

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: VERNONIA SCHOOL DISTRICT 47J, Petitioner v.  
WAYNE ACTON, ET UX., ETC.

CASE NO: 94-590

PLACE: Washington, D.C.

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1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 94-590, Vernonia School District. Is that  
5 the way you pronounce the name of the --

6 MR. VOLPERT: Yes, it is, Mr. Chief Justice.

7 CHIEF JUSTICE REHNQUIST: Versus Wayne Acton.  
8 Mr. Volpert.

9 ORAL ARGUMENT OF TIMOTHY R. VOLPERT

10 ON BEHALF OF THE PETITIONER

11 MR. VOLPERT: Mr. Chief Justice, and may it  
12 please the Court:

13 The issue presented is whether a school district  
14 faced with a serious drug problem with student athletes at  
15 its core may reasonably require athletes to submit to drug  
16 testing absent individualized suspicion.

17 The school district has established a serious  
18 threat to its ability to educate its students and to the  
19 safety of its athletes --

20 QUESTION: Has it identified that threat as drug  
21 use, as opposed to, sort of a lot of bragging about drug  
22 use? It seems to me, my recollection is that the, kind of  
23 the hard evidence on the actual usage was on the thin  
24 side, whereas there was plenty of evidence that people  
25 were going around bragging about drug use, glorifying drug

1 use, giving the impression that it was a smart thing to  
2 do, and kids at that age claim to have done a lot of  
3 things that they haven't done. Where does the, sort of  
4 the hard evidence stop and the evidence of talk begin?

5 MR. VOLPERT: The hard evidence of drug use  
6 consists, Justice Souter, of observations on numerous  
7 occasions by a teacher of students smoking marijuana  
8 across the street, arrests of student athletes for using  
9 drugs, confiscation of drug paraphernalia on school  
10 grounds, admissions by students to the principal that they  
11 have used drugs, admissions by certain student athletes to  
12 the coaches that they had used drugs, coaches'  
13 observations of marijuana coming from the room of athletes  
14 the day after a serious injury --

15 QUESTION: Well, there was one example of that,  
16 for example. Was there more?

17 MR. VOLPERT: I'm sorry, of what?

18 QUESTION: I mean, the -- as I recall the  
19 briefs, there was one example of a coach going into a -- I  
20 think it was a wrestler's room, and he smelled -- after  
21 the kid had been injured, and he smelled pot. I mean,  
22 were there other instances of that?

23 MR. VOLPERT: There were no other instances that  
24 I can recall from the record, Justice Souter, where the  
25 smell of marijuana, where the teachers or coaches noticed

1 the smell of marijuana.

2 QUESTION: I think that's what's bothering me,  
3 because -- I'm sure you didn't intend this, but I think  
4 you spoke of it in the plural, and yet there was only one  
5 instance of it, and that's why I'm troubled by the  
6 difficulty of figuring out just what is provably there  
7 about use, as opposed to what is generalization, or what  
8 is generalization about student bragging.

9 MR. VOLPERT: Well, I could only answer that by  
10 saying that I believe that we have numerous -- I don't  
11 believe, we do have numerous observations, admissions,  
12 proof of athletes being arrested for the use of drugs, and  
13 there is -- I believe what you're referring to is, there  
14 is one instance, and I did not mean to speak of it in the  
15 plural, where a wrestler -- where a coach smelled  
16 marijuana coming from a wrestler's room.

17 The one thing that it seems to me is missing  
18 from this record is a direct observation of a student  
19 athlete using drugs and then, for instance --

20 QUESTION: Well, Mr. Volpert, did the school  
21 district try a drug testing scheme based on reasonable  
22 suspicion that a particular student might be experimenting  
23 with drugs?

24 MR. VOLPERT: If you mean urinalysis drug  
25 testing, Justice O'Connor, no, they did not.

1 QUESTION: Well, the same kind of testing you're  
2 doing under -- or the school was doing under this  
3 random --

4 MR. VOLPERT: No, they --

5 QUESTION: -- testing. You didn't ever use  
6 reasonable suspicion, and for those that the coaches  
7 suspected of using drugs --

8 MR. VOLPERT: We did not --

9 QUESTION: Ask them to be tested.

10 MR. VOLPERT: Excuse me. We did not ever  
11 combine reasonable suspicion with urinalysis drug testing.

12 QUESTION: Why not?

13 MR. VOLPERT: There's no direct evidence in the  
14 record with regard to that. I can only surmise that the  
15 district determined, the school district and the school  
16 board made a reasonable determination that first of all  
17 they would have difficulty making a reasonable accusation  
18 based only on suspicion of drug intoxication, and second  
19 of all, that they assumed that there would not be the  
20 deterrent effect that a random drug testing program would  
21 have, because the only way to -- if you are basing it on  
22 reasonable suspicion, you are largely left to observing  
23 behavior, and bizarre behavior, and then reaching a  
24 conclusion --

25 QUESTION: Or relying on what people have been



1 saying. If somebody says they have been experimenting,  
2 you don't think that would give rise to reasonable  
3 suspicion --

4 MR. VOLPERT: Well, the --

5 QUESTION: -- that it might be true?

6 MR. VOLPERT: The problem is that if someone  
7 says on Wednesday that they have used drugs in the past, I  
8 am not at all convinced that there would be a reasonable  
9 suspicion sufficient to test them at that time, just based  
10 on conversations of past drug use.

11 QUESTION: Do you think that the rule that we  
12 announce ought to be a rule that's specific on a school-  
13 by-school, case-by-case basis, or would it be plausible  
14 for us to say, a) there is a drug problem of dangerous  
15 proportions in this middle and high school population  
16 throughout the country, and that even those schools that  
17 are relatively drug free have a strong interest in keeping  
18 themselves that way?

19 MR. VOLPERT: Justice Kennedy, I believe that  
20 this Court's holdings in Skinner and Von Raab, this Court  
21 could reach such a conclusion. However, I think that  
22 there is a reasonable basis for drawing the line and  
23 requiring individual school districts to establish, or to  
24 reasonably conclude that they have individual problems.

25 QUESTION: Each district, or each school?

1 Suppose there are three high schools, one with a serious  
2 drug problem, the other mild -- the other mild by today's  
3 standard, which means only 10 percent of the students are  
4 using them from time to time -- and the other  
5 substantially less than that. Could you have a district-  
6 wide rule?

7 MR. VOLPERT: If the school district on the  
8 local level determined that there was a serious drug  
9 problem in one of the schools, and after deliberation  
10 reached a reasonable conclusion that there was an  
11 immediate threat to the other schools, I believe you  
12 could.

13 QUESTION: How about our decision in the City of  
14 Renton case dealing with adult bookstores and so forth?  
15 There we said that one city council could rely on findings  
16 made by other city councils as to the effect of adult  
17 bookstores in connection with neighborhood deterioration?

18 MR. VOLPERT: Mr. Chief Justice, I believe that  
19 certainly a school district could rely on evidence of a  
20 drug problem in neighboring school districts. I also  
21 believe that based on this Court's decisions, especially  
22 in Von Raab, this Court could decide that a school  
23 district without any drug problem could rely on national  
24 evidence, but I think that there is a reasonable basis for  
25 drawing a line and allowing individual school boards to

1 make that determination.

2 That is not to say that it would have to be  
3 based on -- that it has to be based on evidence in each  
4 school in the district. That does not say that it cannot  
5 be based on evidence of a drug problem in the county, or  
6 in the general area. If there is a reasonable belief of a  
7 serious and eminent threat of drug use in the schools, we  
8 believe that testing should be allowed.

