.3d at 422-23, namely they are aware that with participation comes sacrifice. One would think that a student who gets into a fight knows that there are consequences for that action. The argument that members of the student counsel have less privacy than those suspended for fighting is ridiculous. The fact that the court struck down the policy in *Willis* further reveals the serious Fourth Amendment implications of drug testing in public schools.


173. *Joy*, 212 F.3d at 1064-65; *Willis*, 158 F.3d at 581; *Todd*, 133 F.3d at 986-87. In *Todd*, the court stated that the reasons behind testing athletes were no different than those for testing all participants in extracurricular activities, deterrence of drug use. *Id.* at 986. The Seventh Circuit pointed to data showing that drug use at the Rush County Schools was lower than the Indiana average. *Id.* at 984. In *Joy*, the court stated that although the school district had revealed that drug use in their school was higher than the
Tenth Circuit, however, correctly questioned the efficacy of drug testing schemes that did not seek to address a specific drug abuse problem, revealing the Fourth Amendment concerns when a school district seeks to drug test its students without any evidence of a drug problem. In *Earls v. Board of Education*, the Tenth Circuit focused on the Supreme Court's discussion in *Vernonia* of the specific findings of drug use by student athletes. Contrary to *Vernonia*, there was no evidence of a drug use problem with students in *Earls*, thus eliminating the efficacy of drug testing these students as a means to deter drug use. The Tenth national average, they made no similar showing that a drug problem existed among students participating in extracurricular activities. *Joy*, 212 F.3d at 1065. In *Miller*, the Eighth Circuit upheld the drug testing program even though there was no evidence of drug use. *Miller*, 172 F.3d at 581; see also *Recent Cases*, supra note 155 at 717 (opining that the “Seventh Circuit erred by not finding dispositive the fact that there was no showing of a correlation between participants in extracurricular activities and drug use at Rush County High School”).

174. See *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1278 (10th Cir. 2001); see also *Gardner v. Tulia Indep. Sch. Dist.*, No. 2:97-CV-020-3, 2000 U.S. Dist. LEXIS 20253, at *12 (N.D. Tex. Dec. 7, 2000) (striking down a testing policy that included both athletic and non-athletic extracurricular activities where there was no showing that a drug problem existed within any segment of the student body); *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 931 (N.D. Tex. 2001) (striking down a drug testing program seeking to randomly test all members of the student body without showing epidemic drug use within the school district). The *Tannahill* court found that the suspicionless drug testing program did not fit within the special needs exception because it is “not specifically targeted to the special needs of a drug crisis or safety-sensitive job functions.” *Id.* at 930. The court acknowledged the school districts’ “good faith efforts” to win “a frustrating war on drugs,” but pointed out the dangers of blanket drug testing on our constitutional freedoms, stating, “[e]xperience should teach us to be most on guard to protect liberty when the Government’s purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” *Id.* (quoting *Olmstead v. United States*, 277 U.S. 429, 479 (1928) (Brandeis, J., dissenting)).

175. 242 F. 3d 1264 (10th Cir. 2001).

176. *Id.* at 1276-77 (pointing out that the final prong of the *Vernonia* test, looking at the nature and immediacy of the concern and the efficacy of the solution, was applied to a specific problem that was not present among the students participating in extracurricular activities). *Id.*

177. *Id.* at 1277-78. School personnel in the school district testified on drug use in their district. *Id.* at 1272-73. Carolyn Daugherty, a choir director, testified that she had never caught a member of her choir using illegal drugs and that during her twenty-nine years of teaching, she referred only one student to the office for suspected drug use. *Id.* at 1273. Sheila Evans, a teacher, testified that she did not believe that any of the students competing in FHA used drugs. *Id.* Danny Jacobs, an assistant superintendent, testified that of the 243 students tested during the 1998-1999 school year, three tested positive. *Id.* Other teachers testified that they suspected some students of drug use. *Id.* One teacher estimated that he saw ten students per year that he suspected of using drugs. *Id.* This evidence hardly establishes an epidemic problem. See Brief for Appellant at 17-20, *Earls v. Bd. of Educ.*, 242 F.3d 1264 (10th Cir. 2001) (No. Civ-99-1213-R) (arguing that there is
Circuit also examined the safety risks involved in athletics and compared those risks with risks in other extra-curricular activities. The court determined that the drug testing scheme in *Earls* would not be able to truly identify those students actually using drugs, and it did not properly address the safety concerns connected with drug use.

