

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 BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
II. Facts	2
III. Argument	3
A. Article I, § 7 Provides Protection Broader than the Fourth Amendment.....	4
1. The Suspicionless Testing of Urine is an Invasion of a Student’s Private Affairs	5
2. Pre-Existing State Law Supports an Independent Analysis and Stronger Protection of Privacy Rights Pursuant to Article I, § 7.....	5
3. The Local Concern Factor Also Favors Independent Analysis and Stronger Protection of Privacy Rights Pursuant to Article I, § 7.	7
B. Washington Law Does Not Support the District’s Proposed “Special Needs” Exception to Article I, § 7	9
C. The District Fails to Articulate a Compelling Reason for the Court to Create a New Exception to Article I, § 7.....	13
D. The District’s Policy Does Not Even Meet the <i>Vernonia</i> Special Needs Test.....	17
1. There is Not a “Drug Crisis” in Wahkiakum Schools.	18
2. Policy 3515 is Not Targeted to the Leaders of Any Drug Culture.....	22
3. Policy 3515 Compels Students to Disclose to School Officials What Prescription Medications They Take.....	24
IV. Conclusion	25

TABLE OF AUTHORITIES

	<u>Page</u>
<i>B.C. v. Plumas Unified Sch. Dist.</i> , 192 F.3d 1260 (9 th Cir. 1999)	19
<i>Camer v. Seattle School District</i> , 52 Wn.App. 531, 762 P.2d 356 (1988)	8
<i>Hodgkins v. Goldsmith</i> , 2000 WL 892964 (S.D. Ind. 2000)	21
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154 (1997)	11
<i>Jacobsen v. City of Seattle</i> , 98 Wn.2d 668, 658 P.2d 653 (1983)	6, 14
<i>In re Juveniles A, B, C, D, & E</i> , 121 Wn.2d 80, 847 P.2d 455 (1993)	1, 13
<i>Kuehn v. Renton Sch. Dist. No. 403</i> , 103 Wn.2d 594, 694 P.2d 1078 (1985)	2, 6
<i>McNabb v. Department of Corrections</i> , 127 Wn.App. 854, 112 P.3d 592 (2005)	1
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	11
<i>Robinson v. City of Seattle</i> , 102 Wn. App. 795, 10 P.3d 452 (2000)	<i>passim</i>
<i>Seattle v. Mesiani</i> , 110 Wn.2d 454 (1988)	7, 14
<i>State v. B.A.S.</i> , 103 Wn. App. 549, 13 P.3d 244 (2000)	12
<i>State v. Berber</i> , 48 Wn.App. 583, 740 P.2d 863 (1987);	6
<i>State v. Brooks</i> , 43 Wn. App. 560 (1990)	10
<i>State v. Helmka</i> , 86 Wn.2d 91, 542 P.2d 115 (1975)	6, 14

<i>State v. Johnson</i> , 128 Wn.2d 431, 447, 909 P.2d 293 (1996)	8
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.3d 833 (1999)	4
<i>State v. Myrick</i> , 102 Wn.2d 506, 688 P.2d 151 (1984)	4
<i>State v. Parker</i> , 139 Wn.2d 486, 493 (1999)	<i>passim</i>
<i>State v. Rochelle</i> , 11 Wn.App. 887, 527 P.2d 87 (1974)	6
<i>State v. Olivas</i> , 122 Wn.2d 72, 856 P.2d 1076 (1993)	1
<i>State v. White</i> , 135 Wn.2d 761, 767-68 (1998)	4, 5, 6
<i>Tannahill v. Lockney Indep. Sch. Dist.</i> , 133 F. Supp. 2d 919 (N.D. Tex. 2001)	19, 24
<i>Theodore v. Delaware Valley School Dist.</i> , 836 A.2d 76 (Pa. 2003)	15
<i>Trinidad Sch. Dist. No. 1 v. Lopez</i> , 963 P.2d 1095 (Colo. 1998)	23
<i>City of Tukwila v. Nalder</i> , 53 Wn.App. 746, 770 P.2d 670 (1989).	6
<i>United Teachers of New Orleans v. Orleans Parish Sch. Bd.</i> , 142 F.3d 853 (5 th Cir. 1998)	19, 23
<i>Vernonia School District 47J v. Acton</i> , 515 U.S. 646 (1995)	<i>passim</i>
<i>Weden v. San Juan County</i> , 135 Wn. 2d 678, 958 P.2d 273 (1998)	8
<i>Willis v. Anderson Community Sch. Corp.</i> , 158 F.3d 415 (7 th Cir. 1998)	21, 24

