UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRADY EUGENE TANNAHILL, a Minor, by His Father and Next Friend, LARRY EUGENE TANNAHILL, Plaintiff, v. LOCKNEY INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	)	**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Civil Action No. 5:00-CV-073-C

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the first ever challenge to the constitutionality of mandatory, suspicionless drug testing of an entire student body. Lockney junior and senior high students face no drug crisis. Rather, all indications show a level of drug use lower than most places in Texas or the nation. And Lockney students are engaged in no dangerous activity that sets them apart from other American students. Because the record reveals no special reason for this school to impose its unprecedented policy, this Court's ruling takes on grave significance. If Lockney's sweeping drug tests are permitted, there remains no principled limitation upon drug testing all 24 million students[1] in junior or senior high school throughout the nation -- approximately ten percent of the entire United States population. Never has a court ruling endorsed a search even a fraction of this magnitude.

This case does not, however, arise in a legal vacuum. Two different judges in Texas federal courts have struck down less extreme drug testing programs affecting only students engaged in extracurricular activities. Brooks v. East Chambers Consol. Independent School Dist., 730 F. Supp. 759 (S.D. Tex. 1989), aff'd 930 F.2d 915 (5th Cir. 1991); Gardner v. Tulia Indep. Sch. Dist., No. 2:97-CV-020-J, slip op. (Nov. 30, 2000) (App. 1-13). The Fifth Circuit has rejected drug testing public school teachers. United Teachers of New Orleans v. Orleans Parish Sch. Bd., 142 F.3d 853, 856 (5th Cir. 1998). And only last month, the Supreme Court struck down a sweeping program of stopping all highway drivers to detect drug possession. See Indianapolis v.Edmond, __ U.S. __, 121 S. Ct. 447, 455 (2000). The Court concluded that the Fourth Amendment will permit such searches "[o]nly with respect to a smaller class." Id.; see

[1] U.S. Department of Education, National Center for Education Statistics, Statistics of Public Elementary and Secondary School Systems; and Common Core of Data surveys (1999), available at <http://nces.ed.gov/pubs2000/digest99/d99t043.html>.

also Willis v. Anderson Community School Corp., 158 F.3d 415, 423 (7th Cir. 1998) (in the school context, "the Supreme Court has not sanctioned blanket testing"). Taken together, these cases present an insurmountable hurdle for Lockney's unprecedented drug testing program. If there is one clear principle behind the Fourth Amendment, it is the prohibition of generalized, sweeping searches of the population.

Lockney Independent School District drug tests its entire student body not because it believes any particular student is consuming illicit drugs. This suspicionless collection and analysis of the urine of hundreds of individuals constitutes an "unreasonable search" in violation of the Fourth Amendment to the U.S. Constitution. The District's blanket testing is not a well-designed means of addressing a demonstrated problem, but rather as a "get tough" gesture aimed at placating a handful of vocal parents who demanded the school "do something" about drugs. Unfortunately, the solution of drug-testing may actually do more harm than good, leading the group that should know the most about children's health, the American Academy of Pediatricians, to oppose involuntary drug testing of school children. American Academy of Pediatrics, "Testing for Drugs of Abuse in Children and Adolescents," 98 Pediatrics 305-07 (Aug. 1996) (App. 121-25).

Courts have allowed, in explicitly narrow terms, drug testing of employees engaged in safety sensitive occupations -- firefighters, train drivers, drug interdiction officers. The heavily regulated nature of these occupations and a demonstrable history of drug use among employees have contributed to courts' willingness to create limited exceptions to the normal safeguards of individualized suspicion. It would seem unimaginable, then, that the mere fact of attending junior or senior high school, especially in a school remarkable for its lack of drug use, would somehow fall into the same category as armed Customs agents responsible for seizing drug smugglers or

drivers who had wrecked a train in an industry rife with drug and alcohol abuse.

No school would even contemplate the drug testing program at issue in this case unless it vastly misinterpreted the Supreme Court decision, in Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995), to allow drug testing of student athletes in a particular high school with an exceptionally severe drug problem. The Court relied pointedly on the facts that: (1) athletes (like firefighters, train drivers, etc.) can hurt themselves and others if they are impaired by drugs, see id. at 649; (2) the school was in a "state of rebellion" fueled by an "epidemic" of drug use and disciplinary problems, id.; (3) the athletes were the ringleaders of the drug culture, prompting other students to follow their example of widespread drug use, see id.; and (4) the athletes had a lower expectation of privacy due to their submitting to full physical exams and their communal showering and disrobing, see id. at 657. In view of these factors, the majority concluded that the school district's policy was constitutional, but cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." Id. at 664-65; see also id., 666 (Ginsburg, J., concurring). The undifferentiated, sweeping conclusion that Lockney students as young as twelve years old, as well as Lockney ISD itself, requires drug testing stands upon a record that is different in every relevant aspect from the Vernonia athletes and their "drug-infested school."

Lockney's hasty decision to drug test its entire student body smacks of the "symbolic" attempt to drug test candidates struck down in the Supreme Court's most recent drug testing case. In Chandler, the Court stressed the absence of any evidence of drug use among the targeted group, as well as the state's failure to demonstrate that the group engaged in any activity involving concrete, immediate harm. See Chandler v. Miller, 520 U.S. 305, 318-19 (1997). Similarly, this Circuit has not hesitated to strike down suspicionless drug testing where it "did not

respond to any identified problem of drug use." See United Teachers, 142 F.3d at 856.

The Fourth Amendment was born of colonial fury at British writs of assistance – general warrants for the king's deputies to enter any place at any time in search of contraband. At the founding the evil was alcohol, rather than narcotics, but little else differs. O'Neill v. Louisiana, 61 F. Supp. 2d 485, 492 (E.D. La. 1998) ("Colonists feared that private residence searches would be the result of such broad governmental authority, and the public outcry against [allowing tax collectors to interrogate citizens regarding annual alcohol consumption] eventually led to legislation requiring specific warrants and the Warrant Clause of the Fourth Amendment."), reasoning adopted, 197 F.3d 1169 (5th Cir. 1999). The modern practice of drug-testing without individualized suspicion constitutes a more sophisticated but no less intrusive search. Chandler and Edmond, as well as the directly applicable holdings in Brooks and Gardner, make clear that the general warrant remains anathema today unless the government makes out a strong, particularized case of need – a circumstance plainly not present for a generalized search of all students regardless of their history of drug use and despite the fact that they engage in no activities that make drug use peculiarly dangerous.

FACTS

Under the policy entitled "Lockney Independent School District Deterrents to the Use of Drugs" ("Drug Testing Policy" or "Policy"), Lockney school officials require all students in grades six through twelve[2] to submit to suspicionless testing by urine sample for detection of alcohol, tobacco, and other illegal drugs. Stipulation of Facts ("Stip."), ¶24, 43; Stip. Exhs. G

[2] After the first year of enforcing its Policy, when the sixth grade students had graduated to seventh grade, defendants revised the Policy to cover all students in grades seven through twelve. See Stip. Exh. I, at 4 (Stip. App. __).

and I; (Stip. App. __).[3]

This mandatory policy was not, however, the District's first foray into the field of drug testing. For many years, the school had in place a voluntary drug testing policy, offering free drug testing to any parent who requested it. Stip., ¶6; Stip Exh. B (Stip. App. __). No parents ever accepted the school's offer. Id. Even members of the School Board who voted to impose mandatory testing did not themselves use the free voluntary program to drug test their own children because they did not suspect their children of using drugs. Bybee Depo., 9 (App. 31); Mathis Depo., 17-18 (App. 54-55); Martin Depo., 7 (App. 40); Ford Depo., 12 (App. 19). As Board Member Martin agreed, his "attempts to prevent [his] children from using drugs were effective without actually going and drug testing them." Martin Depo., 7 (App. 40); see also Ford Depo., 12-13 (App. 19-20).

