

**Oral Argument Requested: March 29, 2008**

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RECORD NO. CV-07241980

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**Supreme Court of the United States**

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ELIZABETH LEMON,  
and TACY JORDAN,  
individually and on behalf of all others similarly situated

Petitioners,

v.

ROCKEFELLER UNITED SCHOOL DISTRICT, and  
JACK DONAGHY, in his official capacity as Principal of Rockefeller High School,

Respondents.

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ON APPEAL FROM A FINAL ORDER OF  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR RESPONDENTS,  
ROCKEFELLER UNITED SCHOOL DISTRICT.

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Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995)

## **PRELIMINARY STATEMENT**

The Rockefeller High School undertook a new, innovative policy in order to respond to the crisis of methamphetamine abuse amongst its students in October of 2007. Petitioners Elizabeth Lemon and Tracy Jordan challenged the constitutionality of the program, which involved the use of trained drug-sniffing dogs, in a District Court suit. Cross motions for summary judgment were filed. The District Court granted Defendant school district's motion for summary judgment. The students appealed to the Fourteenth Circuit Court of Appeals, which affirmed the decision of the District Court. The students now appeal to the Supreme Court of the United States. This brief argues that the use of sniffer dogs was not a search for purposes of the Fourth Amendment and, even if it was a search, that search was reasonable and thus constitutional.

## **QUESTIONS PRESENTED**

1. In a public high school, may a school district, consistent with the Fourth Amendment, use trained, drug sniffing dogs to identify students in possession of contraband amphetamines in order to curb student drug abuse?
2. If the use of such dogs does constitute a search for purposes of the Fourth Amendment, is that search reasonable where a school district is combating a crisis of drug abuse among its students?

## **STATEMENT OF THE CASE**

In recent years, Rockefeller High School ("the school"), like many public schools around the country, has experienced a troubling increase in amphetamine abuse among students. In the last four years, ten students have been arrested for methamphetamine possession, two students were arrested for methamphetamine distribution, and one student was tragically killed in an

explosion of a home methamphetamine lab.

Rockefeller High School has a written policy on controlled substances, which states: “any student found in possession of a controlled substance is subject to immediate suspension and possible expulsion.” The school also has a written policy on prescription medications: “All students must notify the Principal’s office of any prescription medication they are taking. All prescription medication must be turned over to the school nurse, who will administer the medication to students at the appropriate intervals.”

Concerned about the increase in amphetamine use, in an effort to protect its students, Rockefeller High School Principal Jack Donaghy (“Mr. Donaghy”) undertook a new program in September of 2007 to enforce the controlled substance policy. Mr. Donaghy contacted the Yawk State Police Department for assistance in implementing organized searches of students using trained drug-sniffing dogs.

The first program began its implementation on October 16, 2007. Following the guidelines of the announced policy, Mr. Donaghy and a police escort proceeded to sweep the classrooms with a police dog trained to locate amphetamines. As per protocol, Mr. Donaghy, a uniformed police officer and the dog entered the classroom and politely requested that all students place their backpacks, purses and bags on the floor next to their desk. The dog then walked up and down the aisles of desks, sniffing in and around the students’ bags and sniffing the areas of the students’ bodies that were within reach of the dog. Where the dog sensed potential concern and the presence of contraband, the dog sniffed more carefully around the student’s person. This thorough and protective search at times necessitated the dog sniffing certain student’s laps, legs and areas immediately near the body.

The entire protective sweep took approximately two hours, during which time students

were permitted to use the restroom. For their protection and comfort, any student needing to use the restroom was required to wait for a faculty escort of their gender and was accompanied to the facilities by this escort.

If the dog alerted on a student, signaling that it identified the presence of amphetamines, the student was removed from the classroom and subjected to a more comprehensive search in the school gymnasium. For protection, an additional dog was present in the gymnasium during these searches.

The dogs alerted on three students who were subsequently searched: Elizabeth Lemon, Tracy Jordan and Kenneth Parcell.

