

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   BOARD OF EDUCATION OF                   :

4   INDEPENDENT SCHOOL DISTRICT        :

5   NO. 92 OF POTTAWATOMIE               :

6   COUNTY, ET AL. ,                    :

7                   Petitioners               :

8               v.                               :   No. 01-332

9   LINDSAY EARLS, ET AL.                :

10   - - - - -X

11   Washington, D. C.

12   Tuesday, March 19, 2002

13               The above-entitled matter came on for oral  
14   argument before the Supreme Court of the United States at  
15   10:09 a.m.

16   APPEARANCES:

17   LINDA M MEOLI, ESQ., Oklahoma City, Oklahoma; on behalf  
18               of the Petitioners.

19   PAUL D. CLEMENT, ESQ., Deputy Solicitor General,  
20               Department of Justice, Washington, D.C.; on behalf of  
21               the United States, as amicus curiae, supporting the  
22               Petitioners.

23   GRAHAM A. BOYD, ESQ., New Haven, Connecticut; on behalf  
24               of the Respondents.

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3	<b>LINDA M. MEOLI, ESQ.</b>	
4	<b>On behalf of the Petitioners</b>	<b>3</b>
5	<b>PAUL D. CLEMENT, ESQ.</b>	
6	<b>On behalf of the United States,</b>	
7	<b>as amicus curiae, supporting the Petitioners</b>	<b>19</b>
8	<b>GRAHAM A. BOYD, ESQ.</b>	
9	<b>On behalf of the Respondents</b>	<b>28</b>
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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00 -- oh, pardon me -- 01-332, the Board of Education of Independent School District No. 92 of Pottawatomie County v. Lindsay Earls.

Ms. Meoli. Meoli I guess. Is -- is that the correct pronunciation?

ORAL ARGUMENT OF LINDA M MEOLI

ON BEHALF OF THE PETITIONERS

MS. MEOLI: Meoli.

QUESTION: Meoli, okay. The third time is the charm.

(Laughter.)

MS. MEOLI: Mr. Chief Justice, and may it please the Court:

This case involves the constitutionality of the Tecumseh School Board's decision to implement a suspicionless drug testing policy for students in competitive activities as a reasonable response to student drug use.

Tecumseh's policy represents a natural, logical, and rational application of this Court's decision in Vernonia v. Acton. Vernonia's policy applied to students who chose to participate in interscholastic athletics.

1     Tecumseh's policy applies as well to athletics, but also  
2     to all the other competitive activities that are offered  
3     by the district.

4             Respondents do not challenge the policy as  
5     applied to the athletics, conceding that this Court  
6     approved that practice in Vernonia. Competitive --

7             QUESTION: Well, this policy goes beyond what  
8     was permitted in Vernonia, does it not?

9             MS. MEOLI: Well, it covers --

10            QUESTION: It greatly expands the number of  
11     students covered by the policy.

12            MS. MEOLI: It -- it covers a wider variety of  
13     interscholastic competitive activities.

14            QUESTION: And the evidence is not as strong, is  
15     it, in this case of drug use in the school as -- as was  
16     the case in Vernonia?

17            MS. MEOLI: Well, Your Honor, we do not believe  
18     that is true.

19            QUESTION: Well, if you go by the district  
20     court's findings, that's what you'd conclude.

21            MS. MEOLI: The district court in Vernonia?

22            QUESTION: In this case.

23            MS. MEOLI: In this case. No, Your Honor, I --  
24     I really don't think so. I think there is ample evidence  
25     in the record to demonstrate a drug problem in Tecumseh.

1 QUESTION: What do you --

2 QUESTION: By the -- by the young people who  
3 were involved in these particular extracurricular  
4 activities?

5 MS. MEOLI: Yes, we do have evidence of drug use  
6 with these students in extracurricular activities.

7 QUESTION: Well, what do you make of the -- the  
8 reports that have been filed up to the eve of the adoption  
9 of this regulation by the school district with the Feds,  
10 year after year after year, saying, things are fine here?  
11 The only thing we have to worry about is some beer. Were  
12 they lying?

13 MS. MEOLI: No, Your Honor, I don't think they  
14 were lying. Number one, the district has always admitted  
15 that alcohol really is the number one problem in the  
16 school district, and that's what the applications for the  
17 Federal --

18 QUESTION: Yes, but they were -- they were  
19 saying at the same time that they didn't have a problem  
20 with -- with what we usually refer to as drugs.

21 MS. MEOLI: They said it -- it wasn't a major  
22 problem at that time. And -- and I think if you  
23 compare --

24 QUESTION: And -- and in point of fact, as I  
25 understand it, since the testing has been carried out

1 among the -- the class of people subject to this  
2 challenge, there have been only three instances of any  
3 drug use found.

4 MS. MEOLI: From the -- from the drug testing?

5 QUESTION: It would seem -- it seems to me that  
6 your evidentiary problem is up to the eve of adopting the  
7 regulation, the school district was saying, we don't have  
8 a problem. And once the regulation was, in fact, in --  
9 was -- was placed into effect, you've gone for several  
10 years and you found three instances. I -- I don't see how  
11 you -- you don't lose whether we look at it ex ante or ex  
12 post.

13 MS. MEOLI: Let me answer the second part first.  
14 First of all, the -- the policy was only in effect for a  
15 limited amount of time in the 2-year span of time. It was  
16 implemented halfway into the first school year, and so a  
17 limited amount of students were covered in that first  
18 year.

19 The second year, the lawsuit was filed at the  
20 beginning of August, and therefore only a very limited  
21 number of initial testing was done before the district  
22 determined to hold the policy in abeyance. There were  
23 four students in -- under those limited amount of students  
24 that tested positive. I know the court of appeals  
25 referred to three in one area, but that was just in the

1 high school.

2 QUESTION: But didn't one --

3 QUESTION: Well, I suppose the existence of a  
4 policy might be expected to deter drug use so that you  
5 would have fewer instances after it was imposed.

6 MS. MEOLI: Yes, Your Honor, and -- and in fact  
7 really --

8 QUESTION: We will never know, will we?

9 QUESTION: Well, let her answer the question.

10 (Laughter.)

11 MS. MEOLI: Your Honor, in fact, it -- it really  
12 did. I -- I mean, if you even take the limited amount of  
13 testing that we did in the 2-year period of time, the  
14 first year three students tested positive, the second year  
15 one student tested positive. The only full year that the  
16 testing was applied in the Tecumseh School District was  
17 after the district court made its decision but before the  
18 court of appeals overruled it. And that evidence is not  
19 in the record, but it was -- there was a greater number of  
20 students that tested --

21 QUESTION: Ms. Meoli, didn't we say in Vernonia  
22 that in Skinner, which was the railroad employee testing  
23 case, we did not demand that it be shown that the  
24 particular railroad had a drug problem? Didn't we say it  
25 was enough that there was a nationwide problem?

1 MS. MEOLI: Yes, Your Honor.

2 QUESTION: We said that in Skinner, and we  
3 adverted to that in Vernonia.

4 MS. MEOLI: And -- and Vernonia's evidence as  
5 well showed that there was not a specific drug problem  
6 among athletes.

7 QUESTION: I thought the argument in Vernonia  
8 and I thought the opinion in Vernonia, in assessing the  
9 particular interest of the district, repeatedly emphasized  
10 the particular problems with the athletes. The athletes  
11 were the ones that the kids looked up to. They were the  
12 role models. There was rampant drug use among the  
13 athletes. There was a rampant disciplinary problem among  
14 the athletes. Athletes were getting injured. There was a  
15 very specific showing of a specific interest of the  
16 district.

17 And now you're coming in and saying, well, that  
18 -- that really does not matter. And it seems to me that  
19 the implication of what you're saying is that this so-  
20 called special needs requirement will apply to every child  
21 in every school in the United States.

