No. 01-332

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSAY EARLS and LACEY EARLES, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF PROFESSOR AKHIL REED AMAR, SOUTHMAYD PROFESSOR OF LAW, YALE LAW SCHOOL, AND PROFESSOR VIKRAM AMAR, UNIVERSITY OF CALIFORNIA, HASTINGS SCHOOL OF LAW IN SUPPORT OF RESPONDENTS

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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*

Professor Akhil Reed Amar, Southmayd Professor of Law, Yale Law School, and Professor Vikram Amar, University of California, Hastings, School of Law are law professors who teach and write about constitutional law with a special interest in the Fourth Amendment. This brief sets forth their considered view from a scholarly perspective on the issue central to this case: whether the school drug-testing policy imposed by Tecumsah High School on its students is reasonable under the Fourth Amendment. *Amici* join this brief solely on their own behalf and not as representatives of their universities.[1]

SUMMARY OF ARGUMENT

Because the touchstone of the Fourth Amendment is reasonableness, the proper inquiry for this case is whether the monitored drug testing required of extracurricular students is reasonable under the circumstances. That analysis requires consideration of constitutional norms as well as the proportionality and nexus of the test to the government interest. Here, the search and seizure of the person and bodily fluids of a high school student are so intrusive, and the nexus of the test to concerns of safety and deterrence are so tenuous, that the drug-testing policy cannot be sustained. Nor do considerations of democracy or tradition warrant special deference to Tecumsah's unusual policy targeted almost entirely at non-voters. Tecumsah's policy is unreasonable, and thus unconstitutional.

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[1] The Parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part. The DKT Liberty Project contributed money to support the preparation and submission of this brief although the *amici* were not compensated in any way.

ARGUMENT

In 1995, in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), this Court rejected a challenge to a school drug-testing policy that randomly tested athletes, finding that the policy was "reasonable" within the meaning of the Fourth Amendment given the government's justification, the relatively minimal incremental intrusion involved, and – perhaps most importantly – the common sense fit between the government's means and ends. The *Vernonia* Court did not, of course, hold that because one school drug-testing policy is reasonable, *all* school drug-testing policies are reasonable.

Two years later, this Court in *Chandler v. Miller,* 520 U.S. 305 (1997) struck down a Georgia law that required all candidates seeking a place on the statewide ballot to submit to drug testing. The *Chandler* Court, unlike the *Vernonia* Court, did not undertake a comprehensive analysis of the law's overall reasonableness, but instead relied on a categorical presumption against searches lacking in individualized suspicion, and held the Fourth Amendment was violated because Georgia's law did not "fit within the closely guarded category of constitutionally permissible suspicionless searches." *Id.* at 309.

The *Chandler* decision in no way purported to overrule the *Vernonia* case, and indeed cited it for support at various points. *See id.* at 316-17, 319. Nonetheless, there appears to be some methodological tension between the "reasonableness" approach adopted in *Vernonia* (as well as some other recent cases), and the "individualized suspicion" approach reflected by *Chandler*. The present case affords the Court a perfect opportunity to resolve this apparent tension, and in so doing to expound on what we believe to be

the central meaning of the Fourth Amendment's central requirement – that government refrain from searches and seizures that are unreasonable. An honest and careful answer to the reasonableness question here should demonstrate that an overall reasonableness inquiry is no more unstructured than an inquiry focused on warrants, probable cause or individualized suspicion, and indeed can have just as much if not more bite.

A. The Fourth Amendment's Central Requirement of Reasonableness Is Neither Standardless Nor a Rubber Stamp for Government Action.

As we have urged before, the Fourth Amendment means what it says and says what it means:[2]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

These words read straightforwardly do not invariably require warrants or probable cause or even individualized suspicion for searches and seizures – they simply require that the government intrusion be reasonable.

Recognizing the power of the constitutional language, the Court has begun in recent cases to focus more openly on reasonableness as the "central requirement" of the Fourth

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[2] Akhil Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994); Akhil Amar, *Terry and the Future: Terry and Fourth Amendment First Principles*, 72 St. John's L. Rev. 1097 (1998).

Amendment. *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001), citing *Texas v. Brown*, 460 U.S. 730, 739 (1983); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (reasonableness is the "central inquiry"). In *Vernonia* this Court matter-of-factly noted that "the ultimate measure of the constitutionality of a government search is 'reasonableness.'" 515 U.S. at 652. *See also United States v. Knights,* 122 S. Ct. 587, 591 (2001) (noting "touchstone of the Fourth Amendment is reasonableness"). We welcome this trend, and view it as a signal that a textually honest, historically accurate, and common sense framework of the Fourth Amendment is in the making.