I. INTRODUCTION

Plaintiffs initiated this lawsuit in large part because they believe it is wrong to treat public school students like criminal suspects. The District responds, in part, that suspicionless drug testing of student athletes is acceptable because various bodily invasions have already been approved for convicted sex offenders and other incarcerated felons. See Resp. Br. at 20, citing *State v. Olivas*, 122 Wn.2d 72, 856 P.2d 1076 (1993), *id.* at 26, citing *McNabb v. Department of Corrections*, 127 Wn.App. 854, 112 P.3d 592 (2005), and *id.* at 29-32, citing *In re Juveniles A, B, C, D, & E*, 121 Wn.2d 80, 847 P.2d 455 (1993). The District's reliance on criminal justice cases proves that Plaintiff's concerns were valid. Public school students are not prisoners, and their rights are not subject to the same restrictions imposed on those who have been convicted of crimes.

The "special needs" test urged by the District is not supported by Art. I, § 7 case law. Indeed, the federal experience with this malleable doctrine shows that it lacks the predictability and reliability of the Washington constitution. In case after case, this Court's existing Art. I, § 7 jurisprudence has decried the slippery slope that Fourth Amendment law has become. There is no well-grounded legal basis to incorporate the special needs doctrine -- which is perhaps the slipperiest aspect of current

Fourth Amendment law -- into the Washington constitution. The Court should reaffirm the individualized suspicion standard for school searches that has been in place for decades under *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985) and its progeny.

This case presents a simple but compelling question: Should the Court maintain the historic understanding and broader protections of Article I, section 7 of the Washington State Constitution, or should it instead disregard that understanding and abandon the protections of the State Constitution by adopting a recently-articulated narrow federal rule? Because there is no basis for this Court to retreat from the historic and settled requirement of individual suspicion protected by Article I, section 7, the Court should reverse the Wahkiakum Superior Court.

II. FACTS

The parties largely agree on the facts of the case, although the interpretation of those facts differ. App. Br. pp.4-13, Resp. Br. pp. 1-12. Appellants will not rehash those arguments here. However, one factual allegation requires response. The District relies in part on a study (the “SATURN” study) by Dr. Linn Goldberg, and his opinions. Resp. Br. pp. 10-11. Dr. Goldberg refused to submit the SATURN report to either the District or the Appellants, the report was never made part of the record, and Appellants were denied the opportunity to examine the basis for Dr.

Goldberg's opinions. Because Dr. Goldberg's report was not introduced into the record, Plaintiffs agreed not to place into evidence the testimony of their own expert Dr. Nyak Polisar, who would have discussed statistical invalidity of the SATURN study. It would be manifestly unfair to rely on the SATURN study for any purpose on appeal, since Plaintiffs were denied a fair opportunity to expose its weaknesses below. The Court should ignore the District's reference to Dr. Goldberg and his study.

III. ARGUMENT

The District's brief spends surprisingly little time explaining why this Court should create a new exception to Article I, §7. Instead, the District argues that Article I, § 7 should not be interpreted more broadly than the Fourth Amendment (a proposition uniformly rejected by this Court); and argues that a deferential standard of review should apply (an argument fundamentally inconsistent with the constitution and unsupported by any law). There is no basis in Washington law for a proposed new "special needs" exemption to Article I, § 7, nor has the District articulated any compelling reason for this Court to create one. Finally, the facts of this case are so dissimilar from *Vernonia*, that this case can not support a *Vernonia*-type exception to Washington's search and seizure jurisprudence.

A. Article I, § 7 Provides Protection Broader than the Fourth Amendment

“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). 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).

Rather than accepting this well-established principle, the District attempts to avoid an independent analysis by claiming that the suspicionless testing of urine is a public, not private affair, and that two of the six *Gunwall* factors support a view of Article I, § 7 identical to the Fourth Amendment in the public school setting . The Court should reject these arguments.