The dog alerted after sniffing Plaintiff Elizabeth Lemon's ("Ms. Lemon") purse. The police escorted Ms. Lemon to the school gymnasium where she was asked to empty her purse and was searched on her person by a female school official. The Rockefeller Vice-Principal, Mr. Jonathan, found a small pill-box in Ms. Lemon's purse with five tablets of the prescription drug Adderall. The active ingredient in Adderall, used to treat Attention-Deficit Hyperactivity Disorder ("ADHD") is chemically related to amphetamine. Because the pills were not in a valid prescription bottle in compliance with the articulated school policy, the school district immediately and in accordance with standards of due process, suspended Ms. Lemon until she could provide a valid prescription or proof that she was permitted to legitimately possess the substance. The next day Ms. Lemon provided a copy of her valid prescription and had her doctor call Mr. Donaghy in order to clarify that Ms. Lemon had been prescribed Adderall in order to control her ADHD. Ms. Lemon's suspension was promptly withdrawn and she was allowed to return to class on October 18, 2007, under the requirement that she submit her prescription medication to school district in order to be administered through the school nurse.

Another student, Tracy Jordan (“Mr. Jordan”), was also sniffed by the dog after a positive alert. After the dog alerted, Mr. Jordan was asked by the officer to stand up, at which time the dog continued to sniff around Mr. Jordan’s pants pocket. To complete the search, Mr. Jordan was removed from the classroom and taken to the school gymnasium where he was asked to empty his pockets. In his pockets the police uncovered a bottle of prescription medication, distributed from a pharmacy. The bottle contained ten tablets of Dexodrine, another medication used to treat ADHD and containing an active ingredient in the amphetamine family. Because Mr. Jordan could demonstrate he had a valid prescription, he was allowed to return to class and was not subjected to any disciplinary action. He was, however, required to submit his medication to the school district for future administration.

When the police proceeded to search the final student to whom the dog alerted, Kenneth Parcell (“Mr. Parcell”), they discovered a small baggie of methamphetamine, the drug that had motivated the search program, in the pocket of his jeans. Mr. Parcell was subsequently suspended for two weeks for violation of the school’s narcotics policy.

Though the school maintains the efficacy and importance of its narcotics policy, Elizabeth Lemon and Tracy Jordan filed this class action suit, claiming that the search violated their Fourth Amendment rights. The school moved for summary judgment which the district court granted. The district court found that the drug dog sniff did not constitute a search under the Fourth Amendment because the sniff did not implicate any reasonably held privacy interest. While the court of appeals termed the sniff a search, the court nonetheless deemed the search “reasonable” as part of the school’s efforts to protect its students from the drug trade and therefore constitutional under the Fourth Amendment.

## ARGUMENT

### **I. CANINE SNIFFS OF PUBLIC SCHOOL CHILDREN ARE NOT SEARCHES UNDER THE FOURTH AMENDMENT AND THEREFORE DO NOT IMPLICATE CONSTITUTIONALLY PROTECTED RIGHTS.**

The Fourth Amendment to the Constitution guarantees “[t]he right of the people to be secure . . . against unreasonable searches.” U.S. Const. Amend. IV. A canine sniff does not violate the fourth amendment if it does not constitute a search. *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 231 (E.D. Tex. 1980). Further, even if this Court does find that the sniff constitutes a search for purposes of the Fourth Amendment, it does not violate the constitution if it is reasonable. *Id.*

“A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Thus, the application of the Fourth Amendment depends on whether a legitimate expectation of privacy has been invaded. *Smith v. Maryland*, 442 U.S. 735, 740 (1983). “In deciding whether the inspection by . . . [a] sniffer dog, violated the fourth amendment rights of plaintiffs, a twofold test is required. First, it must be determined whether a search of constitutional dimension actually occurred. If it is found that a search occurred, the second issue is whether or not the search was reasonable.” *Jones*, 499 F. Supp. at 231.

Here, no search occurred because students in a public school have less of an expectation of privacy than independent adults, and do not have a privacy interest in the air surrounding their bodies.

#### **A. Generally, Students At Public Schools Have Fewer Privacy Rights Than Independent Adults.**

Although public school students do not shed their constitutional rights at the schoolhouse door, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), school

administrators have a need to protect all students and the educational process. *Doe v. Renfrow*, 475 F. Supp. 1012, 1022 (7th Cir. 1979). School administrators have a reasonable right to inspect in order to perform their duty of providing an educational environment. *Id.* at 1022. Public school students thus have a lesser expectation of privacy than members of the population generally. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995).

Because amphetamine abuse was impeding the school administrators from performing their duty of maintaining an educational environment at Rockefeller High School, Principal Donaghy and the Yawk State Police performed a reasonable inspection. Even had this inspection violated an independent adult's fourth amendment rights, it did not violate the students' rights because it was designed to enforce a substance abuse policy that was being evaded by students to their own detriment.