School officials, like the Board members, did not observe student behavior that suggested a need for drug testing. For many years, the school has had the authority to drug test students upon reasonable suspicion, yet no student has ever been drug tested based on the suspicion that he or she had used drugs or alcohol. Stip., ¶¶4-5; Stip. Exh. A (Stip. App. __).

Lockney's lack of historical drug suspicion is born out by the official Texas School Survey, for which Lockney was fortunate to have been chosen as a data collection site. As stipulated by the parties, these surveys "demonstrate[] that Lockney students use drugs considerably less than their peers in other Texas towns and cities." Stip., ¶38. Specifically, the

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[3] References to the Stipulation Appendix will be cited hereinafter in the format "Stip. App. __." Because Defendants' counsel will not complete assembly and pagination of the Stipulation Appendix until after the filing of Plaintiffs' Brief, all references to that appendix will initially lack a page citation. Upon receipt of the paginated Stipulation Appendix, plaintiffs will submit an amended Brief, containing all page citations.

References to the Appendix to Plaintiffs' Brief will be cited hereinafter in the format "Pls' App. __" and will contain page citations to the Appendix filed herewith.

survey for 1998, administered to students in grades 9 through 12, concluded: "Overall, the use of illicit drugs, and of marijuana in particular, among Lockney ISD secondary students in 1998 was lower than that reported by their counterparts statewide." Lockney ISD, Secondary Exec. Summ., at 5 (App. 130) (emphasis added). The breakdown by specific drugs is striking: Texas students in general had recently used marijuana at a rate 50 percent higher than Lockney students. For hard drugs like hallucinogens and downers, the overall State usage was three times higher than in Lockney. And for cocaine and uppers, the overall State usage was four times higher than in Lockney.[4] Unfortunately, Lockney's ability to avoid substance use was not entirely successful: Lockney's students consumed alcohol, tobacco and inhalants at almost precisely the same rate as students throughout the State. The Report includes a bar chart that provides graphic clarity of Lockney's comparative rates of substance abuse. See id., Figure 2 (App. 136).

Given the historical substance use patterns in Lockney, the decision to pursue urine-based testing is baffling. The test is essentially incapable of detecting alcohol use, Lusk Depo., 134-35 (App. 103-04); the policy makes a point of imposing no punishment for tobacco use, Stip. Exh. I, at 8 (Stip. App. __); and the test does not even attempt to detect inhalants. Stip. Exh. J (Stip. App. __). Instead, the school collects students' urine in order to seek out the drugs for which

[4] Defendants stipulate to the methodological care taken in designing the surveys: "The surveys were filled out under conditions of strict anonymity, most students take the survey 'relatively seriously.' The survey uses a method of excluding answers that are obviously not serious, thus increasing the survey's reliability." Stip., ¶38. Defendants will seek to counter this reliable survey data, instead invoking rumor and hearsay from town residents and teachers. Defendants will invoke these "reports" as "evidence" of drug use, but in deposition, the Superintendent admitted that these "reports" were "nothing definite, nothing they could say, I know you're using drugs, but just a lot of those signs," Lusk Depo., 179 (App. 119), and were described by Board Member Mathis as mere "talk." Mathis Depo., 37 (App. 65). Defendants will also invoke the results of a teacher survey. See Stip., ¶20. Again, the evidentiary value of the teachers' opinions, if invoked by defendants, deserves close scrutiny as to the basis for the opinion (fact or rumor) and for the consistency among teachers estimating drug use (wildly varying estimates indicate unreliable information).

Lockney students have a proven aversion as compared to the rest of the State.[5] As Superintendent Lusk pointed out, even if Lockney can boast a relatively low rate of drug use, the school's drug testing program "provide[s] an opportunity for these kids that are drug free to declare we are drug free." Lusk Depo., 162 (App. 113a).

Defendants will claim that the entire town had long urged a drug testing policy. A careful review of the record and stipulated facts demonstrates a more complex picture. The School Board first began considering a mandatory drug testing policy in 1997, targeting only those students engaged in extracurricular activities. Stip., ¶15. The Board rejected this proposed policy by a vote of 4-3. Id. The Board members voting against the proposal stated in 1997, and continue to assert even to the present day, that they will not support a policy that is limited only to students engaged in extracurricular activities. They will only support a policy of drug-testing all students. Id.; Lusk Depo., 77, 152-53 (App. 90, 109-10); Bybee 6-7 (App. 29-30); Martin, 6 (App. 39); Ford, 6, 10-11 (App. 16-18).

Board members had another reason for voting against the proposal: their attorney informed them that the school did not have a serious enough drug problem to warrant suspicionless drug testing of any group of students. The attorney, Paul Lyle, met with school officials to discuss the extent of any drug problem in Lockney. See Stip. Exh. F (Stip. App. __) . Based on that information, the attorney wrote:

> It is my opinion that, based upon the information presented at your meeting last week, mandatory drug testing of students in the Lockney School District, even of those involved in athletics, fails [sic] short of the legal support enjoyed by the Vernonie [sic] School District because of the lack of drug problems in your district.

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[5] During the course of drug testing a pool of approximately 400 junior and senior high students, including a mandatory test of all students and on-going random testing of students, eleven students have tested positive for illegal drugs, all of them for marijuana only. Stip., ¶35. No students have tested positive for alcohol or any drug other than marijuana and tobacco. Id.

Stip. Exh. F (Stip. App. __). Thus, it was with good reason that School Board President Bernie Ford recalls voting against the 1997 Policy because attorney Lyle declared proposal was legally "on thin ice." Ford Depo., 5-6 (App. 15a-16).

The Board's rejection of the 1997 policy might have been the final word on drug testing, if not for the indictment of nine alleged cocaine dealers in September 1998, Stip., ¶18, an event that caused the Lockney community to began focusing anew, and with renewed vigor, on drug testing. Mathis Depo., 10 (App. 51). In listing reasons for reviving the discussion of drug testing, the fact of the indictments is the first reason that comes to mind for Board Members Mathis and Bybee, and for Mr. Bybee is the most important reason. Mathis Depo., 10 (App. 51); Bybee Depo., 15 (App. 34). Superintendent Lusk, too, acknowledges that the level of staff and community complaints about perceived drug use was specifically affected by the indictments. Lusk Depo., 180 (App. 120).

The indictments concerned nine Lockney residents, all adults alleged to have sold cocaine to an adult undercover agent over a six-month period. Stip., ¶18. The town police had tried on several previous occasions to have an undercover agent purchase drugs, but the operation was unsuccessful in enticing Lockney residents to sell drugs. Mathis Depo., 12 (App. 52). Although the indictments caused understandable alarm to town residents, the accused drug dealers had virtually no ties whatsoever to the school children who would come to be subjected to drug testing. Joel Estrada was one of the accused drug dealers. See Depo. Exh. 5 (App. 15) (article and police photograph). Superintendent Lusk does not know Estrada, does not recognize his photograph, and knows of no connection whatsoever between Estrada and the school. See Lusk Depo. 166-67 (App. 114-15). Like Mr. Estrada, none of the arrested individuals were students, and none were employed by the school. Stip., ¶18. Of the nine Lockney suspects, only one had a

child enrolled in the school district. Lusk Depo., 168-69 (App. 116-17).