Critics charge that the move to a reasonableness test will eviscerate the protections of the Fourth Amendment – that without the elaborate categorical constructs of probable cause, warrants, individualized suspicion, and the like, the Fourth Amendment's doctrinal edifice will collapse. But a reasonableness inquiry is not an inquiry without structure and categories. Rather, it is an inquiry whose structure depends on varied circumstances – an inquiry that recognizes that the key categorical considerations may be different in different kinds of cases, and do not always revolve around warrants, probable cause and individualized suspicion.

Historically, of course, civil trespass suits were the typical remedy for an unlawful search or seizure. Bradford P. Wilson, *Enforcing the Fourth Amendment: A Jurisprudential History* 9-33 (1986). In many cases, civil jurors helped determine whether a search or seizure was reasonable, and the damages they imposed were the means of deterring police misconduct. Thus, civil tort law, which continues to secure citizens in their persons, homes, papers and effects from unreasonable intrusions, can provide useful determinants of reasonableness.

But tort law concepts of reasonableness are only the beginning of the inquiry.[3] Because it is a constitution we are expounding – a single document built around a single set of themes and values – the broad reasonableness language of the Fourth Amendment must be construed in light of rules and principles affirmed elsewhere in the Supreme Law. Thus, in this model of constitutional reasonableness, Fourth Amendment doctrine must be crafted to shelter myriad basic constitutional values – not just the values of privacy and secrecy that have occupied so much judicial attention, but also values such as democratic legitimacy and equality, freedom of expression, personal respect and dignity, just compensation, property, due process and the like. These values will inform each and every Fourth Amendment inquiry.[4] For instance, metal detectors in airports and courtrooms are permissible searches because, among other things, they are relatively unintrusive and well-justified, and, critically, because they treat all persons – rich and poor,

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[3] As we have noted before, the Fourth Amendment "is not mere tort law but constitutional tort law. The ordinary tort law rules applicable to private persons may not always sensibly apply when we deal with government officials who are both entitled to do things that private persons generally may not (levy taxes, for example) and barred from doing things private persons may sometimes do (practice race discrimination, for example)." Amar, 72 St. John's L. Rev. at 1119.

[4] Although the drug test search and seizure at issue here is not a search for law enforcement purposes, that fact does not change the analysis. The Fourth Amendment is not limited to searches for law enforcement or any other purpose – it covers every search and every seizure for whatever reason. Indeed, in many searches, there may be dual purposes for the search. For example, the purpose of metal detectors is not only to prevent future harms and to enhance safety, but also to find and prosecute people who have violated the law by planning to blow up or hijack an airplane. Where there are several legitimate reasons for the search, it would seem to make the search more, not less reasonable.

politically powerful and politically powerless – equally, even though the detectors are not based on any warrant, probable cause or even individualized suspicion. To give another example, a search of a newspaper's files should raise considerable concern, and should require special safeguards in light of the obvious First Amendment implications. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (noting where the materials "sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'").

In addition to explicit constitutional norms, constitutional doctrinal notions of proportionality and nexus – the fit between government's ends and its chosen means – can also set additional markers to determine the reasonableness of searches and seizures. Such an ends-means inquiry is common in constitutional law. *E.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *United States v. Virginia*, 518 U.S. 515 (1996). In this context, proportionality and nexus means that whether a government action is reasonable depends not just on the probability of government finding what it is looking for, but also on how important success of a given search or seizure really is, the intrusiveness of the government action necessary to achieve that success, the identity and vulnerability of the search target, the availability of other means of achieving the government's goal, and so forth. The Court has already embraced many of these quite intuitive notions in the context of the Fourth Amendment. In *Terry*, for example, it expressly recognized the common sense proportionality principle that less serious intrusions require less weighty justifications. Thus, the police officer's suspicions justified a brief stop, and the concerns for his safety justified a brief pat-down.

But the flip side of this logic is that more weighty intrusions will require more weighty justifications. In *Terry*, the officer's suspicions and need for safety would not have justified a full-blown invasive search. And in *Winston v. Lee*, 470 U.S. 753 (1985), the government sought to remove a bullet in the neck of a witness in a criminal case. Even though the government had both probable cause and a warrant, the proposed surgical removal of the bullet was too intrusive and the marginal evidentiary value of the bullet too slight to justify the intrusion. Thus, it was unreasonable. The bang the government got for the buck was simply not enough. Yet another example is found in *Welsh v. Wisconsin,* where the Court held that police could not invade a man's home at night without a warrant to arrest him for a noncriminal traffic offense because that extremely serious invasion was not justified by the relatively mild offense or the need to preserve the evidence of it. 466 U.S. 740 (1984). *See also McDonald v. United States*, 335 U.S. 451, 459 (1948), Jackson, J. concurring (seriousness of the crime is relevant to Fourth Amendment inquiry, and entry into home without warrant and without emergency displayed "a shocking lack of sense of all proportion").

