

MARIJUANA OR FOOTBALL (OR THE FUTURE FARMERS OF AMERICA): *BOARD OF EDUCATION V. EARLS*, 122 S.CT. 2559 (2002).

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Illegal drug use by a large portion of students is an unfortunate feature of most American high schools.¹ Parents and school boards across the nation are debating the merits of fighting and reducing drug use through drug testing.² In *Board of Education v. Earls*,³ the Supreme Court upheld a high school policy that required all students who participated in any extracurricular activity to submit to drug testing. This ruling extended the Court's decision in *Vernonia School District 47J v. Acton*,⁴ in which the Court upheld a high school policy requiring student athletes to submit to suspicionless drug tests. The *Earls* Court's reasoning centered on the broad mandate of schools' "custodial and tutelary responsibility for children"⁵ and thus arguably opened the way for drug testing of all students.⁶ However, Justice Breyer's concurrence, which provided the crucial fifth vote for the majority, is a harmful obstacle to school boards wishing to implement student drug testing if proper public forums for discussion are not provided, or if substantial public opposition to the proposed drug testing arises from those public debates.

In the fall of 1998, the School District of Tecumseh, Oklahoma, in an effort to fight the use of illegal drugs by students, adopted the Student Activities Drug Testing Policy ("Drug Testing Policy"), which requires all students who participate in any extracurricular activity, including the Academic Team and the Future Farmers of

1. A study has found that more than half of all students have used illegal drugs before finishing high school. Department of Health and Human Service, L. JOHNSON ET AL., DEPARTMENT OF HEALTH AND HUMAN SERVICES, MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE, OVERVIEW OF KEY FINDINGS 5 (2001), discussed in *Bd. of Educ. v. Earls*, 122 S. Ct. 2559, 2569-70 (2002) (Breyer, J., concurring).

2. See Tamar Lewin, *With Court Nod, Parents Debate School Drug Tests*, N.Y. TIMES, Sept. 29, 2002, at A1.

3. 122 S. Ct. 2559 (2002).

4. 515 U.S. 646 (1995).

5. 122 S. Ct. at 2565 (quoting *id.* at 656).

6. See Note, 116 HARV. L. REV. 292 (2002).

America, to submit to drug testing.⁷ The Drug Testing Policy requires students to take drug tests (through urine samples) before starting an extracurricular activity, submit to random testing during participation in that activity and submit to tests at any time upon reasonable suspicion.⁸ Respondent Earls, a student at Tecumseh High School, participated in several extracurricular activities that the Drug Testing Policy covered, including the marching band and the National Honor Society.⁹ Earls brought a 42 U.S.C. § 1983 suit that challenged the District's Drug Testing Policy as violating the Fourth Amendment's protection against unreasonable searches.¹⁰

The District Court, applying *Vernonia*, rejected the respondent's claim that the Drug Testing Policy violated the Fourth Amendment and granted summary judgment for the school district.¹¹ The court found that there were "special needs" in the public school context, including maintaining discipline and order¹² and addressing the drug problem facing the school,¹³ which exempted the school from showing probable cause. The court found that such unique needs also lowered the privacy interests of students¹⁴ and justified the school district's implementation of the Drug Testing Policy as a reasonable action under the Fourth Amendment.¹⁵

The Court of Appeals reversed and held that the Drug Testing Policy violated the Fourth Amendment.¹⁶ While the Court of Appeals agreed that the issue had to be considered in the context of the unique environment of a public school,¹⁷ the court held that the School District failed to identify a drug abuse problem reaching "epidemic" proportions, as was the case in *Vernonia*.¹⁸ Without such a burden of proof, the Court of Appeals warned that schools would be able to test all students "simply as a condition of attending school."¹⁹

The Supreme Court reversed. Justice Thomas, writing for the five-justice majority of Chief Justice Rehnquist and Justices Kennedy,

7. 122 S. Ct. at 2562-63.

8. *Id.* at 2563.

9. *Id.*

10. *Id.*

11. 115 F. Supp. 2d 1281, 1285 (W.D. Okla. 2000).

12. *Id.* at 1283.

13. *Id.* at 1287.

14. *Id.* at 1289.

15. *Id.* at 1283-84.

16. 242 F.3d 1264, 1279 (10th Cir. 2001).

17. *Id.* at 1268-69.

18. *Id.* at 1272, 1278.

19. *Id.* at 1278.