In the wake of the indictments, pressure from the more vocal elements of the town made Board members feel they had little choice but to support a drug testing policy. The School Board President, Bernie Ford, maintains that "society is forcing us" to enact a drug testing policy. Ford Depo., 19-20 (App. 26-27). Sustained urging from a group of self-proclaimed agitators pushed the Board to enact the Policy, despite the reservations of Board members who had voted against the 1997 drug testing proposal. Several Board members expressed the sentiment that drug testing was primarily the parents' responsibility, but, as Board Member Martin stated, "our society is pushing more of the raising of children to the school districts, to the supposedly powers. The parents are not, as a whole, wanting to take all the responsibility of raising kids as they used to." Martin Depo., 8 (App. 41). Board President Ford , who himself had reservations about the school's role in policing children's behavior, observed that a number of town residents opposed the drug testing proposal. Ford Depo., 18 (App. 25).

As time passed, the forces in favor of drug testing mounted an ever aggressive campaign. Mike Mathis, who joined the Board after it rejected the 1997 policy, considers himself one of the leaders in getting the drug testing policy passed. Mathis Depo., 30 (App. 61). His wife printed t-shirts proclaiming the town's support for the policy. See id.; Depo. Exh. 4 (App. 14). The widespread free distribution of the shirt was orchestrated by a small group of Lockney residents, the members of which Mr. Mathis knows but refuses to divulge. Mathis Depo., 18-21 (App. 55-58); Martin Depo., 13-14 (App. 43-44). According to Mr. Mathis, the "agitators" who engineered the t-shirt also made telephone calls to urge residents to turn out in support of drug testing in Board meetings. Mathis Depo., 25 (App. 59). This same set of unnamed individuals had been calling for drug testing since 1997 or 1998. Mathis Depo., 27 (App. 60).

Less than a month after the eleven drug indictments, the Board again summoned their attorney, Paul Lyle, to discuss a drug testing proposal. This time around, Superintendent Lusk drafted a proposal based on the policy in the neighboring town of Sundown. Lusk Depo., 72-73 (App. 87-88). Attorney Lyle, who also was retained by Sundown and who had approved Sundown's policy of drug testing all its students, signed off on Lockney's policy that gave rise to this law suit. Mr. Lyle did not make the School Board aware of a previous Texas federal court decision striking down drug testing of students in extracurricular activities. Mr. Lyle did not mention that Lockney and his other client, Sundown, were the only schools in the United States to drug test all students. Finally, although the Board proposed to drug test all teachers (and currently do drug test all teachers), the Board was not made aware of the Fifth Circuit ruling directly prohibiting teacher drug testing. Indeed, the Superintendent was unaware of that ruling until informed of it during his deposition by plaintiffs' counsel. Lusk Depo., 140-41 (App. 107-08). But, relying on their attorney's inexplicable reversal from his 1997 advice against any form of drug testing, the Lockney School Board voted on December 16, 1999 in favor of a mandatory drug testing policy for all students. Stip., ¶24.

The originally enacted Drug Testing Policy provided: "Parental consent for a student to submit to biological testing is required as a condition, grades six through twelve, to be in good standing as a student at Lockney ISD and to be able to participate in activities. 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 the consequences as set forth in this policy. . . ." Stip. Exh. G, at 4 (Stip. App. __).

Under the Original Policy, these consequences of a parent or student refusing to consent to drug testing (i.e., the treatment as a positive test) escalate with each month's refusal. A positive test results in the requirement of a monthly drug test, and the refusal of each month's

drug test is treated as a positive test, thus compounding the student's punishment. The initial refusal results in mandatory counseling, suspension from extracurricular activities, and removal to in-school suspension for three days; after one month, the suspension increases to ten days; after two months, suspension increases to twenty days; and after three months, if the student or parent continues to refuse consent, the student will be removed to Alternative Education Placement, barred from participating in or attending any extracurricular activities, and disqualified for all honors and offices. See Stip. Exh. G, at 5-6 (Stip App. __); Stip., ¶24. Also under the Original Policy, a student in ISS (in-school suspension) was required to wear an orange jumpsuit with the letters ISS stenciled on the back. Stip., ¶42. This practice was abandoned on advice of legal counsel retained for the present litigation. Lusk Depo., 45 (App. 79). The School Board subsequently determined that the penalties in the Original Policy were "unreasonable" – again on advice of their new attorneys retained for the present litigation. Lusk Depo., 10 (App. 66).

In July 2000, the School Board modified the Drug Testing Policy to provide that the following consequence for "failure to participate in the drug testing program": "Removal from participation in all extracurricular activities until participation in the drug testing program." Stip. Exh. I, at 7 (Stip. App. __) ("Revised Policy"). The Revised Policy retains the application of the Original Policy, applying to "students, grades seven through twelve, who attend Lockney Independent School District." Id., 4 (Stip. App. __). The Policy is "mandatory," Stip., ¶43, applying to "each and every student." Lusk Depo., 19 (App. 70).

The Original Policy required that signed parental consent to drug testing be returned to the school principal on or before February 1, 2000. Stip., ¶27. When the February 1, 2000 deadline passed, plaintiff Larry Tannahill had not consented to the drug testing of his son Brady Tannahill. He continues to refuse to consent to drug testing. School officials have no reason to

suspect that Brady Tannahill has ever consumed tobacco, alcohol, or other drugs. Stip., ¶2.

The parents of all other students consented to the original Drug Testing Policy, with its attendant punishments for non-participation. Stip., ¶29. Parents have not been given the opportunity to withdraw their consent, now that the Policy provides less severe consequences for non-participation. Stip., ¶30. Although the school's form does not indicate consent to drug testing for a students' entire career in the Lockney School District, the school now interprets it as having this permanent effect. Mathis Depo., 33-34 (App. 63-64). If a student sought to withdraw consent to drug testing, it would be treated as a positive test result with its attendant consequences. Stip., ¶31.

Under both the Original and Revised Policy, the school tests for eight specified drugs: alcohol, tobacco, opiates, cocaine, amphetamines, cannabinoids (marijuana), phencyclidine (PCP), barbituates, methaqualone, benzodiazepines, methadone, and propoxyphene. Stip. Exh. J (Stip. App. __). The school does not test for a number of controlled substances including LSD, or for steroids or any other performance-enhancing drug. Stip., ¶46. School rules do not prohibit the use of drugs off campus[, for instance, a student smoking marijuana on a Saturday night at home]. Stip., ¶47.

In formulating the policy, school officials did not believe that Lockney students were subject to any special dangers or risks of the sort that have been held to justify drug testing of student athletes. In Lockney, school athletes under the influence of drugs are, in the opinion of school officials, are at increased risk of injury to themselves or other athletes. Lusk Depo., 58 (App. 81). Equivalent risks do not pertain to the mere fact of attending school.

The athletes in Lockney have very different privacy expectations as compared to other students. School athletes are required to take a physical exam. Stip., ¶36. The physical exam

involves disrobing, and, for male athletes, includes a hernia exam, Stip., ¶36, during which the student "lower[s] your jeans and your underwear and they put their finger in your scrotum and make you cough." Ford Depo., 17 (App. 24). Student athletes use locker rooms to get undressed and dressed, and male athletes generally shower in a communal facility in the locker room. Stip., ¶37. In contrast, no other students are subjected to communal showering or disrobing. Id.

Also raising privacy concerns, the Drug Testing Policy does not provide effective protection against the results of a student's positive drug test becoming known to numerous school employees and to the general school population. Specifically, when a positive drug test causes a student's removal from extracurricular activities, it is clear to the activity coach and all participants in the activity that the child has tested positive for drugs, since the only reason for a sudden 21-day removal from the activity is the fact that the student tested positive. See Stip., ¶48; Lusk Depo., 127-28 (App. 101-02) ("anybody with any perception at all knows the reason"). Moreover, parental consent forms require the listing of students' prescription drugs. Stip. Exh. I, at 10 (Stip. App. __). These forms are collected by teachers with no effort made to prevent teachers from reading the students' confidential medical information. Lusk Depo., 124-25 (App. 99-100).

STANDARD OF REVIEW

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994)).

