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David Badanes

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***EARLS v. BOARD OF EDUCATION:*
A TIMID ATTEMPT TO LIMIT
SPECIAL NEEDS FROM BECOMING
NOTHING SPECIAL**

DAVID BADANES†

INTRODUCTION

In *Earls v. Board of Education*,¹ the Court of Appeals for the Tenth Circuit held that the suspicionless drug testing of public school students participating in extracurricular activities was unconstitutional.² The Tecumseh School District in Tecumseh, Oklahoma implemented a policy that required students participating in extracurricular activities to submit to urine drug testing, regardless of any suspicion that a particular student was using illegal drugs.³ Two students challenged the testing policy on the grounds that it violated the Fourth Amendment.⁴ The school district defended the policy asserting that the drug testing was constitutional under the “special needs” doctrine⁵ developed by the Supreme Court.⁶ In contrast to the Tenth Circuit, other courts of appeals have held that similar drug testing schemes are constitutional.⁷ Furthermore, in 1995, the Supreme Court

† J.D. Candidate 2003, St. John’s University School of Law; B.S., SUNY at Stony Brook.

¹ 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 509 (2001).

² *See id.* at 1278 (finding that the school district must demonstrate “some identifiable drug use problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem”).

³ *See id.* at 1267 (“Each student seeking to participate in such activities must sign a written consent agreeing to submit to drug testing prior to participating in the activity, *randomly* during the year while participating . . .”) (emphasis added).

⁴ *See id.* at 1268.

⁵ *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

⁶ *See Earls*, 242 F.3d at 1269.

⁷ *See Miller v. Wilkes*, 172 F.3d 574, 582 (8th Cir. 1999), *vacated as moot*, No. 98-3227, 1999 U.S. App. LEXIS 13289 (8th Cir. June 15, 1999); *see also Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1062-63 (7th Cir. 2000); *Todd v. Rush County Sch. Corp.*, 133 F.3d 984, 985-86 (7th Cir. 1998). The Seventh Circuit

upheld a testing program that required student athletes to undergo suspicionless drug testing.⁸

This Comment agrees with the *Earls* court that the Tecumseh School District's testing policy was unconstitutional. It argues, however, that the rationale of the *Earls* court was erroneous and its analysis and application of the facts too timid. Furthermore, this Comment contends that the special needs doctrine deserves judicial clarification so that it may remain a limited exception to the Fourth Amendment.

Part I of this Comment briefly outlines the United States Supreme Court cases that established the contours and scope of the special needs doctrine. It also examines some of the dissenting opinions and scholarly criticisms of the special needs doctrine. Part II discusses and analyzes the Tenth Circuit's opinion in *Earls*. Finally, Part III suggests a more cogent special needs test.

I. ESTABLISHING THE SPECIAL NEEDS DOCTRINE

The Fourth Amendment of the United States Constitution affords the American populace protection from unreasonable searches and seizures conducted by the government.⁹ The full text of the Amendment reads:

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.¹⁰

Both scholars and the Supreme Court have debated the exact meaning and interpretation of the Fourth Amendment.¹¹

in *Joy* declared that if the case were reviewed solely on the basis of recent Supreme Court precedent, it would have found the policy unconstitutional. See *Joy*, 212 F.3d at 1063. The "doctrines of stare decisis and precedent," however, required the court to follow its holding in *Todd* and declare the policy constitutional. *Id.*

⁸ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁹ U.S. CONST. amend. IV.

¹⁰ *Id.*

¹¹ See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 100 (1979) (Rehnquist, J., dissenting) (recognizing that the interpretation of the Fourth Amendment has "focused on the relationship between the reasonableness requirement and the warrant requirement"); George M. Dery, III, *Are Politicians More Deserving of Privacy Than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 75 (1998); see also

In recent years, the Court has seemingly settled upon the general rule that a nonconsensual search is unconstitutional if it is not authorized by a valid warrant or some level of individualized suspicion.¹² Yet, the Court has carved out a limited number of exceptions to this general rule and has allowed some searches in the absence of either a warrant or individualized suspicion.¹³

The Court has also announced that a search is reasonable when an important governmental need, beyond the normal need for law enforcement, makes the warrant and probable cause requirements impracticable, and the government's interest outweighs the individual's privacy interest.¹⁴ In essence, this describes the special needs doctrine.¹⁵ The genesis of the special

California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (“[O]ur jurisprudence [has] lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.”); Michael E. Brewer, Comment, *Chandler v. Miller: No Turning Back from a Fourth Amendment Reasonableness Analysis*, 75 DENV. U. L. REV. 275, 279 (1997); Jennifer Y. Buffaloe, Note, “*Special Needs*” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 529–30 (1997); Melinda Wyatt Gilliam, Comment, *Oklahoma Constitutional Law: The Future of the Fourth Amendment in Oklahoma High Schools*, 53 OKLA. L. REV. 681, 683 (2000); Robert S. Logan, Note, *The Reverse Equal Protection Analysis: A New Methodology for “Special Needs” Cases*, 68 GEO. WASH. L. REV. 447, 449 (2000); Jennifer E. Smiley, Comment, *Rethinking the “Special Needs” Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811, 812–13 (2001); Peter A. Veytsman, Comment, *Drug Testing Student Athletes and Fourth Amendment Privacy: The Legal Aftermath of Vernonia v. Acton*, 73 TEMP. L. REV. 295, 298 (2000). See generally WAYNE R. LAFAYE, SEARCH AND SEIZURE §§ 1.1, 1.3 (3d ed. 1996) (treatise on the Fourth Amendment).

¹² See *Ferguson v. City of Charleston*, 532 U.S. 67, 69 (2001) (declaring “the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant”); *Chandler v. Miller*, 520 U.S. 305, 308 (2000) (explaining that the Fourth Amendment imposes a “restraint on government conduct [which] generally bars officials from undertaking a search or seizure absent individualized suspicion”); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 624 (1989) (observing that prior Supreme Court “cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–61 (1976) (explaining that even if probable cause is not required, “some quantum of individualized suspicion” remains necessary before a search is reasonable).

¹³ See, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding alcohol testing at roadside checkpoints); *Martinez-Fuerte*, 428 U.S. at 545 (allowing brief detentions for questioning of individuals at international border crossings).

¹⁴ See *Skinner*, 489 U.S. at 624.

¹⁵ As one scholar points out, however, the Supreme Court has not “adequately

needs doctrine was Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*¹⁶

In *T.L.O.*, the Court held that public school officials are agents of the government, and therefore searches of schoolchildren conducted by school officials must comport with the Fourth Amendment.¹⁷ Nonetheless, the Court concluded that the Fourth Amendment does not require school officials to "obtain a warrant before searching a student who is under their authority."¹⁸ The Court reasoned that the warrant requirement is unsuited to the school environment, as it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."¹⁹ Instead of a warrant requirement, the Court substituted a balancing test this weighs the government's interests in conducting the warrantless search against the individual's privacy interests.²⁰ Additionally, in a school setting, the probable cause requirement may be eschewed so long as there is a reasonable belief that the warrantless search will be fruitful in discovering a violation of either the law or the rules of the school.²¹ Justice Blackmun's concurring opinion, however, asserted that the balancing test should be the exception, not the rule.²² He also stated that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."²³

defined what a 'special need' . . . is." Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 261 (2000).

¹⁶ 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

¹⁷ See *id.* at 333.

¹⁸ *Id.* at 340 (indicating that it would "frustrate the governmental purpose behind the search") (quoting *Camara v. Mun. Court*, 387 U.S. 523, 532-33 (1967)).

¹⁹ *Id.*

²⁰ See *id.* at 337 (weighing the government's interest against the individual's interest and stating that reasonableness is determined by "balancing the need to search against the invasion" upon which the search intrudes) (quoting *Camara*, 387 U.S. at 532-33); see also *Terry v. Ohio*, 392 U.S. 1, 22-27 (1968) (discussing the necessity of a balancing test).

²¹ See *T.L.O.*, 469 U.S. at 341-42.

²² See *id.* at 352-53 (Blackmun, J., concurring) (clarifying that probable cause is not necessary when there are reasonable grounds for suspecting that the search will turn up evidence).