1. The Suspicionless Testing of Urine is an Invasion of a Student's Private Affairs

Every Washington court to examine the issue has held that compelled collection and testing of urine invades an individual's private affairs. *Robinson v. City of Seattle*, 102 Wn. App. 795, 822, 10 P.3d 452 (2000); *State v. White*, 129 Wn.2d 105, 111, 915 P.2d 1089 (1996). The District's claim that extracurricular activities are "public, not private affairs," and that a student's expectation of privacy is not invaded (Resp. Br. p. 16-17), should be rejected. In fact, the only Washington case cited by the District directly contradicts the District's argument that compelled urine testing is not invasive of an individual's private affairs. *State v. White*, 129 Wn.2d 105, 111, 915 P.2d 1089 (1996) ("an individual has a reasonable expectation of privacy in respect to those bodily functions which take place in a bathroom stall."). The District's argument that the compelled collection of bodily fluids is somehow "less invasive" than a pat-down search or a search of luggage (Resp. Br. p. 17) is without legal support and defies common sense.

2. Pre-Existing State Law Supports an Independent Analysis and Stronger Protection of Privacy Rights Pursuant to Article I, § 7

"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). Privacy protection has deep roots in our state's frontier history, where warrantless and otherwise arbitrary searches and seizures were explicitly prohibited in the Washington Territory. *Id.* at 810; *accord*, *State v. Rochelle*, 11 Wn.App. 887, 892, 527 P.2d 87 (1974); *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 v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985), 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. In *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983), this Court 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; *accord*, *State v. Parker*, 139 Wn.2d 486, 496-98 (1999) (police may not search belongings of passenger of a car without

individualized suspicion that the passenger possesses a prohibited item); *Seattle v. Mesiani*, 110 Wn.2d 454, 455-58 (1988) (fixed sobriety checkpoints that randomly search motorists without individualized suspicion violate Article I, Section 7). This historical solicitude for privacy is further 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. These statutes together show that the legislature sees a significant difference between searching a school-owned locker and searching a student's person.

3. The Local Concern Factor Also Favors Independent Analysis and Stronger Protection of Privacy Rights Pursuant to Article I, § 7

The District's discussion of the sixth *Gunwall* factor, Resp. Br. at 22-24, misconstrues how the term "local" is used in a *Gunwall* analysis. The scope of Art. I, § 7 protection is independent of Fourth Amendment protection because personal privacy and education are predominantly state and local matters, and not federal or national matters. This cuts in favor of independent constitutional analysis, as shown by the unbroken line of Art. I, § 7 cases.

The District instead argues that because school boards are local, this Court has no authority to determine whether their practices comply with the state constitution. This is not the rule. There can be no doubt that this Court has the authority to determine the law. In matters of Constitutional rights, this Court does not defer to local officials.

Under Article I, section 7, the governmental agency – and not the persons subject to search – “bears a heavy burden to prove the warrantless searches at issue fall within the exception it argues for.” *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); *accord State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The District asks the Court to “presume” that Policy 3515 is constitutional. That request does not comport with Washington law. Washington courts “presume that regularly enacted ordinances are constitutional, *unless the ordinance involves a fundamental right* or suspect class, *in which case the presumption is reversed.*” *Weden v. San Juan County*, 135 Wn. 2d 678, 690, 958 P.2d 273 (1998) (emphasis added). Here the burden is on the District to demonstrate that the abrogation of the fundamental right to be free from suspicionless searches is constitutional.

Courts understandably defer to school districts on matters of curriculum, as in *Camer v. Seattle School District*, 52 Wn.App. 531, 762 P.2d 356 (1988), where the plaintiffs sought an injunction for a school to

teach particular subject matter. Individual rights against governmental invasions of privacy are quintessential subjects for courts to decide, and nothing in state case law requires greater deference on this topic simply because the defendant is a school district.

B. Washington Law Does Not Support the District's Proposed "Special Needs" Exception to Article I, § 7

The District discusses numerous cases decided under the Fourth Amendment, but Washington has never recognized a "special needs" exception to Article I, § 7. See Appellants' Opening Brief at 23-33.