The Tenth Circuit properly analyzed this issue by determining that a school district should not be able to test its students randomly without showing an identifiable drug use problem that creates a special need for such testing. In the absence of finding of a special need, no school district should be able to extend suspicionless drug testing to include participants in non-athletic extracurricular activities. Such an extension violates the test established in *Vernonia* and is unconstitutional under the Fourth Amendment. To be meaningful, the special needs exception must require an actual showing of a substantial and compelling need to diminish the already low privacy rights afforded to school children.

The record here shows no evidence whatsoever pointing to a drug problem among the non-athlete students targeted by the District's testing policy. While the district court appeared to suggest that the existence of any drug use at all in the High School as a whole would suffice to demonstrate a special need... such a reading would render the special needs test meaningless in the school context. The fact that Tecumseh High School, like every other high school in America, has failed to eradicate all drug use hardly justifies elimination of Fourth Amendment rights, especially for the very students least likely to use drugs. The Tenth Circuit also recognized these facts in *Earls*. *Earls*, 242 F.3d at 1277-78. Unless schools can show some identifiable drug problem amongst its students, random drug testing is not an efficacious solution under Supreme Court precedent. *Vernonia*, 515 U.S. at 661-62.

*Id.* at 13 (internal citations omitted). The Tenth Circuit also recognized these facts in *Earls*. *Earls*, 242 F.3d at 1277-78. Unless schools can show some identifiable drug problem amongst its students, random drug testing is not an efficacious solution under Supreme Court precedent. *Vernonia*, 515 U.S. at 661-62.

178. *Id.* at 1277.

179. *Id.* (stating that the testing program includes both “too many students and too few” to be effective from a safety point of view).

180. *Id.* at 1278; see also Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919, 928-31 (N.D.Tex. 2001) (striking down a suspicionless drug testing policy that applied to the entire student body, stating that the general notion of “maintaining drug-free schools or desires to detect illegal conduct are insufficient as a matter of law to demonstrate the existence of special needs”); Gardner v. Tulia Indep. Sch. Dist., No. 2:97-CV-020-J, 2000 U.S. Dist. LEXIS 20253, at *3 (N.D. Tex. Dec. 7, 2000) (striking down a random drug testing policy that applied to suspicionless drug testing of Seventh through Twelfth graders who participated in extracurricular activities).
III. RETURN TO VERNONIA: IDENTIFIABLE DRUG ABUSE SHOULD BE A PREREQUISITE FOR ANY SCHOOL DISTRICT SEEKING TO IMPOSE SUCH A POLICY

A. Testing Students Without Showing a Drug Use Problem Fails the Third Prong of the Vernonia Test

Randomly testing a portion of the student body for drug use, without showing that these are the students using drugs, fails to address the requirement of showing there is a significant problem. Such random testing also unnecessarily punishes those students who want to join activities, forcing them to give up their privacy rights if they want to participate and presuming their guilt if they refuse to consent to testing. In Earls, the Tenth Circuit recognized that there is no logical reason for singling out these students without making a proportional showing of drug use by the student body effected.