22 MS. MEOLI: I'm not saying that, Your Honor. I  
23 -- I think there is a corollary --

24 QUESTION: But isn't that the implication of  
25 what you're saying?



1 MS. MEOLI: No, Your Honor, I don't. For  
2 instance, you were talking about in Vernonia the athletes  
3 were looked up as role models. Well, the athletes in  
4 interscholastic competition in Tecumseh are looked at as  
5 role models to some students --

6 QUESTION: Except for one startling difference.  
7 The -- in -- there was a problem with athletes. Here,  
8 one thing that is clear in the record is the -- the school  
9 board's admission that the -- that the drug and alcohol  
10 problem is more of a problem with those who are not  
11 engaged in these extracurricular activities. In other  
12 words, the testing is directed to a group, those engaged  
13 in competitive activities, that is less of a problem, as  
14 far as drug use is concerned, than the rest of the  
15 students who are idle. And just naturally one would  
16 expect what turns out to be the case, that there's more  
17 drug use in the group that's not tested than there is in  
18 the group that's tested.

19 MS. MEOLI: Well, Your Honor, we have never said  
20 that the -- the students in interscholastic competitive  
21 activities are the only students or even the most likely  
22 students to be abusing drugs. But the evidence that we  
23 have in the case demonstrate that they do abuse drugs.

24 QUESTION: Well, I'm -- I'm referring  
25 specifically to page 100 and 101 of the joint appendix

1 where the question is whether the students who tend to be  
2 involved in drugs are the ones most likely to be choosing  
3 extracurricular activities. And the answer ultimately is,  
4 we have students that are on drugs, and they are in  
5 extracurricular activities. They are -- they are -- there  
6 are probably more that are not in activities.

7 MS. MEOLI: That was the testimony of the -- of  
8 the board president, Dean Rogers. There's also testimony  
9 of James Blue that said he really didn't find that  
10 difference between --

11 QUESTION: Where is that testimony?

12 MS. MEOLI: I think it is at page 106, Your  
13 Honor. Page 106. Now, national studies show that band,  
14 vocal and non-athletic extracurricular activities  
15 students, they are the least likely of all students to use  
16 drugs. Would you agree that this same -- the same thing  
17 would hold true for Tecumseh High School students? The  
18 answer was, no, I would not.

19 QUESTION: He had no basis for saying yes or no.

20 MS. MEOLI: Well, yes, he -- he says that  
21 initially, and then he goes on to say, I just know that  
22 all age levels, all categories -- if we're categorizing  
23 the students that frequent the park. This part of the  
24 deposition was referring to this --

25 QUESTION: Yes, but he's not saying, as was the

1 case in Vernonia, that here is a group that we can  
2 identify that has this problem. Either there's no  
3 particular problem with this group as opposed to all  
4 students -- so, my question is if -- if you can, on the  
5 absence of any special showing with respect to this  
6 extracurricular group, then it seems to me that your  
7 argument is really that all students can be tested. I  
8 mean, there was a special circumstance with the athletes  
9 in Vernonia. Your argument for these extracurricular  
10 people I think would hold as well for -- for all the  
11 students because there's no more of a problem and probably  
12 less among those engaged in extracurricular activities  
13 than the -- than among the students that don't do anything  
14 after school.

15 MS. MEOLI: Your Honor, the use of -- of drugs  
16 among the students in competitive activities was just one  
17 of the factors as to why the Tecumseh board selected that  
18 group. I really do think that, in fact, the -- at the  
19 meeting that the school district held for the community to  
20 give input, they asked that same question, why can't we  
21 drug test all students? And I think there's a couple of  
22 reasons as to why you can't.

23 One of the reasons I think is because students  
24 in general have a property right in their education.  
25 Hence, they have a legal entitlement to a free public

1 education.

2 Secondly, the State compels them to be there,  
3 and parents, if they do not send their -- their children  
4 to school, face criminal prosecution. So -- so they are  
5 there. And I don't think that you can fashion a drug  
6 testing policy that could have the kind of consequences  
7 that would deny them that opportunity or -- or prevent  
8 parents from being persecuted for not --

9 QUESTION: Well, if you want --

10 QUESTION: You don't -- you don't have to go  
11 that far, do you, in order to -- in order to justify  
12 limiting it to those who participate in -- in voluntary  
13 activities?

14 MS. MEOLI: No, Your Honor. We -- we --

15 QUESTION: It seems to me you could say even if  
16 we could drug test anybody, we made the choice of giving a  
17 student who feels that strongly about not undergoing drug  
18 testing the ability to avoid it by simply not engaging in  
19 the extracurricular activities. You don't have to forego  
20 going to school entirely or go to a private school. You  
21 can simply not participate in extracurricular activity.  
22 Isn't that in itself a valid reason for limiting it to  
23 extracurricular activities?

24 MS. MEOLI: Yes. Yes, Your Honor. I --

25 QUESTION: It's an equally valid argument -- I

1 -- I suppose an equally valid argument would -- for -- for  
2 testing everybody would be our object is to stop drug use,  
3 not to penalize people who go out for band. And there's  
4 some evidence in this record that there is more drug use  
5 about the -- among the people who are not going out for  
6 extracurricular activities, but among those who do. And  
7 therefore, if your argument is good for this case, it  
8 seems to me your argument, a fortiori, is good for testing  
9 everybody in the school.

10 MS. MEOLI: Your Honor, the -- the purpose of  
11 this program is not to discipline students. It's not to  
12 catch them. It is to deter drug use and to help those  
13 students --

14 QUESTION: Don't you want to deter drug use  
15 among those who do not go out for band?

16 MS. MEOLI: Yes, Your Honor, I -- I believe we  
17 do.

18 QUESTION: Then why isn't the argument good that  
19 you can test everybody?

20 MS. MEOLI: Well, number one, I -- I think there  
21 is a deterrent effect for implementing this program among  
22 the student -- general student body. If they want to --

23 QUESTION: Well, I think -- go ahead.

24 MS. MEOLI: If they want to try out or -- or  
25 audition for one of those competitive activities, they

1 know in advance that one of the regulations is to be  
2 subjected to drug testing.

3 QUESTION: No, but with respect, what you're  
4 arguing is -- is a justification for the present policy  
5 that you've got, and I understand your position there.

6 What I'm interested in and Justice Ginsburg was  
7 a moment ago is it seems to me that if -- if we take your  
8 argument and we take the evidence that is indicated on the  
9 record, there is at least an equally good argument for  
10 testing everybody in the school, whether they go out for  
11 band or whatnot or -- or do not. And -- and isn't that  
12 the case? That's what we're interested in.

13 MS. MEOLI: Well, I think there is a reasonably  
14 good argument for that. We're not espousing that, but I  
15 think --

16 QUESTION: No, I realize --

17 MS. MEOLI: -- even though -- even -- even if we  
18 utilize the balancing test that was utilized in Vernonia,  
19 I -- I think there is a really good argument --

20 QUESTION: But if we get to that point, then the  
21 whole notion of special need has -- has, more or less,  
22 evaporated. We don't have the kind of special safety need  
23 as -- as in the railroad case. We don't have the unusual  
24 temptation to crime need as in the immigration case, and  
25 the special need is simply the need to deter drug use

1 among all children in all schools of the United States.  
2 And -- and if the -- if the theory of this is special  
3 need, it seems to me that the concept of special need  
4 seems to have gotten lost.

5 QUESTION: I suppose the distinction that you  
6 draw is based on the fact that you have a sanction for the  
7 people that you apply it to. You can tell them you cannot  
8 participate in extracurricular activities. But as -- if  
9 you applied it to the whole school board -- to the whole  
10 school population, rather, you couldn't sanction them by  
11 saying you cannot come to school.

12 MS. MEOLI: Exactly, Your Honor, and -- and that  
13 really is our position because we have to educate the --

14 QUESTION: But you could say --

15 QUESTION: And the only sanction you impose is  
16 you just can't play in the band or -- or cheerlead or  
17 whatever it is they want to do.

18 MS. MEOLI: You can -- you can remain in the  
19 class.

20 QUESTION: So, you have a special burden if you  
21 want to engage in extracurricular activities.

22 MS. MEOLI: Yes, Your Honor.

23 QUESTION: Or how about taking elective classes,  
24 classes that the State doesn't require you to take, but  
25 some students might like to take?

1 MS. MEOLI: Well, Your Honor, we have to draw a  
2 line somewhere, and -- and even though elective classes  
3 are a choice --

4 QUESTION: Well, I wondered what -- the line  
5 that you would draw as a question of the school's policy,  
6 but you were saying at least you see a problem with  
7 testing everyone because people are compelled to go to  
8 school and -- so that's why you resisted drawing the line  
9 there.