ARGUMENT

It is quite clear from Supreme Court precedent that allowing generalized suspicionless testing cannot be countenanced by the Fourth Amendment. In Edmond, to take the most recent example, the Court rejected highway roadblocks designed to counter drug possession. The Court found an insufficient connection between mere the act of driving and the likelihood of being a drug runner. See Edmond, 121 S. Ct. at 455. Allowing a search for the vague purpose of enforcing drug laws, without tailoring it to the targeted group, would permit generalized suspicionless searches:

> [i]f we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. . . the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.

Id. at 454. The Fourth Amendment permits suspicionless searches only when appropriately tailored to a demonstrated need and "[o]nly with respect to a smaller class." Id. at 455.[6] Under exactly the same reasoning, the Texas district court in Brooks stressed that "[t]he intrusion on personal privacy that the school child must undergo . . . cannot be justified by the global goal of prevention of substance abuse." Brooks, 730 F. Supp. at 766. Such generalized goals of drug enforcement can only result in an "across-the-board, eagle eye examination of personal information of almost every child in the school district,"as to which "[i]t is difficult to imagine any

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[6] The Supreme Court has taken great care to craft a detailed, context-sensitive jurisprudence around drug testing. But where a generalized, sweeping impulse has been presented – for instance ensuring that candidates for political office set a good example – the program has been struck down. As the Chandler majority explained, "if a need of the 'set a good example' genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in Skinner, Von Raab, and Vernonia ranked as 'special' wasted many words in entirely unnecessary, perhaps even misleading, elaborations." Chandler at 322. Here, it is only by ignoring the elaborations and specifics of the special needs doctrine that Lockney can defend its unprecedented drug testing program.

search of school children being more intrusive." Brooks, 730 F. Supp. at 765. Difficult as it is, that case has arrived. And under established law, such generalized searches must violate the Fourth Amendment.

In its landmark ruling of Tinker v. Des Moines Indep. Community Sch. Dist., the Supreme Court stressed that students do not "shed their constitutional rights … at the schoolhouse gate." 393 U.S. 503, 506 (1969). Among the most basic of students' rights is the Fourth Amendment, which "generally bars officials from undertaking a search or seizure absent individualized suspicion." Chandler, 520 U.S. at 308. This crucial requirement of individualized suspicion may be waived only in "closely guarded," id., 309, and "limited" circumstances "where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." Id., 314. The School District's drug testing of all students -- undeniably a "search" within the meaning of the Fourth Amendment[7] -- disclaims any pretense of individualized suspicion.

On occasion, the Court has allowed "certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement." Edmond, 121 S. Ct. at 451 (citation omitted). In order to override the Fourth Amendment's normal requirements, the government need must be exceedingly strong:

> Our precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.

Chandler, 520 U.S. at 318 (emphasis added). As we demonstrate below, Lockney falls well short of establishing the existence of a special need for drug testing all of its students.

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[7] When a school "orders the collection and testing of urine, it conducts a search." United Teachers, 142 F.3d at 856; accord Chandler, 520 U.S. at 313.

I. DEFENDANTS HAVE FAILED TO DEMONSTRATE A SPECIAL NEED TO DRUG TEST NON-ATHLETE STUDENTS.

Lockney's program of drug testing its students in no way constitutes a "special need," as that term has been interpreted by the Supreme Court, the Fifth Circuit and Texas federal courts. Two rulings of Texas federal courts – stretching across a decade but each striking down student drug testing for almost identical reasons – and a ruling of the Fifth Circuit striking down drug testing of school teachers all fit squarely into an appellate jurisprudence that closely cabins suspicionless searches. See Brooks, 730 F. Supp. at 766; Gardner, slip op. at 10; United Teachers, 142 F.3d at 856. In an observation that remains true to this day, the Brooks decision noted:

> Every court that has considered urine testing of the general student body in a public school has found it unconstitutional. Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985); Odenheim v. Carlstadt-East Rutherford Regional School Dist., 211 N.J. Super. 54, 510 A.2d 709 (1985); Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 510 N.E. 2d 325, 517 N.Y.S.2d 456 (1987) (testing of public school teachers).

Brooks, 730 F. Supp. at 765. And most recently, a judge in this District struck down Tulia's program of drug testing students – a program not nearly so extreme as the sweeping policy before this Court. See Gardner, slip op. at 10. The Gardner decision viewed Brooks as controlling, dispositive authority prohibiting drug testing beyond that of student athletes. See id., at 2.

The rulings in Brooks, 730 F. Supp. at 766, and Gardner, slip op. at 10, both reject student drug testing by invoking the courts' longstanding insistence that suspicionless drug testing be focused upon individuals in safety-sensitive positions – train drivers who had been in accidents, Skinner v. Railroad Labor Executives' Ass'n, 489 U.S. 602 (1989), customs agents who carry firearms and are responsible for interdicting drugs at the nation's border, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), and others from police and firefighters,

Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990) (en banc), to workers on hazardous gas pipelines, International Broth. Of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454 (9th Cir. 1990). In the school context, this same need to focus on demonstrably dangerous activities holds true.[8] As the Brooks court explained, "[t]he justification for the [school's] drug testing program in essence is that their students would be safer in everything they did if they did not use drugs or alcohol. That rationale does not meet the compelling need criteria necessary to undertake a search without reasonable suspicion." Id. at 764-65; see also Gardner, slip op. at 9 (noting that constitutional drug testing programs are premised upon "the safety sensitive nature" of the activities subjected to testing).

The Supreme Court's consideration of drug testing in the school context likewise is consistent with the Brooks-Gardner analysis. In Vernonia, the Court permitted suspicionless drug testing only for a narrow group of student athletes and only under the peculiar circumstances of a "drug-infested school" in a "state of rebellion" fueled by widespread drug use by student athletes who were engaged in potentially dangerous sport activities. Vernonia, 515 U.S. at 649, 663. The particular, compelling circumstances in Vernonia do not justify extending its holding beyond its narrow facts, and especially not to implicitly endorse drug testing of all students. The court in Gardner concluded that "the holding in Vernonia was limited to random drug testing of student

[8] The Fifth Circuit's lone affirmance of drug testing in a school environment upheld a program focused upon school custodians because of the demonstrable, serious safety risk: they handle dangerous equipment and toxic chemicals in close proximity to elementary school children. Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559, 563 (5th Cir. 1998) (custodians' activities, if impaired by drugs "could place the children at significant risk"). The mere fact that a school environment was involved was clearly insufficient to justify drug testing, as evidenced by the same court striking down the drug testing of teachers – a group in even closer proximity to students but who do not handle dangerous equipment or chemicals. See United Teachers, 142 F.3d at 856; Gardner, slip op. at 9 (noting that "Aubrey was based on the safety-sensitive nature of the custodian's duties").

athletes," as evidenced by Chandler's limiting description of the situation in Vernonia:

> An "immediate crisis," . . . caused by "a sharp increase in drug use" in the school district, . . . sparked installation of the program. District Court findings established that student athletes were not only "among the drug users," they were "leaders in the drug culture."