The holding of *Robinson v. City of Seattle*, 102 Wn. App. 795, 822, 10 P.3d 452 (2000), was that blanket suspicionless drug testing of all municipal job applicants violates Art. I, § 7, regardless of the outcome under the Fourth Amendment "special needs" test. The District errs when it suggests that *Robinson* approved suspicionless drug testing for police officers and firefighters. The plaintiffs' requested scope of relief did not extend to those professions, *id.* at 806 n.14, so anything the Court said about them was dicta. Even if it is not viewed as dicta, *Robinson's* discussion on that subject does not support the District's view of the case. *Robinson* allowed for the possibility that a city could have a strong interest in the sobriety of persons in "positions requiring an employee to carry a firearm," *id.* at 828, but it did not determine that drug testing of such posts

was narrowly drawn to serve that interest. For the categories of employee that most resemble students enrolled in extracurricular athletics (golf course technician, recreation attendant, or tennis instructor, *see id.* at 803-04), *Robinson* emphatically rejected the notion that any purported public safety need existed, let alone one that would authorize suspicionless drug testing. The court should reach the same result here. The District fails to demonstrate a genuine risk to public safety implicated by participation of students in extracurricular sports.

Even more off-point is the District's contention that general language regarding the Fourth Amendment in *State v. Brooks*, 43 Wn. App. 560 (1990) (a case which *pre-dates* the federal adoption of the special needs analysis) somehow creates a special needs exception to Article I, § 7. In *Brooks* the District had reasonable, articulable suspicion that a particular student was engaged in the sale of drugs, even though it might not have amounted to probable cause. *Brooks* at 561-62. On the question of whether the school required probable cause, *Brooks* concluded that the state constitution "provides students no greater protections from searches by school officials than is guaranteed by the Fourth Amendment." *State v. Brooks*, 43 Wn. App. 560, 568 (1986)). That quotation should not be understood as a blanket statement linking the scope of Art. I, § 7 to the Fourth Amendment with regard to every

conceivable legal question that might arise in connection with a school search. *Gunwall* analysis is keyed to the “specific legal issue” involved in each case. *State v. Parker*, 139 Wn2d 486, 493 n.2, 987 P.2d 73 (1999). “The inquiry must focus on the specific context in which the state constitutional challenge is raised.” *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103,115, 937 P.2d 154 (1997). The sentence from *Brooks* relied upon by the District must be understood in its historical context. At the time of the *Brooks* decision, suspicionless searches of students had never been upheld under either the Fourth Amendment or Article I, § 7. In fact, *Kuehn* had specifically forbidden them. The only school searches authorized by the United States Supreme Court at that time were those where school officials had “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). Citing this standard, *Brooks*, 43 Wn. App. at 565, correctly stated that in 1986, at least as to the level of individualized suspicion required for a school search, Article I, § 7 provided students the same protection as the Fourth Amendment.

It was not until 1995, nine years *after* the *Brooks* decision, that the United States Supreme Court in *Vernonia* held for the first time in its history that the Fourth Amendment’s “special needs” test allows school

officials, under certain circumstances, to dispense with the requirement of individualized suspicion and to conduct suspicionless searches of students for drugs and alcohol. This holding, as both the majority and the dissenters pointed out, diverged from *T.L.O.*'s prior requirement of "***particularized*** wrongdoing" for school searches. *Vernonia*, 515 U.S. at 682 (O'Connor, J., dissenting) (emphasis in original); *see also id.*, 515 U.S. at 653 (majority opinion) ("The search we approved in *T.L.O.*, while not based on probable cause, ***was*** based on individualized suspicion.") (emphasis in original). More important, the Court's holding in *Vernonia* is incompatible with the Washington Supreme Court's unequivocal prior holding in *Kuehn* that "[t]he validity of searches of school children [for drugs or alcohol] by school officials is judged by the *reasonable belief* standard . . . , [which] requires that there be a reasonable belief on the part of the searching part school official that the ***individual student searched*** possesses a prohibited item." 103 Wn.2d at 595.

Likewise, *State v. B.A.S.*, 103 Wn. App. 549, 553, 13 P.3d 244 (2000), provides no support for the District. There, the court held that a 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.”

The remainder of the District’s cases are completely inapt. They either deal with such dissimilar circumstances as feeding prisoners, maintaining control of pharmacy records of narcotic drugs, and HIV testing of convicted sex offenders, or they are cases from out of state that do not apply Article I, § 7 principles. The case most heavily relied upon by the District, *Juveniles A, B, C, D, and E*, 121 Wn.2d 80, 847 P.2d 455 (1993), is particularly inapt. Because there was no *Gunwall* analysis in the case, it was considered solely under the Fourth Amendment. Even in that realm, the Court expressly noted:

The holding in this case applies only to convicted sex offenders who, as discussed above, are subject to decreased expectations of privacy. There are no other “groups” included -- either explicitly or implicitly -- in our holding.