10 My question is if you're doing a voluntary, then  
11 why don't you say as well, you volunteer for -- you're  
12 taking a certain course, this is an elective course. Same  
13 thing.

14 MS. MEOLI: Well -- well, elective courses are  
15 really mandatory, Your Honor, in many cases. I mean, you  
16 have your core curriculum that are required for  
17 graduation, and you also have your electives. You need 24  
18 credits in order to graduate from high school. 18 of them  
19 have to be in the core subjects. The rest of them are  
20 electives. But those are required.

21 QUESTION: Except for that, it would be a good  
22 idea, though, wouldn't it?

23 (Laughter.)

24 MS. MEOLI: Yes, Your Honor. I -- I think if --  
25 if we could fashion --



1 QUESTION: That's what I thought you'd say.

2 MS. MEOLI: If we could fashion a way to do it,  
3 I believe the majority of school boards would be behind  
4 it. But -- but at the state of the constitutions of -- of  
5 the 50 States and the states of the compulsory education  
6 laws that all the States have, I -- I don't think that is  
7 possible. So, if a line is going to be drawn, I think the  
8 line can be drawn between the students in the general  
9 school population and students in extracurricular --

10 QUESTION: May I ask? Is there any other  
11 sanction other than -- other than ineligibility for  
12 extracurricular activities? Is there any other sanction  
13 imposed on a student who is found to have been using  
14 drugs?

15 MS. MEOLI: No -- no, Your Honor, and in fact,  
16 that only happens in this policy under the third time --

17 QUESTION: So, really the student could say,  
18 well, the worst -- if I go out for extracurricular  
19 activities and get caught, it'll be back where if I had  
20 gone out at all.

21 (Laughter.)

22 QUESTION: He gets back to square one.

23 MS. MEOLI: Well, I think -- I think children  
24 who engage in these activities really want to compete. I  
25 mean, they are really interested in what they are doing.

1 So, they don't want to get caught. And it's also a -- a  
2 way for these students to say no. Peer pressure among  
3 elementary and secondary school children is -- is very  
4 significant, and --

5 QUESTION: Could you, for that reason, adopt as  
6 a -- as one of our sanctions or a supplementary sanction  
7 simply publicity that the person has been caught? Anybody  
8 who fails the drug test will have his name and photograph  
9 posted on the bulletin board. Would that be -- would that  
10 be constitutional too? I presume it would be under your  
11 theory.

12 MS. MEOLI: I -- I think it would be very cruel,  
13 Your Honor. As -- as to whether --

14 QUESTION: It would get the job done.

15 MS. MEOLI: -- as to whether it is  
16 constitutional or not -- we're -- we're not in -- in the  
17 job of disciplining students. And -- and we seem to be  
18 going into that realm more and more. This program -- we  
19 don't want to put an A on them or a big substance abuse on  
20 them. What we really want to do is help those students.  
21 And it may be constitutional to do that, but that's not  
22 what we are asking this Court to do. We're just asking  
23 you to give us the tools to deter drug use, to help those  
24 drug users.

25 And -- and if there are no other questions --

1 QUESTION: Very well, Ms. Meoli.

2 MS. MEOLI: -- my time.

3 QUESTION: Mr. Clement.

4 ORAL ARGUMENT OF PAUL D. CLEMENT

5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

7 MR. CLEMENT: Mr. Chief Justice, and may it  
8 please the Court:

9 A school district that reasonably concludes that  
10 it faces a drug problem may adopt random drug tests for  
11 students engaged in competitive extracurricular activities  
12 without violating the Constitution.

13 QUESTION: Suppose you've had hard statistical  
14 evidence to show that the kids that go out for the  
15 extracurricular activities are the ones that really do not  
16 use drugs, that the high drug user population is in those  
17 that don't engage in the activities. What -- what would  
18 your recommendation be to the school board at that point?

19 MR. CLEMENT: I think in a case like that, it  
20 still might be appropriate for the school district to test  
21 the students involved in extracurricular activities, and I  
22 think that is because, as this Court has emphasized on a  
23 number of occasions, by making the -- the testing program  
24 applicable only to an avoidable activity, the -- the  
25 school district would be ensuring the reasonableness of

1 the program under the Fourth Amendment.

2 QUESTION: But there's some -- we -- we had an  
3 amicus brief by some -- a pediatrics association and so  
4 forth that pointed out that students that engage in these  
5 extracurricular activities are, indeed, the least likely  
6 to be involved in drug use. And it seems so odd to try to  
7 penalize those students and leave untested the students  
8 that are most apt to be engaged in the problem.

9 MR. CLEMENT: Well --

10 QUESTION: It's just -- it's so  
11 counterintuitive, isn't it?

12 MR. CLEMENT: A couple of points in response to  
13 that, Justice O'Connor. First, there's contrary evidence  
14 as well, and the petitioners in their reply brief point to  
15 some evidentiary studies that showed that really drug use  
16 is distributed evenly across all groups in the student --  
17 in the student population.

18 The second thing I would add is that as -- as I  
19 was noting in answer to Justice Kennedy's question, there  
20 is a sense, and which the majority and Justice Ginsburg in  
21 -- in Vernonia emphasized, that by making the program only  
22 applicable to activities that are avoidable, you -- you  
23 limit Fourth Amendment difficulties. You make the program  
24 more reasonable. And as Justice Stevens pointed out, you  
25 also avoid any difficult questions that might be

1 occasioned by the consequences of a drug testing program  
2 that applies to school-wide.

3 QUESTION: Well, this in the face of a school  
4 district that is certifying to the Federal Government they  
5 don't have a drug problem. I mean, the whole thing is  
6 absolutely odd.

7 MR. CLEMENT: Well, I don't think it's that odd,  
8 Justice O'Connor. First of all, in terms of the  
9 certifications, I would direct you to footnote 23 of the  
10 district court opinion. And the district court found in  
11 that footnote that what those reports really emphasized  
12 are the relative natures of the problem. Alcohol was the  
13 major problem they faced, but in each one of those --  
14 those reports, they note that they do have a drug problem.

15 QUESTION: Well, if alcohol is the problem, why  
16 don't they address that? This is just -- I mean, it's  
17 structured in a way to do very little good it seems to me.

18 QUESTION: Mr. Clement, do you think any school  
19 in the country doesn't have a drug problem?

20 MR. CLEMENT: I would be surprised to find a  
21 school district that didn't. The national figures on --  
22 on the -- the amount of drug use are really staggering.  
23 As we note in our brief, over half of all 12th graders  
24 have tried illegal drugs by the time they graduate from  
25 high school. So, I really think that, you know, if

1 anything, the burden ought to shift in these cases to the  
2 other side to show that this one school district is the  
3 one school district --

4 QUESTION: Can -- can you tell me --

5 QUESTION: In both Skinner and Von Raab, we  
6 imposed or we permitted the imposition of drug testing on  
7 the basis of a nationwide problem, didn't we, without --  
8 without showing that the particular entity in question  
9 shared in that national problem?

10 MR. CLEMENT: That's correct, Justice Scalia.

11 And I would also point out I'm not sure you want  
12 to put school districts in the business of trying -- when  
13 they -- when they find some incidental evidence of drug  
14 use, to try to pin it down to the exact extracurricular  
15 groups involved. If a student comes in --

16 QUESTION: Well, do --

17 MR. CLEMENT: -- for some sort of anonymous drug  
18 counseling, I'm not sure they want to ask him what groups  
19 are you in.

20 QUESTION: May I ask? What is your view on --  
21 on the validity of a -- a school-wide drug testing  
22 program?

23 MR. CLEMENT: Justice Stevens, we think such a  
24 program would be constitutional, but we think the program  
25 at issue here --

1                   QUESTION: So, you would differ from the  
2 petitioners then.

3                   MR. CLEMENT: We -- we do have that difference,  
4 but we think a program like this is constitutional for  
5 three reasons. One, extracurricular students agree to  
6 additional intrusions on their privacy and have additional  
7 safety risks. Second, as --

8                   QUESTION: No. But you say they agree to it.  
9 They agree to it only under the circumstances that if they  
10 don't agree to it, they can't engage in any of these  
11 activities. They know perfectly well they'll never get  
12 into a competitive college if they don't. And the -- the  
13 agreement is not simply something that is -- is arrived at  
14 sort of in the abstract. There's -- there's tremendous  
15 pressure on them to agree to it.

