

NO. 78946-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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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.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

*For good or ill, government teaches the whole people by its example. If government becomes a law-breaker, it breeds contempt of law. It invites every man to become a law unto himself. It invites anarchy. – Justice Brandeis.<sup>1</sup>*

Washington has long recognized a requirement for individualized suspicion before a warrantless search is permitted, even in the case of school children. This requirement was grounded in both the Fourth Amendment and Article I §7. However, in recent years, the Supreme Court of the United States has retreated from the historical understanding of the Fourth Amendment and has permitted suspicionless searches of students based on the “special needs” of school districts. *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *Earls v. Tecumseh Public School District*, 536 U.S. 822 (2002). This case calls upon the Court to decide whether it will continue to enforce protections stronger than those of the Fourth Amendment or if it will follow the reasoning of the federal cases and open the door to suspicionless searches merely upon a government claim of a “special need.”

In the Fall of 1999, Wahkiakum School District No. 200 adopted and began implementing a policy that compels every student in its High School and Middle School who wishes to participate in extracurricular athletic activities to submit to random testing by urinalysis for the

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<sup>1</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

presence of illegal drugs or alcohol. The policy, which is known as Policy 3515, selects students for testing without regard to whether the District has any basis for suspecting that they have used these substances. It requires every student selected to urinate in a cup under close supervision and to disclose to school officials what prescription and over-the-counter medications they take. The policy bans any student who refuses to submit to suspicionless searches from participating in any extracurricular athletic activity, regardless of the student's prior disciplinary record and regardless of whether there is any reason to believe the student has any involvement with illegal drugs or alcohol.

Article I, §7 of the Washington Constitution forbids the government from “disturb[ing]” any person “in his private affairs . . . without authority of law.” This provision “breaks down into two basic components: the disturbance of a persons ‘private affairs’ . . . triggers the protection of the Section”; the government then must show that its “disturbance or invasion” was authorized by law. *City of Seattle v. McCready*, 123 Wn.2d 260, 270 (1994). The undisputed facts of this case compel the conclusion that Policy 3515 (1) intrudes students’ private affairs and (2) does so without authority of law. However, the trial court recognized a new “special needs” exception to Article I, §7 dispensing of the need for a warrant where “under the circumstances the governments

[sic] needs to discover latent or hidden conditions or to prevent their development and this need is compelling enough to justify the intrusion on protected privacy without a warrant.”

The Washington State Constitution generally requires individualized suspicion prior to a warrantless search. Because the breathtakingly broad “special needs” test utilized by the trial court is not a “well recognized” exception to Article I, §7, and has never been adopted by this court, the Washington constitution protects students from the kind of invasive and demeaning searches of their person that the School District performed in the 1999-2000 school year and may perform again. Therefore, Plaintiffs respectfully request that the Court declare Policy 3515 unconstitutional, reverse the trial court’s grant of summary judgment, and remand for entry of judgment on behalf of the Plaintiffs.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by creating a new “special needs” exception to the protections of Article I, §7 of the Washington Constitution permitting the suspicionless searches of students.
2. The trial court erred by finding that the District met its substantial burden of proving that the suspicionless searches fell within the exception to the warrant requirement of Article I, §7.

### III. FACTUAL STATEMENT

#### A. Background

The School District is a public school district situated in Wahkiakum County, Washington. The School District has one secondary school, Wahkiakum High School, and one intermediate school, Wahkiakum Middle School, both of which are located in the town of Cathlamet. The High School (grades 9 through 12) has approximately 195 students; the Middle School (grades 6 through 8) has approximately 110 students. CP 197.

As in every other school district in Washington, some students in the Wahkiakum School District have experimented with illegal drugs or alcohol. According to an anonymous survey that the School District conducted in 1998, however, students in Wahkiakum have used drugs or alcohol at an overall *lower* rate than have other students in Washington. The School District broke down its responses across eight different controlled substances and four separate grade levels and found that, within those thirty-two subcategories, drug use amongst its students was equal to or lower than the state-wide figures in twenty-three subcategories. CP 234. Even this figure overestimates the relative use by Wahkiakum students because, due to the School District's small size, a positive response from a single student in some categories caused the District's

average to exceed statewide use levels. (Because one twelfth-grader out of a sample size of twenty-four said that he or she had tried heroin, for example, the School District reported a 4.2% rate of heroin usage in comparison to the statewide average of 3.6%. *Id.*) Only three students in the entire School District reported that they “frequently” used drugs or alcohol. The 1998 statistics reflected little change from previous years. CP 211-49.

The District acknowledges that there is “no evidence that student athletes were leaders in [any] ‘drug culture’” in its schools. CP 22-30, ¶1.19. The School District’s forms reporting sports-related injuries suffered by its students during school activities do not attribute any of those injuries to drug or alcohol use. CP 202, 251-94. The School District, in fact, has never given a survey to determine whether those students who participate in extracurricular activities in general or in extracurricular athletics in particular use alcohol or drugs at higher rates than other students do. Nor has it ever attempted to break down an existing survey along these lines.

**B. Adoption of the School District’s Drug Testing Policy**

The School District established an advisory committee called the Drug/Alcohol Advisory Committee (later known as the Safe and Drug Free Schools Advisory Committee) in the 1994-95 school year to study

issues concerning drug and alcohol use in schools. CP 199-201. Under the guidance of the Committee, the School District implemented various educational and support programs to address drug and alcohol use by some students. CP 296-308. The District, in addition to continuing its preexisting “DARE” program, sponsored anti-drug abuse programs entitled “Here’s Looking at You” and “CrossLinks,” staffed a “substance abuse preventionist” in its schools, heightened substance abuse awareness among other staff members, formed “support groups for those students at risk,” and established a liaison system for “at-risk students.” CP 202-204. (The School District has not disclosed which students it considers to be “at risk” students for the purposes of these programs, but no evidence indicates that they are student-athletes.) The Committee believes that these drug prevention efforts have been “successful.” CP 199-201.