Id. at 96. In light of the controlling authority of the more relevant particularized suspicion cases, the remainder of the District’s cases do nothing to illuminate the question presented.

C. The District Fails to Articulate a Compelling Reason for the Court to Create a New Exception to Article I, § 7

The District’s brief does not offer any persuasive reason for this Court to set aside the historical understanding long held by the people of this state that a search requires at a minimum individualized suspicion, and

replace it with a malleable and unpredictable federal standard that this Court has rejected many times before. Indeed, it appears that the District offers only one genuine policy argument in favor of random, suspicionless searches:

Random drug testing eliminates the potential for arbitrary witch-hunting that is inherent in suspicion-based testing.

Resp. Br. p.44. Following the District's Orwellian reasoning, a random suspicionless search is less arbitrary than a search based on reasonable suspicion. Of course, a requirement of articulable suspicion is the opposite of arbitrary, because it based on objective facts. Random searches, akin to being struck by lightning, are the essence of arbitrariness. Turning these established understandings on their heads would require this court to overturn every suspicionless search case arising under Article I. § 7. *E.g.*, *State v. Parker*, 139 Wn.2d 486, 496-98 (1999) (police may not search belongings of passenger of a car without individualized suspicion that the passenger possesses a prohibited item); *Seattle v. Mesiani*, 110 Wn.2d 454, 455-58 (1988) (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); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975) (holding that general searches for drugs are unconstitutional).

Rather than explaining why this Court should create a new exception to Article I, § 7, the District simply repeats the reasoning articulated in the federal Fourth Amendment cases of *Vernonia* and *Earls*. This does nothing to illuminate the central question of this case. There are, however, reasons (beyond the historical understanding already explained) why this Court should not create such an exception to Article I, § 7. “The necessity of maintaining a cogent, consistent, and knowable state constitutional approach is particularly pressing where the corresponding federal law has been changeable or uncertain.” *Theodore v. Delaware Valley School Dist.*, 836 A.2d 76, 89 (Pa. 2003) (rejecting *Earls* and maintaining previously adopted *Vernonia* student search standards). Such is the case here. Even the federal Supreme Court is sharply divided on this issue, with Justice Ginsberg, who had concurred in the result in *Vernonia*, authoring a strong dissent in *Earls*. Justice Ginsberg noted that the “special needs” test adopted in *T.L.O.* was “not so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install.” 536 U.S. at 843 (Ginsberg, J., dissenting). In a stunningly brief period of seven years, the Fourth Amendment rights of students to be free from suspicionless searches were first limited by *Vernonia*, and then virtually eliminated by *Earls*. Such a rapid change in federal law should militate in favor of a cautious approach by state courts.

Absent any compelling reason to follow the sharply divided federal courts, this Court should maintain the protections of Article I, § 7.

This Court has never hesitated to reach results under the Washington Constitution that are more protective of individual privacy interests than the United States Supreme Court reaches under the Fourth Amendment, 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); *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).

Because the District has not established any compelling reason for this Court to create a new exception to Article I, § 7, the Court should continue its long established tradition of protecting rights under the State Constitution even in the face of eroding federal protections.

D. The District's Policy Does Not Even Meet the *Vernonia* Special Needs Test

As described above, there is no basis for creating a new special needs exception to Article I, § 7. However, if the Court were interested in creating such an exception, the stark factual difference between this case and the well documented record in *Vernonia*, makes this case a poor vehicle for articulation of a new exception to our constitutional protections. For even if the District could show that Washington's long-

held requirement of individual suspicion should be cast aside in favor of the more lenient “special needs” test such as that articulated in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), Policy 3515 fails to meet even those relaxed standards.