16                  MR. CLEMENT: Two points, Justice Souter.  
17 First, we're not suggesting this is -- this is  
18 constitutional because it's consensual. I think Justice  
19 Kennedy, in -- in his separate opinion in the Ferguson  
20 case, pointed out that in these special needs contexts,  
21 there's an element of voluntariness which is important to  
22 the constitutional analysis, even if it's not voluntary in  
23 the full sense of the word.

24                  This -- a second and related point about that,  
25 though, is that these are avoidable programs, and I think

1 that makes the important difference. And again, as I  
2 noted earlier, because they're -- they're avoidable in  
3 that sense, it avoids any difficult questions with the  
4 consequences that a positive test might generate.

5 QUESTION: But it doesn't --

6 QUESTION: May I ask you a question that -- that  
7 is -- concern -- concerns me about the difference between  
8 this case and Vernonia? If we -- if we look at what  
9 people might expect in the real world, where people know  
10 that athletes, professional athletes, Olympic athletes,  
11 athletes are tested for drugs, but people who are just  
12 everyday people aren't. So, Vernonia could be regarded as  
13 all the students who are athletes -- they will be treated  
14 as athletes are generally. But that's not true of the --  
15 the large population of high school students.

16 MR. CLEMENT: Well, I mean, I -- I think one  
17 fact is that I think it is increasingly becoming true that  
18 -- that these sorts of policies are in society as a whole.  
19 And one of the petitioners in this case who -- who didn't  
20 wanted to be drug tested at school had to go get drug  
21 tested for the job at the Kmart, at the McDonald's. And I  
22 do think that probably does have some influence on the  
23 reasonable expectations of privacy in this area.

24 But I also think that it really doesn't make a  
25 lot of sense to draw a line on -- on sports, and even



1 within sports, of course, there are differences. The  
2 Vernonia policy applied to golfers, as well as football  
3 players. Now, I'm not aware that golfers, as a general  
4 matter, are tested for substance abuse even on the PGA  
5 Tour. I could be wrong about that, but the point is there  
6 are differences in the risks even among the athletes, and  
7 I think this Court in Vernonia didn't make anything turn  
8 on those differences.

9 The dissent in Vernonia pointed out that there  
10 wasn't any evidence of drug use at the grade school in the  
11 7th and 8th grade, and that the evidence really wasn't an  
12 evidence of a disciplinary problem that was specific to  
13 student athletes. And the majority in Vernonia did not --  
14 was not -- was not moved by those two points. The  
15 majority said that the evidence was good enough in these  
16 contexts.

17 And I think this is an area where deference to  
18 the local school boards in their determinations about the  
19 nature of the problem, the nature of the solution, and  
20 particularly the particular students that are going to be  
21 tested is quite appropriate. It's important to  
22 recognize --

23 QUESTION: But you would make -- you would make  
24 -- and I think you've said this -- the same argument if  
25 they had decided to have a universal drug testing policy

1 in the school.

2 MR. CLEMENT: I would, Justice Souter. I do --  
3 as I said, I think it's a more difficult question. And I  
4 think the most difficult problem with a school-wide test  
5 is what Justice Stevens pointed out, and that would be  
6 what are the consequences of a positive test. But if you  
7 imagine a school district that -- that faced -- reasonably  
8 concluded it faced a serious problem and instituted a drug  
9 test where the only ramification of a positive drug test  
10 was a confidential notification of the parents, I don't  
11 see why that test would violate Fourth Amendment  
12 reasonableness.

13 QUESTION: But at that point, I -- the so-called  
14 special need has become virtually a universal need.

15 MR. CLEMENT: I would like to say two things in  
16 response to that.

17 First, in Vernonia itself, this Court didn't  
18 identify the special need as being the drug problem. This  
19 Court identified the special need as being the school  
20 setting, and that's consistent with this Court's decision  
21 in T. L. O.

22 QUESTION: And -- and the special need would be  
23 a universal need in every school in the United States.

24 MR. CLEMENT: I -- I do think it would properly  
25 recognize that the school context is different, and that

1 school boards have a freer hand in testing their students  
2 than the Government has testing either employees or its  
3 citizens at large.

4 QUESTION: But if -- if that is the case, what  
5 is the danger in the school case, comparable to the -- to  
6 the railroad worker's danger or the -- the customs  
7 officer's danger? What is the danger as distinct from  
8 simply the desire to deter illegal drug use?

9 MR. CLEMENT: I think the danger is this. I  
10 mean, it -- and I think Von Raab actually is -- is an  
11 excellent counterpoint. This Court in Von Raab said that  
12 you could test the customs official because they are on  
13 the front line of the drug problems on the supply side. I  
14 think by parity of reasoning, children today are on the  
15 front lines of the drug problem, but on the demand side.  
16 The evidence shows that if you can stop children from  
17 using drugs before their 18th birthday, they're not likely  
18 to start using drugs after that --

19 QUESTION: But if --

20 QUESTION: The danger is getting young people  
21 used to a drug culture. You're raising young people in  
22 school. And the -- the specific danger is unlike with  
23 adults. You're forming -- you're forming their habits for  
24 the rest of their life.

25 MR. CLEMENT: I agree with that, Justice Scalia,

1 and I would -- I would add that this is not the only  
2 context where -- where the Federal Government has  
3 recognized that difference. The penalties for dealing  
4 drugs in a school area or selling drugs to a minor are  
5 much more substantial than those selling drugs to adults.

6 QUESTION: I think that's hardly a revelation  
7 that the Government is concerned about what drugs do to  
8 our culture.

9 MR. CLEMENT: Absolutely, and I think it's  
10 perfectly --

11 QUESTION: It's not exactly rocket science, is  
12 it?

13 MR. CLEMENT: No, and -- and I don't think it's  
14 rocket science also to say that that -- that concern is  
15 particularly acute with respect to the youngest and most  
16 vulnerable members of society. And as I say, if you look  
17 at 21 U.S.C. 859, 860, 861, all of those provisions put  
18 added penalties on someone who deals drugs involving  
19 children.

20 Thank you.

21 QUESTION: Thank you, Mr. Clement.

22 Mr. Boyd, we'll hear from you.

23 ORAL ARGUMENT OF GRAHAM A. BOYD

24 ON BEHALF OF THE RESPONDENTS

25 MR. BOYD: Mr. Chief Justice, and may it please

1 the Court:

2 Opposing counsel said we have to draw the line  
3 somewhere, and the -- the way to draw the line in this  
4 case is to keep in mind the core principle that  
5 individualized reasonable suspicion is the standard for  
6 school searches set forth in T.L.O. If there's going to  
7 be a line as to where do we go past that standard, while  
8 still retaining the core of T.L.O. --

9 QUESTION: There was no individualized suspicion  
10 in Vernonia.

11 MR. BOYD: There -- there was not, and Vernonia  
12 is the exception.

13 QUESTION: Well, so -- so there goes your  
14 principle.

15 MR. BOYD: Vernonia is the exception to the  
16 T.L.O. rule. It didn't -- it did not overrule T.L.O.  
17 What Vernonia said is that in certain special  
18 circumstances, that rule would be set aside. The key --

19 QUESTION: You can have medical -- metal  
20 detectors in schools where they're afraid the children  
21 have guns?

22 MR. BOYD: Yes, they can.

23 QUESTION: Now, there's no individualized  
24 suspicion there, is there?

25 MR. BOYD: No, there's not, and the reason --

1                   QUESTION: Can we take throat swabs if you feel  
2 that there is a contagious disease?

3                   MR. BOYD: Throat swabs if you think there's a  
4 contagious disease. I'm not --

5                   QUESTION: I was trying to -- well, that's what  
6 I -- I raised that because, of course, everyone is making  
7 a criminal analogy, but nobody is arrested here.

8                   MR. BOYD: Well --

9                   QUESTION: Nobody is arrested. This is  
10 counseling. It's an effort to deal with the demand side  
11 of drugs, and -- and I just wonder. That's why I'm -- I'm  
12 raising, right at the beginning, the question of whether  
13 this individualized suspicion is the correct model to  
14 apply.