²³ *Id.* at 351.

Subsequent to the *T.L.O.* decision, the Court has repeatedly applied the special needs doctrine.²⁴ The Court has found special needs to exist in situations as diverse as: searches of a government employee's office,²⁵ administrative inspections of an automobile salvage yard,²⁶ and searches of a probationer's apartment upon the belief that there might be weapons on the premises.²⁷

The Court was confronted with the issue of whether the government may conduct suspicionless drug testing of individuals in *Skinner v. Railway Labor Executives' Ass'n.*²⁸ In *Skinner*, the Federal Railroad Administration (FRA) enacted regulations mandating blood and urine analysis for any employees involved in train accidents which resulted in "(i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of \$500,000 or more."²⁹ The drug testing did not require any level of suspicion that a particular employee had been under the influence of drugs or alcohol at the time of the accident.³⁰ The Court found that the government's concern for safe rail transportation presented the requisite special need.³¹ Ultimately, the balancing test conducted by the Court led to the conclusion that the government's interests in safe rail transportation overshadowed the individual's privacy rights; therefore, the FRA regulations were constitutional.³² In its decision, the Court affirmed that the testing did constitute a search for Fourth Amendment purposes.³³ The Court reasoned

²⁴ See *Dodson*, *supra* note 15, at 263.

²⁵ See *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987).

²⁶ See *New York v. Burger*, 482 U.S. 691, 702 (1987).

²⁷ See *Griffin v. Wisconsin*, 483 U.S. 868, 875-76 (1987).

²⁸ 489 U.S. 602 (1989).

²⁹ *Id.* at 609.

³⁰ See *id.* at 609-12 (describing the regulations). An employee who refused to provide the required blood or urine samples would have his duties restricted for nine months. *Id.* at 610-11.

³¹ See *id.* at 620 (indicating that the government's interest in ensuring safety is a special need justifying departures from the ordinary warrant procedures and probable cause requirements).

³² See *id.* at 633 (stating that such a test "is not an undue infringement" on the privacy of employees).

³³ See *id.* at 617 ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth

that under the facts presented in the case, however, there was no constitutional requirement for individualized suspicion;³⁴ but, it emphasized that this requirement would be dispensed with only "in limited circumstances."³⁵

In *National Treasury Employees Union v. Von Raab*,³⁶ the United States Customs Service implemented a suspicionless drug testing regime as a condition to applying for certain employment positions.³⁷ The policy required all employees who held positions that had a direct involvement in drug interdiction or that required the individual to carry firearms or handle classified material³⁸ to submit a urine sample for drug testing.³⁹ The government identified two special needs: to ensure that front-line interdiction personnel had unimpeachable integrity and judgment,⁴⁰ and that employees who carried firearms were drug-free.⁴¹ Here, as in *Skinner*, the necessity for individualized suspicion was dispensed with on the theory that the government had a need to discover "latent" or "hidden" drug use.⁴² The Court ruled that the requirement was constitutional.⁴³

A perceived drug problem in public schools led to the expansion of suspicionless drug testing policy in *Vernonia School District 47J v. Acton*.⁴⁴ The Vernonia School District drug testing policy required all students who wished to participate in extracurricular athletics to submit to a random, suspicionless drug-testing program.⁴⁵ In *Acton*, the Court identified a special

Amendment.").

³⁴ See *id.* at 624. The Court explained that it has "usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable," but "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Id.* In support of its decision, the Court noted substantial findings by the FRA that alcohol and drug use were a frequent cause of train accidents. *Id.* at 606-07.

³⁵ *Id.* at 624.

³⁶ 489 U.S. 656 (1989).

³⁷ See *id.* at 660-61.

³⁸ See *id.* The Court remanded to the lower court for reconsideration the part of the policy that applied to positions involving the handling of classified material. See *id.* at 664-65.

³⁹ See *id.* at 661 (describing the collection process).

⁴⁰ See *id.* at 670. The government further justified the special need on the grounds that employees had to be physically fit. *Id.*

⁴¹ See *id.* at 670-71.

⁴² *Id.* at 668.

⁴³ See *id.* at 677.

⁴⁴ 515 U.S. 646 (1995).

⁴⁵ See *id.* at 649-50 (describing the policy).

need based on a variety of factors.⁴⁶ The Court reasoned that a warrant requirement “would unduly interfere” with the school’s disciplinary functions and that a probable cause requirement would impede the “substantial need” of the school system to “maintain order in the schools.”⁴⁷ Having found a special need, the Court applied a balancing test, weighing the government’s interests against the students’ privacy interest.⁴⁸

In dicta, the Court noted that the government’s interests need not be compelling, rather, they must be important enough “to justify the particular search at hand.”⁴⁹ According to the Court, the government’s interest in deterring drug use among schoolchildren was certainly important.⁵⁰ This interest was reinforced by the fact that school officials served a “custodial and tutelary” purpose and that a “proper educational environment requires close supervision of schoolchildren.”⁵¹

In comparison with the government’s interest, the Court found the students’ privacy interests to be minimal.⁵² Three factors were utilized to assess the students’ privacy interest.⁵³ The first factor was the nature of the privacy interest upon which the search intruded.⁵⁴ According to the Court, only “legitimate” privacy expectations are protected by the Fourth Amendment.⁵⁵ The Court stated the proposition that “students within the school environment have a lesser expectation of privacy than members of the general population.”⁵⁶

⁴⁶ See *id.* at 653 (adopting Justice Blackmun’s statement in *T.L.O.*).

⁴⁷ *Id.*

⁴⁸ See *id.* at 654–57.

⁴⁹ *Id.* at 660–61 (contending that although the Court in “*Skinner and Von Raab* [had] . . . characterized the government interest motivating the search as ‘compelling’, it would be incorrect to dispose of a case with a simple finding that a compelling state interest did not exist).

⁵⁰ See *id.* at 661–62 (explaining that the deterrence of drug use among schoolchildren also helps to protect the entire educational process).

⁵¹ *Id.* at 655.

⁵² See *id.* at 656–57 (reasoning that students, and student athletes in particular, have a lesser expectation of privacy).

⁵³ See *id.* at 654–60.

⁵⁴ See *id.* at 654.

⁵⁵ *Id.* The Court added that the legitimacy of an expectation of privacy may vary depending upon the context in which the individual is asserting the right. *Id.*

⁵⁶ *Id.* at 657. The Court reasoned that the individual’s legal relationship with the State affected the expectation of privacy. *Id.* Because schoolchildren are in the “temporary custody of the State,” they possess a lower expectation of privacy. *Id.* Moreover, “Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere.” *Id.* at 656.

Furthermore, student athletes have an even lower privacy expectation, in part, because athletes must undress and shower in a public locker room.⁵⁷ The Court concluded that students who voluntarily participate in school athletics have reason to expect intrusions upon their privacy rights.⁵⁸

The second factor concerned the nature of the intrusion.⁵⁹ This factor consisted of two components: the collection process itself and the information disclosed concerning the contents of the human body.⁶⁰ The Court described the urination collection procedure as "nearly identical to those typically encountered in public restrooms," and therefore, found it to be a negligible intrusion upon privacy interests.⁶¹ As for the information disclosed, the tests were limited to detecting the presence of drugs and not other sensitive data.⁶² Additionally, the results of the tests were only disclosed to a limited number of school personnel and not turned over to any law enforcement agency.⁶³ In the Court's evaluation, this component was also not a significant invasion of privacy.⁶⁴

The last factor considered concerned the nature and immediacy of the governmental concern and the efficacy of the government's means for addressing it.⁶⁵ The Court held the nature of the governmental concern to be important, especially since the drug testing program was narrowly tailored towards school athletics.⁶⁶ The Court believed the risk of immediate physical harm to the drug users or their fellow athletes was

⁵⁷ See *id.* at 657 (pointing out that "[s]chool sports are not for the bashful"). The Court also noted that student athletes have a reduced expectation of privacy because they "voluntarily subject themselves to a degree of regulation." *Id.*

⁵⁸ See *id.*

⁵⁹ See *id.* at 658.