The *Vernonia* Court held that a “special need” is present to allow public school districts to perform suspicionless drug testing when at least two critical facts are present. First, the school at issue must experience “a sharp increase in drug use” that reaches “epidemic proportions.” *Id.* at 649, 663. Second, the school must be saddled with, and thus target its policy toward, students who are “the leaders of [a] drug culture.” *Id.* at 649-50, 663. Defendant Wahkiakum School District’s Policy 3515 satisfies neither of these requirements. The Policy also compels students—unlike the policy in *Vernonia*—to disclose to school officials every prescription and over-the-counter medication that they take or face the consequences of false positives.. For each of these reasons, the Policy would fail to comport with the *Vernonia* standards.

1. There is Not a “Drug Crisis” in Wahkiakum Schools.

The United States Supreme Court in *Vernonia* emphasized that, despite the implementation of several anti-drug programs, “teachers and administrators observed a sharp increase in drug use” that had reached

“epidemic proportions.” 515 U.S. at 649, 653. Absent such an “epidemic” or “crisis,” as subsequent decisions make clear, public school officials lack a “special need” to dispense with individualized suspicion. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1268 & n.11 (9th Cir. 1999) (public school’s suspicionless searches for drugs unconstitutional because “there [was] little evidence of a crisis” or a “drug problem . . . at Quincy High”); *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853 (5th Cir. 1998) (suspicionless drug testing of public school teachers invalid because that program did “not respond to any identified problem of drug use by teachers”). *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 929-30 (N.D. Tex. 2001) (school drug testing policy unconstitutional in part because “drug use was generally lower in the District than in other Texas schools” and “drug use [did] not increase[] prior to adoption of policy”)

The evidence produced by Defendants confirms that there is *not* a drug or alcohol “epidemic” or “crisis” in the Wahkiakum schools. The School District’s surveys show that its students use these substances at rates that, on the whole, are *below* statewide averages. Not one single Wahkiakum student has suffered an injury during the five years prior to implementation of the Policy due to drug or alcohol use. In 1998, only

three students in the Schools' entire student bodies reported being "frequent" users of drugs.

Nor does the evidence in this case even exhibit any "sharp increase," *Vernonia*, 515 U.S. at 649, in drug or alcohol use in Wahkiakum schools. The Schools' surveys show that the rates of substance use by students have remained substantially unchanged over time. To the extent that some Wahkiakum students, like many children across the nation, have been tempted to experiment with alcohol or drugs, the School District's Safe and Drug Free School Advisory Committee acknowledges that the non-invasive drug prevention programs adopted by the School District have been "successful" in addressing this issue.

Stripped to its essence, the language of Policy 3515 and its implementation reveal that the School District is not trying to curb any sudden substance-abuse "crisis," but rather—in its own words—is trying to "send[] the strongest message possible to students and the community that illicit drug use is not acceptable and will not be tolerated." The School Board—once again according to Policy 3515—apparently believes that the simple knowledge that student-athletes "will have tested 'drug-free' . . . will discourage younger students from experimenting with alcohol and controlled substances."

But “simply invoking the importance of deterrence is insufficient” to justify random drug testing regimes. *Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415, 423 (7th Cir. 1998); *see also Hodgkins v. Goldsmith*, 2000 WL 892964, at *20 (S.D. Ind. 2000) (“[I]t is clear that *Vernonia* does not stand for the proposition that the importance of deterring drug use among children is alone sufficient to justify suspicionless drug testing.”). The United States Supreme Court has expressly cautioned that a governmental desire to use drug searches as a tool for conveying an anti-drug message is never enough to justify a search of bodily fluids. *Chandler* struck down the State of Georgia’s policy of testing the urine of all political candidates for the presence of drugs. 520 U.S. at 321-22. The court expressly rejected the state’s arguments that searches could be justified in an attempt to create a public image of pure and untainted role models. “if a [governmental] need of the ‘set a good example’ genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in . . . *Vernonia* ranked as ‘special’ wasted many words in entirely unnecessary, perhaps even misleading, elaborations.” *Chandler*, 520 U.S. at 321-22. Because Policy 3515 is designed not to curb a drug epidemic or crisis situation, but rather to send a general anti-drug message to a fairly typical student population, the Policy violates the *Vernonia* standard.