Gardner, slip op. at 8 (quoting Chandler, 117 S. Ct. at 1302).[9] In both Brooks and Gardner, the record contained some evidence of drug and alcohol use. See Brooks, 730 F. Supp. at 760 (hearsay report that "one-third of the high school student body use drugs other than alcohol and they estimated that 97% of the high school student body 'use alcohol.'"); Gardner, slip op. at 6 (school "has an above-average 'driving under the influence' of alcohol percentage"). But neither decision found the kind of "immediate crisis" or "sharp increase" in drug use that justified the Vernonia holding. In fact, the court in Gardner specifically rejected defendants' argument "that the extent of a drug problem is immaterial." Gardner, slip op. at 6. Put simply, an extraordinary showing of a drug problem must precede the extraordinary step of abrogating Fourth Amendment rights. See Chandler, 520 U.S. at 321 (striking down program of testing candidates for elected office because it targeted a group with no appreciable history of drug use and who engaged in no

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[9] Gardner, joined by panels in the Tenth Circuit and the Seventh Circuit, disagreed with a ruling in favor of drug testing students in non-athletic extracurricular activities, endorsing instead the four judges dissenting from a denial of en banc review:

> Because the panel decision gives a very broad reading to the Supreme Court's holding in Vernonia School District 47J v. Acton, 515 U.S. 646 (1995), and seemingly fails to take fully into account the Supreme Court's holding in Chandler v. Miller, 520 U.S. 305 (1997), further review is warranted if we are to avoid sanctioning, by implication, the use of a urine sample as the price of admission to the public schools in this circuit.

Gardner, slip op. at 7 (quoting Todd, 139 F.2d at 571 (Ripple, J., dissenting from denial of rehearing en banc)); see also 19 Solid Waste, 156 F.3d at 1072 (citing with approval Judge Ripple's dissent); Joy v. Penn-Harris-Madison, 212 F.3d 1052, 1062-1063 (7th Cir. 2000) ("we do not believe that the result in Todd is compelled by the Supreme Court's decision in Vernonia. . . . [I]f we were reviewing this case based solely on Vernonia and Chandler, we would not sustain the random drug . . . testing of students seeking to participate in extracurricular activities").

activities that pose a particular danger).

The Fifth Circuit has applied the special needs test in the school context with the same rigorous attention to constitutional detail, even as the rhetorical stakes increase:

> Special needs are just that, special, an exception to the command of the Fourth Amendment. It cannot be the case that a state's preference for means of detection is enough to waive off the protections of privacy afforded by insisting upon individualized suspicion. It is true that the principles we apply are not absolute in their restraint of government, but it is equally true that they do not kneel to the convenience of government, or allow their teaching to be so lightly slipped past. Surely then it is self-evident that we cannot rest upon the rhetoric of the drug wars. As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a "kind of immolation of privacy and human dignity in symbolic opposition to drug use," that troubled Justice Scalia in Von Raab. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681, 109 S.Ct. 1384, 1399, 103 L. Ed.2d 685 (1989) (Scalia, J., dissenting).

United Teachers, 142 F.3d at 857 (striking down mandatory drug testing of public school teachers) (emphasis added).

Expanding Vernonia's carefully tailored language to encompass the sweeping proposal that any governmental interest, no matter how significant or broad, will suffice to abrogate students' Fourth Amendment rights would render the special needs inquiry meaningless in the public school context.[10]

A. Lockney Has Shown No Real And Immediate Interest Sufficient To Override Students' Fourth Amendment Rights.

[10] In New Jersey v. TLO, 469 U.S. 325 (1985), the Court invoked the special circumstances of school as a reason to excuse compliance the warrant requirement for a search of a student's backpack where school officials had individualized reasonable suspicion of violation of school rules. TLO does not provide authority for generalized, dragnet searches of all students in order to find out if any has violated a rule. Indeed, the Vernonia Court specified that a special need to do away only with the warrant requirement does exist in the school context, but even in the absence of warrants, any search of students presumptively must normally be "based on individualized suspicion of wrongdoing." Vernonia, 515 U.S. at 653.

Beginning last year, defendants have treated every student, from pupils entering sixth grade to those graduating high school, as suspected drug users. No effort was made to identify students more likely to use drugs. A twelve year old and a high school senior were deemed equally likely to use drugs. Compare Aubrey, 92 F.3d at 319 (summary judgment permitting school drug testing of all school janitors was improper where "[n]o evidence was presented to show . . . whether the policy at an elementary school would differ from that at a high school"). No effort was made to focus drug testing upon students engaged in activities for which drug use poses a special danger. Football players, marching band members, and students who merely sit in the classroom were all treated as facing the same safety risks. Compare Vernonia, 115 U.S. at 662 (school athletes subject to special risks of injury). The only justification for drug testing the entire student body lay in the Board's desire to deter drug use as widely as possible.

Defendants argue that the goal of deterrence lies behind all of the special needs cases. Indeed, most any misconduct would be better deterred if the State were empowered to search any of us at any time. The fear of discovery would undoubtedly lead to greater compliance with government rules. But the Fourth Amendment was enacted to stand against precisely this dangerous logic. The same could be said of the government's ambition to deter drug trafficking in Edmond. The wider the net cast by a search, the greater the deterrence—but the greater also the danger of contravening the Fourth Amendment. See Brooks, 730 F. Supp. at 765 ("While the discouragement of the use of drugs and alcohol by young people is honorable, if the means of the discouragement are not narrowly tailored to that goal, then they are not reasonable in the constitutional sense.").

A generalized desire to deter drug use fails, as a matter of law, to justify a drug testing program. Something much more specific is demanded. In order to show a special need, the

government must show (1) that drug use among the targeted group would pose serious danger to the public safety, and (2) that a pronounced drug problem exists among the group targeted for testing. See Chandler, 520 U.S. at 314, 321-22; 19 Solid Waste, 156 F.3d at 1073; 68 Am. Jur. 2d Searches & Seizures § 97. As recently noted by the Fifth Circuit in rejecting a drug testing program of all teachers, teachers' aids, and clerical workers injured on the job:

> If any of these three classes of workers were the object of concern, workers chosen for testing are simultaneously underinclusive and overinclusive, remarkably so. The bite is underinclusive because only persons injured in the course of employment are to be tested. It is overinclusive because all persons injured are tested, not just persons injured under circumstances suggesting their fault. Stated another way, there is an insufficient nexus between suffering an injury at work and drug impairment. The school boards have not shown that their rules are responsive to an identified problem in drug use by teachers, teachers' aids, or clerical workers. Regardless, their general interest in a drug-free school environment is not served by these rules.

United Teachers, at 856-857 (emphasis added); see also Edmond, 121 S. Ct. at 454 (striking down generalized seizure despite truism that "traffic in illegal narcotics creates social harms of the first magnitude"); Joy, 212 F.3d at 1064 ("According to the Supreme Court's methodology in Vernonia, we should [ask] . . . whether there is any correlation between the defined population and the abuse, and whether there is any correlation between the abuse and the government's interest . . . ."). Here, too, there is an insufficient nexus between the mere fact of being a student as young as twelve years old and impairment or harm due to drug use. The program could hardly be more overinclusive. As United Teachers makes clear, a proper governmental drug testing program must focus with some precision on the group for which specific evidence indicates a particularized need.

The Fifth Circuit's nexus requirement is hardly anomalous: this rule stands as a consistent hallmark of the Supreme Court's special needs jurisprudence, including its ruling earlier this month, in which the Court required a nexus or close connection between the activity of the

targeted group and the nature of the feared danger. See Edmond, 121 S. Ct. at 455. (overturning a road block for lack of a "close connection" between the group searched and the government's concern); see also Chandler, 520 U.S. at 314 (noting the "documented link" in precedents between the tested group and the safety concern at issue); Recent Cases, 112 Harv. L. Rev. 713, 716 (1999) (noting that suspicion-based testing is reasonable under Supreme Court precedent "only to the extent that there is a recognizable correlation between the targeted group and the problem to be addressed"). Because defendants fail to demonstrate a link between the the mere fact of being a student and a demonstrated risk of harm due to a proven drug problem throughout the school, Lockney ISD has not shown a special need.