⁶⁰ See *id.* The Court also stated that it was insignificant whether medical information was disclosed prior to, or after, the urine samples were gathered. *Id.* at 659.

⁶¹ *Id.* at 658.

⁶² See *id.* (explaining that the drug tests do not detect whether the student is "epileptic, pregnant, or diabetic"). *But see* *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 647 (1989) (Marshall, J., dissenting) (stating that drug tests can now "uncover not only drug or alcohol use, but also medical disorders such as epilepsy, diabetes, and clinical depression").

⁶³ See *Acton*, 515 U.S. at 658. The school also did not impose punishment on students because of test results. *Id.*

⁶⁴ See *id.* at 660.

⁶⁵ See *id.*

⁶⁶ See *id.* at 661-62. The Court also cited some general detrimental effects of drug use by young adults. *Id.* at 662.

particularly high.⁶⁷ The Court also found that due to the “state of rebellion” that was “fueled by . . . drug abuse,” the school district had an immediate problem that needed to be addressed.⁶⁸ According to the Court it was “self-evident” that the drug testing program was an efficient means to curb drug abuse among student athletes.⁶⁹ The Court ruled that the three factor test was met, and therefore held the school district’s drug testing policy constitutional.⁷⁰

Although the Court found suspicionless drug testing constitutional under the *Skinner*, *Von Raab*, and *Acton* fact patterns, subsequent decisions have shown that there are some areas where such testing is invalid. In *Chandler v. Miller*,⁷¹ the Court held unconstitutional the suspicionless drug testing of candidates for specific elected offices.⁷² In *Ferguson v. City of Charleston*,⁷³ a drug testing policy was deemed unconstitutional because the special need identified was too thoroughly intertwined with law enforcement.⁷⁴

In *Chandler*, the Court was confronted with a state statute that mandated drug testing of candidates running for specified state offices.⁷⁵ The Court’s analysis stated that in order to override the Fourth Amendment’s normal requirement of individualized suspicion, the alleged special need must be substantial.⁷⁶ The Court indicated that in each alleged special needs case, the “courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.”⁷⁷ Although the Court did not explicitly mention the three factors used in *Acton*, it indirectly

⁶⁷ *See id.*

⁶⁸ *Id.* at 662–63. *But see id.* at 684–85 (O’Connor, J., dissenting) (questioning whether there was a demonstrated drug problem in the school district); Respondent’s Brief at 2, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (No. 94–590) (disagreeing with the government’s contention that the drug abuse problem was severe; and claiming that “there is little evidence of Vernonia students using drugs, and no evidence of any athlete in Vernonia ever competing while on drugs”).

⁶⁹ *Acton*, 515 U.S. at 663.

⁷⁰ *See id.* at 664–65.

⁷¹ 520 U.S. 305 (1997).

⁷² *See id.* at 308–09.

⁷³ 532 U.S. 67 (2001).

⁷⁴ *See id.* at 84–86.

⁷⁵ *See Chandler*, 520 U.S. at 308.

⁷⁶ *See id.* at 318.

⁷⁷ *Id.* at 314.

discussed the same issues.⁷⁸ The Court articulated that the testing method authorized by the state was “relatively noninvasive,” implying that the first two prongs of the *Acton* test were satisfied.⁷⁹ The government, however, did not present any evidence of drug usage by political candidates—undercutting any justification that the policy was necessary to contain an immediate problem.⁸⁰ Finally, the particular testing parameters were not efficient and “not well designed to identify candidates who violate antidrug laws.”⁸¹ Since there was neither an immediate problem, nor an efficient policy, the third part of the *Acton* test was found to be non-existent by the Court.⁸² As for the government’s interest, the Court reasoned that since public officials do not perform functions that could jeopardize public safety, the importance of the government’s interest was diminished.⁸³

In *Ferguson*, a case that was decided on the same day as *Earls*,⁸⁴ a state hospital⁸⁵ developed a policy that required drug testing of certain maternity patients.⁸⁶ Central to the ruling was the fact that if the patient’s test revealed evidence of drug use, the results could be sent directly to law enforcement officials and the patient could be subject to immediate arrest.⁸⁷ The Court held that what distinguished *Ferguson* from earlier special needs

⁷⁸ See *id.* at 318–21 (analyzing the testing method, the lack of a documented drug problem among candidates, and the government’s interest).

⁷⁹ *Id.* at 318.

⁸⁰ See *id.* at 318–19.

⁸¹ *Id.* at 319. According to the Court, the drug testing procedures were designed in such a way that a candidate would have sufficient notice to abstain from taking drugs in preparation for a scheduled test date. *Id.* at 319–20.

⁸² See *id.* at 320.

⁸³ See *id.* at 321–22.

⁸⁴ Both cases were decided on March 21, 2001. See *Ferguson v. City of Charleston*, 532 U.S. 67, 67 (2001); *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1265 (10th Cir. 2001).

⁸⁵ As a state-owned institution, the members of the hospital were agents of the government and were therefore subject to the Fourth Amendment. See *Ferguson*, 532 U.S. at 76 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 335–37 (1985)).

⁸⁶ See *id.* at 70–73 (detailing the policy guidelines which would trigger the mandatory drug testing of a maternity patient).

⁸⁷ See *id.* The policy did distinguish between discovery of drug use *during* pregnancy—in which case law enforcement was to be notified only upon the patient’s testing positive a second time—and discovery of drug use *after* labor—in which case law enforcement would be notified immediately. In practice, however, any initial positive tests were immediately reported to law enforcement. See *id.* at 72 & n.5.

cases was that the asserted special need was too entangled with law enforcement.⁸⁸ The Court also noted that unauthorized dissemination of a patient's diagnostic tests is a "far more substantial" invasion of privacy than what existed in the earlier special needs cases.⁸⁹ Significantly, the Court affirmed *Chandler's* holding that courts must closely scrutinize the government's alleged special need.⁹⁰ The *Ferguson* court also rejected the viewpoint that "any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."⁹¹

A. *The Special Needs Doctrine Only Applies in Limited Circumstances*

The special needs doctrine is an exception to the general warrant and probable cause requirements.⁹² Recent Supreme Court cases have used the special needs doctrine only in the context of drug testing.⁹³ In these cases, the Court has either limited its application to the specific facts presented or rejected entirely the use of the doctrine.⁹⁴ The foregoing demonstrates the Court's recognition that the special needs doctrine should remain a limited one.

The dearth of cases in which the Court has invoked the special needs doctrine supports the inference that the doctrine is

⁸⁸ See *id.* at 78–79.

⁸⁹ *Id.* at 78 (distinguishing the effects of disseminating a patient's test information to a third party from the effects of an adverse test result on someone applying for a voluntary benefit).

⁹⁰ See *id.* at 81.

⁹¹ *Id.* at 84 (calling such an approach "inconsistent with the Fourth Amendment"). The government had tried to justify the drug-testing program by stating that its ultimate purpose was to protect the health of pregnant women. *Id.* at 81.

⁹² See *supra* notes 12–15 and accompanying text.

⁹³ See Smiley, *supra* note 11, at 827.

⁹⁴ See *Ferguson*, 532 U.S. at 79 (deciding that the lower court's ruling should be reversed on the issue of special needs); *Chandler v. Miller*, 520 U.S. 305, 321 (1997) (limiting the decision in *Von Raab* to its unique facts and holding that the special needs doctrine did not apply); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring) (clarifying that in her opinion the decision was limited to student athletes); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (deciding only that the specific regulations are constitutional); see also *id.* at 636 (Marshall, J., dissenting) (suggesting that the majority was attempting to limit its opinion to "safety-sensitive jobs").

only applicable in exceptional situations.⁹⁵ Further confirmation for this proposition can be found in the majority's opinion in *Acton*, where they warned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."⁹⁶

In *Chandler*, the Court characterized the special needs doctrine as representing "particularized exceptions to the main rule."⁹⁷ Significantly, *Chandler* also limited the *Von Raab* decision, stating that it was "[h]ardly a decision opening broad vistas for suspicionless searches, [rather,] *Von Raab* must be read in its unique context."⁹⁸ Additionally, *Chandler* imposed a higher standard for special needs by stating that the special need must be substantial.⁹⁹ *Ferguson* confirmed *Chandler* and reiterated that an alleged special need must be analyzed to determine if it "fit[s] within the closely guarded category of constitutionally permissible suspicionless searches."¹⁰⁰

The Court has been very consistent in its position that the special needs doctrine is the exception to the main interpretation of the Fourth Amendment.¹⁰¹ Arguably, the decisions in *Chandler* and *Ferguson* can be interpreted as indicating the Court's intention to more strictly limit the application of the special needs doctrine.