15                  MR. BOYD: Well, unless the Court stands ready  
16 to overrule T.L.O., I believe it is the standard. I think  
17 what's behind your question, Justice Breyer, is -- is a  
18 question about intrusiveness of the search. Obviously,  
19 there is a difference between the passive --

20                  QUESTION: Well, I mean, it's absolutely clear  
21 there isn't individualized suspicion, so you win  
22 automatically if that's the test, I would think.

23                  MR. BOYD: Well --

24                  QUESTION: And, of course, it wasn't in  
25 Vernonia. I would think it wouldn't be in certain

1 instances in the school like guns. And so, rather than  
2 just start off, as you did, assuming that that's it, I'd  
3 like to hear some argument for it.

4 MR. BOYD: Of -- of course. Let -- let me try  
5 to set up what -- what I see as -- as basically how you  
6 move from the general rule of T.L.O. to the exception of  
7 Vernonia.

8 In order to set aside that core Fourth Amendment  
9 principle, I think there has to be some nexus to a  
10 problem, some connection that is demonstrated to a problem  
11 either, and preferably both, in terms of safety and drug  
12 use.

13 Both of those are missing here. The reason this  
14 school expanded its initial policy from athletes to  
15 include non-athletes was because it wanted to appear  
16 evenhanded. Now, that's not a value that this Court has  
17 recognized in the -- in the special needs context. They  
18 didn't want to stigmatize the athletes alone through the  
19 drug test, so they said, who else can we get? Their  
20 lawyers said, well, the Seventh Circuit said you can get  
21 the non-athletes, and so they expanded it.

22 But let's look at the safety rationale here.  
23 Now, in Vernonia, the school board said up front, this is  
24 about the safety of our athletes, and that's why we're  
25 doing it. In this case, the school board's testimony and

1 the testimony of everyone else who has been -- who's --  
2 who's testified is that safety is not a reason for this  
3 test. There is nothing about the band or the choir that  
4 is dangerous.

5 And this is a very important too that we did not  
6 make in our briefs I want to bring out. In Vernonia, the  
7 drug test was for in-season athletic activities. While  
8 you're playing football, you're drug tested. They were  
9 concerned about that. In this case, they test year in,  
10 year out. If you look at page 198 of the joint appendix,  
11 the policy itself says it is in season and out season.  
12 So, there's nothing about the activities of Lindsay Earls  
13 in the choir, who's here today, not a drug user -- there's  
14 nothing about her activities in the choir that requires  
15 her being drug tested.

16 QUESTION: But the choir is presumably a year-  
17 round thing in a way that football is not.

18 MR. BOYD: No, it's not, Your Honor. All of  
19 these activities have competitive seasons, and the  
20 competition is what triggers the drug testing. It's quite  
21 clear that in the academic team, choir, band, all of these  
22 activities, they are participating at a certain point, and  
23 yet they are drug tested throughout the year.

24 QUESTION: Are you saying that, for instance,  
25 choir in Tecumseh is only in the fall?



1                   MR. BOYD: The --

2                   QUESTION: Or only in the winter or only in the  
3 spring?

4                   MR. BOYD: Yes, Your Honor, in terms of the  
5 competitions, they are. There's a class which -- which  
6 they are very clear, it is not the reason that drug  
7 testing takes place, and someone who's merely in the class  
8 is not drug tested. But if you go out for the team, as it  
9 were, which competes during a limited season, then you are  
10 drug tested, although it is for the entire year. So,  
11 again, it's not the activities of the choir competition  
12 that are of concern to the school.

13                  QUESTION: Well, give me the quote. Which  
14 season of the four seasons is for band in Tecumseh?

15                  MR. BOYD: I honestly don't know what months of  
16 the year they compete in, and -- and in rebuttal, if I'm  
17 wrong, I'm --

18                  QUESTION: They can't be for all four seasons, I  
19 guess.

20                  But --

21                  MR. BOYD: Excuse me?

22                  QUESTION: -- let me -- let me ask you this.  
23 What -- what they're -- what they're trying to do is to  
24 find a basis on which they can implement a program which  
25 has an element of consent to it. The Government does not

1 think that's necessary, but that's the case that we have  
2 before us. And so, what the school district has done has  
3 taken a set of programs and they said, this is a surrogate  
4 for consent, and that's what's happening here. This -- I  
5 -- I think this goes beyond Vernonia.

6 MR. BOYD: Right.

7 QUESTION: But we take cases as they come to us,  
8 and in this case, it is clear that the student who is --  
9 is so offended by the idea of a search and does not care  
10 about the school district's policy of ensuring that drugs  
11 are school-free doesn't need to participate in the  
12 extracurricular activity. That's their choice.

13 MR. BOYD: Well, Justice Kennedy, you're  
14 absolutely right. That's the position here. And frankly,  
15 I think that's what it comes down to for them. They don't  
16 have the safety rationale. They don't have the drug use  
17 rationale.

18 And -- and I would actually point to the -- to  
19 your concurrence in the Ferguson case where you -- where  
20 you, albeit briefly, survey the special needs in drug  
21 testing jurisprudence and point out that in all of those  
22 cases, the activity was, in a sense, consensual or  
23 voluntary. I mean, this goes back to Justice Scalia's  
24 question in -- in the initial round, too. If you want to  
25 drive a train, if you want to be a customs agent, if you

1 want to be a football player in Vernonia, if you want to  
2 run for office in Chandler, these are all activities which  
3 you're perfectly free to not do. Now, maybe that weighs  
4 into the balance, the constitutional reasonableness  
5 balance, somewhat but it certainly is not dispositive.  
6 And when that's all you have, when there isn't the history  
7 of drug use, when there isn't a safety rationale, when all  
8 you have is this, then it's nothing.

9 Now, I think also I need to --

10 QUESTION: It -- it seems to me if a school is  
11 better than other school districts insofar as drug use,  
12 they have less drug use, that they're maybe entitled to  
13 keep it that way.

14 MR. BOYD: Well --

15 QUESTION: You seem to say not. You seem to say  
16 there has to be some great crisis where we lose a couple  
17 years of kids to drugs, and then we -- and then we move.  
18 National statistics just don't support that.

19 MR. BOYD: Well, there -- there are a couple of  
20 things. I mean, first of all, the -- the crisis  
21 nationally of drug abuse is one that certainly we need to  
22 be concerned about, and I think Justice O'Connor is right  
23 to point out that the pediatricians, along with the public  
24 health social workers and teachers, all say that this  
25 policy of setting up barriers for extracurricular

1 activities is actually counterproductive. It promotes  
2 drug use and other dangerous activities.

3 But let me get to precisely the question that  
4 you're asking, too. This is a school that has in place  
5 cameras in the halls, security guards, drug dogs that  
6 sweep through the school and the -- and the parking lot  
7 and the students. They search lockers. They have  
8 teachers who are trained in looking for drug use. They  
9 have all of these things in place, and they have a  
10 mandatory reporting policy that if they discover any drug  
11 use, they have to report it. Now, over the years, that's  
12 added up to two instances of drugs being found, none of  
13 them associated with non-athletes, none of them associated  
14 with extracurricular activities.

15 QUESTION: Yes, but they have a record here  
16 that, of course, suggests if you want to know if drugs are  
17 going on in your school, you ask the kids. You don't find  
18 them because nobody is stupid enough to take them into the  
19 school. But it's all around and they use them. And here  
20 they ask the kids, and the teachers ask the kids, and they  
21 say, sure, there's a lot of drug use going on over in the  
22 park, at parties. That's the record that I saw.

23 MR. BOYD: Well --

24 QUESTION: And I don't really see how that -- I  
25 mean, you know, you might be able to drive a millimeter of

1 light between that and Vernonia.

2 MR. BOYD: Well --

3 QUESTION: So, go ahead and try. But I -- I  
4 can't --

5 (Laughter.)

6 QUESTION: I mean, I -- I -- they did what I  
7 would have done. I would have asked my children what's  
8 really going on in this school, and they get a positive  
9 response when it's a question of drugs.

10 MR. BOYD: Justice Breyer, I -- I think you're  
11 right. I'm going to go ahead and try. But I think  
12 there's -- I think there's an important distinction here.  
13 What the kids said in this case is, to the extent there's  
14 drug use going on, who's doing it? It's not the choir and  
15 the band and so forth. And I think that that's critical.