1. The Absence of a Drug Problem.

Use of illicit drugs is remarkably low among the school's students in general and virtually non-existent among the youngest students subject to the drug test. See supra, at 4. Yet, in order to declare a governmental interest in drug testing sufficiently immediate or urgent to set aside the usual Fourth Amendment protections, courts look for a documented history of drug use in the targeted population. See Skinner, 489 U.S. at 607 ("alcohol and drug abuse by railroad employees" posed "significant problem"); Vernonia, 515 U.S. at 648, 663 ("immediate crisis" caused by "a sharp increase in drug use" (emphasis added)); Gardner, slip op. at 6-7 (rejecting the contention that the extent of drug use was immaterial in Vernonia). This inquiry into past drug use makes sense, given that random drug testing ousts the usual Fourth Amendment requirement of individualized suspicion. Before depriving an entire group of the presumption of innocence, some evidence should at least point to a drug problem within the group. Furthermore, because courts permit suspicionless drug-testing only to address a genuine danger, "[p]roof of unlawful drug use may help to clarify -- and to substantiate -- the precise hazards posed by such use."

Chandler, 520 U.S. at 319. Accordingly, "the evidence of drug and alcohol . . . in Skinner, and . . . Vernonia bolstered the government's and school officials' arguments that drug-testing programs were warranted and appropriate." Id. (citations omitted).[11]

The Fifth Circuit, focusing particularly on the school context, emphasized the importance of demonstrating a history of drug abuse through reliable, concrete evidence, rather than rumor or hearsay:

> Despite hints of the school boards, the testing here does not respond to any identified problem of drug use by teachers or their teachers' aids or clerical workers. The school district offered evidence that during the seven months these tests were in place, four teachers or substitute teachers tested positive for drugs. This datum, while troubling, is in this undeveloped form an uncertain base for extrapolating drug use.

United Teachers, at 856.

The evidence before this Court provides a striking parallel to the record relied upon in United Teachers to strike down a drug testing program. All reliable evidence demonstrates that (1) Lockney's school suffers no present drug crisis; (2) surveys show no evidence in recent years of a "sharp increase"in drug use, Vernonia, 515 U.S. at 648, 663, as defendants have stipulated, see Stip. ¶ 39, and; (3) drug use in Lockney is markedly lower than it is in other towns and cities in Texas and throughout the nation. Defendants can seek to contradict this evidence only through subjective hearsay statements and unconfirmed rumors. Supra, at 6 n.4. If there is anything

[11] In the process of striking down a drug testing program for candidates for public office, Chandler relied on the fact that candidates exhibited no special history of drug abuse. At the same time, the Court acknowledged that a documented drug problem is not an absolute prerequisite to upholding a drug testing program, though it clearly is an important factor, the absence of which can be overcome only by such findings as the "unique context" in Von Raab of employees who, "more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use." Chandler, 520 U.S. at 320 (citation omitted). Plaintiffs, of course, play no critical role in enforcement of the nation's laws.

"special" about Lockney, it is certainly not its need to implement drug testing.[12]

Rather than controvert these facts, Defendants reply that the school has not managed to eliminate drug use entirely. But if one or even a small minority of students using marijuana could justify across the board urinalysis for heroin, cocaine, and other drugs, then this prong of the "special needs" inquiry becomes meaningless. This Court can take judicial notice of the fact that no school has eliminated drug use, but this hardly justifies a finding that Lockney's school has demonstrated a special need for drug testing based on the minimal level of drug use in the school generally. In fact, the evidence shows that Lockney students have a much lower rate of drug use than other students in Texas. Maintaining Lockney's stellar record is a laudable school priority, but it cannot, under the case law, constitute a special need.

2. Drug Testing of Non-Athlete Students Does Not Address a Safety Threat.

By drug testing scores of students who undertake no hazardous activities whatsoever, the School Board ignores the well-settled conclusion that the concern for safety forms the cornerstone of special needs jurisprudence. Beginning with the companion cases, Skinner and Von Raab, the Supreme Court has emphasized that the departure from the usual requirement of individualized suspicion grew from a particularized and ultimately superseding need to protect the public from a tangible and significant threat:

> Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, employees who are subject to testing . . . can cause great human loss before any signs of impairment become noticeable to supervisors or others.

Skinner, 489 U.S. at 628 (citation omitted); see also id. at 634 ("surpassing safety interests" in

[12] The uncontested facts likewise show that Lockney's school is nowhere near the "state of rebellion" pivotal to the special need finding in Vernonia. 515 U.S. at 649.

avoiding train accidents); Von Raab, 489 U.S. at 670 (drug interdiction and carrying a firearm pose grave safety threats). Similarly in Vernonia, the Court upheld a testing regime aimed specifically at "drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." 515 U.S. at 662 (emphasis added). Consonant with this precedent, the Court's most recent drug testing case struck down a suspicionless search of candidates for state office, noting that "[n]otably lacking in [the state's] presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." Chandler, 520 U.S. at 318-19 (emphasis added). The eight-justice Chandler majority concluded by emphasizing:

> We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable" -- for example, searches now routine at airports and at entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

Id. at 323 (emphasis added).

The Fifth Circuit has also rested its drug testing cases on considerations of public safety. As the Gardner court noted, "Aubrey was based on the safety-sensitive nature of the custodian's duties." Gardner, slip op. at 9 (discussing Aubrey, 92 F.3d 316). And in O'Neill, an opinion endorsed by the Fifth Circuit, the court stressed the lack of any "immediate safety threat" when it struck down a drug testing scheme. O'Neill, 61 F. Supp. at 497, aff'd, 197 F.3d 1169.[13]

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[13] [note: don't use this footnote if we keep the text reference above to Burka and Plane.] Every circuit that has addressed drug testing has uniformly looked to safety as the dominant factor in applying the special needs test. See, e.g., 19 Solid Waste, 156 F.3d at 1074 (noting the validity of public safety concerns before striking down the testing scheme). When a drug test applies to individuals whose activities do not affect safety, the drug testing program has never been upheld under the special needs test. See, e.g., Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 823 (3rd Cir. 1991) (disallowing suspicionless testing of "maintenance custodian's work [because it] does not appear to involve any great risk of causing harm to other persons"), cert. denied, 504 U.S. 943 (1992); Plane v. United States, 750 F. Supp. 1358, 1369 (W.D. Mich.

As with candidates for elected office in Georgia (and in notable contrast with the football players in Vernonia), many of Lockney's students engage in no activities whatsoever that raise tangible safety concerns. As the Brooks court noted, "[s]chool activities, on campus and off, do not carry the inherent risks associated with the enforcement duties with which Customs employees are charged or with the responsibility that railway employees have with heavy machinery and sometimes dangerous cargo." Brooks, 730 F. Supp. at 766. The fact that some students engage in activities that pose some hazards is precisely the kind of rationale for universal drug testing that has no validity under the law. See, e.g., Burka v. New York City Transit Auth., 739 F. Supp. 814, 822 (S.D.N.Y. 1990) (the fact that subway drivers perform hazardous duties does not justify drug testing of subway turnstile operators); Plane v. United States, 750 F. Supp. 1358, 1369 (W.D. Mich. 1990) (fact that some environmental protection specialists perform dangerous duties does not justify drug testing of employees "who do not inspect or handle hazardous wastes [or] coordinate spill responses").

3. The district's proffered interests are purely symbolic.

Courts do not lightly or routinely authorize a search simply because the government articulates some plausible rationale for its policy. Quite the opposite is true. The governmental interests previously held to justify drug-testing were termed "compelling," Von Raab, 489 U.S. at 670, "surpassing," Skinner, 489 U.S. at 634, and "important," Vernonia, 515 U.S. at 661.

The record before this Court reveals a peculiar chain of events that led Lockney to become one of the first public schools in America to drug test all of its students. First, the Superintendent drafted a drug testing policy that applied only to extracurricular activities. Stip.,

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1990) (disallowing suspicionless testing of environmental specialists "who do not inspect or handle hazardous wastes [or] coordinate spill responses"); Burka, 739 F. Supp. at 822 (disallowing suspicionless testing of turnstile operator).