9 QUESTION: Now, by the same reasoning, shouldn't  
10 testing then be allowed through the entire school  
11 population? And haven't, in fact, you made -- if your  
12 case is good here, haven't you in fact made a case for  
13 random testing of the entire school population in these  
14 schools?

15 MR. VOLPERT: Justice Souter, under the facts of  
16 this case, I believe we have probably made a sufficient  
17 case for drug testing of the entire student body of the  
18 Vernonia School District.

19 QUESTION: Because your argument basically is  
20 that the nonathletes tend to follow the lead of the  
21 athletes, so that if your hypothesis is right, then sort  
22 of --

23 MR. VOLPERT: No.

24 QUESTION: -- throughout the school population  
25 you're doing this.

1 MR. VOLPERT: No, that would not be our  
2 argument.

3 Our -- my argument is that that, in fact,  
4 occurred. I would not -- to the extent -- I would not  
5 base that on speculation that because athletes are using  
6 drugs, that there might be a spillover effect. In this  
7 case, there is proof, I believe the district court called  
8 beyond any reasonable doubt, that there was a drug problem  
9 which was all-pervasive throughout the school system,  
10 athletes and nonathletes.

11 QUESTION: Mr. Volpert, isn't there a  
12 significant difference between the people who go to  
13 school, who are required to go to school by State law, and  
14 athletes?

15 The athletes sign a consent form, do they not?  
16 Isn't there a difference between athletics, which is a  
17 volunteer activity -- I thought that you were relying on  
18 that distinction, and that's why you were limiting the  
19 testing to the athletics program, but now you tell me no,  
20 it's just on the basis of pervasive drugs. You could  
21 randomly test all students.

22 MR. VOLPERT: Justice Ginsburg, in this case we  
23 have a serious threat to athletes and a serious threat to  
24 preservation of discipline and order in the schools. In  
25 our case, we have both. In response to Justice Souter's



1 question, I was simply suggesting that it would be  
2 possible to establish a situation that was so bad in the  
3 general school population and was such a threat to the  
4 preservation of order in the schools that would justify  
5 testing of all athletes -- excuse me, of all students.  
6 That is not --

7 QUESTION: But didn't you also say that you had  
8 it here, that you had made the case here, or could have  
9 made the case here?

10 MR. VOLPERT: I think hypothetically we could  
11 have made that case under these facts.

12 QUESTION: So that you didn't -- on your theory  
13 you didn't need, as Justice Ginsburg points out, the  
14 feature of the voluntary consent form.

15 MR. VOLPERT: Our case is based on both. I am  
16 responding to a hypothetical. I do not think that in all  
17 circumstances it is necessary for you to have both.

18 QUESTION: Serious enough problem, you don't  
19 need the consent; less serious problem, you might need it?

20 MR. VOLPERT: Extreme problem.

21 QUESTION: Let me ask a different question.  
22 Supposing -- if it's that serious, you're also assuming  
23 it's so serious you can't -- you wouldn't have any  
24 individualized suspicion as to particular students who  
25 might be using drugs. It would be sort of a

1 contradiction, it seems to me.

2 MR. VOLPERT: Well, I don't think so, Justice  
3 Stevens, because if you -- it's kind of hard to  
4 characterize the record in this case, but when you read  
5 the record in its entirety, you realize the extent to  
6 which drug use became -- the extent to which disciplinary  
7 problems became pervasive.

8 QUESTION: But Mr. Volpert, we have findings.  
9 What did the -- the district court made findings, and the  
10 Ninth Circuit said, we accept those findings.

11 MR. VOLPERT: Correct.

12 QUESTION: Rejected -- even though the Ninth  
13 Circuit came out the other way. Those facts are the ones  
14 that control this case. And what were the facts that the  
15 district court found? Did they find -- the district court  
16 find that everybody in the school was involved, or what  
17 exactly is the fact basis for the case?

18 MR. VOLPERT: The district court found, Justice  
19 Ginsburg, a startling and progressive increase in the use  
20 and glamorization of drugs, characterized the student body  
21 being in a state of rebellion, characterized -- said a  
22 general flagrant attitude that there was nothing the  
23 school could do about their conduct or drug use typified a  
24 usual day.

25 Teachers testified about a tremendous difference

1 in the type of behavior than they had seen over the course  
2 of the last 16 or 17 years.

3 QUESTION: None of that sounds like it's  
4 confined to athletes.

5 MR. VOLPERT: Pardon me?

6 QUESTION: None of that sounds like it's  
7 confined to athletes.

8 MR. VOLPERT: Justice Stevens, the district  
9 court found that the athletes were among the leaders of  
10 the group in the classroom who were causing disruptions.

11 QUESTION: How do they know that if they don't  
12 have individualized suspicion? That's what puzzles me.

13 MR. VOLPERT: How do they know that --

14 QUESTION: Yes.

15 MR. VOLPERT: That the athletes were being  
16 disruptive?

17 QUESTION: No, no. They know who the leaders  
18 are who are the most frequent users of drugs, but they  
19 don't have any individualized suspicion as to particular  
20 individuals.

21 MR. VOLPERT: Well, the district courts referred  
22 to the conclusion that this was -- that the conduct was  
23 drug-related, if that's what you're asking, as being  
24 inescapable, and the Ninth Circuit said that the  
25 district -- the district officials observed conduct which

1 was so far out of the norm that drug use was a logical  
2 conclusion. Now --

3 QUESTION: Well, that would be individualized  
4 suspicion, wouldn't it?

5 MR. VOLPERT: Well, I don't think so  
6 necessarily. If you see in the classroom someone  
7 misbehaving, and you're a teacher, you at that point have  
8 to make an important choice if you're suggesting that you  
9 drug test based on individualized suspicion. You have to  
10 decide -- make very difficult decisions as to whether this  
11 behavior is so bizarre that it indicates the use of drugs,  
12 and that you're going to make an accusation and drag  
13 someone down to the principal's office --

14 QUESTION: But Mr. Volpert, isn't that pretty  
15 much what the Fourth Amendment is designed to require,  
16 something based on individualized suspicion, and the  
17 school district didn't even try that, did they?

18 MR. VOLPERT: Well --

19 QUESTION: I mean, the school made no effort to  
20 at least launch its program on the basis of some kind of  
21 testing based on individualized suspicion, and I think in  
22 the school context we've said it doesn't have to be  
23 probable cause, but there was no effort made to do that,  
24 was there?

25 MR. VOLPERT: There was no -- let me draw a



1 distinction, Justice O'Connor. There was no drug testing  
2 program based on reasonable suspicion.

3 QUESTION: Right.

4 MR. VOLPERT: The district took many, many steps  
5 to try to solve it as a behavioral problem --

6 QUESTION: Well --

7 MR. VOLPERT: -- observing behavior and dealing  
8 with it.

9 QUESTION: -- let me ask you this. Suppose we  
10 were to conclude that at least on this record the school  
11 should try individualized suspicion. Now, it's overlaid  
12 here by the use of consent forms. Do you take the  
13 position that if there is a valid consent form by the  
14 student and the student's parents that there would for  
15 that student not have to be individualized suspicion?

16 MR. VOLPERT: We have never relied on the  
17 consent form in this case. James Acton --

18 QUESTION: But could you?

19 MR. VOLPERT: -- did not sign a consent. Yes, I  
20 believe we could.

21 QUESTION: Yes, so you might have some  
22 combination in effect.

23 MR. VOLPERT: The problem, Justice O'Connor,  
24 with individualized suspicion is clear in our record in  
25 the problem of drugs, it was clear in the record in

1 Skinner, and clear in the record in Von Raab. Because it  
2 is so difficult to detect for certain that you have any  
3 kind of drug involvement in behavior, especially with  
4 adolescents --

5 QUESTION: A reasonable suspicion doesn't mean  
6 for certain, does it?

7 MR. VOLPERT: No, it does not, but when you are  
8 asking a teacher to actually make an accusation of drug  
9 use, and that accusation is based on a number of  
10 circumstances, it is far less intrusive in a circumstance  
11 like this to allow the random drug testing rather than  
12 just fingering individual athletes, taking them to the  
13 principal's office, and make them submit to the test. You  
14 would also --

15 QUESTION: It's not only less intrusive, I take  
16 it the suggestion of individualized suspicion would alter  
17 fundamentally the relation between the student and the  
18 teacher.