16 I think that the jurisprudence of this Court in  
17 looking at when do you set aside individualized suspicion,  
18 it says there has to be that connection between --

19 QUESTION: Why? Now, I --

20 MR. BOYD: Why.

21 QUESTION: Of course, if I read the cases, as I  
22 do, and they logically require you to win, that's the end.  
23 You win.

24 MR. BOYD: Sure.

25 QUESTION: But just in case it's open --

1 (Laughter.)

2 QUESTION: -- I would like to know why. I take  
3 it they've given you some reasons why they've limited it.  
4 One, these are the school leaders and maybe it'll spread.

5 MR. BOYD: Sure.

6 QUESTION: Two, we don't want to put the  
7 student, although we'd really like to, to the choice of  
8 school versus drug testing. We'll put him to the choice  
9 of extracurricular versus drug testing. It's a little bit  
10 better. Okay. That's their reason.

11 Now, what do you say?

12 MR. BOYD: Well, I -- I mean, I think what's  
13 perhaps behind your question is a little bit of what's the  
14 law and why is the law that way and a little bit of why  
15 the policy --

16 QUESTION: I'll tell you what's behind the  
17 question. What's behind the question is that I think  
18 undoubtedly you're right, that this is a slight expansion  
19 of Vernonia. You want to say a lot. They'll say hardly  
20 any. So, it's hard for me to see why, if I came out one  
21 way in Vernonia, I'd come out differently here. And  
22 that's what I want you to --

23 MR. BOYD: Okay, fair enough. I -- I think the  
24 question is where do you want to put your focus. If your  
25 focus is solely on is there evidence of drug use in the

1 high school alone, then the difference here I think is  
2 still very important. In Vernonia, you had athletes who  
3 were skipping class and being arrested. You had people  
4 smoking marijuana across the street in plain view. You've  
5 got none of that here. I think there is that difference.

6 But I think that also I would ask you to focus  
7 somewhere different than what is the overall general  
8 problem. I would say that if you take seriously the idea  
9 of the nexus, or connection, being there in order to take  
10 what is a serious step from individualized suspicion to  
11 blanket intrusive search, I would say you have to look at  
12 what are the reasons for picking this group. Is it simply  
13 to be fair to the athletes where a problem may exist, or  
14 is it -- which is the case here, or is it because there's  
15 a problem here, which is certainly not the case here.

16 And there's another difference too, Justice  
17 Breyer, which I think is absolutely critical. In  
18 Vernonia, that was a school where discipline was out of  
19 control. Discipline throughout the school jurisprudence  
20 of this Court has been a critical factor. In Vernonia, it  
21 was a school that said, quote, we don't have a major drug  
22 problem for many years, just like this school. But then  
23 in the space of 2 or 3 years, they said, discipline  
24 referrals have increased by almost threefold. Teachers  
25 are threatening to quit. We're thinking about mass

1     expulsion of the students. We can't keep control of this  
2     school.

3             Now, if you look what this school has said, by  
4     contrast, let me refer you to the joint appendix. In  
5     their Federal reports, they say -- now, I'm not talking  
6     about the drug use here. I'm talking about discipline.  
7     They say on page 192, minimal problems have been  
8     experienced due to violent safety and discipline problems.  
9     That's right in the middle. And in the very last sentence  
10    on that page --

11            QUESTION: I don't understand the point of this  
12    argument, counsel. I mean, is -- is the only reason  
13    schools want to prevent drug use is that they have unruly  
14    classrooms when they have drug use? I should think that  
15    is the least of the reasons to prevent drug use.

16            MR. BOYD: Well, it --

17            QUESTION: And -- and what I miss in your  
18    argument is any recognition of the fact that we are  
19    dealing here with minors. I mean, you're talking here  
20    about a search rather than a seizure, but in the case of  
21    minors, you can keep them, in effect, imprisoned after  
22    school, can you not, if they haven't done their homework  
23    or something else? The school is standing in loco  
24    parentis. It is trying to train and raise these young  
25    people to be responsible adults. And I think that -- it's



1 a -- it's a world of difference from -- from what -- from  
2 what the State can do with regard to adults.

3 MR. BOYD: Let -- let me -- let me do two  
4 things, if I may, Justice Scalia. Let me just quote the  
5 last sentence of what I was about to say and then I -- and  
6 then, if I may have your permission to address the in loco  
7 parentis argument, because there's a good answer to that.

8 In terms of the discipline argument, Justice  
9 Breyer, what the school said is we don't have that  
10 problem, and in the last sentence, the discipline policies  
11 in place at each site have been effective in dealing with  
12 the problems. So, I think if one of the things, maybe not  
13 the only thing, Justice Scalia, but if one of the things  
14 we care about is can the kids learn here, is this a school  
15 environment that is conducive to learning and safety and  
16 discipline, Tecumseh High School has that in hand with  
17 their cameras and guards and dogs and everything else.  
18 They don't need this policy. Especially they don't need  
19 it for Lindsay Earls. I mean, if they want to voluntarily  
20 test all the students, they apparently will get many of  
21 them, but why should we force Lindsay Earls to -- to give  
22 up her privacy as part of that?

23 QUESTION: You're willing to rest your case on  
24 the proposition that the only valid basis for conducting  
25 drug searches is to -- is to enable the school to maintain

1 discipline.

2 MR. BOYD: No, no.

3 QUESTION: So long as you have a bunch a  
4 druggies who are orderly in class, the school can take no  
5 action. Is -- is that what you want us to --

6 MR. BOYD: Absolutely not. Given that we have  
7 here a school that has not only discipline in hand, but  
8 also drug use itself in hand, especially among these  
9 activities, which themselves aren't dangerous, it seems it  
10 adds up to me the mirror image of Vernonia.

11 But let me address your point, Justice Scalia,  
12 about in loco parentis.

13 QUESTION: Except for one point that was made in  
14 Vernonia, and it does go across the board, and that was  
15 the statement that drug testing on suspicion, which is the  
16 alternative, because in life, it's everything as compared  
17 to what. So, if we didn't have the -- the random testing,  
18 it would be on individual suspicion. And the point was  
19 made there that if you had -- if you treated the children  
20 that way, you would transform this random process into  
21 what the opinion author called a badge of shame, and that  
22 it might be worse the risk of singling out the  
23 troublesome, but not drug likely student, the one that the  
24 teacher -- the one that's always the bad boy in the class  
25 and diverts the teachers --

1                   MR. BOYD: Right.

2                   QUESTION: -- who are engaged in that exercise  
3 from the job of teaching to being a police officer.

4                   MR. BOYD: Justice Ginsburg, there's a good  
5 answer to that question. Let me focus on the facts of  
6 this case, as they come to this Court. This is a school  
7 that already has not had this problem of pointing the  
8 finger of -- of accusation at students, although it could  
9 do that with its drug dogs and locker searches and  
10 everything else. When it gets a student for whom there is  
11 some suspicion of drug use, say, a -- a drug dog hits on a  
12 student who could easily have had dad's beer spilled on  
13 the -- on the sleeve. That will make a drug dog alert.  
14 That student is then questioned. That already happens in  
15 this school.

16                   But there's also a key point that I think was  
17 missed in that -- in that discussion in Vernonia, which is  
18 that even if -- whichever way you rule in this case,  
19 suspicion-based drug testing can and will go forward in  
20 this and many other schools. So, even if you have a  
21 blanket policy, if there is, say, some malicious teacher  
22 out there who wants to -- to pick out Johnny because  
23 Johnny is acting bad and -- and put that badge of shame on  
24 him, she or he can certainly do that. I don't think that  
25 that is a reason to go ahead with the policy that doesn't

1 have a basis in the safety, discipline, or drug use  
2 rationales.

3 Now, Justice Scalia, I'm feeling like I'm not  
4 getting to the in loco parentis question, and I do because  
5 the -- the short answer is, I believe the brief by the  
6 parents, the amicus brief -- Jean Burkett is the lead one  
7 -- really engages this question in a very vigorous and  
8 intelligent manner. And what they say is this. In loco  
9 parentis is a doctrine that does not say the school is the  
10 parent, can take over from the parent. The parent still  
11 retains certain roles, and the parents in this community  
12 -- a good number of the parents in this community say I  
13 want to raise my kid and I've succeeded so far in raising  
14 my kid by having open communication where they can come to  
15 me and talk and we will -- and we will have that trust  
16 there. The school has interfered with that relationship  
17 by forcing me, the parent, to sign off on this drug test,  
18 which is a different way of raising kids.

