

NO. 78946-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HANS YORK and KATHERINE YORK, parents of AARON E. YORK
and ABRAHAM P. YORK, and SHARON A. SCHNEIDER and PAUL
A. SCHNEIDER, parents of TRISTAN S. SCHNEIDER,

Appellant,

v.

WAHKIAKUM SCHOOL DISTRICT NO. 200,

Respondent.

APPELLANT'S REPLY TO BRIEF *AMICUS CURIAE* OF THE
STATE OF WASHINGTON

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I. INTRODUCTION

Under article I, section 7, general, suspicionless, exploratory searches are unconstitutional. The Attorney General invites the Court to reverse this well established principle and to drain the state constitution of independent effect by tying article I, section 7 jurisprudence to federal Fourth Amendment jurisprudence and its ever-eroding protections. The Court should decline the Attorney General's invitation.

II. ARGUMENT

A. **This Court's Cases Demonstrate that Article I, Section 7 Provides Broader Protections for Students than the Fourth Amendment**

The Attorney General argues that because the search involved here is outside the context of law enforcement, that article I, section 7, provides no greater protection than that of the Fourth Amendment. As a threshold matter, it is not accurate to say that the school district's searches are unrelated to law enforcement. The school's stated purpose is to detect and deter the use of illegal substances, not lawful ones. There is also no guarantee that the search results would not be used in a later criminal prosecution, should the police seek to subpoena them. Where the school takes for itself the mantle of law enforcer, it is proper for it to be judged by law enforcement standards.

Assuming *arguendo* that the District's search policy is truly not related to law enforcement, the Attorney General's argument cannot be reconciled with this Court's prior cases.

In *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985), the Court examined the search of student luggage by school administrators. No law enforcement personnel were involved. Regardless, the Court concluded that such suspicionless searches were "anathema" to the protections of both the Fourth Amendment and article I, section 7 of the Washington constitution. *Id.* at 674. While the U.S. Supreme Court has arguably retreated from that understanding of the Fourth Amendment (although notably that specific issue has been neither presented nor decided), this Court has never retreated from that established understanding of article I, section 7. In fact, the Court continues to reaffirm the validity of *Kuehn*. See *State v. Surge*, --- Wn.2d ---, --- P.3d ---, 2007 LEXIS 293, ¶¶ 14-15 (April 19, 2007) (C. Johnson, J. (plurality)). Likewise, in *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983), this Court invalidated a policy of suspicionless pat-down searches of every patron attending concerts at the Seattle Center Coliseum. The Court considered the searches particularly offensive to constitutional values that the persons being frisked were juveniles and young adults. *Id.* at 674. Even state law permitting searches of students' belongings

requires at least a reasonable belief that the individual student searched possesses a prohibited item. RCW 28A.600.230, 240(2).

Furthermore, this Court has never retreated from the article 1, section 7, requirement of individualized suspicion under *any* circumstances. *State v. Jordan*, --- Wn.2d ---, --- P.3d ---, 2007 LEXIS 296 ¶ 10 (“Finally, this court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition.”) (citing *In re: Maxfield*, 133 Wn.2d 332, 341, 945 P.2d 196 (1997); *State v. Jackson*, 150 Wn.2d 251, 267 76 P.3d 217 (2003); *Young*, 123 Wn.2d at 186-87; *City of Seattle v. Mesiani*, 110 Wn.2d 454, 455 n. 1, 755 P.2d 775 (1988)); *Id.* at ¶ 15 (“We hesitate to allow a search of a citizen’s private affairs where the government cannot express at least an individualized or particularized suspicion about the search subject or present a valid exception to a warrantless search. A random, suspicionless search is a fishing expedition, and we have indicated displeasure with such practices on many occasions.”).

The Attorney General’s assertion that article I, section 7, provides no more protection than the Fourth Amendment is based on an off-point quotation from *State v. Brooks*, 43 Wn. App. 560, 718 P.2 837 (1986). *Amended Brief of the State of Washington* p.3. As explained in

Appellant's Reply Brief (at pp. 10-11), the statement in *Brooks* that the state constitution "provides students no greater protections from searches by school officials than is guaranteed by the Fourth Amendment" was made at a time when Washington courts understood the Fourth Amendment to prohibit suspicionless searches – a principle established by *Kuehn*. While the U.S. Supreme Court has retreated from this understanding, that retreat can not and should not drag this Court's understanding of article I, section 7, with it.

B. The Voluntary Nature of School Activities Does Not Excuse a Constitutional Violation

The Attorney General makes much of the statement that participation in extracurricular activities is a privilege, not a right. *A.G. Brief* at pp.4, 6-7. That fact does not excuse a constitutional violation. *Kuehn*, 103 Wn.2d at 600 ("the mere announcement that a constitutional right must be waived in order to participate in the school activity cannot make the search reasonable."). Just as athletics in *Wahkiakum* are not a right, participation in band was not a right in *Renton*, yet the Court did not hesitate to reject the argument in *Kuehn* that the voluntary nature of band constituted a waiver to suspicionless searches. Even if there is not a constitutional right to participate in extracurricular athletics, public schools that choose to offer such programs must provide them within

constitutional standards. This includes freedom from invidious discrimination, freedom of speech and religion, and, as here, freedom from intrusions into private affairs into law.

C. The Federal “Special Needs” Test Does Not Apply

The Attorney General relies on *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 847 P.2d 455 (1993) for the argument that Washington has adopted the federal special needs test for warrantless searches. Such is not the case. *Juveniles*, was decided solely on federal Fourth Amendment grounds. *State v. Surge*, --- Wn.2d ---, --- P.3d ---, 2007 LEXIS 293, ¶22 (April 19, 2007) (opinion of C. Johnson, J.). The Court has never adopted a special needs test with respect to article I, section 7, and should not do so now. The Court should stick with the established test: an intrusion into the private affairs of an individual requires individualized or particularized suspicion or a valid exception to a warrantless search. *State v. Jordan*, --- Wn.2d ---, --- P.3d ---, 2007 LEXIS 296, ¶ 15 (April 26, 2007).

In the Court’s divided opinion in *Surge*, some justices noted a perceived disagreement about whether a search outside the standard police search-and-seizure context should be decided under article I, section 7 under a test resembling strict scrutiny or under the traditional approach described above. *See Surge*, at ¶ 42, n.5 (Owens, J., concurring) (noting disagreement). This difference, to the extent it exists, need not be decided

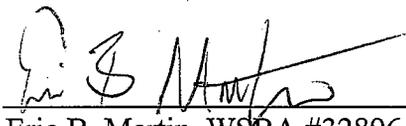
in the present case. Plaintiffs prevail under either standard, since the District's searches are not narrowly tailored to a compelling governmental interest, nor do they fall within a recognized exception to the requirements for individualized suspicion or a warrant.

III. CONCLUSION

The Court should reverse the court below and hold the District's suspicionless drug testing program unconstitutional.

RESPECTFULLY SUBMITTED this 1st day of May, 2007.

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By 
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CERTIFICATE OF SERVICE

I, Eric B. Martin, the undersigned, hereby certify and declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Davis Wright Tremaine LLP. My business and mailing addresses are both 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688.
3. On May 1, 2007, I caused to be served true copies of the following documents titled exactly:

Appellants' Reply to Brief *Amicus Curiae* of the Sate of Washington;

and this subjoined Certificate of Service to be served upon the Court via U.S. Mail, and upon the below-listed addressees in the below-listed manner.

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