19 MR. VOLPERT: I think it would, Justice Kennedy.  
20 Certainly under this record I think virtually everyone  
21 acting up in the classroom would have been taken down to  
22 the principal's office and basically accused of drug use.

23 In this situation, contrary to the position --

24 QUESTION: Not accused, just asked to be tested,  
25 isn't that the proposal?

1 MR. VOLPERT: Except that in the situation of  
2 individualized suspicion, you are telling an individual  
3 student, I believe that you are using drugs, and I think  
4 the Court must focus on the burden that that places on  
5 teachers to actually make that type of accusation. They  
6 are not experts in the field.

7 QUESTION: Well, if it's combined, however -- if  
8 all the school wants to do is test student athletes, and  
9 if all but a handful have signed valid consent forms, I  
10 assume as to those with valid consent forms that the  
11 existing program could be used. That leaves you with a  
12 handful of people who decline to sign a consent form, I  
13 suppose.

14 MR. VOLPERT: That would.

15 Another problem with reasonable suspicion, of  
16 course, is in the case of drug use, most of the time  
17 you're going to miss it. That may be the primary problem.  
18 The expert testimony is that 90 percent of the time,  
19 you're not going to detect drug use.

20 QUESTION: How long was this random testing in  
21 effect in the school?

22 MR. VOLPERT: It began in the fall of 1989, and  
23 the decision from the Ninth Circuit was rendered last  
24 spring.

25 QUESTION: And during that interval of time, how

1 many tests turned up positive?

2 MR. VOLPERT: I believe the testimony was, an  
3 estimate from the superintendent, two or three.

4 QUESTION: It must have been a very effective  
5 program, then

6 MR. VOLPERT: Well, it was a very effective --  
7 (Laughter.)

8 QUESTION: Shows how effective it was, I  
9 suppose.

10 MR. VOLPERT: I believe it does, Justice Scalia.  
11 It --

12 QUESTION: One side says it shows no problem,  
13 the other side it shows how effective it is --  
14 (Laughter.)

15 QUESTION: -- but I'm wondering, Mr. Volpert,  
16 why you didn't test for the most frequently used  
17 controlled substance -- well, it's not a controlled  
18 substance --

19 QUESTION: Steroids.

20 QUESTION: -- alcohol.

21 QUESTION: Steroids.

22 QUESTION: It's alcohol, I think. Don't kids  
23 drink beer and wine?

24 MR. VOLPERT: I will focus on the question about  
25 alcohol. There's no direct evidence in the record as to



1     why alcohol was not tested. I would assume, if I may  
2     infer from the record, that the district believed that  
3     they were better equipped to detect the use of alcohol  
4     because of alcohol being on one's breath, and perhaps the  
5     effect on gait, which is fundamentally different from the  
6     use of drugs.

7             QUESTION: Well, maybe it was because they did  
8     not think that the drinking of alcohol, which kids have  
9     been doing for a long time, produced the kind of classroom  
10    disruption that harder drugs do.

11            MR. VOLPERT: There is a comment, Justice  
12    Scalia, from Principal Aultman to that effect, that  
13    alcohol has been around for a long time. I think he was  
14    probably referring to that.

15            QUESTION: That makes alcohol use by high school  
16    students okay, that it's been around a long time?

17            MR. VOLPERT: No, I think --

18            QUESTION: I don't understand that one.

19            MR. VOLPERT: No, I'm not -- no one's saying  
20    it's okay, Justice Stevens, but I think the school board  
21    made a determination that these drugs were what were  
22    causing the problem, and it's one of the types of  
23    decisions the Court --

24            QUESTION: Do these tests pick up steroids,  
25    which I suppose athletes might be more inclined to take?

1 MR. VOLPERT: It did not test for steroids.

2 QUESTION: The one athlete related drug that  
3 might be involved.

4 MR. VOLPERT: There's no evidence in the record  
5 as to why that is, although I understand that steroid  
6 testing is very expensive, and the district may have made  
7 the determination based on the cost.

8 QUESTION: May I ask you a question which you  
9 may have answered, I just seem to be unclear on it. If  
10 there were not at least generalized suspicion that there  
11 was a drug problem in schools, do you take the position  
12 that the consent form would be sufficient to authorize the  
13 random athletic -- systematically random athletic testing  
14 that you were doing here?

15 MR. VOLPERT: Justice Souter, we have never  
16 argued or briefed that issue.

17 QUESTION: So your position is -- here is that  
18 both, i.e., the behavioral evidence and the consent forms,  
19 are sufficient, and that's as far as your argument goes?

20 MR. VOLPERT: No. Our argument here is that the  
21 behavior, which disrupted the classroom severely, and the  
22 threat to student athletes were sufficient to jeopardize  
23 compelling governmental interests of the school.

24 QUESTION: Oh, even without the consent from?

25 MR. VOLPERT: Even without the consent form,

1     yes. We believe that this policy is constitutional  
2     notwithstanding the consent form.

3             QUESTION: But I thought you answered my  
4     question about the consent form to the effect that that  
5     alone would provide the basis for random testing, if you  
6     didn't have more.

7             That's what you said. Do you want to retract  
8     that now?

9             MR. VOLPERT: I didn't understand that to be  
10    your question, Justice O'Connor.

11            QUESTION: So what is your answer?

12            MR. VOLPERT: Could I ask you to restate the  
13    question?

14            QUESTION: Suppose all you had was a consent  
15    form, validly obtained, knowingly, willingly given by the  
16    student and the student's parents, is that enough for that  
17    student to be randomly tested for drugs, using the test in  
18    this case?

19            MR. VOLPERT: We have never taken the position  
20    that it was, because consent was not given in this case.

21            QUESTION: Well, what is your position today?

22            MR. VOLPERT: I'm sorry, I do not have a  
23    position on that. That's never been briefed, and I don't  
24    have a position on that.

25            QUESTION: Thank you, Mr. Volpert.

1 Mr. Seamon, we'll hear from you.

2 ORAL ARGUMENT OF RICHARD H. SEAMON

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONER

5 MR. SEAMON: Thank you, Mr. Chief Justice, and  
6 may it please the Court:

7 I'd like to begin by addressing a question that  
8 arose earlier. The question was, if there was so much  
9 evidence of drug use in Vernonia, why wasn't there enough  
10 individualized suspicion to make individualized suspicion-  
11 based testing effective?

12 That question is plainly relevant under the  
13 balancing approach this Court applied in Skinner and Von  
14 Raab, because even though the Court declined to impose a  
15 least intrusive means requirement in its analysis, it is  
16 plain that alternatives to suspicionless testing are  
17 relevant to decide whether suspicionless testing is  
18 actually necessary to further the governmental interest  
19 that is being asserted, and I think that the limitations  
20 of individualized suspicion testing are illustrated well  
21 on the facts of this case.

22 Some of the evidence concerned drug use by  
23 individual students, and would have permitted  
24 individualized suspicion-based testing of those  
25 students -- for example, the students from whom drug



1 paraphernalia was confiscated, the students who were seen  
2 smoking marijuana in the coffee shop across the street  
3 from the school, the students who were arrested for using  
4 intoxicants at a party during the school day.