Finally, as we have argued elsewhere, the common sense of the people acting collectively – through jury verdicts, community advisory boards, election results, longstanding traditions, and general legal patterns – must be relevant to the reasonableness analysis. The Amendment, after all, affirms a right of *the people,* and as this Court has recognized, "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion on the reasonable expectations of personal security caused by these practices." *Terry*, 392 U.S. at 17, n.14; *Chandler*, 520 U.S. at 309-10 (noting Georgia was the first and only state to condition political

candidacy on a drug test); Akhil Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 124 (2000) (noting the importance of looking to what other states are doing because "[m]ost important, law canvassing has the salutary effect of focusing the Justices not on themselves and their own wisdom, but on the wisdom of the American people more generally).[5]

As should be clear from all this, a reasonableness standard is far from a toothless watchdog. Adoption of an overall reasonableness approach does not mean that all government searches or seizures will be justified. Indeed, the reasonableness rule might well provide *greater* protection against government action than presumptive requirements of warrants, probable cause or even individualized suspicion. As *Winston v. Lee*, cited above, and other cases make clear, for example, some searches may be unreasonable because they are too intrusive, no matter how particularized and justified the government's suspicion is. Like *Winston*, the present case illustrates that a reasonableness test can be used to invalidate overreaching by government.

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[5] In addition to the contours of reasonableness developed through judges and juries in civil tort actions, there are other modes in which reasonableness can be delineated and enforced. For example, legislatures could fashion rules delineating the search and seizure authority of government agents. Agency guidelines spelling out concrete search and seizure guidelines for recurring fact patterns could be created and published. *See* Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. at 816-19. Taken together, and taken seriously, these judgments, guidelines and rules can provide standards "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing." *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1553 (2001).

B. The School Drug-testing Policy Here Is Not Reasonable in Light of All the Circumstances.

When measured by the Fourth Amendment's reasonableness standard, the monitored urine collection at issue here fails. First, it is important to note that this policy involves both a seizure (the requirement that the student go in the restroom to produce and turn over a urine sample) and a search (the examination and testing of the urine). The Fourth Amendment protects the right of the people to be "*secure in their persons*" – singling out bodily intrusions for special judicial solicitude. Both the search and the seizure must be justified, and here they simply are not.

To begin with, we must remember that the policy at issue here is not embodied in any Act of Congress or piece of legislation by a State. While school board enactments are entitled to respect as a form of state law to be sure, they simply cannot be afforded the same kind of deference in a Fourth Amendment case as a statutory enactment that has been considered by various legislative committees, with input from the Chief Executive of a State or the federal government.

There is another process aspect of the school board policy that argues against judicial deference – the policy applies only to a group of individuals who lack voting rights. Even after the Twenty-Sixth Amendment lowering the voting age to eighteen, the overwhelming majority of high school students in America are not yet old enough to vote and register their preferences concerning searches, drug policies and the like. Where a law singles out for inferior treatment a distinct class of persons who are structurally disabled from protecting their interests in the legislative arenas, constitutional principles of equality often justify

searching judicial review of government actions. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

Skepticism of the policy at issue here is also warranted because the policy is so unusual. As we suggested above, a reasonableness inquiry takes full account of community sentiment measured broadly.[6] The record here suggests that at most, "a handful" of the 15,000 school boards across the nation "have taken up drug testing." C.A. App. 856. Certainly petitioners have not suggested or demonstrated that their policy is typical or widely adopted. Nor is this high school district merely aberrational among high schools. The fact that community college districts throughout the country have not felt the need to test their students who participate in extracurricular activities cuts against the reasonableness of the policy in question. We are aware of no reason to believe that high school students subject to this policy are more likely to use drugs than college students a few years older. One explanation for why junior colleges (and four-year colleges, for that matter) have not undertaken steps like that taken here may be that college aged students can vote and may express disapproval at the polls. That possibility, of course, simply underscores how the political process cannot always be trusted to correct its own excesses in the search and seizure area where certain voices are not heard.

A Fourth Amendment reasonableness inquiry does not,

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[6] It is particularly important in light of small-town politics that community sentiment be measured broadly. Thus, although petitioners emphasize that no one spoke out at the town meeting against the policy, numerous parents and community members have spoken out since, including directly to this Court as *amici*, and have said they did not know about the meeting or they did not feel they could speak out. In any event, the broad measure we envision involves much more than the one school involved, and thus is more likely to reliably reflect the sense of the American people.

of course, focus only on how a government search policy has been made and by whom, but also on how and why the search is conducted. And when we look at these two factors, the unreasonableness of the present policy becomes quite clear.