B. Criticisms of the Special Needs Doctrine

The special needs doctrine has been highly criticized.¹⁰²

⁹⁵ Since 1987, when Justice Blackmun's concurrence in *T.L.O.* established the special needs doctrine, there have been only eight cases in which the Supreme Court has used the doctrine as the basis for its holding. See *Ferguson*, 532 U.S. at 79; *Chandler*, 520 U.S. at 318; *Acton*, 515 U.S. at 653; *Skinner*, 489 U.S. at 619; *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987); *New York v. Burger*, 482 U.S. 691, 702 (1987); *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987).

⁹⁶ *Acton*, 515 U.S. at 665.

⁹⁷ *Chandler*, 520 U.S. at 313.

⁹⁸ *Id.* at 321.

⁹⁹ See Smiley, *supra* note 11, at 824.

¹⁰⁰ *Chandler*, 520 U.S. at 309; see *Ferguson*, 532 U.S. at 77.

¹⁰¹ See *supra* notes 92-97 and accompanying text.

¹⁰² See, e.g., Dery, *supra* note 11, at 75; Buffalo, *supra* note 11, at 530-31; Smiley, *supra* note 11, at 812-13; see also Ross H. Parr, Note, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL RTS. J. 241, 273 (1998) (submitting that the *Acton* decision is inconsistent with the Court's previous case law). See generally LaFave, *supra* note 11, §§ 10.3(d), (e).

Justice Blackmun, the originator of the doctrine, believed that the doctrine should be limited;¹⁰³ in fact he dissented in the next two cases that adopted the special needs doctrine.¹⁰⁴ In both instances, Blackmun argued that there was no special need preventing the government from obtaining a warrant.¹⁰⁵ Other dissenting opinions by Supreme Court justices have been scathing in their disparagement of the special needs doctrine and its associated balancing test.

In *T.L.O.*, Justice Brennan's dissent argued that the Court had made a serious error by abandoning the probable cause requirement.¹⁰⁶ Brennan further contended that the majority opinion's balancing test "vastly overstate[d] the social costs that a probable-cause standard entails" and failed to give adequate weight to the individual's privacy interest.¹⁰⁷ According to the dissent, "warrantless searches are *per se* unreasonable, subject only to a few specifically delineated and well-recognized exceptions."¹⁰⁸ Brennan also argued that the purported search must be significantly less intrusive than a full-scale search and that sufficient weight must be given to the privacy interests in the balancing test for a warrantless search to be justified.¹⁰⁹ Brennan defined a special need as one beyond the mere need to apprehend lawbreakers. It should only be invoked in those situations of exigency that would make "obtaining a warrant either impossible or hopelessly infeasible."¹¹⁰ Brennan conceded that this strictness might deter some searches, but maintained this was the Fourth Amendment's very purpose.¹¹¹ Brennan

¹⁰³ See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring).

¹⁰⁴ See *Griffin v. Wisconsin*, 483 U.S. 868, 881 (1987) (Blackmun, J., dissenting) (arguing that a warrant should have been required); *O'Connor v. Ortega*, 480 U.S. 709, 742 (1987) (Blackmun, J., dissenting) (expounding his viewpoint that there was no demonstrated special need); see also *Buffalo*, *supra* note 11, at 537 (contending that Justice Blackmun did not intend "to create a category of special needs exceptions to the warrant and probable cause requirements").

¹⁰⁵ See *Griffin*, 483 U.S. at 881 (Blackmun, J., dissenting); *O'Connor*, 480 U.S. at 742 (Blackmun, J., dissenting).

¹⁰⁶ See *T.L.O.*, 469 U.S. at 354 (Brennan, J., dissenting) (arguing that the decision was not supported by precedent).

¹⁰⁷ *Id.* at 362 (Brennan, J., dissenting).

¹⁰⁸ *Id.* at 354 (Brennan, J., dissenting).

¹⁰⁹ See *id.* at 355 (Brennan, J., dissenting).

¹¹⁰ *Id.* at 356 (Brennan, J., dissenting).

¹¹¹ See *id.* at 357 ("[F]orcing law enforcement personnel to obtain a warrant before engaging in a search will predictably deter the police from conducting some searches that they would otherwise like to conduct.").

claimed that the Court had "jettison[ed] the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment"—for an amorphous balancing test.¹¹²

Justice Marshall's forceful dissent in *Skinner* argued that the majority opinion was shortsighted and "allowed basic constitutional rights to fall prey to [a] momentary emergenc[y]."¹¹³ He called the special needs rationale "unprincipled and dangerous" and found that its exceptions had "badly distorted" the precision of Fourth Amendment jurisprudence.¹¹⁴ Marshall would have allowed a warrantless search without a showing of individualized suspicion only in cases where the search was routine, fleeting, and nonintrusive.¹¹⁵

Marshall skillfully pointed out that even if the *collection* of the urine samples was reasonable under an exigency rationale, the same is not true for the actual *testing* of the samples.¹¹⁶ Since the urine samples would not spoil, there was ample time to obtain "a warrant authorizing, where appropriate, chemical analysis of the extracted fluids."¹¹⁷

Marshall's argument also emphasized that the intrusion on privacy was more severe than the majority had indicated.¹¹⁸ He asserted that the Court had trivialized the intrusiveness of the searches.¹¹⁹ Marshall noted that the Court had previously characterized both a limited search of a person's outer clothing¹²⁰ and a scraping of a suspect's fingernails¹²¹ as "severe . . . intrusions upon cherished personal security."¹²² He further explained that compelling a person to produce a urine sample on demand was a deep intrusion on "privacy and bodily

¹¹² *Id.* at 357–58.

¹¹³ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (arguing that the "war" on drugs provides no justification for reducing the protection provided by the Fourth Amendment).

¹¹⁴ *Id.* at 639 (Marshall, J., dissenting).

¹¹⁵ *See id.* at 638 (Marshall, J., dissenting) (pointing out that other Supreme Court cases have allowed warrantless searches only under these conditions).

¹¹⁶ *See id.* at 642–43 (Marshall, J., dissenting).

¹¹⁷ *Id.* at 643 (Marshall, J., dissenting).

¹¹⁸ *See id.* at 636 (Marshall, J., dissenting) (finding the majority's characterization "startling").

¹¹⁹ *See id.* (Marshall, J., dissenting).

¹²⁰ *See Terry v. Ohio*, 392 U.S. 1, 24–25 (1968).

¹²¹ *See Cupp v. Murphy*, 412 U.S. 291, 295 (1973).

¹²² *Skinner*, 489 U.S. at 644 (Marshall, J., dissenting) (quoting *Terry*, 392 U.S. at 24–25).

integrity."¹²³

Marshall also argued that even under the majority's balancing test, he would have come to a different conclusion.¹²⁴ In his opinion, "[t]he benefits of suspicionless . . . urine testing are far outstripped by the costs imposed on personal liberty by such sweeping searches."¹²⁵ Compared to the substantial invasion of privacy interests, Marshall contended that the government's interest was not as great as the majority concluded.¹²⁶ He derided the government's argument that drug testing would deter employees from using drugs as "simply implausible."¹²⁷ Marshall argued that since the testing only occurred after a major train accident, "if the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior."¹²⁸

Marshall, in a similar vein as Brennan's *T.L.O.* dissent, pointed out that invalidating the FRA's testing policy might "hinder the [g]overnment's attempts to make rail transit as safe as humanly possible. But, constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries."¹²⁹

In *Von Raab*, Justice Scalia's dissent focused on the lack of any "real evidence of a real problem that will be solved by urine testing of Customs Service employees."¹³⁰ According to Scalia, the Court's earlier approval of a special need was based upon "well-known or well-demonstrated evils."¹³¹ Scalia's argument demonstrates his belief that any use of the special needs doctrine

¹²³ *Id.* at 645 (Marshall, J., dissenting) (arguing that drawing blood, or demanding a urine sample, is no less intrusive than the searches in *Terry* and *Cupp*).