¶15. The Board narrowly rejected the policy, with the majority of the Board explicitly stating that it seemed unfair to single out any group for drug testing. Id. Of course, the special needs test is precisely about focusing upon groups for whom drug use or safety issues uniquely justify drug testing. Nonetheless, the Board members were firm in their conviction, and the other members of the Board understood that, if they wanted a drug testing policy, it would have to cover all students – not because of evidence that all students were engaged in safety-sensitive activities or were troubled by drug use, but simply out of a desire to be even-handed.

When nine Lockney adults were arrested for selling cocaine to an undercover agent, the pressure for a drug testing policy emerged with renewed force. Mathis Depo., 10 (App. 51). A group of self-described "agitators" called for the Board to implement a policy. Supra, 9. Knowing that the only policy acceptable to the full Board would have to cover all students, defendants turned to their attorney, Paul Lyle. Id. Mr. Lyle had recently approved the neighboring town of Sundown's drug testing of all students – apparently the first such policy in the nation – and he advised Lockney's Board that it could proceed with such a policy. Id. Thus, motivated by a sense that it would be unfair to include any students in the policy unless all were included, the Board enacted the Policy at issue here.

As much as one might admire the Board's desire to be even-handed, this represents a symbolic rather than substantive purpose of the sort rejected in Chandler. See 19 Solid Waste, 156 F.3d at 1076 (Briscoe, J., concurring) (rejects rationale of "subject[ing one group of employees] to drug testing solely because of the [government's] alleged interest in maintaining consistent policies with respect to all [employees] and not because of any safety or health concerns"). Fairness may well suggest subjecting twelve year old students to the same drug test as high school football players, but the school fundamentally lacks any special need to test its

youngest students. All evidence shows these younger students have virtually no involvement with drugs. By law they cannot drive. They merely find themselves swept up in a search that bears no relationship to individual guilt or a demonstrated special need.

In a similar vein, defendants admit a variety of symbolic goals of the drug testing program. For instance, Bernie Ford, the School Board President, believes that a reason for enacting the drug testing policy was "that it sends a message to the community that the school does not support drug use." Ford Depo., 26 (App. 28). In another theme repeated by several members, Board Member Martin feels the school was forced into drug testing: "our society is pushing more of the raising of children to the school districts, to the supposedly [sic] powers. The parents are not, as a whole, wanting to take all the responsibility of raising kids as they used to." Martin Depo., 8 (App. 41). Again, these sentiments fall well outside the pressing, concrete concerns that have justified drug testing in other contexts.

As much as Defendants may sincerely wish to project a drug-free image, the Supreme Court has unequivocally stated that this desire does not justify suspension of normal Fourth Amendment protections. In striking down Georgia's drug-testing of candidates for public office, the Court explained:

> What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. The suspicionless tests, according to respondents, signify that candidates, if elected, will be fit to serve their constituents free from the influence of illegal drugs. But Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not "special," as that term draws meaning from our case law.

Chandler, 520 U.S. at 321 (emphasis added).

B. The District's Scheme Is Ineffective In Deterring Drug Use.

In order to prove a special need for suspicionless drug testing, it is not enough that the government prove a cognizable interest: the proposed scheme must also effectively further that articulated interest. Again, the Policy's sweeping scope renders it less effective. The Supreme Court in Vernonia upheld a specifically targeted policy: "[I]t seems … self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." 515 U.S. at 663. In the instant case, by contrast, the District's policy makes no pretense of tailoring the scope of its solution to the problem at hand.

Furthermore, while the Vernonia Court relied on the fact that athletes were leaders of the student drug culture whose "'role model' effect" "largely fueled" the severe drug crisis presented in that case, 515 U.S. at 663, the sweeping policy here makes no effort to focus upon those who are role models for the social behavior of other students. As in virtually every high school, athletes in Lockney act as the primary role models, especially for other students' social behavior. Lusk Depo., 49 (App. 80).

Finally, the proffered test does not effectively screen for alcohol or tobacco – the most commonly used and lethal drugs in the school – or for LSD or steroids. Of the six drugs the test does screen for, only marijuana remains detectable in urine for a long enough period that the test would likely discover its use. See Lusk Depo., 136-37.

II. VIOLATION OF PLAINTIFFS' LEGITIMATE PRIVACY EXPECTATIONS.

Because Lockney has failed to demonstrate a special need, consisting of a pronounced drug problem among the student body as a whole and an immediate threat to the public safety, because the policy is founded largely on symbolic purposes, and because the drug testing program is ineffective at pursuing its claimed goals, the Court should end its inquiry here with a finding of

unconstitutionality. The special needs test is a threshold matter. If the government cannot show that its interest in drug testing an entire student body rises to this level, the inquiry ends with a determination that the Fourth Amendment has been violated. This would be true regardless of the quantum of the privacy interests at stake.

The law of this Circuit reads Chandler to have permitted balancing of privacy interests only upon first finding a special need. In a decision described recently by the Fifth Circuit as a "complete and well-crafted opinion" whose reasoning has been adopted by the Fifth Circuit, see O'Neill, 197 F.3d at 1170, Judge Fallon described the two-step process by which this Court should evaluate a claimed special need:

> The Chandler opinion exhibits an apparent retrenchment in the Court's drug testing jurisprudence. While continuing to recognize that suspicionless searches are occasionally justified, Justice Ginsburg stressed that in cases where the requisite showing of a special need is lacking, there is no need to balance public and private interests because the Fourth Amendment bars such searches. In other words, the inquiry as it has matured from Skinner to Chandler is a two step process. First, a court must determine whether special needs exist that justify a suspicionless search. If, and only if, such special needs are present, a court may then proceed to the second phase, balancing public versus private interests. In Chandler, the Supreme Court never reached the second step because it found no special needs. This view appears consistent with the one held by the drafters of the Amendment, who apparently envisioned the possibility of warrantless searches so long as they were accompanied by some level of suspicion or exigent circumstance (i.e., "special needs").

O'Neill, 61 F. Supp. 2d at 496-97 (emphasis added), aff'd, 197 F.3d 1169 (5th Cir. 1999), cert. denied, 120 S. Ct. 2740 (2000); see also Skinner, 489 U.S. at 619 ("When faced with such special needs, we have not hesitated to balance the governmental and privacy interests . . . ."); 19 Solid Waste, 156 F.3d at 1072 ("If the government has not made its special need showing, then the inquiry is complete, and the testing program must be struck down as unconstitutional.") (citing Chandler, 520 U.S. at 318); 68 Am. Jur. 2d Searches & Seizures § 97 (2000) ("[T]he government must first show the testing is warranted by a special need; only after that showing does the court

then inquire into the relative strengths of the competing interests.").

"Government-ordered 'collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable.'" Chandler, 520 U.S. at 313 (quoting Skinner, 489 U.S. at 617). When balancing this well-established privacy interest against the government's interest, courts consider (1) the nature of the privacy interest upon which the search intrudes, and (2) the character of the intrusion. See Vernonia, 515 U.S. at 654, 658; Joy, 212 F.3d at 1059; 19 Solid Waste, 156 F.3d at 1072; 68 Am. Jur. 2d Searches & Seizures § 97 (2000). Under this balancing analysis, this Court should conclude that the substantial nature of the privacy interest at stake and the invasive nature of the governmental intrusion cannot serve to justify the District's purely symbolic purpose.

A. The Design of the Drug Test Imposes Unusually Severe Intrusions Upon Students' Reasonable Expectations of Privacy.

Justice Scalia, author of the Vernonia decision, has deemed state-compelled urinalysis "particularly destructive of privacy and offensive to personal dignity," a "demeaning bodily search," and a "needless indignity." Von Raab, 489 U.S. at 680, 684, 685 (Scalia, J., dissenting); see also Charles Fried, Privacy, 77 Yale L. J. 475, 487 (1968) ("in our culture the excretory functions are shielded by more or less absolute privacy").