5 But this was not the only relevant evidence in  
6 the record that there was a drug problem in Vernonia. The  
7 school district witnessed a two- to threefold increase in  
8 disciplinary problems over the course of a couple of  
9 years. At the same time, it witnessed the rise of an  
10 apparent drug culture. Students boasting about their use  
11 of drugs, whether true or false, was certainly relevant to  
12 the officials' assessment of whether a drug problem  
13 existed, and finally, the organization of groups with  
14 names like The Drug Cartel.

15 Now, maybe the fact that a student belongs to a  
16 group called The Drug Cartel does not provide  
17 individualized reasonable suspicion for testing that  
18 individual. That would be a debatable point. But the  
19 fact that such a group springs into existence at the same  
20 time that there is a two- to threefold increase in  
21 disciplinary problems, and teachers for the first time  
22 begin hearing students boasting about drug use and writing  
23 about it in essays that they hand in to be graded clearly  
24 is relevant in assessing the existence of a drug problem.

25 QUESTION: Mr. Seamon, do you think the evidence

1 would have supported a random program not limited to  
2 athletes, but for the entire student body?

3 MR. SEAMON: I don't think that it would have  
4 supported a program for the entire student body. I think  
5 it's -- the fact that the program in this case was limited  
6 to student athletes was relevant, and supports the  
7 reasonableness of the program in several ways. Perhaps  
8 first and foremost is the fact that interscholastic sports  
9 is a voluntary activity. The student can avoid testing  
10 simply by deciding not to engage --

11 QUESTION: It's a little bit like saying going  
12 to graduation is a voluntary activity, as far as I'm  
13 concerned. A lot of students consider that a very  
14 important part of their education.

15 QUESTION: I'm not sure why you should draw your  
16 answer, and draw the line you're proposing exactly that  
17 way.

18 If there's a school-wide problem, what's wrong  
19 with school-wide testing? It certainly seems -- in one  
20 sense, the required courses are more important than the  
21 voluntary courses.

22 MR. SEAMON: The required courses are of course  
23 more important, in our view, than extracurricular  
24 activities. One of -- and the reason that we find it  
25 significant that this testing was limited to students who

1 participated in an extracurricular activity is that it  
2 gave the student the ability to avoid testing at the same  
3 time he or she was not denied access to the required  
4 curriculum that he or she needed to get a diploma.

5 QUESTION: So I guess a school where it has a  
6 problem with drug use where it isn't the athletes who seem  
7 to be leading the thing, they're just sort of out of luck.  
8 You're a lucky school if it's the athletes who are the  
9 potheads, but if you're in another school there's really  
10 nothing you can do about it.

11 MR. SEAMON: We would not draw a line --

12 QUESTION: Very strange.

13 MR. SEAMON: -- to limit drug testing to student  
14 athletes. We think that testing of athletes is  
15 particularly defensible because -- for some of the  
16 reasons --

17 QUESTION: That wasn't the question you were  
18 asked. The question you were asked is not whether this  
19 one is particularly defensible, but where the other one is  
20 defensible, and you said no.

21 MR. SEAMON: I'm sorry if I misstated our  
22 position. It is not our position that drug testing of all  
23 students would be invalid in all circumstances. If a  
24 school district had a severe enough drug problem that it  
25 reasonably concluded that that was the only way in which

1 the drug problem could be effectively addressed, then such  
2 a program may well be permissible, but it would depend to  
3 a large extent on the consequences of testing positive.

4 QUESTION: Didn't the district here have some  
5 fear of injury to the athletes as a result of drug use?

6 MR. SEAMON: Yes, that's right. It had a  
7 reasonable fear of that, and that's why testing of  
8 athletes was particularly defensible, because their  
9 engaging in that activity and playing sports posed a risk  
10 of physical injury both to themselves --

11 QUESTION: Well, Mr. Seamon, you started, I  
12 thought, to tell us why the school district couldn't rely  
13 on individualized reasonable suspicion, but I never heard  
14 you answer that question that you posed. Why couldn't it?

15 MR. SEAMON: Well, I -- let me complete the  
16 answer to that question. I began by making the point that  
17 much of the evidence that the school officials could  
18 reasonably credit as pointing to the existence of a drug  
19 problem was not necessarily focused on individual  
20 students, and wouldn't necessarily --

21 QUESTION: But some was. They could have tried  
22 their program that way.

23 MR. SEAMON: And some was.

24 QUESTION: Could the school district have relied  
25 on the consent forms for -- as to those students who had



1 validly executed them?

2 MR. SEAMON: Yes, to the extent that valid  
3 consent was given under this Court's cases.

4 QUESTION: That doesn't trouble like your  
5 predecessor.

6 MR. SEAMON: No. Valid consent is a basis for a  
7 search, and that's always been true.

8 QUESTION: Even though it was coerced? I mean,  
9 even though they said you can't play on the varsity team  
10 unless you give the consent?

11 MR. SEAMON: This is --

12 QUESTION: I mean, it seems to me the consent  
13 form is bound in with the whole program. I agree, if you  
14 just ask voluntarily, whoever's willing to undergo  
15 testing, no penalty if you don't -- is that the kind of  
16 consent form you're talking about, or is the consent form  
17 in this case? The consent form in this case was -- well,  
18 would have been coerced.

19 MR. SEAMON: Well, this is the difficult  
20 question. This is, I suppose, why petitioner isn't  
21 relying on the consent forms. In many -- there is at  
22 least a plausible argument to the extent that you're  
23 denying a student a benefit the consent is coerced, and

24 QUESTION: Well, do you rely on the forms  
25 because athletics are in effect an incidental, voluntary

1 activity?

2 MR. SEAMON: We don't rely on the forms. We  
3 really rely on the voluntary nature, the extracurricular  
4 nature of the activity that triggered the testing.

5 QUESTION: All right. Let me give you a  
6 different example. Maybe it won't make a difference, but  
7 let me give it to you. What if the kids at the National  
8 Honor Society dance had been found smoking pot, and the  
9 school adopted a policy that no one could be inducted into  
10 the National Honor Society without signing one of these  
11 consent forms, would that consent would be sufficiently  
12 uncoerced to be valid, and would that then justify testing  
13 of those who had consented?

14 MR. SEAMON: I'm not sure of the answer to that.  
15 I suspect that, you know --

16 QUESTION: Isn't the reason that you're  
17 concerned about it that you know perfectly well that if  
18 these kids want to get into a good college and they're not  
19 in the Honor Society or the record says, couldn't join the  
20 Honor Society because they wouldn't consent to drug  
21 testing, that they're going to be at a tremendous  
22 disadvantage in college application? Isn't that the  
23 problem?

24 MR. SEAMON: That's right, and --

25 QUESTION: Why isn't there a like problem for

1 the student athletes? Their athletic activities are taken  
2 into consideration when they apply to colleges.

3 MR. SEAMON: That's right, and that's why we  
4 rely on the extracurricular, voluntary nature of the  
5 activity than the concept of consenting to it or not,  
6 because questions of consent can become very difficult,  
7 depending on the value of the benefit that you're  
8 conditioning the consent on.

9 I want to --

10 QUESTION: Mr. Seamon, you answer that you have  
11 some reservations about testing everyone based on what  
12 this Court did in Von Raab. There was a whole category of  
13 employees. The case was remanded, was it not?

14 MR. SEAMON: Yes, that's right.

15 QUESTION: Do you know what was the follow-up on  
16 remand with respect to all those other people, the  
17 accountants, the animal caretakers?