During the summer of 1999, the Committee nonetheless recommended that the School Board adopt a random drug testing policy. Rather than drafting its own policy, the Committee submitted for consideration the policy then used by Burlington-Edison High School and advocated adopting it wholesale. The Committee even used the same number that Burlington used, Policy 3515. As originally proposed, the Policy required every student who participated in *any* extracurricular activity, regardless of whether that student played football or French horn,

to submit to random drug testing. On September 20, 1999, without ever notifying all the parents of students in the District that the School Board was considering this drastic new course of action, the School Board followed the Committee's recommendation and adopted Policy 3515. CP 310-17.

Upon learning that the School Board had adopted Policy 3515, Plaintiffs Hans and Katherine York expressed their concerns to Superintendent Bob Garrett. At a School Board meeting on October 18, 1999, several parents attended that meeting and at least four expressed their opposition to the Policy. CP 22-30, ¶1.23 (parents in District do not unanimously support policy). Despite the opposition, the Board voted to retain the policy.

The Board did, however – acting on the advice of its counsel, the Wahkiakum County Prosecutor – amend the policy at that meeting to cover only students participating in extracurricular *athletic* programs. To that end, the Board simply replaced the words “extracurricular activities” with the words “extracurricular athletic activities” throughout the policy. This revision affected not only those parts of the documents that explained the dictates of the policy but also those articulating the Board's alleged “beliefs” and the purposes underlying the policy. So, for example, in the September 1999 version of Policy 3515, the Board stated that students

who participate in all extracurricular activities need to be “ke[pt] ... safe” in their activities and are “role models” for the other students, while a month later the Board stated that only student-athletes need to be “ke[pt] ... safe” and are “role models.” The rest of the policy remained entirely unchanged.

Policy 3515 compels all student athletes – regardless of their disciplinary or academic records, their parents’ wishes, or their history with drugs – to submit to suspicionless drug and alcohol testing, or be denied participation in athletic programs. The Policy states:

Each student wishing to participate in any extracurricular athletic program and the student’s custodial parent or guardian shall consent in writing to drug testing pursuant to the District’s drug and alcohol testing program. . . . No student shall be allowed to participate in any extracurricular athletic program absent such consent.

CP 319. The Policy states that it serves three objectives: (1) to keep extracurricular athletic activities safe for students; (2) to reduce drug and alcohol use among high school and middle school students in the School District by providing student athletes with a reason to say “no” to drugs or alcohol and role models who are drug and alcohol free; and (3) to encourage those student-athletes abusing drugs or alcohol to seek treatment. CP 318.

The School District selects student-athletes for testing pursuant to random drawings. Once selected, the District takes the students to the

Wahkiakum County Health Department and requires them to disclose all “medications currently being taken” by them, which has included such medications as Ritalin, insulin, and acne, weight loss, and allergy medication. CP 342-43, 345-403. In light of this disclosure, the Health Department staff, as well as the School District superintendent, the principals of the High School and Middle School, and staff of the lab who test the urine learn the names of all students who have been tested and what prescription and over-the-counter drugs each of those student takes. CP 342-43, 206.<sup>2</sup>

Students are ordered to produce urine samples in close enough proximity to a Health Department employee that the employee can ensure that the student does not tamper with the sample. “If a student is unable to produce a [urine] sample at any particular time, they may be given up to twenty-four ounces of fluid to drink and directed to remain at the collection site for up to two hours . . . under observation.” CP 325-27. If the student refuses, or is unable without a demonstrable medical reason, to provide a urine sample, “the consequences shall be as if the student had a ‘positive’ result.” *Id.*

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<sup>2</sup> At summary judgment, the District disputed this fact. However, it remains undisputed that a student testing positive must disclose prescription medications that may explain a positive result or face suspension from athletic activities. CP 140-60.

Once the Health Department has obtained a cup of the student's urine, it seals the cup and sends it to Comprehensive Toxicology Services in Tacoma, Washington. CP 339-44. This laboratory examines the contents of the urine for the presence of methamphetamine, barbiturates, benzodiazepines, cocaine, ethanol (the alcohol contained in intoxicating beverages), opiates, and THC cannabinoids (the chemical agent in marijuana). *Id.* Upon the direction of the School District superintendent, the lab will also test for steroids. CP 402. The lab reports the results of its examinations to the Health Department, and the School District superintendent "or to such person as the superintendent may designate." CP 326-30.

If a student's drug and alcohol test comes back negative, the School District takes no action. If a test finds the presence of drugs, the School District first suspends the student from extracurricular athletic activities for the longer of thirty calendar days or the remainder of the season. A second such positive results since the seventh grade results in suspension for one calendar year. A third such positive result leads to permanent ineligibility for extracurricular athletics. CP 328-29.

The consequences are less severe if a student tests positive for alcohol use. After the first such positive test, the School District will suspend the student from all extracurricular athletic activities for either

fourteen days (if the student submits to a parent conference and drug and alcohol assessment and counseling) or twenty-eight days (if the student declines to submit to such procedures). After a second positive result during the school year, the suspension increases to twenty-one days or forty-five days. A third positive result leads to a forty-five day suspension. If a student agrees to undergo counseling to reduce the suspension period, the student or her family must pay all costs associated with such counseling. CP 328-29.

