No. 16-1163

IN THE

Supreme Court of the United States

SHAWN STRONG, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF STATE TECHNICAL COLLEGE OF MISSOURI, ET AL.,

Petitioners,

—v.—

BRANDON KITTLE-AIKELEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Jason D. Williamson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Anthony E. Rothert
Counsel of Record
Gillian R. Wilcox
Jessie Steffan
ACLU OF MISSOURI FOUNDATION
906 Olive Street, Suite 1130
St. Louis, MO 63101
(314) 652-3114
ARothert@aclu-mo.org

QUESTION PRESENTED

Whether the Fourth Amendment allows mandatory, suspicionless drug testing of all adults matriculating at a public college, regardless of whether their course of education will involve dangerous activities, and where there is no evidence that the college has a drug problem?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

RULES

OTHER AUTHORITIES

INTRODUCTION

This case involves a Fourth Amendment challenge to a state technical college's blanket imposition of mandatory, suspicionless drug testing on all matriculating students. The expressly stated goals of the drug-testing program were: "1) assisting students in making safe and healthy choices; (2) supporting students who are drug free; 3) improving the learning environment; 4) decreasing the number of students placed on academic probation and academic suspension; 5) improving [the College's] retention rate; and 6) improving [the College's] graduation rate." App. 109. Once the program was challenged, the college offered a different, post hoc, rationale: deterring drug use among students in programs posing a significant safety risk. App. 116. However, the drug-testing requirement was not limited to students enrolled in dangerous academic programs, but applied to *every* student, including those enrolled in programs presenting no particular dangers, such as General Education, Communications, Social Science, Computer Programming, Mathematics, and Design Drafting Technology. App. 108; Programs, State Technical College of Missouri, https://www.statetechmo.edu/programs/ (last visited Apr. 18, 2017). The college "does not have any greater prevalence of drug use among its students than any other college, . . . [and] there is no evidence that drug use caused or contributed to any accident in [the College's] history." App. 108.

Consistent with this Court's well-established precedents, the district court, affirmed by a 9-2 majority of the en banc court of appeals, held that

the college's mandatory drug-testing policy was constitutional as to programs that presented a specific safety risk to others, but unconstitutional as applied to those academic programs that do not pose such a risk. App. 111-117. There is no basis for granting certiorari. There is no split in the circuits. Indeed, there are no other cases even addressing such an indiscriminate, across-the-board college drug-testing program. Petitioners' disagreement with the decision below largely rests on factual assertions that are contrary to the district court's factual findings, none of which petitioners challenged as clearly erroneous. Petitioners essentially disagree with how the court applied well-settled rules to a particular context. That is not a sufficient basis for this Court's review.

STATEMENT OF THE CASE

A. The Challenged Program

State Technical College of Missouri (formerly Linn State, hereinafter "the College") is a public two-year college that offers at least twenty-eight distinct academic programs for its roughly 1,100 to 1,200 students. App. 107-108. At the time of trial, the programs offered by the College were divided into five divisions: Mechanical, Electrical, Civil, Computer, and General Education. App. 108.[1] Some examples of the academic programs within those five divisions include Communications, Social Science, Mathematics, Auto Mechanics, Computer

[1] Except where otherwise indicated, this Statement of the Case relies on the factual findings of the district court, none of which Petitioners ever challenged as clearly erroneous.

Programming, Design Drafting Technology, and Network Systems Technology. App. 125-149; *see also* Programs, State Technical College of Missouri, https://www.statetechmo.edu/programs/ (last visited Apr. 18, 2017).

"Over the course of [the College's] fifty-year history, there has never been an accident on campus that resulted in death or substantial bodily injury." App. 108. While there have been less serious accidents, "there is no evidence that drug use caused or contributed to any accident in Linn State's history." *Id.*

Nonetheless, on June 17, 2011, the College's Board of Regents adopted a mandatory drug-testing policy to be applied to all incoming students. *Id.* The stated purpose of the policy is as follows:

> The mission of [the College] is to prepare students for profitable employment and a life of learning. Drug screening is becoming an increasingly important part of the world of work. It is also believed it will better provide a safe, healthy, and productive environment for everyone who learns and works at [the College] by detecting, preventing, and deterring drug use and abuse among students.

App. 108-109. The Board of Regents further explicated the program's purpose by articulating six goals:

> 1.) assisting students in making safe and healthier choices; 2.) supporting students who are drug free; 3.)