18 MR. SEAMON: Yes. The district court on remand  
19 upheld the testing program with respect to the categories  
20 of employees who had access to sensitive classified  
21 information, and it noted that some of the categories that  
22 this Court expressed concern about, including animal  
23 caretakers, were not subject to the testing --

24 QUESTION: Do you take the position that the  
25 relation between schools and their students is the same as

1 between the Government and its employees?

2 MR. SEAMON: No, we do not. It is a different  
3 one, and it is important, especially, I believe, in  
4 assessing the impact of individualized suspicion-based  
5 testing in this context.

6 One of the problems, to finish my answer to  
7 Justice O'Connor, with individualized suspicion-based  
8 testing is that in a sense you get both false positives  
9 and false negatives. I mean, there may be one student who  
10 uses drugs, but simply sits quietly in the back of the  
11 classroom and gets straight D's, and that student goes  
12 unnoticed.

13 QUESTION: Thank you, Mr. Seamon.

14 Mr. Christ, we'll hear from you. Am I  
15 pronouncing your name correctly?

16 MR. CHRIST: Mr. Chief Justice, no, you're not.  
17 It's Mr. Christ.

18 QUESTION: Christ, Mr. Christ.

19 ORAL ARGUMENT OF THOMAS M. CHRIST

20 ON BEHALF OF THE RESPONDENTS

21 MR. CHRIST: Thank you, and may it please the  
22 Court:

23 My opponents have just offered you two  
24 justifications for this highly intrusive search. One is  
25 maintaining order in the classroom, and the other is



1 promoting athletic safety, and I'd like to address each in  
2 turn.

3 First, order in the classroom. If that's the  
4 goal, then it seems to me that this test is completely  
5 unnecessary. You don't need urine testing to detect,  
6 punish, and by punishing deter disorderly behavior.  
7 Disorderly behavior is obvious. Disruptive students give  
8 themselves away.

9 Urine testing isn't going to aid in detecting.  
10 Now, it may help in explaining why disorderly students are  
11 that way, but you don't need to know that in order to  
12 detect this problem and deter it through appropriate  
13 punishment.

14 QUESTION: If you have an unruly student, the  
15 teacher reports a student as unruly, on your individual  
16 testing, or individual suspicion basis, could every unruly  
17 student be then subject to urinalysis because the teacher  
18 says, I've got a discipline problem here, maybe it's  
19 drugs, let's test her?

20 MR. CHRIST: It depends on the misbehavior, but  
21 I think if there is sufficiently disruptive behavior to  
22 justify their conclusion now that these misbehaving  
23 students were all on drugs, that would perhaps, under  
24 T.L.O., present individualized suspicion to test that  
25 student.

1           QUESTION: Mr. Christ, I'd like you to be as  
2 concrete as possible about this, because I was troubled by  
3 your, well, you can -- the answer is individual testing.  
4 Isn't that fraught with the risk that the teacher is going  
5 to pick out the kid he doesn't like, and those are the  
6 people that will be subject to the discipline, as opposed  
7 to the random selection? There's something even about  
8 that.

9           MR. CHRIST: Well, the problem with the random  
10 selection is that you are subjecting every student,  
11 including those who are not disorderly, not misbehaving,  
12 to this intrusive degrading experience, and that's the  
13 problem, on the one side, to be balanced against this risk  
14 that maybe the school district would pick out certain  
15 students. It would not apply the individualized suspicion  
16 standard appropriately, and I have no reason --

17           QUESTION: Well, I mean, suspicion, unless you  
18 mean by suspicion probable cause, I mean, a high degree of  
19 proof, you're always going to get people who are utterly  
20 innocent, and I frankly would find it much more shameful  
21 to be picked out and sent to have a drug test because I'm  
22 suspected of using drugs than I would to be part of a  
23 general school population who just repeatedly do this.  
24 Indeed, wouldn't there be a right to individualized  
25 hearings before one is, in effect, accused of having used

1 drugs? Could you do that without giving some individual  
2 hearing to the student? And all of a sudden we're into a  
3 big deal of a due process case.

4 MR. CHRIST: No, I don't think -- there wasn't  
5 in T.L.O. a requirement of a hearing before the school  
6 officials looked into the student's purse. They had  
7 reasonable suspicion to suspect that the student was  
8 violating school rules, and so they conducted a search.

9 QUESTION: And you don't think it was a lawsuit  
10 if they didn't have reasonable suspicion? I mean, I can  
11 just imagine a parent whose child has been sent down to  
12 have drug testing because the child was "suspected" of  
13 having used drugs, and the parent saying, my child never  
14 used drugs, not -- never suspected at all. It's a  
15 lawsuit, isn't it?

16 MR. CHRIST: Well, I think the intrusion here is  
17 less if you pick out the few students who are disbehaving  
18 and disorderly, and subject them to testing as opposed to  
19 take every student, including those who are well-behaved  
20 and simply want to play school sports --

21 QUESTION: I see, you're not suspected of using  
22 drugs. Just bad kids can be drug-tested, misbehaving  
23 students. There's no suspicion of drugs involved at all.  
24 You're just -- you're a bad actor.

25 MR. CHRIST: Well, my first point is, if you

1 want to deter disorderly conduct, you just see it and you  
2 punish it appropriately. You don't need to go beyond that  
3 and say, are drugs the cause, in order to have any  
4 deterrent effect.

5 QUESTION: You think it's better to be selected  
6 as one of the few in the school to be drug-tested on the  
7 basis of a suspicion, than to be part of the general --  
8 what is the intrusion that is involved?

9 MR. CHRIST: Well, if you are disrupting class,  
10 then you have justified, perhaps, school officials in  
11 taking you out and subjecting you to a test. That is less  
12 intrusive than to take everybody who is well-behaved and  
13 subjecting all of them to the test.

14 QUESTION: Do you think --

15 QUESTION: The random test, though, didn't  
16 subject everyone. I thought it was administered to a few  
17 on a random basis. It wasn't everyone in the school, and  
18 it wasn't every student athlete, was it?

19 MR. CHRIST: No, it is every student athlete,  
20 every athlete who tries out for sports.

21 QUESTION: Well, the initial test.

22 MR. CHRIST: Initial test --

23 QUESTION: Yes, but I'm talking about the random  
24 testing.

25 MR. CHRIST: Thereafter they're testing



1 10 percent of each student each week, so that during the  
2 course of the season you're eventually probably going to  
3 get to everybody.

4 QUESTION: Do you think the district could  
5 reasonably conclude that the dangers of an individualized  
6 suspicion requirement go beyond the danger that the  
7 teacher might single out the unpopular student, but that  
8 it changes the whole relation between the teacher and the  
9 student? One of the big complaints of teachers is that  
10 they're being turned into policemen. You want this Court  
11 to turn them into policemen, I take it.

12 MR. CHRIST: I don't want to turn them into  
13 policemen, Your Honor, but there is -- the relationship  
14 is, at times, adversarial. As you pointed out in T.L.O.,  
15 they're there to educate but first they also have to  
16 maintain order and discipline, and students -- teachers  
17 are disciplinarians in the first instance.

18 QUESTION: But you want us to structure the law  
19 on drug testing for individualized suspicion, which it  
20 seems to me is a very significant step forward in  
21 assigning the responsibilities of this sort of very, very  
22 difficult and highly intrusive judgment to the teacher,  
23 whereas a random testing program eliminates that need  
24 altogether, and it seems to me the school district at  
25 least could make the plausible argument that this is a

1 reasonable alternative for it to adopt.

2 MR. CHRIST: Your Honor, I don't want to  
3 misstate my position here. I am not contending for urine  
4 testing on individualized suspicion. I'm not conceding  
5 that that would be constitutional. I am submitting to you  
6 that that would be less intrusive than the present program  
7 of random testing.