Policy 3515 expressly reserves the right of the School District to turn over the results of the urinalysis to law enforcement officials upon “legal compulsion.” CP 328-30.

### **C. Implementation and Enforcement of Policy 3515**

The School District began implementing and enforcing Policy 3515 as soon as it was adopted. Every student who was participating in extracurricular athletics was therefore required in the Fall of 1999 to sign, and have one of his or her parents sign, a form submitting to random drug testing. This requirement forced students who had been training on Wahkiakum’s various teams for weeks or even months to sign the “authorization forms” or quit the team. Seven parents, including Plaintiff Sharon Schneider, signed the forms under protest, and wrote that they objected to the policy. CP 407-15. The School District operated and

enforced Policy 3515 for the remainder of the 1999-2000 school year.

During that time there were only three positive drug tests.

The evidence demonstrates that Policy 3515 failed to reduce student drug or alcohol use. In a School District survey conducted after the adoption of the initial policy, 46.2% of the students who identified themselves as past users of drugs or alcohol said that they *will not change* their level of use as a result of the Policy, and 26.9% said that the testing policy would cause them to *increase* their use; only 26.9% said that the testing will encourage them to reduce (but not stop) their use. CP 133-36. The same number of students were cited for drug or alcohol violations by the School District after the implementation of Policy 3515 as were cited before the policy's implementation. CP 197-98.

These results accord with the conclusion of the American Academy of Pediatrics. That Academy has stated that it is opposed to suspicionless drug testing in schools because it stigmatizes the group selected for testing and "is not likely to detect most drug users." CP 415-22. As explained in the declaration of Plaintiff's expert Nicholas Zill, requiring suspicionless drug testing as a condition for participating in extracurricular activities is actually counterproductive. CP 422-25, ¶ 7. Several national surveys show that students who are involved in extracurricular activities are less likely to abuse drugs than students who

do not volunteer for those activities. *Id.*, ¶ 4-6. Policies that erect barriers to participation in extracurricular activities (such as the invasion of privacy and presumption of guilt that comes with suspicionless drug testing) will drive students away from the positive, fulfilling after-school experiences that provide better alternatives to recreational drug use. Removing a student who abuses drugs from a school athletic team is the worst approach. *Id.*, ¶ 8-9.

#### **D. Procedural History**

Plaintiff Hans York is a deputy sheriff for the Wahkiakum County Sheriff's Office. Plaintiff Paul Schneider is a medical doctor. The Yorks and Schneiders oppose the illegal abuse of drugs and alcohol, but they highly object to the District's testing policy as a method for dealing with that abuse because it is an ineffective and unconstitutional expenditure of state funds, because it intrudes on the constitutional rights of their children, and because it intrudes on their rights as parents to forge their relationships with their children. From Deputy Sheriff York's professional training and work experiences with substance abusers in the county, he knows that student athletes are no more likely to have drug or alcohol problems than other students, and that there are less offensive yet still practicable ways for the District to identify students under the influence.

Plaintiffs filed suit in this Court on December 17, 1999, alleging that Policy 3515 violates Article I, §7 of the Washington Constitution and the Fourth Amendment of the U. S. Constitution. In light of the later-decided case of *Earls v. Tecumseh Public School District*, 536 U.S. 822 (2002), Plaintiffs dropped their Fourth Amendment claims.

Plaintiffs sought a preliminary injunction against further enforcement of Policy 3515. On September 11, 2000, Judge Penoyar issued a memorandum opinion stating that the School District intruded upon students' private affairs by learning the results of their drug tests. He further held that one of the reasons for the Policy – the School District's desire to deter students from using drugs or alcohol – “violates the students' privacy rights” under Article I, §7 of the Washington Constitution. However, Judge Penoyar declined to impose a broad preliminary injunction, instead entering an order modifying the policy to require that results of drug tests be sent to the Court which would then forward the results to the students' doctors to decide what action to take “based on his or her professional opinion.” That decision was accepted for discretionary review in the Court of Appeals. While on appeal, the School District voluntarily suspended all testing pending resolution of this case, so the Court of Appeals held that the interlocutory appeal was moot. 110 Wn.App. 383, 385, 40 P.3d 1198 (2002). Following additional

discovery, the parties brought cross motions for summary judgment. The trial court, Judge Goelz, *Pro Tem*, presiding, granted the District's motion and denied the Plaintiff's motion.

The trial court correctly held that Policy 3515 authorizes warrantless searches of students who are not suspected of any wrongdoing. CP 480-99. The trial court also properly held that Article I, §7 of the Washington Constitution provides greater protection of individual rights than the Fourth Amendment of the U. S. Constitution, and that the District has the burden of proving that the policy is constitutional. CP 480-99.

However, the trial court went on to hold that the only relevant exception to the Article I, §7 requirements of individual suspicion and a valid warrant is “ the ‘special needs’ exception recognized under the Fourth Amendment by the U. S. Supreme Court in *Board of Education v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) and *Vernonia [Sch. Dist. v. Acton]*, 515 U.S. 646 (1995).” CP 480-99. In doing so, the trial court distinguished between the “special needs” of school authorities to act quickly in a school environment recognized in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), which authorized warrantless searches based on individualized suspicion (a circumstance not present here), and the “special needs” recognized in *Earls* and *Vernonia*,

permitting suspicionless searches. Without citation or analysis, the trial court held that the “special needs” exception recognized by *Earls* and *Vernonia* was

not a creature born exclusively of school environments. Rather the conditions existing in any environment can justify a finding of ‘special needs’ where under the circumstances the governments [sic] needs to discover latent or hidden conditions or to prevent their development and this need is compelling enough to justify the intrusion on protected privacy without a warrant.