181. See Todd v. Rush County Sch., 133 F.3d 984, 985 (7th Cir. 1998) (detailing the schools attempt to show a significant drug problem). In Todd, the Seventh Circuit pointed out that cigarette use for Rush County tenth graders was higher than the state average, alcohol use for eleventh and twelfth graders was higher than the state average, but marijuana use for ninth and twelfth graders was lower than the state average. Id. at 984. The school district did not attempt to show drug use among students participating specifically in extracurricular activities. See id. In addition the school district appeared to have less of a drug problem than others in Indiana. See id. This further questions whether they met the immediacy of the concern requirement in Vernonia. Todd v. Rush County Schs., 139 F.3d 571, 571 (7th Cir. 1998) (denying rehearing of original Todd decision). The dissenters in the Seventh Circuit stated that there "is no showing of a particularized need because of a 'state of rebellion' . . . and certainly no showing that the targeted group . . . presents a particularized need." Id. at 572. The dissenters also argued that Chandler required the government to demonstrate a need to test the identified group, which was absent in Todd. Id.

182. Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1056 (7th Cir. 2000) (noting that "students who refuse to take the drug test are deemed to have admitted they are under the influence of drugs or alcohol. . . "); Tannahill, 133 F. Supp. 2d at 922 (stating that "any refusal by the student and/or parent, to sign the consent form will be treated as a positive test, and subject the student to consequences set forth in this policy. . "). Some opponents argue that drug testing these students can actually increase drug use in the overall student body. See Lynn Zimmer, Drug Testing USA: A Policy for Maximising Harm, at http://www.drugtext.org/articles/967110.htm (last visited Nov. 15, 2001); Robert Taylor, Compensating Behavior and the Drug Testing of High School Athletes, 16 CATO JOURNAL (1997), available at http://www.cato.org/pubs/journal/ mj16n3-5.html; see also infra note 196.

183. Earls, 242 F.3d at 1278 (holding that any district seeking to impose a suspicionless drug testing scheme must demonstrate an identifiable drug abuse problem because "[s]pecial needs must rest on demonstrated realities") (quoting United Teachers v. Orleans Parish Sch. Bd., 142 F.3d 853, 857 (5th Cir. 1998)); see also William J. Bailey, Current Issues In Drug Abuse Prevention: Suspicionless Drug Testing in Schools, Indiana Prevention Resource Center (July 19, 1997), at http://www.drugs.indiana.edu/issues/
In *Vernonia*, the Supreme Court considered the "nature and immediacy of the governmental concern at issue... and the efficacy of [the] means for meeting it." The Vernonia School District demonstrated an immediate concern that greatly affected a specific segment of their student body. In comparison, the school districts in *Joy*, *Todd*, *Miller*, and *Earls* could not show the same level of drug use among its students. Only the Tenth Circuit, in *Earls*, recognized this significant fact.

In upholding suspicionless drug testing programs, the Seventh and Eighth Circuits failed to note that the Supreme Court paid close attention to the specific drug abuse problems facing the school district in *Vernonia*. Nevertheless, one may argue that drug testing students without showing that there is drug abuse among their peer group may still act as a deterrent. By not requiring any showing of drug use among the students included in the testing, the Seventh and Eighth Circuits failed to show either an immediate concern or that the government’s approach was efficacious. Furthermore, a drug testing scheme that fails a prong of the *Vernonia* test does not survive constitutional scrutiny.

suspcionless.html (stating that “[P]articipation in school athletics and extracurricular activities is a protective factor that reduces the likelihood that a youth will use alcohol, tobacco, and other drugs”) (emphasis in original).


185. *Id.* at 662-63. In examining the immediacy of the district’s concerns, the Court pointed to the district court’s conclusion that “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,” and that “the rebellion was being fueled by alcohol and drug abuse as well as by the student’s misperceptions about the drug culture.” *Id.; see also supra* notes 9, 34 and accompanying text.

186. *Joy* at 1064, 212 F.3d at 1064; *Todd*, 133 F.3d at 985; *Miller*, 172 F.3d at 580; *Earls*, 242 F.3d at 1276-77.