> improving the learning environment; 4.) decreasing the number of students placed on academic probation and academic suspension; 5.) improving [the College's] retention rate; and 6.) improving [the College's] graduation rate.

App. 109. Notably, the Board nowhere cited safety risks posed by any of the College's programs as a justification for the new drug-testing policy. App. 116.

Beginning in the fall of 2011, all incoming students were required, as a condition of admission, to sign a form acknowledging that their refusal to provide a urine sample would result in withdrawal. Ex. P15. If a student tested positive for drugs once, he or she would have to be re-tested within forty-five days, and would be subject to probation and a random test later in the year. *Id.* A second positive test would lead to forced withdrawal. *Id.* The test results were not to be shared with law enforcement, but the school reserved the right to inform parents of a positive drug test for any student under twenty-one years of age. App. 122.

The College does not subject to drug testing any faculty or staff associated with its programs, even though they are expected to work with the same allegedly dangerous tools and materials to which some of their students will be exposed. App. 109.

Prior to the initiation of the schoolwide drug-testing program, the College already had in place separate, more tailored drug-testing requirements. For example, students enrolled in the Heavy

Equipment Operations program, those seeking a Commercial Driver's License, and students involved in accidents on campus or with college-owned vehicles were subject to drug testing. App. 110-111. These forms of testing were not at issue in the case.

The College began testing students on September 7, 2011. Tr. (July 1, 2013) at p. 56. Five hundred fifty-eight students provided urine samples and paid the $50 fee the College charged for the tests. Ex. P60.

B. Proceedings Below

In September 2011, Branden Kittle-Aikeley and other students filed a class action challenging the mandatory suspicionless drug-testing policy as a violation of their Fourth Amendment rights. App. 100. They sought a declaration that the policy was unconstitutional on its face and injunctive relief. *Id*. In response, the College for the first time offered a new rationale for the program, asserting that it was based on a presumption that all students were enrolled in safety-sensitive courses or programs, and that the drug-testing program was designed to promote safety in high-risk classes. App. 116. It pointed to a discretionary waiver provision in the challenged policy, arguing that any student could seek a waiver in order to be exempted from the drug-testing requirement. App. 156-157. By the College's own admission, however, the waiver provision did not specify what a student would have to show in order to obtain such a waiver and gave the College's president unfettered discretion in evaluating the merits of any waiver request. App. 158-160. The district court granted a temporary restraining order and a preliminary injunction, finding that drug

testing constituted a search, and that the mandatory, suspicionless drug-testing program at issue here did not satisfy the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements. App. 186-189.[2]

On interlocutory appeal, the court of appeals vacated the preliminary injunction. App. 171-185. It, too, applied the "special needs" analysis, but concluded that the drug-testing program was not facially unconstitutional because it could conceivably be constitutional as applied to those students enrolled in particular safety-sensitive courses of study. It remanded to the district court, where plaintiffs amended their complaint to make clear that they sought as-applied relief. App. 101.

After a bench trial, the district court made extensive and detailed findings with respect to the safety risks associated with the school's various programs. App. 100-168. Applying this Court's "special needs" jurisprudence, it upheld drug testing as applied to those programs for which the College presented sufficient evidence of special safety concerns that outweighed the students' privacy rights, and held drug testing unconstitutional as applied to students enrolled in programs for which

---

[2] The district court found "that the adoption of [the College's] drug-testing policy was motivated predominantly by considerations other than the safety interest ultimately relied upon by [the College] in response to this litigation." App. 116. It noted that "[t]he six 'Program Goals' adopted by the Board of Regents do not even mention preventing accidents or injuries caused or contributed to by drug use, and instead focus on goals like improving retention and graduation rates." *Id.* But it nonetheless considered the College's post hoc safety rationale.

the school failed to demonstrate a heightened safety risk. *Id*.

The district court concluded that the state had demonstrated sufficient safety risks in five programs to establish a "special need" justifying mandatory suspicionless drug testing: Aviation Maintenance, Electrical Distribution Systems, Industrial Electricity, Power Sports, and CAT Dealer Service Technician. App. 125-127, 136-138. In these programs, it found that the College had demonstrated that the students worked with especially dangerous tools, and that they would be entering highly regulated industries in which drug testing is common. In Electrical Distribution Systems, for example, students "work with power lines, climb forty-foot poles, and operate digger derricks and bucket trucks," and must undertake internships that themselves require drug testing. App. 126. In these programs, the court found that the special safety needs outweighed students' privacy interests and that suspicionless drug testing was reasonable. App. 127, 137-138.