8 QUESTION: Well, it's rather hard for us to  
9 write an opinion to say that there's a less intrusive  
10 alternative but that that's unconstitutional, too.

11 MR. CHRIST: I think you should find that any  
12 urine testing is unconstitutional on the justifications  
13 that are given to you, but if they cannot prevent random  
14 testing of everyone, including my client, who is well-  
15 behaved and simply wants to play sports, then I'm  
16 suggesting that short of that you should have testing for  
17 those who are not well-behaved, and who are disorderly,  
18 and who are disrupting classes. Then they should be the  
19 ones -- if the school district needs to find out why these  
20 students are misbehaving, and I don't think they need to  
21 know that in order to punish the behavior and thus deter  
22 it, but if they do need to know that, then they should  
23 subject the disorderly students to urine testing, not  
24 every --

25 QUESTION: But surely the drug problem goes

1 deeper than just -- if it exists, and the courts below  
2 found it did, goes deeper than just misbehavior in class,  
3 doesn't it? I mean, it has other deleterious  
4 consequences.

5 MR. CHRIST: Sure. Drugs are harmful to the  
6 users. There are other deleterious consequences to drug  
7 use, but the justification that the school district has  
8 put forth throughout these proceedings is that we have  
9 students who are disorderly, and we need to find an  
10 effective means of deterring that behavior.

11 QUESTION: Well, what if the justification  
12 offered was that there's an increased risk of physical  
13 harm, health risks to athletes who are using drugs, and as  
14 part of our policy in the school to weed out those with  
15 heart problems, or those with other special risks in  
16 athletic programs, we're going to require this kind of  
17 testing for health purposes. Now, would that be  
18 sufficient to justify this?

19 MR. CHRIST: No, we don't believe that's  
20 sufficient.

21 QUESTION: Well, why not? It would be just like  
22 testing for a hernia, or a heart problem, or asthma, or  
23 whatever else might be the case.

24 MR. CHRIST: Well, I don't know that the school  
25 district can compel anyone to submit to an examination for

1 those purposes, but under the safety standard that you set  
2 in Skinner and Von Raab --

3 QUESTION: Surely you would not take the  
4 position that a school can't protect itself from risk of  
5 injury to its student athletes by requiring physical exams  
6 for all those problems.

7 MR. CHRIST: I'm not contending that the school  
8 district does not --

9 QUESTION: Is that your position, that the  
10 school district can't do that for a student athlete?

11 MR. CHRIST: That's not my position. I don't  
12 need to take that here. I am contending that the risk of  
13 injury from a student using drugs in sports, in athletics,  
14 is not sufficiently compelling to justify so intrusive an  
15 invasion of privacy as urine testing.

16 QUESTION: You agree, don't you -- and surely  
17 it's done all over the country for every high school  
18 sport -- you've got to take a physical exam before you can  
19 participate?

20 MR. CHRIST: True, and my client took a physical  
21 exam here, too, which was required here, but the  
22 circumstances of that examination indicate the privacy  
23 that attaches to the passing of urine. He took the  
24 examination in the privacy of his doctor's office.

25 QUESTION: Well, how much privacy is there in a



1 boy's locker room with a bunch of urinals lined up against  
2 the wall, guys walking naked from the shower to the  
3 lockers?

4 MR. CHRIST: The point -- it's substantially  
5 different. There's a substantial difference between using  
6 a public facility and being singled out and compelled to  
7 produce urine while somebody monitors and observes the  
8 production of the sample, and then surrender the sample to  
9 the Government so it can be chemically analyzed for  
10 whatever secrets are contained therein.

11 QUESTION: Well, would it make any difference to  
12 you if the test -- if the student had an option of going  
13 to a private clinic, or private physician to have the test  
14 done?

15 MR. CHRIST: It would make --

16 QUESTION: Would that save it, in your view?

17 MR. CHRIST: No, it would not save it, but it  
18 would make it less intrusive, and that was one of the  
19 procedural safeguards that you identified in Skinner and  
20 Von Raab as necessary to reduce the intrusiveness of urine  
21 testing to a constitutional permissible level.  
22 Independent monitors, independent test sites, no direct  
23 observation of the sample being produced, advance  
24 notice --

25 QUESTION: But you say if all those things were

1     done, it wouldn't make any difference. You say that's  
2     better, but that's not enough.

3             MR. CHRIST: Correct.

4             QUESTION: Well, what is enough?

5             MR. CHRIST: I don't think anything is enough to  
6     justify urine testing of students for the purposes that  
7     have been advanced by my opponents.

8             QUESTION: Do you have a fallback position? I  
9     mean, is it all or nothing here?

10            (Laughter.)

11            MR. CHRIST: Well, that's the position I'm  
12   taking is, if they cannot --

13            QUESTION: I know that's the position you have  
14   taken, but I mean it seriously. Do you have a fallback  
15   position?

16            MR. CHRIST: My fallback position is, if they  
17   are justified in urine testing, in implementing a program,  
18   they are not justified in implementing this program  
19   because it lacks the procedural safeguards you identified  
20   in Skinner and Von Raab.

21            QUESTION: Then what is the program? Can you be  
22   concrete about the program that you think would be  
23   appropriate? First, could the school have the physical  
24   exam on the school's premises? You distinguished the  
25   physical exam because you said it's in the privacy of the

1 student's own physician's office, but suppose the  
2 school -- this is a wealthy district, and said, we're  
3 going to do it all in school. Would that be all right?  
4 Physical exam includes everything including urinalysis.

5 MR. CHRIST: You identified -- let me respond  
6 this way. You've identified these procedures in Skinner  
7 and Von Raab. I do not read those opinions to say that  
8 each and every one of those is essential, and I do not  
9 read that opinion to say you give greater weight to one or  
10 the other.

11 At the same time, I don't read those opinions to  
12 say that a program completely lacking in all of them would  
13 pass muster, which is what we have here, so I can't say  
14 that if they have no direct observation but they still  
15 require disclosure of medications, and they don't use  
16 independent monitors, that that would pass muster.

17 QUESTION: Well, you have some factors here that  
18 didn't exist there, and that is the -- this is an athletic  
19 program. It's not that you have to leave school entirely,  
20 it's just that you don't play athletics. You didn't have  
21 in Von Raab the factor that these are minors in a tutelary  
22 context. Surely that's a factor that cuts in favor of  
23 being able to do it.

24 MR. CHRIST: Those are two factors that do  
25 reduce the intrusiveness, but as -- let me speak to both

1 of them, first the fact that this is voluntary. You don't  
2 have to play athletics. That's true, but you have to  
3 appreciate how important athletics is to the school  
4 experience, especially in this school district. The  
5 testimony on that is quite clear.

6 QUESTION: You painted a very depressing picture  
7 of this town, as I recall. You said there's virtually  
8 nothing else to do except go to the intramural athletic  
9 games.

10 MR. CHRIST: Actually, that was my opponent who  
11 painted that picture, but --

12 QUESTION: Oh, I see.

13 (Laughter.)

14 QUESTION: I know somebody did. I certainly  
15 didn't want to visit the place.

16 MR. CHRIST: That was the testimony they  
17 presented, and I'm just illustrating the ramifications of  
18 that. To say that this is simply athletics and you don't  
19 have to play sports doesn't quite answer the question.  
20 That -- it still -- it may be voluntary, but it's an  
21 important part of the school experience, and to compel a  
22 student to give that up in order to protect themselves  
23 from this search just simply isn't justified.