CP 480-99.

Applying this breathtakingly broad new exception to the protections of Article I, §7, the trial court held that the right privacy of one’s urine is entitled to greater protection under the state constitution than the federal constitution, and the District’s intrusion into that right was “troubling” and “approach[es] the tolerance limit” of the constitution. *Id.* Nonetheless, the trial court held that the “need to discover student use of illegal drugs and prevent its impact on the Wahkiakum Schools is sufficient justification to allow the District to compromise individual privacy rights.” *Id.* The trial court further found that the plan was narrowly tailored to address that interest because the testing was random, limited to athletes, and not done for law enforcement purposes. *Id.*

Plaintiffs timely filed this appeal following the trial court’s decision.

#### **IV. ARGUMENT**

There is no basis in Washington law for the adoption of the “special needs” test used by the trial court. Unlike the federal courts, Washington courts hold the line of personal rights by maintaining the established privacy rights citizens enjoy under Article I, §7. Even if this Court were to adopt a new exception to the requirement of individual suspicion, there is no basis for adopting a rule as breathtakingly broad as that adopted by the trial court. Finally, the evidence submitted by the District failed to demonstrate either a compelling governmental interest in the drug testing program, or that the program was narrowly tailored.

##### **A. The Special Needs Exception Created by the Trial Court Is Inconsistent with Washington Law**

Article I, §7 of the Washington constitution provides broader protection than the Fourth Amendment of the U. S. Constitution. The District’s test does not fall within any previously recognized exception to that broad protection. The new exception created by the trial court cannot be reconciled with well-established protections already recognized in Washington law, and should not be adopted by the Court.

##### **1. Article I, §7 Provides Protections Broader than those Provided by the Fourth Amendment**

Article I, §7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded,

without authority of law.” Article I, §7 is explicitly broader than that of the Fourth Amendment as it “clearly recognizes an individual’s right to privacy with no express limitations.” *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Furthermore, “while the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, article I, section 7, holds the line by pegging the constitutional standard to ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant.’” *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.3d 833 (1999) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)); accord, *State v. White*, 135 Wn.2d 761, 767-68 (1998). The meaning of Art. I, § 7 does not become weaker “where the United States Supreme Court determines to further limit federal guarantees in a manner inconsistent with [the Washington Supreme Court’s] prior pronouncements. *State v. Jackson*, 102 Wn.2d 432, 439 (1984). It thus is “well established that Article I, §7 of [the Washington] Constitution provides to individuals broader protection against search and seizure than does the Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486, 493 n.2 (1999); Robert F. Utter & Hugh D. Spitzer, *Washington Constitution and Commentary*, 20-22 (2002) (“Article I, Section 7 is the provision that has produced the greatest divergence between the Washington Supreme Court

and the U.S. Supreme Court.).<sup>3</sup> In fact, all six factors enunciated in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), support the conclusion that the Washington Constitution offers heightened protection of the students' privacy rights in this case. The Washington Supreme Court has held that the first, second, third, and fifth *Gunwall* factors support independent analysis of Article I, §7 claims and that those factors need not be addressed in subsequent cases arising under that provision. *See, e.g., id.* at 65-67; *Johnson*, 128 Wn.2d at 445. It is the fourth factor, pre-existing state law, and the sixth factor – matters of particular state interest,

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<sup>3</sup> This Court “often” reaches results under the Washington Constitution that are more protective of individual privacy interests than the United States Supreme Court reaches under the Fourth Amendment, *White*, 135 Wn.2d at 768, and has consistently refused to dilute Article I, §7 protections “where the United States Supreme Court determines to further limit federal guarantees in a manner inconsistent with this Court’s prior pronouncements.” *State v. Jackson*, 102 Wn.2d 432, 439 (1984). For a sample of such decisions, see *Parker*, 139 Wn.2d 486, 492 n.1 (1999) (rejecting holding of *Wyoming v. Houghton*, 526 U.S. 295 (1999), that police may search belongings of passenger of a car without individualized suspicion); *State v. Ladson*, 138 Wn.2d 343 (1999) (rejecting holding of *Whren v. United States*, 517 U.S. 806 (1997), that police may conduct warrantless “pretextual” traffic stops so long as they have an objectively legal basis for stopping individual); *Seattle v. Mesiani*, 110 Wn.2d 454, 455-58 (1988) (rejecting the eventual holding of *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990), that permitted fixed sobriety checkpoints that randomly search motorists without individualized suspicion); *Myrick*, 102 Wn.2d 506 (1984) (rejecting the holding of *Oliver v. United States*, 466 U.S. 170 (1984), that the “open fields” doctrine permits police to conduct warrantless searches on private property); *State v. Jackson*, 102 Wn.2d 432 (1984) (rejecting the holding of *Illinois v. Gates*, 462 U.S. 213 (1983), that informants’ tips need not satisfy specific reliability tests to supply probable cause for a search warrant); *State v. Ringer*, 100 Wn.2d 686 (1983) (rejecting two U.S. Supreme Court decisions that expanded the Fourth Amendment’s search-incident-to-arrest exception to the need for search warrants); *State v. Simpson*, 95 Wn.2d 170 (1980) (rejecting the holding of *United States v. Salvucci*, 448 U.S. 83 (1980), that limited the class of persons who have standing to raise Fourth Amendment invasion-of-privacy arguments).

that tend to be unique to the context in which the issue arises and which should therefore be examined in each case. *Id.* at 455.

The fourth factor – preexisting state law – supports heightened protection here, both for the protection of private bodily functions, and for the protection of students from suspicionless searches.