At the same time, the district court determined that the state failed to demonstrate a sufficient special need for mandatory drug testing of students in the school's remaining twenty-three programs. For example, the court found that the only evidence of safety concerns the College advanced with respect to Computer Programming was a "one-page affidavit from the department chair." App. 147. The affidavit contained only three sentences about the students' activity working with computers, stressing that they run on electricity. *Id*. But the court found the computer components use "no more

voltage than that used by an ordinary, household computer," and that students work in a lab under the close supervision of an instructor, diminishing any danger. App. 148.

Similarly, the court found that in Design Drafting, the only "tools" the students are required to use are pencils, paper, and computers, and that while they sometimes visit construction sites where one must wear a hard hat, the safety risks "appear limited to the possibility that a student might accidentally trip and fall while navigating uneven ground during a site visit." App. 149-151.

For the Auto Body and Auto Mechanics programs, the court found that the tools the students use are "no different than that which might be found in any household garage." App. 127. It further found that the College's witness "offered no testimony as to whether serious injuries are even possible in these programs," App. 128; that there was "no evidence of problems at other schools like [the College] or from the automotive industry generally," App. 128-129; that the students are "highly supervised and subject to a number of faculty-enforced safety precautions," reducing whatever risk there might be, App. 129; and that students in these programs are not entering a heavily regulated field in which drug testing is a norm, App. 130.

Despite being on notice that it had to make program-specific showings of safety risks, the College offered no evidence whatsoever with regard to any distinct dangers posed by eight of its academic programs. App. 151-152.

The College argued that the mere potential for cross-enrollment justified drug testing the entire student body, but the district court found that the College did "not produce[] any evidence showing that even a single student enrolled in a non-dangerous program has ever actually cross-enrolled into a class in another program that involves safety-sensitive activities." App. 155-156.

Accordingly, the district court permanently enjoined application of the drug-testing program to students "who were not, and are not, or will not be, enrolled" in the identified safety-sensitive programs. App. 167.

On appeal, a divided panel of the Eighth Circuit reversed. App. 47-81. The panel majority held that the district court erred in reviewing the drug-testing policy on a program-by-program basis and that, in any event, testing all students was justified for the broad purpose of "providing 'a safe, healthy, and productive environment for everyone who learns and works at [the College] by detecting, preventing, and deterring drug use and abuse among students.'" App. 61-65.

The court of appeals granted rehearing en banc, App. 44-46, and by a vote of 9-2, affirmed the district court's injunction barring drug testing of students not enrolled in the five dangerous courses of study. App. 1-40. The en banc court agreed that the College could constitutionally impose mandatory drug testing with regard to those programs that it had demonstrated were safety-sensitive, but that absent such a showing, warrantless, suspicionless testing was unconstitutional. Relying on *National Treasury Employees Union v. Von Raab*, 489 U.S. 656

(1989), it reasoned that the Fourth Amendment analysis appropriately focused on the dangerousness of particular programs and did not permit the school to presume that every student would enroll in a dangerous program where no evidence to support that presumption was offered. App. 16-19, 27-28 (noting district court's finding that "the possibility of cross-enrollment was 'abstract and unsubstantiated.'").

The en banc court rejected the school's alternative argument that "fostering a drug-free environment" was a sufficient "special need" to dispense with the Fourth Amendment's requirements of individualized suspicion and a warrant, noting that "no crisis sparked the Board of Regents' decision to adopt the drug[-]testing policy," and that the College "does not believe it has a student drug-use problem greater than that experienced by other colleges." App. 19-24. The court distinguished *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), on the ground that those cases involved (i) children under the temporary custody of the school, (ii) who were involved in extracurricular activities, and (iii) where the schools had advanced specific evidence of particular drug problems at their schools. App. 22-24.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT IN THE CIRCUITS OR WITH STATE COURTS OF LAST RESORT, AND THIS CASE DOES NOT PRESENT A QUESTION OF NATIONAL IMPORTANCE.

Petitioners cite no conflict in the circuits, and there is none. The lower court's decision does not conflict with the decision of any other court of appeals or of any state court of last resort. Indeed, the decision does not conflict with any decision of *any* court on the questions presented. Accordingly, there is no need for this Court's intervention.