188. *Todd*, 133 F.3d at 986-87 (upholding drug testing of participants in extracurricular activities without showing a drug problem or safety concerns particular to these students); *Miller*, 172 F.3d at 580 (upholding random drug testing even though the school district showed no “immediate crisis”); *see also Colwell, supra* note 130 at 552-53 (arguing that the Seventh Circuit’s decision in *Todd* did not apply *Vernonia* in upholding the drug testing scheme).

189. *See generally Hearing, supra* note 12. DeLa Salle Drug Testing Results revealed that the percentage of students testing positive decreased from three percent to less than one percent during the two years that the school conducted random drug tests. *Id.* at 21. DeLa Salle is a private school in Louisiana, where consenting to drug testing is required for admission. *Id.* at 29.

B. Testing a Small Sampling of Students Cannot Address the Significant Drug Abuse Concerns Facing Schools

Drug abuse is a problem facing many American schools today and should not be taken lightly. However, allowing random drug testing of students who participate in extracurricular activities unnecessarily infringes upon the rights of some students while ignoring possible drug use by others. While drug testing policies may prevent drug use by some students, they fail to address drug use by those who do not participate in extracurricular activities. As the Seventh Circuit pointed out in *Joy*, these policies permit drug testing on a group basis and allow drug testing

191. *Hearing supra* note 12 at 30-33. Statistics show that illicit drug use among adolescents increased between 1990 and 1996. *Id.* According to these statistics, 37.8 percent of all high school students (sample size – 70,964) had used illicit drugs from 1995-1996, compared with 20.9 percent in 1990-1991 (sample size 127,101). *Id.* at 30. *But see National Center for Health Statistics, supra* note 82 at 247-49. Other studies show that adolescent drug use has remained constant throughout the 1990s. *See, e.g.* *id.* at 247. The National Center for Health Statistics reported that marijuana use among twelve to seventeen year olds dropped from nine percent to seven percent between 1997 and 1999. *Id.* In addition, the study showed that cocaine use among twelve to seventeen year olds dropped from 2.6 percent to 0.8 percent between 1979 and 1999, remaining at 0.8 from 1998 to 1999. *Id.* The National Center for Health Statistics also reported that marijuana use among high school seniors dropped from 33.7 percent to 21.6 percent between 1980 and 2000. *Id.* at 248. Marijuana use, however, remained relatively unchanged among high school seniors from 1996 to 2000, with use in 1996 at 21.9 percent; 1997 at 23.7 percent; 1998 at 22.8 percent; 1999 at 23.1 percent; and 2000 at 21.6 percent. *Id.*

The only drug that saw an increase in use during this time period was ecstasy, which increased from 2.0 percent in 1996 to 3.6 percent in 2000. *Id.* at 249; *see also U.S. Department of Health and Human Services, Office of Applied Studies, Summary of Findings from the 2000 National Household Survey on Drug Abuse, at http://www.samhsa.gov/oas/NHSDA/2knhsda/chapter2.htm* (last visited Feb. 8, 2002). A survey conducted by the U.S. Department of Health and Human Services showed that overall drug use among twelve and thirteen year olds decreased during 1999 to 2000, from 3.9 percent to 3.0 percent; marijuana use decreased from 1.5 percent to 1.1 percent; psychotherapeutic drug use decreased from 1.8 percent to 1.6 percent; cocaine use decreased from 0.2 percent to 0.1 percent; hallucinogen use decreased from 0.3 percent to 0.2 percent; and inhalant use decreased from 1.3 percent to 0.7 percent. *Id.* at fig. 2.4. This survey further showed that drug use among fourteen through seventeen year olds remained virtually constant from 1999 to 2000. *Id.* at fig. 2.5. Furthermore, this survey revealed that drug use peaks between the ages of eighteen and twenty (when people are likely to be in college and unable to be tested for drug use). *Id.* at fig. 2.3. It is possible that although less students will use drugs if they are being tested in high school, they will likely experiment once they get to college. *Id.* Once individuals reach the age of 21, however, drug use dramatically decreases as age increases. *Id.*