For starters, by any measure, the seizure of a student, the forced production of urine, and the search of the urine are highly intrusive. Indeed, "[t]here are few activities in our society more personal or private than the passing of urine." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (internal quotation and cite omitted); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680, 685 (1989), Scalia, J., dissenting (calling a state-compelled urinalysis "particularly destructive of privacy and offensive to personal dignity," and a "needless indignity.") Unlike the de minimus invasion of, for example, walking through a metal detector at an airport, or even showing one's license at a driver checkpoint, the drug test involves a personal seizure of a most intimate kind. The student is required to go in the bathroom where she knows a teacher with whom she must deal every day stands outside the bathroom stall listening for sounds of "normal" urination. The student must produce and then give up her bodily fluids which the teacher then tests for temperature and inspects for clarity. Even an experienced adult would find the procedure embarrassing – a modest high school student might find it intolerable. Indeed, in *Chandler*, when the required test took place in a doctor's office and the results would not be published, the Court nevertheless found a significant intrusion. 520 U.S. at 312.

Because the intrusion is so serious, the reasonableness balance and its concern for proportionality and nexus requires an equally serious government justification that is served by the law. But what interest does the government

claim? Deterrence and safety. Pet. Br. at 14, 42. Deterrence is undoubtedly a laudable goal for a school board, but, like the general goal of "investigating crime" in *Terry* that would not justify a full-blown seizure, it cannot justify the substantial bodily intrusion the drug-testing imposes. If it did, the government could easily set up checkpoints on street corners to search the pockets and purses of all passersby to deter drug use, or it could continuously monitor every checking account to deter tax fraud. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (where checkpoint's primary interest is general interest in crime control, the checkpoint violates the Fourth Amendment). Even given the special responsibility school districts have for the students in their care, this generalized, non-immediate, non-specific goal cannot justify the repeated physically invasive searches and seizures of the drug-testing. *See Tinker v. Des Moines*, 393 U.S. 503 (1969) (reminding us that school children, by virtue of their age, do not lose all constitutional protection).

As for safety, that goal could indeed justify a search and seizure if there were any evidence to support the safety concern (as there was in *Vernonia*) or if the need for safety was immediate (as it was in *Terry)*. Here, there is not. Nor does common sense suggest that students who participate in choir or band are in more danger if they participate in those activities under the influence of drugs. *Cf. Chandler*, 520 U.S. at 321-22 (Georgia "officials typically do not perform high-risk, safety sensitive tasks"). Thus, the scope of the seizure is not "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19. The disconnect – the lack of nexus and proportionality – between the non-immediate government interest and the high level of invasion demonstrates the policy's unreasonableness.

That brings us to another key point: the drug-testing policy is unreasonable because the students subject to the random drug-testing are no more likely to be involved in illicit drug use than anyone else. Indeed, common sense would suggest that the students involved in extracurricular activities like Choir and FFA may well be the students least likely to be involved in drug use.[7] To be sure, such common sense could be overcome by sufficient on-the-scene experience showing that the targeted extracurricular activities were in fact often the setting for illicit drug use, but the school board has not suggested any experience or evidence (other than occasional anecdotes) along those lines. *See Chandler*, 520 U.S. at 321 ("Georgia asserts no evidence of a drug problem among the State's elected officials.") In fact, the school district has not suggested any reason why *this* group of people – participants in extracurricular events in high school – are any more suspicious with regard to drug usage than all students or for that matter all persons. If random testing of this group is reasonable, why couldn't government require random drug testing of everyone?

Perhaps a drug test for everyone wouldn't be so bad. At least under such a system, students would not feel stigmatized since everyone would be in the same boat. And many of the occupants of that boat would be voters, who – because they would suffer the same indignity as the students – would at least be somewhat able to virtually represent their interests. A policy that applies to everyone rather than a few has the virtue of non-discrimination, and that virtue may be sufficient to tip the balance in some cases. Thus, as noted earlier, the metal detector search at an airport or courthouse

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[7] In this respect, it is significant that the plaintiff here, Lindsay Earls, is a wholly innocent citizen. This case does not raise the exclusionary rule as a remedy for violations, so there is no conflict here between the truth and the Fourth Amendment as there is in suppression cases.

is reasonable, in part, because it happens to everyone. Such a search is wholly non-discriminatory, and that counts in its favor. But factors other than non-discrimination that might justify another global search are absent in such a global drug-test. A metal detector is non-intrusive, and the threat to safety posed by any guns on planes or in government buildings is quite large – those are a few reasons why most people (including, significantly, those persons seeking entry to those planes and buildings) generally agree that it is proportionate and reasonable. But the safety-in-numbers argument loses some of its appeal as the intrusiveness of the search escalates, and the government's safety return on successful searches decreases. Thus, a strip-search before boarding a plane does not become reasonable simply because everyone who boards is strip-searched. Similarly, the monitored urine sampling at issue here intrudes so deeply on personal dignity and bodily integrity, and offers so little in safety assurances, that no one would take comfort in the thought that everyone else was suffering the same indignities.