2. Policy 3515 is Not Targeted to the Leaders of Any Drug Culture.

Policy 3515 also fails Fourth Amendment scrutiny because, even if there were a “drug epidemic” in the School District (which there is not), the Policy is not tailored to the source or focus of such a problem. Even when a drug crisis exists in a school, a “special need” to dispense with individualized suspicion is present only when the policy is carefully targeted to the vortex of the problem—that is, to those specific students who are “the leaders of the drug culture.” *Vernonia*, 515 U.S. at 649-50, 663. The record in *Vernonia* was replete with evidence that student-athletes were “leaders” of a student “rebellion” that created “an immediate crisis.” *Id.* at 649, 663; *see also Chandler*, 520 U.S. at 316 (noting that this context was “critical” to *Vernonia*’s holding).

Subsequent decisions have confirmed that this narrow tailoring was “critical” to *Vernonia*’s holding, *Chandler*, 520 U.S. at 316, and have consistently invalidated schools’ drug and alcohol testing policies that failed to target a “narrow group of students” who were leaders of a drug culture. *Willis*, 158 F.3d at 423 (public school’s suspicionless drug testing policy of all students who get in fights unconstitutional because it was not “crafted . . . to target the narrow group of students that [the school district] perceive[s] as most at risk for substance abuse”); *see also United Teachers*

of New Orleans, 142 F.3d at 856-57 (invalidating suspicionless drug testing policy because there was “an insufficient nexus between” the teachers tested and any drug abuse problem in the school); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109-10 (Colo. 1998) (even though public school had a “serious problem” with drug abuse, its suspicionless drug testing policy targeting students in extracurricular activities violated the Fourth Amendment because “the Policy included student groups that were not demonstrated to have contributed to the drug problem” and did not “play a role in promoting drugs”). *Accord, United Teachers of New Orleans*, 142 F.3d at 857 (“[S]pecial needs must rest on demonstrated realities.”).

Policy 3515 is not narrowly crafted to addressing any drug problem in Wahkiakum schools. The School District admits that its student-athletes are not the “leaders” of any drug or alcohol culture in the Wahkiakum schools. Nor, prior to adopting the policy, did the School District ever attempt to determine whether student-athletes use drugs or alcohol more often, less often, or at the same rate as other students; all of its surveys are of the student body as a whole. From his experience as a deputy sheriff with the Wahkiakum Sheriff’s Office, in fact, plaintiff Hans York believes that student athletes are no more likely to use drugs or alcohol than students who do not partake in after-school athletics. Indeed,

if the School District were permitted to test student athletes for drug or alcohol use despite the absence of any evidence suggesting that student-athletes contribute to that problem, then nothing would prevent the School District from testing the entire student body. This, most assuredly, is an unconstitutional result. *See Willis*, 158 F.3d at 415 (discussing slippery slope problem); *Tannahill*, 133 F. Supp. 2d at 930 (invalidating school-wide drug testing policy).

3. Policy 3515 Compels Students to Disclose to School Officials What Prescription Medications They Take.

Finally, even if Policy 3515 satisfied the *Vernonia* prerequisites necessary to establish a “special need” to conduct suspicionless drug testing, the Policy still violates both the Article I, § 7 of the Washington State Constitution and the Fourth Amendment because it compels students to endure more than just drug testing: It also forces them to disclose to school officials what prescription and over-the-counter medications they take.¹ The Supreme Court in *Vernonia* explicitly limited its holding to allow the School District to learn only the results of drug tests; it refused to assume what it called “the worst,” *i.e.*, that students also had to inform school officials of what prescription drugs they take. 515 U.S. at 660. The students in *Wahkiakum*, however, must disclose this

¹ Although the policy says such disclosure is voluntary, a false positive created by an undisclosed prescription drug is treated the same as a positive test for illicit drugs.

information to school officials. The School District has stated that the Superintendent as well as the School principals have access to whether students take Ritalin, insulin, allergy medication, or any other prescription drug or dietary supplement. And nothing in the drug testing forms tells the students that they have any right keep this information confidential. This forced disclosure of extremely sensitive information unreasonably impinges on students' privacy and, hence, violates Article I, Section 7 and the Fourth Amendment.

IV. CONCLUSION

The District's arguments seriously erode the traditional jurisprudential analysis governing searches in the State of Washington. Washington Courts have always required that searches be reasonable, and based on some particularized suspicion. The Court should reject the invitation to follow the federal courts in narrowing this protection. The Court should reverse the Superior Court.

RESPECTFULLY SUBMITTED this 22nd day of
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