192. *See Sandy Louey, Schools Considering Drug-Testing Program: Trustees May Get Recommendation This Spring*, ***Dallas Morning News***, Jan. 21, 1999, at 1G (stating that drug testing can give “students a way of escaping peer pressure to use drugs by providing them a reason to refuse.”); Elizabeth Campbell, ***School Officials Saying Drug Testing Going Well***, *Fort Worth Star-Telegram*, Mar. 1, 2000, Metro at 4 (stating that drug testing “gives kids a good reason to say no”).
“for all but the most uninvolved students.” As a result, school districts fail to reach those students who are perhaps the most in need of significant intervention by the schools.

Some argue that drug testing only a portion of the student body may actually increase drug use. For example, drug testing athletes, may

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193. Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1064 (7th Cir. 2000); See also Vernonia, 515 U.S. at 667 (O'Connor, J., dissenting) (stating that because of Vernonia “the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search”).

194. Bailey, supra note 183 (stating that “participation in school athletics and extracurricular activities is a protective factor . . . student athletes and students participating in extracurricular activities are among the lowest risk students for involvement with alcohol, tobacco, and other drugs”); School Weighs Expansion of Drug-Testing Policy, SOUTH BEND TRIB., Feb. 5, 1998 at B3 (discussing school district plans to expand drug testing to band and choir students and the concern of one board member that “the at-risk kids are the ones not involved in extra-curricular activities.”); Appellant’s Opening Brief at 16 n.10, Earls v. Bd. of Educ., 242 F.3d 1264 (10th Cir. 2001) (No. Civ-99-1213-R) (stating that “[n]ationwide statistics show that participation in extracurricular activities, by reducing after-school free time, helps reduce involvement in risky pursuits such as drug use.”).

195. Zimmer, supra note 182 (discussing the potential harms that can arrive from drug testing). Zimmer stated:

Drug testing in the schools may also increase rather than decrease the prevalence of drug problems among youth. Its advocates have suggested that by detecting adolescent drug users, before any indicators of dysfunction, early “intervention” is possible. However, this ignores that most youthful drug use is occasional and transitory and does not require intervention. It also assumes that intervention produces only positive consequences. The truth is it does not. Simply being labeled a drug user is stigmatizing and is likely to generate negative reactions from parents, teachers, and non-drug-using peers. As a result, some options and opportunities may be foreclosed, thereby pushing adolescent drug users deeper into a deviant subculture. Furthermore, admitting youthful drug users into drug treatment programs where they are encouraged to think of themselves as “addicts” may ultimately produce more harmful patterns of drug use, marked by therapist defined cycles of “relapse and recovery”. Thus, drug treatment should not be regarded as inevitably benign.

Nor are school-based testing programs likely to have much deterrent value. Currently, such programs are largely limited to students enrolled in sports or other extracurricular activities, with exclusion being the primary sanction imposed on those testing positive. What this means is that students attracted to both drugs and school sponsored activities must choose between the two. Of course, the requirement of choosing may stop some adolescents from using drugs; however, it may also stop some adolescents from engaging in activities that, in the long run, protect them from escalating their drug use. Thus, for students not deterred, drug testing may actually reduce the likelihood of their drug use remaining occasional and transitory.

Id. (internal citations omitted).
cause some members of the team to quit to avoid drug testing.\textsuperscript{196} If these theories prove true, drug testing a portion of the student body will have the opposite effect than intended. Drug testing can actually deter students from participating in extracurricular activities.\textsuperscript{197} As a result, there is an increased risk that students will choose drug use over participation in extracurricular activities, which arguably decrease drug use.\textsuperscript{198}