¹²⁴ *See id.* at 650 (Marshall, J., dissenting); *see also* Dodson, *supra* note 15, at 274 ("What the balancing test amounts to is how the Justices feel about a particular law.").

¹²⁵ *Skinner*, 489 U.S. at 650.

¹²⁶ *See id.* at 652-54.

¹²⁷ *Id.* at 653.

¹²⁸ *Id.*

¹²⁹ *Id.* at 650.

¹³⁰ *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting). By contrast, in *Acton*, Justice Scalia found "an immediate crisis . . . of much greater proportions than existed in *Von Raab*." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995).

¹³¹ *Von Raab*, 489 U.S. at 684 (Scalia, J., dissenting).

should be limited to targeted groups against whom the use of the doctrine makes sense.¹³² Notably, Scalia characterized urine testing as a "type of search particularly destructive of privacy and offensive to personal dignity."¹³³

In Justice O'Connor's *Acton* dissent, she argued that the majority's approval of a broad-based search of every student athlete was a "greater threat to liberty" than a suspicion-based search of individual athletes.¹³⁴ She argued that a suspicionless policy should only be approved when it was "clear that a suspicion-based regime would be ineffectual."¹³⁵ In her view, if "an individualized suspicion requirement would not place the government's objective in jeopardy", then the Court should require individualized suspicion.¹³⁶ O'Connor reasoned that the school district had already demonstrated it could reasonably identify students who were using drugs, therefore, the district would not be hampered by an individualized suspicion requirement in its quest to deter drug use.¹³⁷

Scholars have also objected to the special needs doctrine. One commentator described the special needs doctrine as a "judicial rubber stamp of approval for randomized drug-testing programs."¹³⁸ According to this critic, the courts favor the government's interests and inadequately account for the privacy interests of the individual when conducting the balancing test.¹³⁹ Another scholar called the special needs doctrine a "failed experiment" that could potentially validate searches in many other contexts.¹⁴⁰ This scholar argued that the special needs doctrine "has failed to provide courts with a coherent basis on

¹³² See *id.* at 685–86 (Scalia, J., dissenting) (discussing how the decision could have been limited to "employees assigned specifically to drug interdiction duties").

¹³³ *Id.* at 680 (Scalia, J., dissenting). Scalia wrote the majority opinion in *Acton* where he portrayed similar urine testing as a negligible infringement of privacy interests. See *Acton*, 515 U.S. at 658.

¹³⁴ *Acton*, 515 U.S. at 667 (O'Connor, J., dissenting).

¹³⁵ *Id.* at 667–68 (O'Connor, J., dissenting).

¹³⁶ *Id.* at 674 (O'Connor, J., dissenting).

¹³⁷ See *id.* at 679–80 (O'Connor, J., dissenting) (contending that a "suspicion-based testing [program] . . . would have gone a long way toward solving Vernonia's school drug problem while preserving the Fourth Amendment rights of" the students).

¹³⁸ Dodson, *supra* note 15, at 276.

¹³⁹ See *id.* at 276–77.

¹⁴⁰ Smiley, *supra* note 11, at 836–37 (indicating that the special needs decisions "have the potential to validate government intrusions in many other aspects of our lives").

which to render search and seizure decisions.”¹⁴¹

Another commentator’s criticism of the special needs exception is that it has turned “the warrant preference rule on its head.”¹⁴² According to this commentator, the balancing test does not “adequately safeguard the rights protected by the Fourth Amendment.”¹⁴³ Still another scholar suggests that the courts have used the doctrine to justify “greater intrusions into an individual’s zone of privacy.”¹⁴⁴ Other critics of the special needs doctrine have complained that it is “arbitrary, and ad-hoc,”¹⁴⁵ and provides an “inadequate guide” to courts in deciding future cases.¹⁴⁶

II. THE *EARLS* DECISION

The Tecumseh school district in Oklahoma adopted a drug testing policy that required drug testing of all students who participated in any extracurricular activity, including such activities as academic teams, Future Farmers of America, band, and vocal choir.¹⁴⁷ Prior to participating in an activity, each student was required to sign a written consent agreeing to submit to random drug testing.¹⁴⁸ The test was designed to detect the presence of amphetamines, marijuana, cocaine, and

¹⁴¹ *Id.* at 835 (declaring that “different courts have reached completely opposite outcomes when applying special needs,” and therefore a conclusive interpretation of the doctrine is warranted).

¹⁴² Buffalo, *supra* note 11, at 530–31 (arguing that as a result of the special needs cases, the warrant preference rule only accounts for a “portion of government searches conducted”).

¹⁴³ *Id.* at 551 (criticizing the balancing test as one that is “malleable and unprincipled,” and which “inevitably results in a decision upholding the search in question”).

¹⁴⁴ Michael Polloway, Comment, *Does the Fourth Amendment Prohibit Suspicionless Searches—Or Do Individual Rights Succumb to the Government’s “So-Called” Special Needs?*, 10 SETON HALL CONST. L.J. 143, 182 (1999) (claiming that the Supreme Court engages in circular reasoning whereby “the more the government intrudes [on privacy], the less privacy we expect; thereby giving the government more authority to intrude”).

¹⁴⁵ Logan, *supra* note 11, at 447–48 (agreeing with other critics that the doctrine leads to “inconsistent results . . . and a dearth of guidance to lower courts [in] applying” the special needs standards).

¹⁴⁶ Benjamin Gerald Dusing, Note, *Constitutional Standards for Suspicionless Student Drug Testing: A Moving Target*, 88 KY. L.J. 687, 713–716 (2000) (discussing how *Acton* has not helped in deciding other suspicionless drug test cases).

¹⁴⁷ See *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1267 (10th Cir. 2001).

¹⁴⁸ See *id.*

opiates in a student's urine.¹⁴⁹ The testing procedure required a student to go to a restroom with a faculty member who would stand outside the closed restroom stall as the student urinated into a vial.¹⁵⁰ The monitor would then pour the contents of the vial into two bottles.¹⁵¹ Together, the monitor and the student would seal the bottles.¹⁵² The student would also fill out a form, which would be submitted to the drug testing lab, listing any medications legally prescribed for the student.¹⁵³ Two students, one a member of the marching band and academic team, the other a member of the academic team, challenged the drug testing policy.¹⁵⁴

The *Earls* court explained that the analysis of this case was determined by the nature of the Fourth Amendment right as it applies to schoolchildren.¹⁵⁵ The court declared that students' Fourth Amendment rights are different from those of adults and are determined by considering "what is appropriate for children in school."¹⁵⁶ The *Earls* court ultimately accepted *Acton's* proposition that special needs exist in the school environment.¹⁵⁷ The majority, however, recognized another Tenth Circuit decision that interpreted *Chandler* as requiring courts to first inquire "whether the government has established the existence of a special need before proceeding to any balancing of government and private interests."¹⁵⁸ Nonetheless, the court chose to ignore its own precedent and used the *Acton* decision as the primary guide for its analysis.¹⁵⁹ The court also indicated, however, that it would have found that a special need existed

¹⁴⁹ See *id.* The tests also detected the presence of barbiturates and benzodiazepines. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 1268.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ *Id.* at 1268-69 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995)).

¹⁵⁷ See *id.* at 1270.

¹⁵⁸ *Id.* at 1269 (citing *19 Solid Waste Department Mechanics v. Albuquerque*, 156 F.3d 1068, 1072 (10th Cir. 1998)). *19 Solid Waste Department Mechanics* involved a drug testing program instituted by the city that required certain city employees to undergo a substance abuse test. See *id.* at 1071. In that case, the Tenth Circuit held that before a court undergoes a balancing test it must determine whether there is a special need. See *id.* at 1269.