Scalia, and Breyer, held that the Drug Testing Policy did not violate the Fourth Amendment. The Court said meeting the probable cause standard, necessary for criminal searches, which is unnecessary in the public school context, because such a requirement would “unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed” in schools.²⁰ Considering the safety and administrative concerns of the school, the Majority acknowledged that a search without probable cause that includes drug testing of students may be reasonable when there are “special needs.” Justice Thomas saw special needs in the public school context, because school authorities have “custodial and tutelary responsibility for children.”²¹

Following the three-part balancing test of *Vernonia*, Justice Thomas first examined the nature of the privacy interest allegedly compromised by the Drug Testing Policy.²² The Court noted, “A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.”²³ Rejecting the respondent’s argument that *Vernonia*’s approval of drug testing applied only to student athletes, the Court offered a more comprehensive grounding for *Vernonia* when it said that *Vernonia* “depended primarily on the school’s custodial responsibility and authority.”²⁴ This responsibility extended to non-athletes and athletes alike.

Next, the Court analyzed the character of the intrusion imposed by the Drug Testing Policy.²⁵ While admitting that urination is a human function protected by great privacy, the Court pointed out that the degree of intrusion on privacy is determined by “the manner in which production of the urine sample is monitored.”²⁶ The Court called “minimally intrusive”²⁷ the process by which a teacher waits outside a closed restroom stall for the student to produce a urine sample while listening for the sounds of urination.²⁸ In contrast, the procedure in *Vernonia* did not provide a closed door for male students when

20. 122 S. Ct. at 2564 (quoting *Vernonia*, 515 U.S. at 653).

21. *Id.* at 2565 (quoting *Vernonia*, 515 U.S. at 656).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 2566.

26. *Id.* (quoting *Vernonia*, 515 U.S. at 657).

27. *Id.* at 2567.

28. *Id.* at 2566.

producing their urine samples.²⁹ In addition, the Court noted that “only after a third positive test will the student be suspended from participating in any extracurricular activity for the remainder of the school year, or 88 school days, whichever is longer.”³⁰ Positive drug test results have no academic consequences and are not turned over to the police.³¹ Considering these factors, the Court found the invasion of students’ privacy to be “even less problematic” than in *Vernonia*.³²

The last part of the *Vernonia* balancing test is the nature and immediacy of the government’s concerns and the efficacy of the Drug Testing Policy in meeting those concerns.³³ The Court found the “nationwide drug epidemic”³⁴ and “specific evidence of drug use at Tecumseh schools”³⁵ as sufficient reasons for implementing the Drug Testing Policy.³⁶ While the *Vernonia* Court recognized that student drug use in that school had reached “epidemic proportions,”³⁷ the *Earls* Court said that this recognition did not create a requirement of a “pervasive drug problem before allowing the government to conduct suspicionless drug testing.”³⁸ Also, the Court found drug testing of students who participate in extracurricular activities to be a reasonably effective means of addressing the drug problem.³⁹

Justice Breyer concurred. He found the Drug Testing Policy to be reasonable under the Fourth Amendment and expressed substantial agreement with Justice Thomas.⁴⁰ Justice Breyer wrote separately to stress several points, including the seriousness of the drug problem in schools nationwide.⁴¹ He also said “not everyone would agree” that the privacy-related issue with providing a urine sample is “negligible,” as some people would be “seriously embarrassed” by such a procedure.⁴² The school board’s providing an “opportunity for the airing of . . . differences at public meetings designed to give the entire community the opportunity to be able to participate in

29. *Id.*

30. *Id.* at 2567.

31. *Id.* at 2566-67.

32. *Id.* at 2566.

33. 515 U.S. at 660.

34. 122 S. Ct. at 2567.

35. *Id.*

36. *Id.* at 2568.

37. 515 U.S. at 662-63.

38. 122 S. Ct. at 2568.

39. *Id.* at 2569.

40. *Id.*

41. *Id.*

42. *Id.* at 2570-71.

developing the drug policy” was very important.⁴³ He continued, “The school board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, *in this instance*, revealed little, if any, objection to the proposed testing program.”⁴⁴ Thus, Justice Breyer’s concurrence questions the validity of a drug testing program opposed by a substantial part of the community.

Justice O’Connor, who had dissented in *Vernonia*, joined Justice Ginsburg’s dissent. Justice Ginsburg called the Drug Testing Policy unreasonable, capricious and perverse.⁴⁵ She pointed out that the *Vernonia* Court’s analysis of the nature of the privacy interest intruded upon was based in the context of athletic participation where school athletes have reduced expectation of privacy.⁴⁶ Here, the respondent was not participating in sports. In analyzing the character of the intrusion, Justice Ginsburg noted the lack of confidentiality of test results.⁴⁷ In terms of the nature and immediacy of the problem, she argued that drug use among Tecumseh’s students was not a major problem.⁴⁸ Justice Ginsburg stressed that the drug testing in *Vernonia* was limited to athletes whereas the Tecumseh Drug Testing Policy “indiscriminately subjected to testing all participants in competitive extracurricular activities.”⁴⁹ To Justice Ginsburg, *Vernonia*’s passing constitutional muster was in the context of the special risks of combining drug use with physical exertion.⁵⁰ This special risk was “necessary to our decision in *Vernonia*.”⁵¹ In contrast, the “great majority of students the Tecumseh School District seeks to test are engaged in activities [such the school band and the Future Homemakers of America] that are not safety sensitive to an unusual degree [like athletics].”⁵²

Justice Thomas’s majority opinion correctly focused on the educational and disciplinary responsibilities of a public school toward its students and their parents and attempted to give schools latitude in testing students for drug use. The Court firmly departed from the

43. *Id.* at 2571.