19 QUESTION: Well, but the in loco parentis  
20 argument works against you there too because in loco  
21 parentis also indicates that all children are forced to go  
22 to this school.

23 MR. BOYD: Yes.

24 QUESTION: And we have to accept that a majority  
25 of the parents want to make sure that those children are

1 in a drug-free atmosphere.

2 MR. BOYD: In --

3 QUESTION: And they have -- they -- you seem to  
4 me to be disparaging about police dogs and locker  
5 searches, and maybe that's what you're going to challenge  
6 next. But what the -- what -- what the school board has  
7 said is that this is a necessary and effective policy, and  
8 that's -- that's all it said.

9 MR. BOYD: Justice --

10 QUESTION: And there are rights of other  
11 children who want to go to a school which is drug-free, if  
12 they can.

13 MR. BOYD: Absolutely, Justice Kennedy.

14 QUESTION: And it seems to me that's part of in  
15 loco parentis too because those students are required to  
16 go the school just as -- as the drug user is.

17 MR. BOYD: You're absolutely right about that,  
18 and please don't hear me to be disparaging of those other  
19 tools because those are tools that do not include a  
20 blanket intrusive search, which is the principle that's at  
21 issue here. And I actually applaud this school for  
22 being --

23 QUESTION: Well, why does it make difference why  
24 you applaud it or not?

25 MR. BOYD: Oh, it probably doesn't. It probably

1 doesn't.

2 QUESTION: We're talking about a constitutional  
3 question.

4 MR. BOYD: It -- it does. But -- but the point  
5 I'm trying to make is that -- is that these other tools,  
6 which they have the legal right to use, are being used  
7 successfully.

8 In loco parentis I think comes into play when  
9 you have a school like Vernonia where, as -- as you put  
10 it, Justice Kennedy, the rights of the other students,  
11 their ability to get an education and to themselves stay  
12 drug-free is being interfered with. Now, if we were  
13 talking about the Vernonia school --

14 QUESTION: Are you saying that the in loco  
15 parentis principle does not apply in the case of a school  
16 if a minority of parents object to what the school is  
17 doing?

18 MR. BOYD: That's not my position.

19 QUESTION: Well, I thought that was what you  
20 were saying a moment ago?

21 MR. BOYD: Let -- let me please try to be more  
22 clear about that. It depends on what the issue is and  
23 what's happening in the school. When there is an issue of  
24 school discipline, say, in the Fraser case or the  
25 Hazelwood case, where you had student conduct that was in

1 a sense -- well, certainly had -- had a element of  
2 connection to constitutional protection, but yet affected  
3 the rights of other students to be able to learn in that  
4 environment, then --

5 QUESTION: Well, how did -- how does Hazelwood  
6 fit that description?

7 MR. BOYD: Well, because of the disruption that  
8 could be caused by the -- by the school paper articles.  
9 My -- my point is that where disruption --

10 QUESTION: I don't think the reason in Hazelwood  
11 was -- where the discipline was justified was -- caused  
12 disruption, but because when you're learning in school,  
13 you follow the instructions of the teacher.

14 MR. BOYD: Well, and also the form issue. I  
15 mean, I -- I think that's certainly there and I don't -- I  
16 -- I brought this upon myself by bringing up the case, but  
17 I hope --

18 QUESTION: You did, yes.

19 (Laughter.)

20 MR. BOYD: I did. I did. I did and I apologize  
21 for that.

22 But my point is that the in loco parentis  
23 doctrine more broadly comes into play when the rights of  
24 the student who says, I want to -- or the minority comes  
25 into conflict with -- with the environment of the school

1 of learning and discipline. And that's -- that was the  
2 case in Vernonia. That's not the case here. And it's  
3 certainly not the case if you think of it in terms of the  
4 rights of the student --

5 QUESTION: Now, say again why you -- you think  
6 the Vernonia situation, with respect to this point, is  
7 different than the Tecumseh.

8 MR. BOYD: Sure. It's -- it's really the point  
9 I was making to Justice Breyer about discipline in the  
10 school. Vernonia had convincingly shown and the district  
11 court found that there was a discipline problem that was  
12 out of control that was directly tied to drug use by  
13 athletes. They wanted to address this problem by going  
14 after the thing that was connected to it.

15 Now, this is a school that doesn't have any of  
16 that. It doesn't have the discipline problem. It doesn't  
17 have the drug use.

18 QUESTION: Well, but that -- that question has  
19 been batted back and forth -- you're -- you're not saying,  
20 are you, that unless the school has the sort of discipline  
21 problem they had in Vernonia, it can't do this?

22 MR. BOYD: No, I'm not. No, I'm not, although I  
23 think that when you have neither a discipline problem nor  
24 a drug use problem among the tested students, nor a safety  
25 among the students tested, I don't see how you get within



1     Vernonia at all unless Vernonia sort of quietly,  
2     implicitly said what we really meant to say was drug test  
3     everybody because those principles do apply to all 24  
4     million secondary school students in this Nation. And so  
5     I don't --

6             QUESTION: May I ask on the drug test? If you  
7     had a choice, in terms of which is the -- I understand you  
8     think this is clearly unconstitutional. Would it be more  
9     unconstitutional or less unconstitutional to test  
10    everybody?

11            MR. BOYD: I'm not really sure that one can --  
12    can rank more and less constitutional. Both seem to me  
13    plainly unconstitutional. The only constitutional way to  
14    go beyond individualized reasonable suspicion is to  
15    identify a problem in a school and devise a solution that  
16    has a close nexus to that particular problem, and that  
17    certainly isn't the case here.

18            Let me put that a little bit differently,  
19    Justice Stevens.

20            QUESTION: Of course, Justice Scalia would --  
21    would respond by saying, well, everybody knows there's a  
22    potential problem in every school in the country, and  
23    that's enough. And why isn't that an effective argument?

24            MR. BOYD: It's not -- it's not enough because  
25    what I would say is that it is really that the balancing

1 test behind the Fourth Amendment reasonableness  
2 requirement becomes one where there's no weight on one  
3 side of the -- of the balance. That's a little vague, so  
4 let me --

5 QUESTION: Why is that? Now, they've come in  
6 with a brief on the other side and said, you know, despite  
7 the fact that we're spending X billion dollars, two-thirds  
8 of which goes on the supply side for interdiction --

9 MR. BOYD: Right.

10 QUESTION: -- demand has stayed constant among  
11 teenagers, and it's about 20 to 30 percent of all of the  
12 children in these high schools who take drugs. Now, if  
13 you know that that is a fact, why is it-- and if you know  
14 this is a typical high school, why isn't that enough to do  
15 just what you said would be constitutional, to say here's  
16 a particular problem, 20 to 30 percent of the kids are  
17 taking drugs, and we want to come in with a solution  
18 that's tailored to that?

19 MR. BOYD: Well, it's -- you know, the number is  
20 probably, according to Mr. Clement, is more like 50  
21 percent, and -- and that 50 percent of -- of the kids in  
22 the high schools are using drugs.

23 QUESTION: All right. Then it's much worse than  
24 I thought.

25 MR. BOYD: And --

1 (Laughter.)

2 QUESTION: And then if that -- if that's fine,  
3 then -- then there is the problem you talked about, which  
4 I just heard you say. And so, if -- you said if there's a  
5 problem of a serious sort, and that this is tailored to  
6 that problem, they can do it. All right. So then why  
7 couldn't they do this on that theory?

8 MR. BOYD: Well, if it's 50 percent nationally,  
9 this school in its reports to the Federal Government says  
10 that its school-wide drug use based on its own surveys,  
11 which is where the national data comes from, surveys, is 5  
12 percent. 5 percent.

13 QUESTION: All right, 5 percent. I mean, maybe  
14 -- maybe they exaggerated in that report. I guess I'd  
15 have to take the finding of the district court here, and  
16 when I read the district court opinion, I thought the  
17 district judge thought it was a fairly serious problem.