¹⁵⁹ See *Earls*, 242 F.3d at 1270.

even under a *Chandler* analysis.¹⁶⁰

In evaluating the nature of the students' privacy interest the court concluded that, like the athletes in *Acton*, "participants in other extracurricular activities have a somewhat lesser privacy expectation than other students."¹⁶¹ The court discounted any difference in the level of "communal undress" between athletes and participants in extracurricular activities, declining to give it "much weight" in its analysis.¹⁶² The court reasoned that it was more significant that certain aspects of participating in extracurricular activities legitimately lowered a student's expectation of privacy.¹⁶³ The *Earls* court explained that since the students voluntarily agreed to "follow the directives and adhere to the rules set out by the director of the activity", their privacy expectations were lowered.¹⁶⁴

Earls dispensed with the character of the privacy intrusion issue in one short paragraph.¹⁶⁵ In the court's opinion, the case was squarely within the *Acton* fact pattern, and therefore, the invasion of privacy was insignificant.¹⁶⁶ Thus, the first two prongs of the *Acton* test were satisfied.

The third prong of the *Acton* test, however, was not satisfied.¹⁶⁷ The court held that the nature and immediacy of the drug testing policy were not sufficient to outweigh the student's privacy interest.¹⁶⁸ Primarily, the court questioned the immediacy of the need for a drug testing program.¹⁶⁹ The court noted the "paucity of evidence of an actual drug abuse problem among those subject to the [p]olicy."¹⁷⁰ Without a drug abuse

¹⁶⁰ See *id.* at 1270 n.4 (reasoning that a potential drug abuse problem would be sufficient to demonstrate a special need).

¹⁶¹ *Id.* at 1276.

¹⁶² *Id.* at 1275.

¹⁶³ See *id.* at 1275-76. The court also remarked, however, that it did "not believe that voluntary participation in an activity, without more, should reduce a student's expectation of privacy in his or her body." *Id.* at 1276.

¹⁶⁴ *Id.*

¹⁶⁵ See *id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 1276-78.

¹⁶⁹ See *id.* at 1277.

¹⁷⁰ *Id.* After detailing the evidence of drug use in the school district, the court concluded that such evidence was minimal. See *id.* at 1272-74. For the 1999-2000 school year only one student, out of 241, had tested positive for drug use. *Id.* at 1273.

problem, the efficacy of the drug testing policy was doubtful.¹⁷¹

The court implied that the government's interest in *Earls* was not as important as the government interest that existed in *Acton*.¹⁷² The court acknowledged that deterring drug use among student athletes is important due to the particular dangers such drug use causes.¹⁷³ It was difficult, however, for the court to imagine how drug-abusing participants in the vocal choir were in any more physical danger than the drug-abusing non-participating students.¹⁷⁴ The court also identified students not covered by the policy who were more appropriate candidates for drug testing than the identified extracurricular participants.¹⁷⁵ The court ultimately concluded that the school district's policy too often tested the wrong students.¹⁷⁶

The court considered an alternative rationale for the drug testing program—namely, that the tests were needed because extracurricular students were subject to less supervision than students in classrooms.¹⁷⁷ Again, the *Earls* court discounted this argument, stating there was an imperfect match between the need to test and the group tested.¹⁷⁸

After concluding that the third prong was unsatisfied, thereby rendering the policy unconstitutional, the *Earls* court stated:

[A]ny [school] district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.¹⁷⁹

¹⁷¹ See *id.* at 1277.

¹⁷² See *id.* at 1276–77 (comparing the risk of physical harm to extracurricular participants with the risk of physical harm to student athletes).

¹⁷³ See *id.* at 1276.

¹⁷⁴ See *id.* at 1277.

¹⁷⁵ See *id.* (specifying that students working with shop equipment or in school laboratories are involved in activities that could be considered dangerous).

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* (stating that there are students who are not subject to the policy who also have little or no supervision, including students involved in other student organizations).

¹⁷⁹ *Id.* at 1278. The court, however, did not want to state a bright line rule which would quantify the minimum level of drug usage sufficient for a school district to “demonstrate” an identifiable drug abuse problem. *Id.*

A. Criticism of the Earls Analysis

The *Earls* court's decision to virtually ignore *Chandler* and base its analysis on *Acton's* three part test is misguided. Since, the *Chandler* case was decided after *Acton*, it represents the current Supreme Court's philosophy on the special needs doctrine.¹⁸⁰ According to tenets of legal jurisprudence, a more recent decision should shape a court's analysis on a particular area of law.¹⁸¹ The *Chandler* decision indicates that the alleged special need has to be "substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."¹⁸² *Chandler* indicated that a demonstrated problem of drug abuse was not a necessary prerequisite for a special need claim, but evidence of drug usage would bolster any argument that a drug testing program was warranted and appropriate.¹⁸³ *Chandler* distinguished the only case in which a drug testing program was validated without a prior demonstration of a drug abuse problem.¹⁸⁴ Arguably, the Court is indicating that it would take an extreme case to override its preference for a prior demonstration of a drug abuse problem before finding the required substantial special need.

As the *Earls* court noted, the evidence of actual drug usage in the Tecumseh school district was minimal, and possibly non-existent among the target group, therefore, a special need did not exist.¹⁸⁵ Once a court determines the government cannot establish a special need, it should not proceed to apply the balancing test.¹⁸⁶ This was confirmed by the *Chandler* decision,

¹⁸⁰ As the *Ferguson* case was decided on the same day as *Earls*, the *Earls* court would not be expected to have used that case in its analysis. See *supra* note 84 and accompanying text.

¹⁸¹ See *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1065–66 (7th Cir. 2000) (explaining how *stare decisis* and precedent influence a court's decision); Theodore M. Benditt, *The Rule of Precedent*, in *PRECEDENT IN LAW* 89, 89–98 (Laurence Goldstein ed., 1987).

¹⁸² *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

¹⁸³ See *id.* at 319.

¹⁸⁴ See *id.* at 320–21 (negating the government's argument that the *Von Raab* decision should lead the Court to conclude that a pre-existing drug problem was not a requirement). The Court, however, did not overrule *Von Raab*, but limited it to its unique facts. See *id.* at 321.

¹⁸⁵ See *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1272–74 (10th Cir. 2001) (detailing the level of drug usage among the student population).

¹⁸⁶ See *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 156 F.3d 1068, 1072 (10th Cir. 1998).

which states that without a special need a court should discontinue its inquiry.¹⁸⁷ Alternatively, as O'Connor's dissent in *Acton* demonstrates, the *Earls* court could have held that a suspicion-based program would have sufficed to meet the government's interest.¹⁸⁸

B. How the Earls Court Failed to Consider Other Facts in its Application of the Acton Three Part Test.

Assuming, arguendo, that the *Earls* decision to use the *Acton* three part test was correct, the court's analysis lacked clarity and failed to consider other facts that would have strengthened its eventual decision.

Students do not "shed their constitutional rights . . . at the schoolhouse gate."¹⁸⁹ Consequently, the Fourth Amendment does protect schoolchildren.¹⁹⁰ The *Earls* court unfortunately repeated and adopted the Supreme Court's statement that students within the school environment "have a lesser expectation of privacy than members of the population generally."¹⁹¹ A closer examination of the context in which the Supreme Court announced this proposition, however, reveals that both the Supreme Court and the *Earls* court have subsequently misused this statement.

Justice Powell wrote the statement in his concurring opinion in *T.L.O.*;¹⁹² therefore, it does not represent the holding of the Court. Powell reasoned that due to the close association between students and their teachers, it was "unrealistic to think that students have the same subjective expectation of privacy as the population generally."¹⁹³ Powell conceded, "But for purposes of *deciding this case*, I can assume that children in school—no less than adults—have privacy interests that society is prepared to

¹⁸⁷ See *Chandler*, 520 U.S. at 318.

¹⁸⁸ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 679–80 (1995) (O'Connor, J., dissenting). By applying O'Connor's logic, the school district should be able to identify drug abusing students.

¹⁸⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (applying the First Amendment).