The Seventh Circuit noted that participants in extracurricular activities, like athletes, assume a leadership position in school.\textsuperscript{199} The court reasoned that because of this leadership role these students assumed a decreased expectation of privacy and could therefore be subjected to random drug testing.\textsuperscript{200} This reasoning is flawed. It is true that athletes take on a leadership role.\textsuperscript{201} It is also true that participants in extracurricular activities similarly take on a leadership role.\textsuperscript{202} However, the same is also true with respect to other students not subject to this policy. The student who makes the honor roll every semester takes on a leadership role, yet, they are not subject to drug testing under these policies unless they choose to join an extracurricular activity. A policy that reaches students simply because of a presumed leadership role is not efficacious because it can leave out a significant portion of the student body and will most likely miss the students most in need of intervention.\textsuperscript{203}

Furthermore, leadership does not implicate safety nor does it imply high levels of drug use. In \textit{Chandler v. Miller}, the Supreme Court struck

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\textsuperscript{196} See Taylor, \textit{supra} note 182 (arguing that drug testing athletes may increase overall drug use because marginal athletes may quit the team to avoid drug testing). The author stated that, “drug testing, by invading the privacy of student athletes and by making continued drug use difficult or impossible . . . will most probably lead marginal student athletes to ‘quit the team.’ Freed from the regimen of athletics, these former athletes may revert to the drug-use patterns of their nonathlete peers . . . ” \textit{Id.}
\textsuperscript{197} See \textit{supra} notes 195-196.
\textsuperscript{198} See Bailey \textit{supra} 183 (stating that participation in extracurricular activities is a protective factor); see also U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, \textit{Adolescent Time Use, Risky Behavior and Outcomes: An Analysis of National Data} (Sept. 11, 1995), at http://www.apse.hhs.gov/hsp.cyp/xtimuse.htm (stating that participation in extracurricular activities decreases free time and reduces student involvement in risky behavior).
\textsuperscript{199} Todd \textit{v. Rush County Schs.}, 133 F.3d 984, 986 (7th Cir. 1998) (stating that participants in extracurricular activities take on leadership roles and “serve as an example to others”).
\textsuperscript{200} See \textit{id.}
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} See \textit{supra} note 194.
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down a drug testing scheme that tested candidates for elected office. Candidates for elected office are considered leaders. Yet, the Supreme Court struck down the drug testing policy because there were no safety concerns at issue, nor was there any evidence of drug use among this class of citizens; there was no special need.

C. Other Possible Solutions to Adolescent Drug Use

A series of government documents discussing tips for preventing drug use did not address drug testing as a means of deterrence. Instead, these documents focused on education, peer discussion groups, and parental guidance. The Center for Substance Abuse Prevention calls for drug prevention methods that include education, a focus on the dangers of drug use, peer discussions, demonstrating alternatives to drug use, and community involvement that addresses drug use from a variety of angles. Drug testing opponents call for education and preventative

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205. See id. at 311.
206. Id. at 319, 323.
207. See National Institute on Drug Abuse, Prevention Principles for Children and Adolescents, at http://www.nida.nih.gov/Prevention/PREVPRINC.html (last visited on Feb. 8, 2002); see also Tips for Prevention Programming: Effective Drug Prevention Strategies (May 1997), available at http://www.whitehousedrugpolicy.gov/publications/prevent/tips2.html (stating that prevention programs that emphasize personal skills were most effective in reducing drug and alcohol use); see also Joetta Sack, School Drug Prevention Programs Found to Come Up Short, EDUC. WEEKLY, at http://www.edweek.org/we/vol-16/23drug.h16 (last visited Feb. 8, 2002) (stating that the most successful drug prevention programs teach children how to resist drug use and deal with peer pressure to use drugs).
208. See, e.g., Sack, supra note 207.
209. Center for Substance Abuse Prevention, 2000 Annual Summary: Effective Prevention Principles and Programs 24 (2000) (indicating that effective programs focus on risk and protective factors). This study provided examples of successful drug prevention programs. Id. For example, Across Ages, a school and community-based prevention program matches up school-aged children with adult mentors to provide role models and focuses on boosting self esteem, problem solving skills, and increasing knowledge about alcohol and tobacco use. Id. at 24. Across Ages focuses on students aged ten through thirteen and providing participants increased knowledge and ability to respond to situations involving drug use. Id. at 24, 26. In addition, Athletes Training and Learning to Avoid Steroids (ATLAS), a program focused on male high school athletes, is designed to teach these athletes about the risks of steroid use, provide healthy sports nutrition alternatives, provide skills to resist using drugs, build team ethics, and develop team intolerance for drug use. Id. at 26. According to this study, ATLAS participants had a “50 percent reduction in new use of anabolic steroids; lower use of alcohol, illicit drugs, and sport supplements; and reduced drinking and driving occurrences [one] year after the intervention.” Id. at 27.
measures rather than focusing on testing as a means to deter drug use. Others claim that urinalysis is not a reliable means of drug testing because it often produces false positives, which lead to inaccurate accusations.