“Preexisting state law reflects a consistent protection of privacy of the body and bodily functions.” *Robinson v. City of Seattle*, 102 Wn. App. 795, 811, 10 P.3d 452 (2000). As recognized by the *Robinson* court, that historical privacy protection goes beyond the fact that warrantless and otherwise arbitrary searches and seizures were explicitly prohibited in the Washington Territory. *Id.* at 810. The *Robinson* court recognized that “consistent protection of privacy” in the freedom to refuse electroshock therapy, *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200 (1991), the freedom from HIV testing without consent, with few exceptions RCW 70.24.330, the doctor-patient privileged nature of urinalysis tests, *State v. Rochelle*, 11 Wn.App. 887, 892, 527 P.2d 87 (1974), and the subjective and objective privacy of a bathroom stall, *State v. Berber*, 48 Wn.App. 583, 589, 740 P.2d 863 (1987), *City of Tukwila v. Nalder*, 53 Wn.App. 746, 749-52, 770 P.2d 670 (1989).

Washington courts also have a long history of protecting citizens, including students, against suspicionless searches for drugs and alcohol.

*Kuehn* examined a school district policy to search all students' luggage for alcohol before a field trip. Recognizing that "we *never* authorize general, exploratory searches," *id.* at 599 (quoting *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975) (emphasis added)), the court concluded that the general search of student luggage was "anathema" to Art. I, § 7 protections, *id.* at 602. *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983), invalidated a policy to conduct suspicionless pat-down searches of every patron attending concerts at the Seattle Center Coliseum. The Court considered it particularly offensive to constitutional values that the persons being frisked were juveniles and young adults. *Id.* at 674. This historical solicitude for privacy is also reflected in state statutes. For example, RCW 28A.600.230 & .240(2) prohibit school officials from subjecting students to strip or body cavity searches, and permit such officials to search students' belongings only upon a *reasonable belief* that the individual student searched possesses a prohibited item. RCW 28A.605.030 closely controls access to student records, and this privacy protection is also echoed in the Public Disclosure Act's exemption allowing schools to maintain the privacy of those records, RCW 42.17.310(1)(a).

The privacy protections afforded in Washington law to bodily functions and the history of this state's prohibition of suspicionless searches support an independent analysis of Article I, §7.

The sixth *Gunwall* factor – whether the matter is of particular state interest or local concern, or if instead there appears to be a need for national uniformity – favors independent analysis as well. “[P]rivacy interests are matters of particular state interest and local concern.” *Johnson*, 128 Wn.2d at 445. Furthermore few matters are of more intense local interest than education and the rights of students and student-athletes. See *Bennett v. New Jersey*, 470 U.S. 632, 634 (1985) (emphasizing the “deeply rooted tradition of state and local control over education”). Unlike the federal constitution, which makes no reference to education, the Washington constitution declares “it is the paramount duty of the state to make ample provision for the education of children residing within its borders.” Art. IX, § 1. As education is a local matter, so too are extracurricular athletics. See RCW 28A.600.200 (delegating to Washington Interscholastic Activities Association the authority to “extensively regulate[]” student athletics). Other states have recognized the importance of examining school drug testing programs under their independent state constitutions. See, e.g., *Joye v. Hunterdon Central*

*School District*, 176 N.J. 568, 826 A.2d 624 (2003); accord, *Loder v. City of Glendale*, 14 Cal.4<sup>th</sup> 846, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (1997).

Given the long history of unequivocal decisions handed down by Washington courts, there can be no doubt that the protections of Article I, §7 must be analyzed separately from the Fourth Amendment when it comes to the privacy rights of public school students. The Court should not accept the retreat from previously expressed rights set forth in the *Vernonia* and *Earls* decisions based on a Fourth Amendment analysis. Instead, the Court should apply a rigorous independent analysis based on Article I, §7.

**2. The District's Plan Does Not Fit Within Any Previously Recognized Exception to Article I, §7**

Article I, Section 7 of the Washington Constitution forbids the government from “disturb[ing]” any person “in his private affairs . . . without authority of law.” This provision “breaks down into two basic components”: (a) whether the government’s action constitutes a “disturbance of a person’s ‘private affairs’ [thereby] trigger[ing] the protection of the Section”; and (b) whether the government has shown that its “disturbance or invasion” was authorized by law. *City of Seattle v. McCready*, 123 Wn.2d 260, 270, 868 P.2d 134 (1994). The undisputed facts of this case compel the conclusion that drug and alcohol tests

conducted pursuant to Policy 3515 (a) intrude into students' private affairs; and (b) do so without authority of law.

**a. Conducting mandatory urinalysis disturbs students' "private affairs."**

The trial court correctly held that there is a right to privacy in the content of an individual's urine. CP 480-99. Indeed, it is practically beyond dispute that governmental actors disturb individuals' "private affairs," by the entire process of mandatory urinalysis. *Robinson* at 818 ("It is difficult to imagine an affair more private than the passing of urine."). The Washington Supreme Court has recognized that "an individual has a reasonable expectation of privacy in respect to those bodily functions which take place in a bathroom stall." *State v. White*, 129 Wn.2d 105, 111, 915 P.2d 1089 (1996). The compulsory collection and testing of urine – as well as the revelation of the test results – forces individuals to "submit to a humiliating procedure" that invades "fundamental" privacy interests of Washington citizens. *Robinson*, 102 Wn. App. at 822; *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989) (collection and testing of urine intrudes upon "an excretory function traditionally shielded by great privacy"); *National Treasury Employees Union v. Van Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (state officials' collection and testing of persons'

urine is “particularly destructive of privacy and offensive to personal dignity”).