¹⁹⁰ See *New Jersey v. T.L.O.*, 469 U.S. 325, 332–36 (1985) (discussing how the Fourth Amendment applies in the school context). See generally LAFAVE, *supra* note 11, § 10.11 (detailing the law of search and seizures in the context of students).

¹⁹¹ *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1271 (10th Cir. 2001) (quoting *Acton*, 515 U.S. at 657).

¹⁹² See *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring).

¹⁹³ *Id.*

recognize as legitimate.”¹⁹⁴ This indicates that his conclusion that students have a lessened privacy expectation should be limited to the facts of *T.L.O.* In *T.L.O.* the search was conducted to discover evidence of a student’s violation of a school rule.¹⁹⁵ Students know that they are expected to follow the rules and regulations of the school district.¹⁹⁶ In this context, it may be reasonable to assume that a student would have a lesser expectation of privacy. A student, however, would not expect their privacy interests to be any different when it comes to their bodily functions.¹⁹⁷ Although “children *are* compelled to attend school, . . . nothing suggests that they lose their right to privacy in their excretory functions when they do so.”¹⁹⁸ The student has no reason to believe he is expected to urinate on demand in the presence of a teacher.¹⁹⁹ Additionally, evidence exists that forcing students to urinate on demand has caused students to suffer from stress.²⁰⁰ The *Earls* court should have distinguished the expected privacy interests of students in the context of obeying school rules and regulations versus the expected privacy interests of students performing excretory functions.

The Supreme Court’s conclusion that the drug testing in

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ See *id.* at 328 (noting that the student was accused of smoking in the school’s bathroom, a violation of the school’s rules and regulations).

¹⁹⁶ See Paul T. Hayden, *Applying Client-Lawyer Models in Legal Education*, 21 LEGAL STUD. F. 301, 314–15 (1997); see also *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1106–07 (Colo. 1998) (noting that students have numerous rules to follow).

¹⁹⁷ See Respondent’s Brief at 16, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (No. 94–590) (stating that “nothing in their experience in the classroom . . . prepares them for the school’s . . . demand to produce urine for inspection”).

¹⁹⁸ *Acton v. Vernonia Sch. Dist. 47J*, 23 F.3d 1514, 1525 (9th Cir. 1994), *rev’d*, 515 U.S. 646 (1995).

¹⁹⁹ See Respondent’s Brief at 27, *Acton* (No. 94–590) (explaining that children expect to urinate in seclusion).

²⁰⁰ See *Lopez*, 963 P.2d at 1108 (stating that one student was too embarrassed to urinate on demand); *Schail v. Tippecanoe County Sch. Corp.*, 679 F. Supp. 833, 843 (N.D. Ind. 1988), *aff’d*, 864 F.2d 1309 (7th Cir. 1988) (indicating that some athletes suffered from so much stress “that they were unable to void the[ir] bladder for up to two or three hours”); Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968) (explaining that “in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one’s dignity and self-esteem”); see also *Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281, 1291 n.38 (W.D. Okla. 2000), *rev’d*, 242 F.3d 1264 (10th Cir. 2001) (detailing the statements of the students whose complaints ranged from embarrassing to degrading).

Acton was indistinguishable from the ordinary use of a restroom is dubious.²⁰¹ In a case similar to *Earls*, the Colorado Supreme Court disagreed and indicated, "We question the . . . conclusion that the ordinary use of the school's restrooms was indistinguishable from the drug testing that took place here."²⁰² Forcing a student to urinate inside a vial for the purposes of a drug test cannot be equated to the ordinary use of a public restroom.²⁰³ "Ordinarily, a student urinates simply because the body requires it, not because a school district insists that the student provide a urine sample on demand in order for the school district to search it for the presence of drugs."²⁰⁴

The Supreme Court and the Tenth Circuit should take notice of these countervailing opinions and conclude that in the area of urine testing, a student's privacy interests are no less than any other citizen's under the Fourth Amendment.

The *Earls* court also held that, similar to the athletes in *Acton*, extracurricular participants have a reduced expectation of privacy compared to the general student population.²⁰⁵ The *Acton* court posited that student athletes have an even lesser expectation of privacy than other students.²⁰⁶ *Acton* came to this conclusion on the basis of how the athletes dressed and showered in the locker room, and to a lesser degree on their voluntary participation in the athletic activity.²⁰⁷ The Supreme Court's linguistic choice to follow its declaration that "[l]egitimate privacy expectations are even less with regard to student athletes" with the statement that "[s]chool sports are not for the bashful," indicates that the communal dressing and showering of athletes is the primary reason for its conclusion.²⁰⁸ The Supreme Court emphasized that the reason for the lower privacy expectation for student athletes was the state of "communal

²⁰¹ See *Acton*, 515 U.S. at 658.

²⁰² *Lopez*, 963 P.2d at 1108.

²⁰³ See *id.*

²⁰⁴ *Id.*

²⁰⁵ See *Earls*, 242 F.3d at 1276; see also *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1063 (7th Cir. 2000) (holding that students who participate in extracurricular activities have a greater expectation of privacy than athletes, but a lesser expectation of privacy than the general student population).

²⁰⁶ See *Acton*, 515 U.S. at 657.

²⁰⁷ See *id.* (suggesting that because athletes have to undergo physical examinations and follow the coach's directions there is an analogy between student athletes and employees in highly regulated industries).

²⁰⁸ *Id.*

undress" they have to endure.²⁰⁹ Other courts have agreed and have indicated that this is a significant factor.²¹⁰ In contrast, for the most part, students involved in extracurricular activities do not have to undress in front of others or shower together.²¹¹ The *Earls* court's determination to overlook this factor is not in conformity with the Supreme Court's analysis.

Similarly, the focus of the *Earls* court on the voluntary nature of extracurricular activities is flawed. The *Acton* language that volunteering is an "additional respect" indicates that this is a secondary factor, which by itself cannot support a lesser privacy expectation among the selected group of students.²¹² Moreover, even if the *Earls* court is correct that the voluntary nature of an activity can serve as the basis for a student's reduced expectation of privacy, the court overstates the reason it uses, while conveniently ignoring other facts that would challenge its conclusion. A Pennsylvania court agrees that "a student's privacy interests are no less than any other student's just by participating in any extracurricular activity."²¹³ The *Earls* court admitted that the aspects of participating in extracurricular activities that are in common with the athletes involved in *Acton* include "follow[ing] the directives and adher[ing] to the rules set out by the...director of the activity."²¹⁴ The *Earls* court also agreed that this only constrains their personal freedom "in some small way."²¹⁵ It seems odd that a student who follows the rules has somehow now agreed to a lesser privacy expectation. Moreover, every student, not just students who volunteer for activities, must follow numerous rules and directives set forth by their teachers.²¹⁶ This leads

²⁰⁹ See *id.* (assuming that all student athletes have to dress and undress in a locker room situation similar to the one in existence in *Acton*).

²¹⁰ See *Joy*, 212 F.3d at 1063; *Willis v. Anderson Cmty. Sch. Corp.*, 158 F.3d 415, 421-22 (7th Cir. 1998); *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 929 (N.D. Tex. 2001); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1107 (Colo. 1998).

²¹¹ See *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1276 (10th Cir. 2001); *Lopez*, 963 P.2d at 1107.

²¹² See *Acton*, 515 U.S. at 657.

²¹³ *Theodore v. Del. Valley Sch. Dist.*, 761 A.2d. 652, 660 (Pa. Commw. Ct. 2000).

²¹⁴ *Earls*, 242 F.3d at 1276. The *Earls* court did point out that unlike the athletes in *Acton*, the extracurricular students did not need to obtain pre-participation physicals or insurance. *Id.*

²¹⁵ *Id.*

²¹⁶ See *New Jersey v. T.L.O.*, 469 U.S. 325, 377 n.16 (1985) (Stevens, J.,

circuitously to the absurd conclusion that all students must have an even lesser privacy expectation than the general student. Furthermore, the *Earls* court agrees that it would be doubtful that all students could be subjected to a drug testing program.²¹⁷

Furthermore, there is a convincing argument that participation in extracurricular activities is not really a voluntary choice. The Supreme Court has stated that participating in extracurricular activities is part of a "complete educational experience."²¹⁸ The *Earls* court conceded that extracurricular "participation has become an integral part of the educational experience for most students."²¹⁹ For high school students that apply to colleges and universities, their participation in extracurricular activities is a key component of their chances for being selected to attend their preferred college.²²⁰ The student would thus be presented with a choice between subjecting themselves to a degrading urine test or not participating in the extracurricular activity. For all the reasons presented above, the *Earls* court should have concluded that the Tecumseh policy failed the first prong of the *Acton* test.

