SUPREME COURT OF THE UNITED STATES

No. 01–332

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY, ET AL., PETITIONERS *v.* LINDSAY EARLS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 27, 2002]

JUSTICE BREYER, concurring.

I agree with the Court that *Vernonia School Dist. 47J* v. *Acton,* 515 U. S. 646 (1995), governs this case and requires reversal of the Tenth Circuit's decision. The school's drug testing program addresses a serious national problem by focusing upon demand, avoiding the use of criminal or disciplinary sanctions, and relying upon professional counseling and treatment. See App. 201–202. In my view, this program does not violate the Fourth Amendment's prohibition of "unreasonable searches and seizures." I reach this conclusion primarily for the reasons given by the Court, but I would emphasize several underlying considerations, which I understand to be consistent with the Court's opinion.

I

In respect to the school's need for the drug testing program, I would emphasize the following: First, the drug problem in our Nation's schools is serious in terms of size, the kinds of drugs being used, and the consequences of that use both for our children and the rest of us. See, *e.g.*, White House Nat. Drug Control Strategy 25 (Feb. 2002) (drug abuse leads annually to about 20,000 deaths, $160

billion in economic costs); Department of Health and Human Services, L. Johnston et al., Monitoring the Future: National Results on Adolescent Drug Use, Overview of Key Findings 5 (2001) (Monitoring the Future) (more than one-third of all students have used illegal drugs before completing the eighth grade; more than half before completing high school); *ibid.* (about 30% of all students use drugs *other than marijuana* prior to completing high school (emphasis added)); National Center on Addiction and Substance Abuse, Malignant Neglect: Substance Abuse and America's Schools 15 (Sept. 2001) (Malignant Neglect) (early use leads to later drug dependence); Nat. Drug Control Strategy, *supra,* at 1 (same).

Second, the government's emphasis upon supply side interdiction apparently has not reduced teenage use in recent years. Compare R. Perl, CRS Issue Brief for Congress, Drug Control: International Policy and Options CRS–1 (Dec. 12, 2001) (supply side programs account for 66% of the federal drug control budget), with Partnership for a Drug-Free America, 2001 Partnership Attitude Tracking Study: Key Findings 1 (showing increase in teenage drug use in early 1990's, peak in 1997, holding steady thereafter); 2000–2001 PRIDE National Summary: Alcohol, Tobacco, Illicit Drugs, Violence and Related Behaviors, Grades 6 thru 12 (Apr. 5, 2002), http://www.pridesurveys.com/us00.pdf (slight rise in high school drug use in 2000–2001); Monitoring the Future, Table 1 (lifetime prevalence of drug use increasing over last 10 years).

Third, public school systems must find effective ways to deal with this problem. Today's public expects its schools not simply to teach the fundamentals, but "to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services," all in a school environment that is safe and encourages learning. Brief for

National School Boards Association et al. as *Amici Curiae* 3–4. See also *Bethel School Dist. No. 403* v. *Fraser,* 478 U. S. 675, 681 (1986) (Schools "'prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves conductive to happiness and as indispensable to the practice of self-government in the community and the nation'") (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)). The law itself recognizes these responsibilities with the phrase *in loco parentis*—a phrase that draws its legal force primarily from the needs of younger students (who here are necessarily grouped together with older high school students) and which reflects, not that a child or adolescent lacks an interest in privacy, but that a child's or adolescent's school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions. Cf. *Vernonia, supra,* at 654–655. A public school system that fails adequately to carry out its responsibilities may well see parents send their children to private or parochial school instead—with help from the State. See *Zelman* v. *Simmons-Harris, ante,* p. __.

Fourth, the program at issue here seeks to discourage demand for drugs by changing the school's environment in order to combat the single most important factor leading school children to take drugs, namely, peer pressure. Malignant Neglect 4 (students "whose friends use illicit drugs are more than 10 times likelier to use illicit drugs than those whose friends do not"). It offers the adolescent a nonthreatening reason to decline his friend's drug-use invitations, namely, that he intends to play baseball, participate in debate, join the band, or engage in any one of half a dozen useful, interesting, and important activities.

II

In respect to the privacy-related burden that the drug

testing program imposes upon students, I would emphasize the following: First, not everyone would agree with this Court's characterization of the privacy-related significance of urine sampling as "negligible." *Ante*, at 9 (quoting *Vernonia,* 515 U. S., at 658). Some find the procedure no more intrusive than a routine medical examination, but others are seriously embarrassed by the need to provide a urine sample with someone listening "outside the closed restroom stall," *ante*, at 8. When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it important that the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community "the opportunity to be able to participate" in developing the drug policy. App. 87. The 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.

Second, the testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school.

Third, a contrary reading of the Constitution, as requiring "individualized suspicion" in this public school context, could well lead schools to push the boundaries of "individualized suspicion" to its outer limits, using subjective criteria that may "unfairly target members of unpopular groups," *ante*, at 13, or leave those whose behavior is slightly abnormal stigmatized in the minds of others. See Belsky, Random vs. Suspicion-Based Drug Testing in the Public Schools—A Surprising Civil Liberties Dilemma, 27 Okla. City U. L. Rev. 1, 20–21 (forthcoming 2002) (listing court-approved factors justifying suspicion-based drug testing, including tiredness, overactivity, quietness,

boisterousness, sloppiness, excessive meticulousness, and tardiness). If so, direct application of the Fourth Amendment's prohibition against "unreasonable searches and seizures" will further that Amendment's liberty-protecting objectives at least to the same extent as application of the mediating "individualized suspicion" test, where, as here, the testing program is neither criminal nor disciplinary in nature.

* * *

I cannot know whether the school's drug testing program will work. But, in my view, the Constitution does not prohibit the effort. Emphasizing the considerations I have mentioned, along with others to which the Court refers, I conclude that the school's drug testing program, constitutionally speaking, is not "unreasonable." And I join the Court's opinion.