Petitioners nonetheless contend that the Court should review this case in the absence of any conflict because it presents a question of national importance that is of interest to every public college in the United States. Pet. 6. Nothing could be further from the truth. Review of this case would be unlikely to affect anyone other than the students at the College, for two reasons. First, petitioners point to no other public college that seeks to impose such mandatory, suspicionless drug testing on all students, regardless of evidence of a particular problem or a special need. Second, the decisions below are based on detailed factual findings regarding the College, its particular programs, and the specific evidence adduced at trial. They therefore have little resonance beyond the College itself.

As a general matter, public colleges, including technical colleges, do not impose mandatory drug testing on their entire student body. Moreover, applying Eighth Circuit precedent, the district court

permitted the College to carry out drug testing of students enrolled in academic programs that present a real and substantial public safety risk.

In addition, the decision below breaks no new ground. It simply applies well-established Fourth Amendment principles governing "special needs" searches to the facts presented by the College's particular circumstances. The court's decision does not bar public colleges from drug testing where they demonstrate a recognized special need or where individualized suspicion exists to do so. Rather, the decision merely holds that where a college does *not* demonstrate special needs, it may not subject adult students to suspicionless drug testing. That principle flows directly from this Court's decision in *Chandler v. Miller*, 520 U.S. 305 (1997), which invalidated a drug-testing program imposed on candidates for public office where the state was unable to demonstrate a special need above and beyond ordinary law enforcement. The application of that standard to the facts of this case has little resonance for anyone outside this particular institution.

II. THE PETITION RESTS ON DISAGREEMENTS WITH THE DISTRICT COURT'S FACTUAL FINDINGS, NONE OF WHICH PETITIONERS HAVE CHALLENGED AS CLEARLY ERRONEOUS.

Many of Petitioners' arguments are flatly contradicted by the district court's factual findings. Yet Petitioners never challenged any of those findings as erroneous. And even if they had, this

Court does not grant certiorari to resolve such factual disputes.

Petitioners maintain, for example, that nearly all of the College's students are involved in dangerous courses, and that those enrolled in non-dangerous programs cross-enroll in other courses that are dangerous. Pet. 26, 30. The district court found, however, that the College had offered no evidence at trial that even a single student cross-enrolled, and instead simply rested on an abstract and unsupported assertion—even though the College had ready access to specific information on what courses its students have taken. App. 153-156. Indeed, the district court found that the vast majority of students were *not* enrolled in programs that expose them to dangerous activities. App. 95 (noting that Respondents "obtained the desired relief for a substantial majority of the class members"). This cannot be squared with Petitioners' insistence that all, or even most, of the College's students are at such a risk of danger that they can all be subjected to mandatory suspicionless drug testing. Petitioners also take issue with the district court's findings that in several of the programs, close faculty supervision was adequate to address the safety concerns the College had identified. Pet. 27. Yet Petitioners never challenged these, or any other findings of the district court, as clearly erroneous.

Even if Petitioners had preserved a challenge to the trial court's findings, that would not be a basis for this Court's review. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." Rule 10. That is precisely what Petitioners seek.[3]

III. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S PRECEDENTS TO THE FACTS OF THIS CASE.

At bottom, Petitioners disagree with how the court of appeals applied well-established doctrine to the facts found by the district court. But certiorari is not designed for mere review of the application of the Court's precedents to a particular factual situation. Sup. Ct. R.10. In any event, the court of appeals here correctly applied this Court's "special needs" precedents.

Drug testing imposed by state actors is indisputably a search triggering Fourth Amendment scrutiny. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989) (collection and testing of urine is a search). And because "urine tests are searches," a public entity's "drug-testing program must meet the reasonableness requirement of the Fourth Amendment." *Von Raab*, 489 U.S. at 665.

While a conclusion that a search is reasonable has "usually required 'some quantum of individualized suspicion,'" the Court has recognized that "[i]n limited circumstances, where the privacy

---

[3] The fact that the College did not even cite the particular safety needs of its curriculum as a basis for its drug-testing program when the program was first adopted, and only advanced that interest as a post hoc matter in litigation, makes this a particularly poor vehicle for certiorari. The pretextual nature of the College's justification offers a separate and independent ground for affirming the court of appeals' decision, one that would have little or no consequence for other programs that legitimately sought to address specific safety concerns.

interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)). "When such 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314 (citing *Von Raab*, 489 U.S. at 665–66). This Court's "precedents establish that the proffered special need for drug testing must 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." *Id*. at 318.