24 Now, as to your second point that we're talking  
25 here about students and not adults, there should not be a



1 different standard for students than adults. A different  
2 standard might be justified if the Government -- if you  
3 accept the proposition that the Government is  
4 substantially less interested in preventing drug-related  
5 injuries to students than adults, or if you accept the  
6 proposition that students have substantially less privacy  
7 interest, that urine testing is for them not so severe an  
8 invasion of privacy as it is for adults.

9 QUESTION: Haven't we allowed schools to impose  
10 mild corporal punishment?

11 MR. CHRIST: I don't know.

12 QUESTION: Yes, I think we have, and why is  
13 that? Because the school has at least some portion of the  
14 authority that the parent has when the child goes to  
15 school.

16 It seems to me you just cannot assume that  
17 children in that kind of a context have all of the rights  
18 that an emancipated adult has in a context such as Von  
19 Raab.

20 MR. CHRIST: I am not contending the student's  
21 rights of privacy are coextensive with an adult's, and I  
22 think you've held otherwise in T.L.O., but I'm saying when  
23 you come to something so private and personal as the  
24 passing of urine, that their rights certainly extend that  
25 far.

1 QUESTION: Let me ask you a question on that  
2 one, if I might. What if the school had a physical  
3 examination requirement for every student at the beginning  
4 of the school year that included this particular urine  
5 test, would that be constitutional?

6 MR. CHRIST: No.

7 QUESTION: It would not?

8 MR. CHRIST: It would not, we don't believe, if  
9 they required just as a condition of going to school that  
10 they take a urine test.

11 QUESTION: How about a physical exam with  
12 everything except this particular test, just to be sure  
13 they're healthy, and for the good of the kids, to find out  
14 if there was any problem the school ought to be aware of?

15 QUESTION: Can they take blood? Blood is okay,  
16 but urine's bad?

17 MR. CHRIST: Well, you said in Skinner that  
18 blood tests, compelled removal of blood as opposed to a  
19 urine test, is substantially less intrusive, but I don't  
20 think that they would be justified in compelling a student  
21 to produce blood, simply --

22 QUESTION: Does that rest on your assumption  
23 that there's no Nation-wide drug problem in the schools?

24 MR. CHRIST: I'm not assuming that there's no  
25 Nation-wide drug problem in the --

1 QUESTION: Suppose that we assume that there is.  
2 Does that change your answer?

3 MR. CHRIST: No. I think you need to judge each  
4 drug-testing program by the problem it's intended to  
5 solve, district by district, school by school.

6 QUESTION: Thirty percent users in a rural high  
7 school, would that be sufficient to sustain a test where  
8 at the beginning of the year everybody takes a physical  
9 exam and there's a testing for drugs?

10 MR. CHRIST: No, because my first contention is  
11 that you don't need the drug test in order to solve the  
12 problem of disorders -- disorderly behavior in the  
13 schools, so whatever --

14 QUESTION: I'm talking about solving the problem  
15 of drugs in the schools.

16 MR. CHRIST: We still don't think that it would  
17 be justified, Your Honor.

18 QUESTION: Are you saying actually you can't  
19 have a medical test? You couldn't -- I mean, a school  
20 district couldn't say we want to know how the students,  
21 whether they're nourished properly, whether they're --  
22 whether they have disease, how they're going -- and so  
23 what we want to do, we'll give you the nurse or the  
24 doctor, but you couldn't require constitutionally a  
25 medical test, physical exams? Can't they require physical

1 exams for athletes?

2 MR. CHRIST: They do require a physical exam.

3 QUESTION: I mean, so -- couldn't -- are you  
4 saying they couldn't require physical exams for students  
5 to come to school? They want to know how the health of a  
6 student is.

7 MR. CHRIST: I'm not saying that. I don't think  
8 that I need to contend that here.

9 QUESTION: All right. Well then, the problem,  
10 of course, for people is, if they can require the physical  
11 exams for the health, and I guess you could require  
12 medical -- metal detectors to keep guns out of schools, a  
13 lot of things you can require, what's different about  
14 this?

15 MR. CHRIST: Because this is so highly  
16 intrusive.

17 QUESTION: Medical exams all involve urinalyses.

18 MR. CHRIST: That's --

19 QUESTION: I've probably had hundreds of them in  
20 my life, and so have you, and you know, what's the special  
21 thing here?

22 MR. CHRIST: The medical exam you're talking  
23 about is being conducted in private by the student's  
24 doctor. It is not being conducted --

25 QUESTION: Well, people urinate, you know, in



1 men's rooms all over the country. It's not necessarily --  
2 and I don't mean to be -- trivialize it, but it isn't  
3 really a tremendously private thing, is it?

4 MR. CHRIST: I think it is private when it is  
5 being compelled by the Government, and the Government is  
6 there watching and observing and collecting specimens.

7 QUESTION: All right. What I'm trying to get  
8 you to do is to pinpoint precisely what it is that's the  
9 intrusion of the privacy interest. That's what I'm  
10 trying --

11 MR. CHRIST: It's not --

12 QUESTION: That's what I'm aiming at.

13 MR. CHRIST: It's not the mere act. We all  
14 urinate. That's -- has to be conceded.

15 (Laughter.)

16 MR. CHRIST: In fact, I might do so here, if --

17 (Laughter.)

18 QUESTION: A serious point, which is difficult.  
19 I think it's a very difficult thing to do, because I, like  
20 you, and a lot of other people, have some kind of instinct  
21 that there is something private going on here, but to try  
22 to pinpoint it precisely is difficult, and it's because it  
23 is difficult that I'm asking you the question, to help on  
24 this, to the extent you can, to try to pinpoint just what  
25 it is about this test that is private, and therefore

1       offends you and many others.

2               MR. CHRIST: I appreciate the help, and what I  
3       think is the point here is that this is being compelled by  
4       the Government, they're watching you do it, they're taking  
5       your urine, and they're analyzing it to see what secrets  
6       therein, and at the same time they are compelling a  
7       student to come forward and disclose all their private  
8       medications, and that is highly intrusive and personal to  
9       most people.

10              QUESTION: That's what I wondered, too. Is  
11       there -- is that in this case? That is, is there in this  
12       case any indication that people who had medications that  
13       they didn't want disclosed have to proceed with the normal  
14       test, or is there -- could they have their own doctor do  
15       it and give the result, or -- in other words, how much is  
16       that in this case, that problem?

17              MR. CHRIST: The disclosure of private  
18       medications, both prescription and nonprescription, is  
19       compelled by the policy statement itself, and is also  
20       compelled by the -- Exhibit 109 is the urine sample  
21       specimen form. You have to fill that out at the time  
22       you --

23              QUESTION: But Mr. Christ, you made a grand-  
24       scale attack on this.

25              This is a child whose parents did not wish the

1 form to be signed. The child didn't want it to be signed.  
2 You never got to any refined question of, well, I'll sign  
3 it but I won't disclose what drugs I'm taking, what  
4 prescription drugs I'm taking, so that's -- whether that  
5 feature of the program is infirm is not part of this case,  
6 is it?

7 MR. CHRIST: It's part of the case. All of the  
8 testing protocol is part of the case. We think that it is  
9 intrusive for all those reasons as well as the fact that  
10 it doesn't serve a compelling governmental interest.

11 QUESTION: Your case is not one to modify this  
12 program. Your case is one that, I'm not required to  
13 submit to it, period --

14 MR. CHRIST: Correct, but --

15 QUESTION: -- not that it can be tailored in  
16 some way that it would be satisfactory.

17 MR. CHRIST: But as Justice Souter indicated,  
18 that -- my fallback position is that if you say drug  
19 testing is okay, then I at least want to stop this drug  
20 test because it is being performed in an especially  
21 intrusive fashion.