18 MR. BOYD: Well --

19 QUESTION: He didn't put numbers on it.

20 MR. BOYD: Right, he did not.

21 QUESTION: But you used the word serious  
22 problem. So --

23 MR. BOYD: Okay. What -- what I wanted to say,  
24 Justice Breyer, is this. If you take the school at their  
25 own word, that their data shows that it's at 5 percent,

1 and you take the school board president and all three  
2 teachers at their word in saying, to the extent that that  
3 drug use -- that 5 percent is there, it tends not to be  
4 among these activities, and if you take this Court  
5 seriously in articulating a nexus test, there simply is  
6 not a nexus between choosing these non-athletes who, both  
7 in terms of school versus Nation and the non-athletes and  
8 the school versus the other students, are really  
9 exceptionally unlikely to be using drugs. It's a terribly  
10 poor --

11 QUESTION: Now, in your opinion a school that  
12 did find that it was within, let's say, half the average,  
13 say 20 percent or 25 percent, and they did feel that a  
14 significant number of their extracurricular activity  
15 students were involved in that, if -- if they've heard  
16 that through hearsay or any other way that was reasonably  
17 plausible for policy makers, they could then do this in  
18 your opinion.

19 MR. BOYD: No, they could not because there  
20 still is a need for a safety rationale. There is not a  
21 single case in which drug testing has been upheld by any  
22 court, outside of this line of cases for extracurricular  
23 non-athletes.

24 QUESTION: Well, what was the safety rationale  
25 with golfers in Vernonia?

1           MR. BOYD: Well, the safety rationale -- I mean,  
2 certainly the Court in Vernonia didn't talk about golfers  
3 one way or another, but --

4           QUESTION: Well, but you're -- you're saying  
5 that Vernonia was based on a safety rationale. Its  
6 testing included golfers.

7           MR. BOYD: Well, in Vernonia, the Court talked  
8 at some length about the safety rationale. Justice  
9 Kennedy, in his -- in his Ferguson concurrence, also  
10 described the Vernonia holding as -- as being about  
11 students who are athletes and face these danger risks.

12           Now, reasonableness, Your Honor --  
13 reasonableness -- it does need to turn in the end on some  
14 kind of reasonable line drawing. I think it was  
15 reasonable for the Court to say in Vernonia, the line that  
16 was drawn by Vernonia among athletes, the vast majority of  
17 whom are doing things that, if not involving physical  
18 contact, certainly involve exertion of the court, that in  
19 the opinion of the Court could cause death. Death was  
20 what was -- the word that was used by this Court. Also,  
21 in Skinner, death from train accidents; in Von Raab, death  
22 from misguided bullets. Those were the stakes in those  
23 cases.

24           Here you've got a choir.

25           QUESTION: How about death from overdose?

1                   MR. BOYD: Death from overdose is certainly a  
2 concern, but there's no --

3                   QUESTION: I mean, do you think life and death  
4 is -- is really not involved in -- in the fight against  
5 drugs?

6                   MR. BOYD: It absolutely is, Justice Scalia, and  
7 -- and where there's --

8                   QUESTION: Let's not minimize that.

9                   MR. BOYD: I don't mean to, and where there is  
10 evidence of drug use among a group of students, then I --

11                  QUESTION: As far as -- as far as the extent of  
12 the drug use is concerned, this is an elected school  
13 board, isn't it?

14                  MR. BOYD: It is.

15                  QUESTION: Why -- why should I trust your  
16 assessment of how serious the drug problem is and what  
17 measures are reasonable to counter that -- that  
18 seriousness over the assessment of -- of the local  
19 citizens who -- who elect their school board, and their  
20 school board says we have a big enough problem that we  
21 want to use this draconian measure?

22                  MR. BOYD: Well, I think if we listen to the  
23 school board and to the school administration, who  
24 themselves are even closer to that problem, what they say  
25 is, we've identified enough of a problem that initially we

1 want to test our athletes. And they directed Mr. Jacobs  
2 to go off and draft a policy for athletes. He did so.  
3 They came back and he said, you know, we feel kind of bad  
4 about stigmatizing our athletes. Who else can we test?  
5 Now, that's not identifying a drug problem.

6 In fact, the best evidence in this case is what  
7 the school itself says to the Federal Government where the  
8 Federal Government says, now, remember these reports, when  
9 they write them, they say, tell us what you know, not  
10 based on just sort of vague evidence, but tell us what you  
11 really know about drug use, do some surveys, ask some  
12 questions, look around. The school did that, and over the  
13 course of a number of years, they said consistently  
14 exactly what Vernonia said back before it had a problem.  
15 We don't have any --

16 QUESTION: Suppose -- suppose the school  
17 district said, we're going to have two schools and you can  
18 go to either one. One, they don't have dogs or -- or  
19 tests or anything else. It's the druggie school.

20 (Laughter.)

21 QUESTION: And -- and the other school -- and  
22 the other school is they have mandatory testing for  
23 everybody. Would that be constitutional? And then your  
24 client could go to the druggie school.

25 MR. BOYD: I don't think so because I think even

1 by the nature of that hypothetical, it presupposes one of  
2 the schools is going to be vastly inferior on a number of  
3 grounds.

4 QUESTION: Vastly experience why?

5 MR. BOYD: Excuse me?

6 QUESTION: Why? Because there are drug users  
7 there.

8 MR. BOYD: Well, I -- I think -- no, I don't  
9 think that's the reason why. I think --

10 QUESTION: No parent -- no parent would -- would  
11 send the child to the first school that I suggested, other  
12 than perhaps your client wants to go there.

13 (Laughter.)

14 MR. BOYD: Well, she absolutely would not, Your  
15 Honor. I mean, Lindsay Earls is -- is a young woman, a  
16 freshman at Dartmouth now, who hasn't used drugs. She was  
17 drug tested and she passed, and no one has suspected her  
18 of using drugs. I'm sure my -- my opposing counsel would  
19 attest to that.

20 QUESTION: Can -- can -- doesn't -- don't magnet  
21 schools have rules for uniforms and so forth that they're  
22 -- they're completely optional? A school district could  
23 have two schools, one with -- one with no testing, the  
24 other with testing. Then you have a choice.

25 MR. BOYD: I think uniforms are a world apart.



1       There's not an intrusive blanket search.

2               QUESTION: Well, they're not covered by the  
3       Fourth Amendment.

4               MR. BOYD: Exactly.

5               QUESTION: I mean, isn't that the problem?

6               MR. BOYD: It is.

7               QUESTION: What do you -- do you say just  
8       frankly to the argument, forget individualized need,  
9       forget special need entirely, forget suspicion? We're  
10       standing in loco parentis and if we think it's reasonable  
11       to do it, we can do it. What's the answer to that  
12       argument?

13              MR. BOYD: I -- I think the answer to the  
14       argument is the Fourth Amendment turns on reasonableness.  
15       It's not a majority rules standard. And I think you have  
16       to look at the incremental intrusion here, and this is a  
17       point that I don't think has been made today. But with  
18       school athletes, they already submit a urine sample.

19              QUESTION: That doesn't answer the question.  
20       The question -- yes, it turns on reasonableness, but what  
21       Justice Souter's question suggests is that the -- the  
22       issue is whether it would be reasonable for a parent who's  
23       concerned about drug use on the part -- on the part of his  
24       children, to be this intrusive. That is the question.

25              MR. BOYD: For a parent to do it -- I -- well, I

1 see that my time is up. May I --

2 QUESTION: Yes. I extend your time by 30  
3 seconds.

4 MR. BOYD: Thank you.

5 A parent can do many things that are different  
6 than what a school could do. The fact that a parent could  
7 do a drug test is exactly the reason -- and in Tecumseh  
8 they could do that. That is not a reason for a school to  
9 do it in circumstances where there is not a demonstrated  
10 problem among the students who were being tested with a --  
11 with a solution that's actually tailored in any reasonable  
12 fashion to meet that problem. Otherwise --

13 QUESTION: Thank you, Mr. Boyd.

14 MS. Meoli, you have 1 minute remaining.

15 MS. MEOLI: Mr. Chief Justice, if there are no  
16 further questions, I'll waive the remainder of my time.

17 CHIEF JUSTICE REHNQUIST: Very well.

18 The case is submitted.

19 (Whereupon, at 11:10 a.m., the case in the  
20 above-entitled matter was submitted.)

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