44. *Id.* (emphasis added).

45. *Id.* at 2572.

46. *Id.* at 2573-74.

47. *Id.* at 2574-75.

48. *Id.* at 2576.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 2577.

Court of Appeals' idea that a "negligible"⁵³ level of drug use among students could not justify drug testing. Considering the national problem of student drug use, drug use of any level should not be tolerated in schools. Still, future school boards and concerned parents and students will have to see if lower courts focus on Justice Breyer's concurrence and hamper drug testing efforts if either proper public forums for discussion are not provided or substantial public opposition to the proposed drug testing arises from those public debates.

In addition to stressing a school's tutelary function, another way Justice Thomas attempted to provide leeway to school districts was by not limiting schools to testing the students most likely to use drugs.⁵⁴ Schools do not have to use the "least intrusive means" when implementing drug testing programs.⁵⁵ In contrast, Justice Ginsburg would include only student athletes in a drug testing policy. School boards and parents who favor wider drug testing may ask why only students who are physically active should be subject to heightened health concerns. Student athletes who engage in rigorous physical training may face *heightened* health risks from drug use, but this fact does not mean that less physically active students are immune from the inherently high health hazards of drug use. There is no practical distinction in the health risk between drug use by students who participate in athletics and those who do not. Furthermore, Justice Ginsburg's reliance on *Vernonia* as limiting drug testing only to student athletes is misplaced. The *Vernonia* Court said that "legitimate privacy expectations are *even less* with regard to student athletes."⁵⁶ That it is easier to justify drug testing of student athletes than non-athletes supports the idea that it is justifiable to protect the public health by testing as many students as possible.

Justice Breyer's concurrence stressed the national drug problem in finding the Drug Testing Policy constitutional.⁵⁷ In his concurrence, he also recognized the importance of demand side policies such as counseling and rehabilitation in addition to combating the supply of drugs. Yet his concurrence raises two questions that can work against giving school districts wide latitude in using student drug testing. First, must every school board that wishes to implement a drug testing

53. 242 F.3d at 1275.

54. 122 S. Ct. at 2569.

55. *Id.*

56. 515 U.S. at 657 (emphasis added), *quoted in* 122 S. Ct. at 2565, fn. 3.

57. 122 S. Ct. at 2569-70.

policy provide for a public meeting to allow the public to discuss the privacy issues surrounding drug testing? Justice Breyer said:

When trying to resolve [a question such as whether the privacy invasion in urine sampling is negligible that] involve[s] *constitutional values*, I believe it is important that the school board provided an opportunity for the airing of these differences at public meeting designed to give the entire community “the opportunity to be able to participate in developing the drug policy.”⁵⁸

It seems that school districts can help shield their drug testing programs from constitutional challenge by providing a public forum for discussion.⁵⁹ Public discussion is good in itself, but Justice Breyer’s concurrence poses another hurdle to drug testing.

It is unclear what level of community agreement is needed before public school drug testing can be implemented. Justice Breyer said that it was “important” that the Tecumseh school board “used this democratic . . . process to . . . resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any objection to the proposed testing program.”⁶⁰ Even in school districts where parents and school administrators predominantly support drug testing of students, there will surely be a vocal minority opposed to any drug testing.⁶¹ If so, must drug testing programs that conform to those found in *Vernonia* and *Earls* be “softened,” through greater privacy protections, for example, to earn greater support of the community and to be legally implemented? If there is a majority of parents and administrators who favor a *Vernonia* and *Earls*-like drug testing policy, then those in opposition should not be able to prevent the implementation of parents, administrators, and undoubtedly many students’ desire to send a strong message against drug use.

Justice Breyer’s concern for involving parents and the public in an educational policy as important as student drug testing is understandable. But such concerns should be left to the local political process. Parents should be trusted to raise objections on their children’s behalf and to vote out school board officials who go against the wishes of the community with respect to student drug testing or any other educational issue. Future courts addressing the *Vernonia* and *Earls* progeny should focus on public schools’ foremost responsibility: that of providing a safe and healthy educational

58. *Id.* at 2571 (emphasis added).

59. *Id.*

60. *Id.*

61. See Lewin, *supra* note 2.

environment. To achieve this goal, parents, school administrators and students will need courts to adhere to Justice Thomas' emphasis on the special educational and disciplinary needs of public schools.