The solution to adolescent drug use should address all students on a widespread basis rather than focusing on suspicionless drug testing of a portion of the student body. Focusing on education, the dangers of drugs, community involvement, providing alternatives to drugs, and teaching adolescents how to avoid social pressures can effectively deter drug use without interfering with the constitutional rights of students. A school district should not resort to drug testing until those less intrusive methods are proven ineffective.

IV. CONCLUSION

Although a return to individualized suspicion is not possible in light of Vernonia and other cases permitting suspicionless drug testing, the Supreme Court should find that drug testing all students who participate in extracurricular activities is unconstitutional under the Fourth Amendment unless a school district can demonstrate a special need to employ such testing. In each of the circumstances where the Supreme

210. See Drug Testing – Does It Deter Drug Abuse? 8 CQ RESEARCHER 1001-24 (Nov. 20, 1998). In this article, Professor William Sonnenstuhl, a professor of industrial labor relations, stated, “I don’t think drug testing deters anyone, except for the novices. . . . Skillful drug users know how to beat the tests. It just becomes a game they have to play.” Id. at 1008. Professor Sonnestuhl pointed out that drug abuse did not decrease in the railroad industry until the unions started educating their members about drug testing. Id. at 1007-08.

211. Bailey, supra note 183 (claiming that urinalysis, the least expensive means of drug testing, often results in false positives); see also Harry Connick, Public High School Drug Testing Program for Student Athletes: Policy and Plan, Sample Policy for Student Athletes, at http://www.noda.new-orleans.la/us/source/druopoly.html (last visited Feb. 6, 2002). Harry Connick, district attorney for Orleans Parish, Louisiana, proposed a sample proposal requiring school districts to rely on hair analysis for drug testing. Id. Mr. Connick, who also testified at the Congressional Hearing on Drug Testing in School, supra note 12, stated that hair testing expands the detection period, is more difficult to alter, and is less intrusive and embarrassing than taking a urine sample. Connick, supra; see also Dana Hawkins, Trial by Via: More Schools Give Urine Tests for Drugs – But at What Cost?, U.S. NEWS & WORLD REP. (May 31, 1999), at 70, available at http://www.usnews.com/usnews/issue/990531/nycu/drugs.htm (stating that urinalysis tests are wrong five to sixty percent of the time). When in high school, honor roll student and baseball player, Travis Robinett falsely tested posted for tetrahydrocannabinol (THC) and, as a result, was kicked off the baseball team and lost the opportunity to obtain a college athletic scholarship. Id. Such scenarios reveal the dangers that suspicionless drug testing can have on innocent students. Id.

Court upheld suspicionless drug testing, it did so only after specific factual findings revealed a valid special need. The Tenth Circuit properly recognized this fact, while the Seventh and Eighth Circuits ignored this essential aspect of *Vernonia*. Requiring evidence of widespread drug abuse and valid safety concerns among students subject to drug testing will provide the Fourth Amendment protections required by the Constitution. Schools will be required to meet all three prongs of *Vernonia* by proving an immediate and widespread concern that drug testing can effectively address.