Here, in order to comply with Policy 3515, students must urinate in the presence of Wahkiakum County Health Department employees and must permit the designated laboratory to explore the contents of their urine. Policy 3515 also compels students to reveal additional private information: students must inform the School of all medications they are taking at the time of the tests, or upon a positive result in order to avoid the penalty of suspension from athletic activities. This private medical information and the chemical information contained in each student’s bodily fluids are traditional “privacy interests Washington citizens held in the past and are entitled to hold in the future.” *White*, 135 Wn.2d at 768; *accord Myrick*, 102 Wn.2d at 511.

Even if Washington courts had not already made it clear that the entire process of compulsory urinalysis disturbs individuals’ private affairs under state constitutional law, it would still be beyond dispute that all such state action triggers the protections of Article I, §7. It is well settled that an individual’s “private affairs” are “disturbed” under Article I, §7 whenever the government conducts a “search” under the Fourth Amendment. *See, e.g., Parker*, 139 Wn.2d at 493-94; *Robinson*, 102 Wn. App. at 819 (“The [privacy] protections of Article I, Section 7 are never

less than those of the Fourth Amendment.”). And the United States Supreme Court has repeatedly held that the “taking and testing of the urine” pursuant to a government-mandated urinalysis – as well as “the reporting of the results” – constitute “searches” under the Fourth Amendment. *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1287 n.9 (2001); *accord id.* at 1296 n.1 (Scalia, J., dissenting). Article I, §7, therefore, necessarily protects these privacy interests – and thus demands that the School District demonstrate (as with any other search) that it is acting under the authority of law.

The trial court rejected the District’s argument that the mandatory urine testing scheme proposed by the District was not a “search.” That holding has not been challenged on appeal. This Court should likewise find any urinalysis mandated by the government invades the privacy of the test subject and is a search for Article I, §7 purposes.

**b. The School District lacks “authority of law” to implement Policy 3515.**

Searches conducted without prior approval by a judge or magistrate are *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The School District’s invasions of students’ private affairs under Policy 3515 are done without the requisite “authority

of law,” as required by Article I, §7. In recent years, this Court has clarified exactly how Article I, §7 provides greater privacy protection than the Fourth Amendment, making it plain that there are only two ways in which governmental actors may satisfy the “authority of law” requirement of Article I, 7: (1) obtain a valid search warrant or (2) act pursuant to an exception to the warrant requirement that comports with “well-established principles of common law.” *McCready*, 123 Wn.2d at 273; *accord State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996); *Robinson*, 102 Wn. App. at 813 & n.52 (“To pass constitutional muster, the City’s warrantless drug testing program must fall within a common law exception.”). It is undisputed that Policy 3515 mandates warrantless searches, so the constitutionality of the Policy stands or falls on whether it is justified by an exception to the warrant requirement that was well established at common law.

The “exceptions to the warrant requirement” under Article I, Section 7 are quite “narrow.” *State v. Ladson*, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999); *see also Hendrickson*, 129 Wn.2d at 72 (“The exceptions to the requirement of a warrant . . . are jealously and carefully drawn.”) (internal quotation marks and citations omitted). In addition, “[t]he burden is always on the State to prove” that its purpose for the search at issue falls within an exception to the warrant requirement.

*Ladson*, 138 Wn.2d at 350; *see also Parker*, 139 Wn.2d at 496 (“[T]he government . . . bears a heavy burden to prove the warrantless searches fall within the exception it argues for.”). The traditional exceptions are consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry stops. *Ladson*, 138 Wn.2d at 349; *accord*, Johnson, Justice Charles W., *Survey of Washington Search and Seizure Law: 2005 Update*, 28 Seattle U.L. Rev. 479, (Spring 2005).

None of the traditional exceptions apply here, and neither the District, nor the trial court claimed otherwise. Instead, the District invited the trial court to adopt a new special needs test akin to the Fourth Amendment special needs test described in *Vernonia* and *Earls* – an invitation accepted, and expanded upon, by the trial court. The trial court’s new exception cannot be reconciled with well-established constitutional principles.

### **3. The New Exception Created by the Trial Court Can Not Be Reconciled with Well-Established Washington Law**

The common law has always required that governmental officials have some level of individualized suspicion before searching persons for drugs or alcohol. Although an exception to the warrant requirement exists that allows public school officials to search a student for drugs if they have a “reasonable belief” that the student actually possesses a controlled

substance, *State v. McKinnon*, 88 Wn.2d 75, 82, 558 P.2d 781 (1977), this Court in *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985), squarely refused to extend this exception to cover *suspicionless* searches for drugs or alcohol. In *Kuehn*, in response to catching some students with alcohol on a field trip, the Renton School District instituted a policy requiring every student wishing to participate in any such trip to submit to a pre-departure search of his or her luggage.

This Court invalidated this policy, expressly holding that:

The validity of searches of schoolchildren by school officials is judged by the reasonable belief standard. The reasonable belief standard requires that there be a reasonable belief on the part of the searching school official that the ***individual student searched*** possesses a prohibited item. When school officials search large groups of students solely for the purpose of deterring disruptive conduct ***and without any suspicion of each individual student searched***, the search does not meet the reasonable belief standard. . . . In the absence of individualized suspicion of wrongdoing, the search is a general search. “[*W*]e never ***authorize general, exploratory searches.***” *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975).

*Kuehn*, 103 Wn.2d at 595, 599 (emphasis added).