Petitioners rely on this Court's decisions upholding drug testing of high school students in *Vernonia* and *Earls*. Pet. 15-16. But this Court has "held that 'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,' and that the rights of students 'must be applied in light of the special characteristics of the school environment.'" *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (quoting *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682 (1986) and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). Schoolchildren have a lesser expectation of privacy than do adults. Indeed, this Court upheld mandatory suspicionless drug testing in *Vernonia* and *Earls* primarily because

those cases involved children under the care and supervision of public school officials. *See Vernonia*, 515 U.S. at 654 ("Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."); *Earls,* 536 U.S. at 829–30 ("'the reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children'") (quoting *Vernonia*, 515 U.S. at 656). Here, the Eighth Circuit properly recognized that "[t]he facts in this case are substantially different from those in [*Vernonia*] and [*Earls*]." App. at 22. What is permissible for children is not necessarily permissible for adults.

Petitioners also argue that the courts below erred by considering whether each of the particular academic programs at the College involves a substantial public safety risk, and permitted suspicionless drug testing only of students in programs that present such a risk. This, however, is the approach directed by this Court's precedents. In *Von Raab*, 489 U.S. at 677–78, for example, the Court considered separately three categories of Customs employees subject to drug testing. It upheld the testing as applied to those seeking positions that involved the use of firearms or the interdiction of drugs, but remanded for further proceedings to determine whether a third category of employees, those with access to classified information, could be subjected to testing. In *Skinner,* 489 U.S. at 633–34, the Court upheld drug testing not of all railroad employees, but only of those involved in accidents or safety infractions. And in both *Earls* and *Vernonia,* the Court emphasized that the schools tested not all

students, but only those involved in extracurricular activities and sports, respectively.

The district court's decision to assess the existence of a special need on a program-by-program basis, where there was no evidence that safety concerns applied across the board to all students—and the court of appeals' endorsement of that program-by-program approach—is not only consistent with this Court's precedents, but also with those of the other courts of appeals. *See, e.g., Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 873 (11th Cir. 2013) ("*Skinner* and its progeny . . . conducted the special-needs balancing test not at a high order of generality but in a fact-intensive manner that paid due consideration to the characteristics of a particular job category (e.g., the degree of risk that mistakes on the job pose to public safety), the important privacy interests at stake, and other context-specific concerns (e.g., evidence of a preexisting drug problem)."); *Nat'l Fed'n of Fed. Emps.–IAM v. Vilsack,* 681 F.3d 483, 489 (D.C. Cir. 2012) ("When assessing the reasonableness of the Fourth Amendment intrusion by [drug testing] policies, . . . the Supreme Court has differentiated between job categories designated for testing, rather than conducting the balancing test more broadly . . . ."). If the College were correct, and no such fact-specific inquiry were required, any college that offered even a small number of dangerous classes could drug test all its students, regardless of whether they ever took a dangerous class.

Petitioners argue that in assessing safety risks, the district court should have given greater

weight to the risk that a student could harm himself in determining whether Petitioners had demonstrated a special need. The court of appeals noted, however, that "[a]lthough the Supreme Court mentioned the safety of the individual employees in *Skinner* and *Von Raab*, the Court upheld the suspicionless drug testing in those cases based on the broader interests of public safety and security." App. 19 (citing *Von Raab*, 489 U.S. at 668–71; *Skinner*, 489 U.S. at 621, 628–30). But more to the point, Petitioners make no showing that giving greater weight to students' own potential harms would have altered the outcome with respect to any of the programs. For many programs, the College offered no evidence of safety risks whatsoever; for many others, the evidence was so conclusory that it would be insufficient regardless of the weight assigned to self-harm.

Finally, Petitioners argue that the court of appeals erred in concluding that the College's interest in "fostering a drug-free environment" was not a "special need" that justifies warrantless, suspicionless drug testing. But the court of appeals' conclusion in that regard is plainly correct. As this Court made clear in *Chandler*, such general assertions do not qualify as special needs. There is nothing "special" about the College's general interest in having a drug-free environment.

CONCLUSION

This case presents no conflict among the circuits, no question of national importance, and merely involves the application of this Court's established "special needs" jurisprudence to a unique

set of facts. For all the above reasons, the writ of certiorari should be denied.

Respectfully Submitted,

Anthony E. Rothert
Counsel of Record
Gillian R. Wilcox
Jessie Steffan
ACLU OF MISSOURI FOUNDATION
906 Olive Street,
Suite 1130
St. Louis, MO 63101

(314) 652-3114
ARothert@aclu-mo.org

Jason D. Williamson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Dated: April 26, 2017.