Beyond the inherent intrusion of coerced urine collection, Lockney school officials have compounded the invasion of students' privacy by carelessly allowing the revelation of positive test results and private prescription drug information. First, although the School carefully protects written drug test results, it has designed a testing program that reveals a positive test result to "anybody with any perception at all." Lusk Depo., 127 (App. 101). Specifically, the Policy provides that a positive test result causes the student be suspended for 21 days from all

extracurricular activities. Policy, at 5 (Stip. App. __). According to the Superintendent, a student's sudden 21-day suspension effectively communicates to all observers that the student has tested positive for drugs. Lusk Depo., 127 (App. 101).

Second, the School's parental consent form requires the listing of students' prescription drugs. Policy, at 10 (Stip. App. __). These forms are collected by teachers with no effort made to prevent teachers from reading the students' confidential medical information. Lusk Depo., 124-25 (App. 99). The Vernonia Court stated that just this kind of compelled disclosure of medical information "raises some cause for concern," explaining that:

> In Von Raab, we flagged as one of the salutary features … the fact that employees were not required to disclose medical information unless they tested positive, and, even then, the information was supplied to a licensed physician rather than to the Government employer.

Vernonia, 515 U.S. at 659 (citation omitted).

B. Lockney's Students Have Done Nothing to Lower Their Legitimate Privacy Expectations.

Even as Lockney students are subject to an unusually intrusive drug test, they have done nothing to lower their expectations of privacy. Again, Vernonia provides an apt comparison. There, the Court found that student athletes could be considered to have lesser privacy expectations than other students because they voluntarily participated in an activity that already involved significant intrusions. Here, by contrast, simply attending school is not voluntary and, unlike a regulated industry or even student athletics, "the school environment does not require an automatic forfeiture of certain rights and privacy expectations." Brooks, 730 F. Supp. at 766.

3. Attending School is not Voluntary

Merely attending school is compulsory, not voluntary. As the Brooks court noted, "[e]very child, at least in Texas, must attend school. School attendance does not trigger an instant

diminution of rights." Brooks, 730 F. Supp. at 766. It thereby stands in marked contrast to contexts in which courts have held that any attendant compromise of privacy interests could be avoided by opting out. In Vernonia, for instance, the Court upheld drug tests of student athletes in large part because by "choosing to go out for the team," players voluntarily subject themselves to a degree of regulation "higher than that imposed on students generally." Vernonia, 515 U.S. at 657. Athletes already consent to a urine sample, making the additional test less intrusive. Members of the student body at large, by contrast, enjoy no such luxury of choice. Under Texas law, they must attend school. See Tx. Educ. § 25.085.

In a pair of Seventh Circuit decisions involving school drug testing, the notion of voluntariness proved decisive. Whereas "in Vernonia . . . drug testing could be construed as part of the 'bargain' a student strikes in exchange for the privilege of participating in favored activities," Willis, 158 F.3d at 422, the Seventh Circuit pointed out that students who find themselves in fistfights cannot

> be described as voluntarily engaging in misconduct – at least not as the term 'voluntary' is used in Vernonia. There the Court noted a series of steps that an athlete had to take in order to compete – submitting to a preseason physical, maintaining a minimum grade point average, attending practices, etc. This course of conduct presumably indicates forethought and at least some appreciation of all that participation in an extracurricular activity entails. We doubt that this degree of consideration – and certainly this appreciation of the consequences – characterizes the typical fight between fifteen-year-olds.

Id., at 422. In contrast, the court in Todd, 133 F.3d at 986, upheld suspicionless drug-testing policy for students involved in extracurricular activities because it "applies only to students who have voluntarily chosen to participate in an activity." The students subject to Lockney's testing regime – which is to say all students – strike no 'bargain' by attending school as they are required to do by law. While the Vernonia Court stopped well short of permitting suspicionless drug

testing of all students compelled to attend school, see 515 U.S. at 666 (Ginsburg, J., concurring), Lockney does just that.[14]

No Supreme Court case outside the school context has contravened this logic. Those subject to testing in Skinner could choose not to work as railroad operators, a dangerous position that would require them to forgo some of their privacy expectations. Similarly, the Court in Von Raab was careful to note that testing applied only to covered positions that "the employee elects to apply for." 489 U.S. at 667. By contrast, the motorists in Edmond could hardly choose abstain from driving on the public highways in order to avoid compromising their Fourth Amendment privacy interests. And in Chandler, requiring candidates to forego their bids would have meant requiring them to give up the right to run for public office in order to preserve a Fourth Amendment privacy right.

In the instant case, there is no element of voluntariness, forethought, or appreciation of consequences required of the students to be tested. All that is required is that they be students, which, under Texas law, they have no choice but to be. They have no choice regarding their submission to such a search. In short, there is no shred of voluntary action on the part of a Lockney student that could give rise to the reduced privacy expectation that courts have found to exist in other settings.

2. Merely Attending School is not Highly Regulated Dangerous Activity

[14] In Trinidad School Dist. v. Lopez, 963 P.2d 1095 (Colo. 1998), the Colorado Supreme Court, in striking down that school district's policy, addressed a policy more narrow than the one at issue here. The school district in Lopez had enacted a policy that mandated suspicionless drug testing for all students desiring to participate in extracurricular activities. In that case, the Policy applied to Band members, whose participation in the band was conditional on enrollment in a for-credit class. Id. at 1105. Taking this condition into account, the Colorado Supreme Court concluded that "the type of voluntariness to which the Vernonia Court referred does not apply to students who want to enroll in a for-credit class that is part of the school's curriculum." Id. at 1107.

Vernonia found athletes to have lowered privacy expectations because they are subject "to a degree of regulation even higher than that imposed on the students generally." 515 U.S. at 657. Specifically, the Court lists the following "extra" regulations: (1) preseason physicals; (2) acquiring insurance coverage; (3) maintain a minimum grade point average, and; (4) having to "comply with any 'rule of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic directors with the principal's approval.'" Id.

The record before this Court demonstrates a significant distinction between student athletes and the numerous other students swept up by defendants' policy. Every facet of the privacy diminishment found for athletes in Vernonia is absent here. First, the School mandates that only athletes submit to physical exam which requires disrobing, and, for male athletes, includes a hernia exam during which the student "lower[s] your jeans and your underwear and they put their finger in your scrotum and make you cough." Ford Depo., 17 (App. 24); Lusk Depo., 103 (App. 96). Second, members of the general student body have no need for insurance coverage. Third, no special academic standards apply unless a student chooses to "go out" for activities like football. Fourth, although the athletic coaches impose various special rules on members of their team, they have no such authority over the general student body. See Lusk Depo., 31 (App. 74) (referring to "coach's rules").

Moreover, unlike railway employees, Lockney students are not participants "in an industry that is regulated pervasively to ensure safety." Skinner, 489 U.S. at 627. Nor are they akin to the customs agents in Von Raab, who likewise faced uniquely lowered expectations of privacy: "Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms." Von Raab, 489 U.S. at 672.

The mere fact of attending a public school in the United States is worlds apart from operating a locomotive, interdicting drugs at the border, handling firearms, or participating in any other industry that is understandably highly regulated for public safety. These are ordinary high school students, engaged in no special activity. They have done nothing to deserve anything but the expectation of full privacy rights.

CONCLUSION

For the reasons stated above, plaintiffs request that this Court grant plaintiffs' motion for summary judgment.

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CERTIFICATE OF SERVICE

I certify that on the ___ of December, 2000, a true and correct copy of the above and foregoing was served upon the above-named defendants by sending said copy by overnight

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