As the Court suggested in the final excerpted sentence, *Kuehn* is not an isolated decision. In a long line of cases – both before and after *Kuehn* – the Washington Supreme Court has steadfastly adhered to the rule that governmental actors may not, under Article I, §7, search persons for drugs or alcohol without having a particularized belief that each individual searched possesses illegal substances. *See Parker*, 139 Wn.2d

at 496-98 (police may not search belongings of passenger of a car without individualized suspicion that the passenger possesses a prohibited item); *Mesiani*, 110 Wn.2d at 455-58 (fixed sobriety checkpoints that randomly search motorists without individualized suspicion violate Article I, Section 7); *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983) (invalidating policy of conducting suspicionless searches of patrons at rock concerts); *Helmka*, 86 Wn.2d at 93 (holding that general searches for drugs are unconstitutional). The Washington Court of Appeals has followed a similar course. *See, e.g., State v. B.A.S.*, 103 Wn. App. 549, 553, 13 P.3d 244 (2000) (school’s policy of searching all students who were on its parking lot without a valid excuse violated Article I, §7 because school officials lacked “reasonable grounds for suspecting that the search [would] turn up evidence that the student has violated or is violating either the law or the rules of the school”); *Robinson*, (rejecting drug testing for applicants for city employment).

The requirement of individualized suspicion is further bolstered by the well-established principle that constitutional protections are possessed individually. The District’s plan permits testing of students who are not suspected of wrongdoing merely because some students with whom they associate may be involved in illegal drugs. In fact, the connection between teammates is even further attenuated than the connection between

passengers riding in an automobile when the driver is arrested. Yet this Court has unequivocally rejected an argument that such passengers are subject to search absent individualized suspicion of wrongdoing. *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). This Court has specifically recognized that “[r]egardless of the setting ... constitutional protections [are] possessed individually.” *State v. Broadnax*, 98 Wn.2d 289, 296, 654 P.2d 96 (1982). Thus “merely associating with a person suspected of criminal activity ‘does not strip away’ individual constitutional protections.” *Parker*, at 498 (quoting *Broadnax* at 296). Thus when the government has no articulable suspicion that an individual has violated the law, a search of that person is invalid under Article I, §7. *Id.* Here the District’s plan permits searches of students merely because they are on an athletic team with some individuals who may use illegal drugs.

This Court should follow the established and consistent line of authority here. Laudable as the District’s goal of deterrence may be, that purpose does not justify scuttling the common law’s requirement of individualized suspicion for invading students’ private affairs. *See Kuehn*, 103 Wn.2d at 595. The School District may no more force its student-athletes to submit to searches of their urine than it could demand that they acquiesce to pre-game searches of the vehicles in which they rode to arrive at the game.

**B. The Test Devised by the Trial Court is Overbroad and Unworkable**

Rather than relying on an existing exception to the protections of Article I, §7, the trial court created a new exception, based on the federal “special needs” test. However, the trial court expanded the test beyond the special needs of the educational environment, and in doing so created a test so broad as to completely abrogate Article I, §7.

The trial court described its “special needs” test thusly:

[T]he conditions existing in any environment can justify a finding of “special needs” where under the circumstances the governments [sic] needs to discover latent or hidden conditions or to prevent their development and this need is compelling enough to justify the intrusion on protected privacy without a warrant.

CP 480-99. In that single sentence, the trial court swept aside this Court’s Article I, §7 jurisprudence and replaced it with a standard so broad as to practically eliminate the constitutional protections of that provision.

First, every search necessarily involves “latent or hidden conditions.” If a condition is not hidden, it is in plain view and is therefore not subject to constitutional protection. The trial court’s standard goes even further, allowing a government search if conditions exist that might develop into latent or hidden conditions the government needs to know about. This standard is so broad that it threatens to subsume the constitutional protections of Article I, §7, and cannot be

reconciled with the requirement for a warrant is cases such as *Mesiani* or *Jacobsen*, which involved “hidden” alcohol consumption, or indeed any case requiring a warrant.

Second, under the trial court’s standard, there would never be a reason to obtain a warrant so long as the government could articulate a reason “compelling enough” to justify a search. After all, if suspected student drug use is “compelling enough” despite no evidence of actual injury caused by such use, *Mesiani* would have been decided differently regarding DUI checkpoints, in light of the evidence showing 658 traffic deaths in Washington during the year, “357 or 54.3 percent [of which] involved a driver under the influence of alcohol” and that “[f]or the same period, drivers under the influence of alcohol were involved in 13,030 investigated accidents ... 6,908 [of which] involved injury.” *City of Seattle v. Mesiani*, 110 Wn.2d 454, 462-63, 755 P.2d 775 (1988) (Dolliver, J., concurring). In fact, because the trial court held that there was a “need to know” about student drug use, the trial court’s rule would seem to permit searching of any student’s home or car without individual suspicion and without a warrant. Indeed, nothing in the trial court’s opinion limits suspicionless searches to athletes, or even to extra-curricular activities. This broad license to search cannot be reconciled with this Court’s constitutional jurisprudence.

**C. The District Failed to Present Evidence Sufficient to Justify Any Exception to the Protections of Article I, §7**

Even if the Court accepts the breathtakingly broad exception to Article I, §7 crafted by the trial court, or crafts some other new exception to Article I, §7 (which it should not), the District still had a heavy burden to show that the policy served a compelling governmental interest and was narrowly tailored to serve that interest. *State v. Farmer*, 116 Wn.2d 414, 429-30, 805 P.2d 200, 812 P.2d 858 (1991); *Robinson*, 102 Wn.App. at 816-17. This the District failed to do. The District offered two justifications for its warrantless and suspicionless searches under Policy 3515: (1) deterring drug use among public school students; and (2) “protecting the safety of student participants in interscholastic athletics.” The District failed to prove that either of these purposes were compelling enough to warrant abrogation of constitutional protections, or that the District’s plan was narrowly tailored to serve these purposes.