The Tenth Circuit described the character of the intrusion involved in *Earls* as virtually identical to the testing process in *Acton*.²²¹ One important aspect of the *Acton* test, however, is not present in *Earls*. In *Acton*, an initial test that indicates the presence of drugs was followed by a second test to confirm the result.²²² This would at least minimize the chances of a "false

concurring and dissenting) (listing some of the rules that all students may be required to follow); see also *supra* note 196 and accompanying text.

²¹⁷ See *Earls*, 242 F.3d at 1278 (speculating that the Supreme Court would not approve of a drug testing policy that tested all students).

²¹⁸ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000).

²¹⁹ *Earls*, 242 F.3d at 1276.

²²⁰ See Barb Berggoetz, *Movement to Dump the SAT Isn't Swaying State's Colleges*, THE INDIANAPOLIS STAR, Mar. 28, 2001, at A1 (indicating that extracurricular activities are a factor for more competitive schools in deciding whether to admit a student); Michael Ollove, *Picking Between Students on a Whim and a Prayer; Educated Guesses Are Big Part of Admissions*, THE BALTIMORE SUN, Mar. 4, 2001, at 1A (stating extracurricular activities help colleges to distinguish among its candidates); Claudia Wallis, *Special Report: How to Make a Better Student, Their Eight Secrets of Success*, TIME, Oct. 19, 1998, at 80 (observing that competitive colleges use participation in extracurricular activities as a sign of genuine commitment).

²²¹ See *Earls*, 242 F.3d at 1276.

²²² See *id.* at 1267-68 (according to the facts of the case only one drug test is undertaken); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650-51 (1995) (indicating that a positive test is followed by a secondary confirming test).

positive.” Urine tests can yield inaccurate results as often as sixty percent of the time.²²³ False positives can arise from such innocent activities as the use of medications.²²⁴ Although, in *Earls*, the school district claimed that its drug tests were 99.4% accurate, this would still suggest that of every 1000 students tested, six would be unfairly judged as drug users. Although this is a small number, to paraphrase a famous quote, it is better to free ten drug users than incorrectly accuse one who is innocent.²²⁵ It would be unconscionable to brand a student as a drug abuser when they are innocent of any wrongdoing. In addition to the false positives, the test’s susceptibility to cheating renders it ill designed to identify the chronic drug user.²²⁶ Since there are a variety of ways for drug users to cheat to obtain a clean result, the efficiency of urine drug testing is questionable. Additionally, the district should have to justify a warrantless search for both the collection and testing of the urine specimens.²²⁷ The Supreme Court’s depiction of the character of the intrusion in *Acton*, and by implication in *Earls*, is one that should be challenged. The character of the intrusion involved in *Earls* is a serious one and likely does not meet the second prong of the *Acton* test.

The *Earls* court does state persuasive reasons why the third prong of the *Acton* test is not met. The court could have added to its opinion that a school district should not attempt to divide the student population into broad categories and then conduct drug testing on a category-by-category basis. This would eventually result in drug testing for all but the most uninvolved and isolated students.²²⁸ The court should have stated a bright line

²²³ JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 130 (1997).

²²⁴ See *id.* at 132. False positives can also arise from the ingestion of certain foods. *Id.*

²²⁵ See *Goetz v. Crosson*, 967 F.2d 29, 39 (2nd Cir. 1992) (“[I]t is better that ten guilty persons go free than that one innocent person is convicted.”) (citing WILLIAM BLACKSTONE, COMMENTARIES 358).

²²⁶ See *New Trade Boom to Cheat Drug Tests at Work*, THE SOUTHLAND TIMES (New Zealand), May 2, 2000, at 7; Christopher Reed, *Beware: That Bagel Could Get You Fired; Tests That Mistake Food For Drugs Are Terrifying US Workers*, THE OBSERVER, Dec. 12, 1999, at 16; Amy Shipley, *Drug Tests, Troubling Results; IOC’s System is Plagued by False Positives in Addition to Cheating*, THE WASHINGTON POST, Sept. 23, 1999, at D1 (illustrating how athletes can perform activities that will result in inaccurate results).

²²⁷ See *supra* notes 115–17 and accompanying text.

²²⁸ See *Willis v. Anderson Cmty. Sch. Corp.*, 158 F.3d 415, 423 (7th Cir. 1998)

rule that any expansion of drug testing beyond student athletes is unconstitutional.

III. A BETTER SPECIAL NEEDS TEST

Since there is a difference in the federal courts of appeals, on the issues presented in *Earls*, it would be wise for the Supreme Court to clarify its position on this matter.²²⁹ The courts, and particularly the Supreme Court, should state a bright-line rule making suspicionless drug testing of students participating in extracurricular activities unconstitutional. A vast number of students participate in extracurricular activities.²³⁰ If the courts allow the special needs doctrine to apply to this population, it is only one small step to making all students subjected to urine drug testing. Consequently, despite the ills of a broad-based search, and the warnings of the *Acton* Court, the Fourth Amendment would have virtually no meaning or application to the schoolchildren of America.

This Comment suggests that the Court should be firm in its general rule that a warrant, or some level of suspicion, is required before a search can be conducted by the government. Unfortunately, the lower courts have misused the special needs doctrine and have validated invasive drug testing in many situations.²³¹ The special needs doctrine by its very definition states that it should only be applied in situations where obtaining a warrant or requiring reasonable suspicion is "impracticable."²³² The Court has added the additional requirement that the special need be substantial.²³³ The Supreme Court should give the lower courts a clear indication of exactly when the special needs doctrine is applicable.

The special needs doctrine should be reworked to state that

(warning against the possibility that school districts will divide students into broad categories so that eventually virtually all students will be subject to the drug testing policy).

²²⁹ See *supra* note 7.

²³⁰ NATIONAL CENTER FOR EDUCATION STATISTICS, THE CONDITION OF EDUCATION 1995, at <http://www.nces.ed.gov/pubs/ce/c9543a01.html> (last visited Apr. 11, 2002).

²³¹ See Dodson, *supra* note 15, at 282 (listing some of the situations in which courts have allowed drug testing programs); Smiley, *supra* note 11, at 828-30 (discussing some of the cases from the Seventh Circuit that have validated drug testing programs on the basis of the special needs doctrine).

²³² See *supra* note 23 and accompanying text.

²³³ See *supra* notes 182-84 and accompanying text.

it would only apply to situations where the government interest is compelling and where the general public safety is substantially threatened by a well-documented and genuine danger. Furthermore, this danger should be one that would cause great harm to a large number of the population. This would preserve the special needs doctrine to situations such as nuclear power plants²³⁴ and airport safety checks.²³⁵ This new standard would oblige the Court to overturn the *Acton* decision, and quite possibly, the *Von Raab* and *Skinner* decisions as well.

CONCLUSION

The special needs doctrine is a limited exception to the requirement that the government obtain a warrant or demonstrate some level of suspicion before conducting a search. The Supreme Court has held that the government has a special need to mandate suspicionless drug testing of student athletes. The *Earls* decision wisely refused to extend the special needs doctrine to students participating in extracurricular activities. The Tenth Circuit, however, was too timid in its approach and should have announced a bright-line rule prohibiting a school district from adopting a urine drug testing program for students who participate in extracurricular activities as violative of the Constitution. Furthermore, the special needs doctrine needs to be restated so that it provides a more coherent guideline for the judicial system.

²³⁴ See *Int'l Bhd. of Elec. Workers, Local 1245 v. U.S. Nuclear Regulatory Comm'n*, 966 F.2d 521, 527 (9th Cir. 1992).

²³⁵ See *United States v. Henry*, 615 F.2d 1223, 1228-29 (9th Cir. 1980).