22 QUESTION: Mr. Christ, supposing that instead of  
23 feeling that drugs were the problem in the high school,  
24 the board had felt that it was alcohol that was a problem,  
25 and that they had the same reason to attribute it to

1 athletes as the board here did to -- drugs to athletes,  
2 and so -- but they don't set up a urine testing program,  
3 they set up a breathalyzer program under exactly the same  
4 circumstances here.

5 Is that -- I mean, what I'm trying to find out  
6 is, is it the fact that it's the urine factor that makes  
7 this invalid, or is it the factor that the Government  
8 administers a test to some individual? Is a breathalyzer  
9 test okay?

10 MR. CHRIST: No, we think not, but the problem  
11 here is twofold. One, the purposes for which they're  
12 testing are not compelling enough: maintaining order in  
13 the classroom and preventing -- and preserving athletic  
14 safety, but in addition to that --

15 QUESTION: Well, isn't there something broader,  
16 the idea that drug use has a lot more -- brings with it a  
17 lot more problems than that, just to try to ferret out  
18 drug use?

19 MR. CHRIST: Well, Your Honor, drugs do have a  
20 problem, and no one is denying that, and they're a problem  
21 for the young and the old, and if simply the problem of  
22 drugs on the user is sufficient to justify the Government  
23 in compelling urine tests, then we should all be subjected  
24 to urine tests.

25 QUESTION: Well, but school performance on



1 tests, not necessarily disruptive performance, but it just  
2 affects a student in many, many ways, doesn't it?

3 MR. CHRIST: That's true, it does affect them in  
4 many ways, and it's a tragedy if someone takes drugs,  
5 young or old, but it has not been -- that has not been  
6 offered as justification by the school district for this  
7 drug test, and if you accept that as justification for  
8 drug testing students, then I think that you have arrived  
9 very nearly at universal drug testing, because you could  
10 not confine your ruling to the school setting. Drugs  
11 present all those problems to adults --

12 QUESTION: Yes, but --

13 MR. CHRIST: -- as to students.

14 QUESTION: -- surely the school -- the school  
15 has an interest in seeing students learn and perform in a  
16 way that the Government has no interest in seeing citizens  
17 in general. I mean, they are not -- the Government is not  
18 the tutor of its citizens generally.

19 QUESTION: Students are kids. You have no doubt  
20 that the parents can do this if they want to, don't you?

21 MR. CHRIST: The parents may have that right.

22 QUESTION: Well, of course.

23 MR. CHRIST: But the schools don't.

24 QUESTION: You're dealing with people who are  
25 subject to others' tutelage, and the question here is to

1     what extent some of that authority and responsibility can  
2     be exercised by the school districts even when the parent,  
3     particularly the parent in this case, doesn't want it to  
4     be exercised.

5             There may be parents who don't like corporal  
6     punishment in schools, for example, but we've indicated  
7     that we -- it existed at common law, and we won't use the  
8     Eighth Amendment to say you can't have it, so you either  
9     accept it, or you don't go to public school, and the  
10    question here is whether this is another instance like  
11    that.

12            But you're dealing with children. You're not  
13    dealing with adults who have a totally different set of  
14    rights. The question is to what extent the school has  
15    some of the authority of the parents in this regard.

16            MR. CHRIST: I don't think they have sufficient  
17    authority to justify this intrusion on privacy, and some  
18    of what we have been referring to are children, are  
19    18 years of age.

20            QUESTION: May I go back to the --

21            MR. CHRIST: They're --

22            QUESTION: I'm sorry.

23            MR. CHRIST: I'd just point out, they're old  
24    enough to vote and serve on juries.

25            QUESTION: Well, your client's in seventh grade?

1 MR. CHRIST: My client was in seventh grade at  
2 the time of this drug test. He is a sophomore now. He  
3 will be 18 --

4 QUESTION: And it's not a class action, so  
5 that's the case that's before us.

6 MR. CHRIST: It's not, but he's seeking an  
7 injunction against having to submit to this test for the  
8 balance of his high school career --

9 QUESTION: May I take you back to the  
10 question --

11 MR. CHRIST: -- which will take him to age 17.

12 QUESTION: I seem bent on interrupting you. I'm  
13 sorry.

14 May I go back to the question of intrusiveness  
15 again? You answered the Chief Justice that a breathalyzer  
16 test, if alcohol had been the drug of concern here, that a  
17 breathalyzer test would also have been unconstitutional,  
18 other things being equal.

19 MR. CHRIST: Well, as I understood, a random  
20 breathalyzer test.

21 QUESTION: That's right.

22 MR. CHRIST: Yes.

23 QUESTION: Other things being equal,  
24 administered the same way, just do it by breath.

25 MR. CHRIST: Correct.

1 QUESTION: And you said that would be  
2 unconstitutional..

3 MR. CHRIST: Yes.

4 QUESTION: I take it, then, that the intrusive  
5 feature, or features, which are of concern to you in the  
6 urine test in fact are not the quasi-exposure of having to  
7 produce the sample with someone standing behind you,  
8 because that doesn't occur in the breath test, so I take  
9 it the reasons that you find the intrusiveness to be  
10 unreasonable is that you are disclosing the contents of  
11 something -- chemicals in your urine, chemicals in your  
12 breath -- and you are being forced as a protective measure  
13 in appropriate cases to disclose any drugs you may be  
14 taking that might affect the test.

15 Those are the two points of intrusiveness that  
16 are crucial for you, is that correct?

17 MR. CHRIST: Correct, and I would add that  
18 you're doing all of that without ever having given  
19 suspicion to suspect that you've done anything wrong.

20 QUESTION: Right. I realize the question of  
21 justification is there, too, but the features of  
22 intrusiveness which are crucial to you are the disclosures  
23 of knowledge which in effect can be gained either from  
24 your admission of, or your disclosure of other drug use  
25 and the testing of the chemicals. Those are the two



1 features.

2 MR. CHRIST: Correct.

3 QUESTION: Yes.

4 QUESTION: Now, presumably the disclosure of  
5 what other prescription drugs you might be taking could be  
6 easily cured.

7 These samples go to a testing lab, and the  
8 student could fill out a form saying what they are, put it  
9 in a sealed envelope, and have it transmitted to the  
10 testing, the independent testing, without ever disclosing  
11 to the school district at all what private prescription  
12 medication is in use.

13 MR. CHRIST: It must be possible, because it was  
14 in Skinner and Von Raab, although I do not know why the  
15 school district here did not, after Skinner and Von Raab,  
16 adopt the same procedures. Maybe there was something --

17 QUESTION: Well, if it did, then that would go a  
18 long way towards solving your objection, I gather.

19 MR. CHRIST: Not --

20 QUESTION: And make this a more reasonable  
21 program.

22 MR. CHRIST: It would not go far enough.

23 QUESTION: On this record, were the results  
24 disclosed to the school officials?

25 MR. CHRIST: Pardon me?

1 QUESTION: On this record, in this case --

2 MR. CHRIST: Yes. The school --

3 QUESTION: And there's no particular guarantees  
4 of confidentiality?

5 MR. CHRIST: The disclosure is made to the  
6 school officials who are conducting the test. They aid  
7 the student in filling out the form --

8 QUESTION: I see.

9 MR. CHRIST: -- at the time, and so when you  
10 disclose your medication, you are disclosing to the school  
11 officials.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Christ.

13 MR. CHRIST: Thank you very much.

14 The case is submitted.

15 (Whereupon, at 11:06 a.m., the case in the  
16 above-entitled matter was submitted.)  
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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*VERNONIA SCHOOL DISTRICT 47J, Petitioner v. WAYNE ACTON, ET UX., ETC.*

*CASE NO.: 94-590*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Don Mari Federico*

(REPORTER)