**1. The Reason the District Implemented the Policy Is Not a Compelling Government Interest**

The United States Supreme Court made it clear that when “suspicionless intrusions pursuant to a general [governmental] scheme are at issue,” “the primary purpose of the . . . program” determines its constitutionality. *City of Indianapolis v. Edmond*, 121 S. Ct. 447, 457-58 (2000); *accord Ferguson*, 121 S. Ct. at 1290. “[S]econdary purposes,”

even if lawful, are irrelevant. *Edmond*, 121 S. Ct. at 457. The Washington Constitution is even more demanding than its federal counterpart in “forbid[ing] use of pretext as justification for a warrantless search or seizure [and] requir[ing] [courts to] look beyond the formal justification for the [search] to the actual one.” *Ladson*, 138 Wn.2d at 353; accord *State v. Angelos*, 86 Wn. App. 253, 256, 936 P.2d 52 (1997) (government must show that it was “actually motivated” by the exception to the warrant rule that it advances). Article I, §7 thus permits searches of public school students only if school officials’ “primary purpose” for conducting those searches is a valid one.

The record demonstrates that the District’s primary purpose in adopting the Policy was to deter drug use, not to protect student safety. Policy 3515 initially applied to students in *all* extracurricular activities, including those such as the Honor Society and the chess club that pose no safety risk at all. It was only when faced with a legal challenge that the District trimmed the Policy back to extracurricular athletics because it believed that student-athletes have a reduced expectation of privacy and, therefore, that the revised policy would be more likely to survive judicial scrutiny. Safety considerations played no part in this decision. In any event student safety is not a legally sufficient basis for conducting

suspicionless searches for drugs or alcohol. *Cf. State v. Farmer*, 116 Wn.2d 414, 430, 805 P.2d 200 (1991); *Kuehn*.

Furthermore, while the School District cites to studies and statistics regarding the number of its students who use drugs or alcohol, the District is not aware of a single accident or injury that has occurred to its student-athletes due to such use. Nor has the District produced any credible evidence suggesting that any of the individuals who created and adopted the policy were motivated by safety considerations. If they were, one would have expected the Policy to apply to all students who participate in physical education classes, because far more athletic injuries have occurred there than in extracurricular athletic events over the past five years.

The circumstances surrounding the adoption of Policy 3515, in short, give every reason to believe that the Policy's "primary purpose" is that stated in the School District's statement accompanying its enactment: to deter drug use by "send[ing] the strongest message possible to students and the community that illicit drug use is not acceptable and will not be tolerated." The policy also attempts to ensure that potential "role models" are drug-free. These purposes do not meet the District's burden of showing that their policy falls within a recognized exception to the Article I, §7 individualized suspicion requirement. In addition, a state has

no more power to impose involuntary drug tests on “role models” than on anyone else. *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (invalidating Georgia statute that required drug tests for elected officials). This principle was perhaps best expressed by Justice Scalia:

“[T]he impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.”

*Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (Scalia, J., dissenting).

Simply preventing drug use, while commendable, is not so compelling as to permit setting aside constitutional protections. Because the District failed to demonstrate a compelling interest in the purpose of Policy 3515, the trial court erred in granting it summary judgment.

## **2. The District’s Plan Is Not Narrowly Tailored**

Narrow tailoring requires at a minimum that a program be *necessary* for government to achieve its proffered interest and actually advance that interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-11 (1989) (plurality); *id.* at 519 (Kennedy, J., concurring). The record shows that the District’s policy is not necessary for the District to accomplish its proffered goals and does next to nothing to advance them.

First, there is nothing in the record to demonstrate that the policy would have any affect on the use of drugs by students in Wahkiakum

schools. A classification that does not actually further the ends of government is not narrowly tailored. *See, e.g., Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). Second, there is nothing in the record demonstrating that the District considered any alternatives to the abrogation of constitutional rights. At a minimum, the District could have reserved urine testing to those students who showed physical manifestations of drug use.

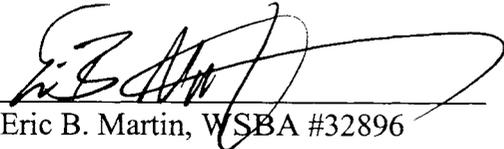
Because the District failed to present evidence that the policy is narrowly tailored to achieve a substantial governmental goal, even if this court were to recognize a new exception to the protections of Article I, §7, the Court should nonetheless reverse the grant of summary judgment.

## V. CONCLUSION

The court below created a new exception to the protections of Article I, §7, that does not comport with this Court's jurisprudence and for which there is no reasonable basis. The Court should reject this new creation, reverse the trial court, and hold Policy 3515 unconstitutional.

RESPECTFULLY SUBMITTED this 18th day of September,  
2006.

Davis Wright Tremaine LLP  
Attorneys for Plaintiff/Appellants

By   
Eric B. Martin, WSBA #32896

CERTIFICATE OF SERVICE

I, Christy Blanchard, 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 September 18, 2006, I caused to be served true copies of the following documents titled exactly:

Appellants' Brief; and this subjoined Certificate of Service to be served upon the below-listed addressees in the below-listed manner.

<b>(Attorney for School Defendants)</b> Fred A. Johnson Prosecuting Attorney Michael J. Sullivan P.O. Box 397 64 Main Street Cathlamet, WA 98612	X	U.S. Mail Messenger Overnight Mail Facsimile (using fax # below)
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