Finally, the school board cannot claim that the policy is reasonable because students can opt out of it. As this Court noted in *Lee v. Weisman*, when the school board argued that its policy of prayer at graduation was non-coercive because students did not have to attend,

> Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalism in the extreme. . . . Everyone knows that, in our society and in our culture, high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free

> to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student though youth and all her high school years.

505 U.S. 577, 595 (1992). If a school board cannot require a child to give up her constitutional claim to religious liberty "as the price of attending her own high school graduation," it also may not require a child to give up extracurricular activities as the price of protecting herself against unreasonable search and seizure.

Opting out of extracurricular activities means opting out of much that is important about the high school experience. Colleges look closely at high school extracurricular activities for purposes of both admission and scholarships, and participation in numerous activities may increase the chance of admission. Indeed, Lindsay Earls' admission to Dartmouth was dependent, in some measure, on her participation in a variety of extracurricular activities. A student who avoids those activities to protect herself against unreasonable search and seizure pays a heavy price for that choice. And extracurricular activities are important opportunities for students to explore different vocations, to develop social and leadership skills, and to learn to live and work together as responsible adult citizens. For these reasons, participation in these ongoing activities is far more crucial – and far less "voluntary" – than attending a high school graduation. The false option to not participate in extracurricular activities cannot make the searches and seizures conducted under the drug-testing policy reasonable.

C. The Circumstances That Made the Vernonia Policy Reasonable Are Absent Here.

The drug-testing policy approved in *Vernonia* applied to student athletes who, because of the very activity that triggered the drug-testing, had already given up significant aspects of their privacy, modesty, and personal dignity. For athletes who already underwent medical exams (including urine samples) and who showered and dressed together regularly in communal showers and bathrooms, the incremental burden on the "security of their persons" from random drug-testing was small. Thus, the requirement of proportionality was satisfied. But high school choir and band members have not compromised their rights to privacy, personal dignity, and bodily integrity due to their participation in choir and band. Thus, the affront of the monitored urine-sampling process is both freshly imposed and powerful.

Similarly, in *Vernonia*, drug-testing athletes was reasonable because the athletics themselves created both incentives and dangers related directly to drugs: either the drugs might be taken to enhance athletic performance (as in steroids) or the interaction between the effects of drugs and the vigorous physical activity of the sport created a particular danger. The Court highlighted this nexus:

> [T]his program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from the psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose

substantial physical risks to athletes.

515 U.S. at 662. But here, there is no nexus between the targeted activities – the Academic Team, Band, Choir, Show Choir, Color Guard, Future Farmers of America, and Future Homemakers of America – and drug-use or drug-testing. Participants in these activities are not likely to seek to enhance their performance with drugs (indeed, the Choir teacher noted that the lemon juice was the only performance enhancer of which she was aware, J.A. 127), nor are the activities seriously likely to be more dangerous if the students who participate have taken drugs (although the government professes concern over FHA members who "work with cutlery or sharp instruments," Brief for the United States As Amicus Curiae Supporting Petitioners at 20, the record reflects that the extracurricular activities involve mock interviews, not sharp instruments, C.A. App. 672).

Finally, it was significant in *Vernonia* that not only was there evidence that large numbers of athletes were taking drugs (indeed, the problem was of "epidemic proportions"), but the record was also clear that the athletes were "the leaders of the drug culture." 515 U.S. at 649. Thus, there was a strong nexus between the policy providing that athletes would be tested, and the problem of drug use that had been specifically identified and documented among athletes. That nexus is completely lacking here. Indeed, petitioners have conceded that the policy is *not* based on the belief that these students were the most likely to abuse drugs. Pet. Br. at 41. Without such a nexus, and without proportionality, the drug-testing policy is unreasonable.

CONCLUSION

If this Court takes the Fourth Amendment at its word, and considers whether, in light of all the circumstances the search and seizure at issue here is constitutionally reasonable, it must conclude that it is not.

Respectfully submitted,

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