**B. The Dog Sniff Was Not A Search Because Students Do Not Have Privacy Interests In the Air Surrounding Their Bodies.**

The trial court correctly determined that there was not a search of the students because the students have no legitimate privacy expectation in the air around their bodies. “[S]tudents [do] not have a justifiable expectation of privacy that would preclude a school administrator from sniffing the air around the desks with the aid of a trained drug detecting canine.” *Doe*, 475 F. Supp at 1022. Use of such a dog “does not expose non-contraband items that otherwise would remain hidden from public view” and thus does not threaten any legitimate expectation of privacy students may have. *United States v. Place*, 462 U.S. 696, 707 (1983). It is important to note that “[t]he legitimate expectation that information about a perfectly lawful activity will remain private is categorically distinguishable from [an individual’s] hopes or expectations concerning the nondetection of contraband.” *Caballes*, 543 U.S. at 410.

Additionally, the dog sniffs were not a search because they were minimally intrusive and

did not disrupt the school day. “The level of intrusiveness of an investigative technique is critical to whether the actions of government officials constitute a search.” *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266 (9th Cir. 1999).

In *Doe*, the presence of the trained dogs within the classroom for only several minutes was a “minimal intrusion at best and not so serious as to invoke the protections of the Fourth Amendment.” *Doe*, 475 F. Supp. at 1020. The court in *Doe* looks at several cases involving dog sniffs in the public and states that they do not violate Fourth Amendment rights because in every instant the officer had “previous independent information or ‘tips’ concerning the whereabouts of drugs that were later sniffed out by the dogs.” *Id.* at 1021. The school in *Doe*, only requested the assistance of the dogs after having an “upsurge in drug use at the schools.” *Id.* The dogs only interrupted each classroom for a few minutes and “[n]o student was treated with any malice nor was the operation planned in a way as to embarrass any particular student.” *Id.* at 1022.

Similarly, the dog sniffs in the instant case did not disrupt the school day, and it followed an upsurge in drug use at the school, including the death of one of the students. It should thus be determined that the intrusion was so minimal as to fail to constitute a search for the purposes of the Fourth Amendment.

- 1. The Dog Sniff Could Only Reveal Information Relating To The Presence Of Contraband, For Which Students Have No Legitimate Expectation Of Privacy.**

“Any interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that only reveals possession of contraband compromises no legitimate privacy interest.” *Caballes*, 543 U.S. at 408. Use of canines in identifying the presence of drugs that “does not expose non-contraband items that otherwise would remain hidden from public view” is not a search for purposes of the fourth amendment because people do not have a

legitimate expectation of privacy in contraband items. *Place*, 462 U.S. at 707. Contraband items are not held to be legitimate privacy interests because the “expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable.” *Caballes*, 543 U.S. at 408-09.

In *Place*, a man was traveling and while in the airport the police used a drug sniffing dog to sniff his luggage. 462 U.S. at 696. The Court reasons that as long as a dog “does not expose noncontraband items that otherwise would remain hidden from public view,” then the items that a person has a valid private interest in would not be disclosed. *Id.* at 707. The fact that the dog did not have to open the luggage in order to find the contraband items led the Court in *Place* to decide that it did not constitute a search within the meaning of the Fourth Amendment because a person does not have a legitimate privacy interest in contraband items. *Id.*

In *Doe*, trained drug sniffing dogs and a uniformed police officer went into each classroom of the middle and high schools for a couple of minutes and walked up and down the aisles as the students sat at their desks, for the purpose of locating illicit drugs. 475 F. Supp. at 1016-17. The students in *Doe* did not have a “justifiable expectation of privacy that would preclude a school administrator from sniffing the air around the desks with the aid of a trained drug detecting canine.” *Id.* at 1022. The court reasoned that any expectation of privacy held by the students, is diminished due to the nature of public school setting and education, and because they receive constant supervision while in school. *Id.* The dogs were brought to the school in response to an increasing drug problem in the schools and thus the students’ health and safety was compromised. *Id.* The court in *Doe* also found that the “students did not have a justifiable expectation of privacy that would preclude a school administrator from sniffing the air around the desks with the aid of a trained drug detecting canine.” *Id.*

Here, the Principal called upon the assistance of drug sniffing dogs for the purpose of helping with the rising drug problem in his school, more specifically with the widespread trafficking of drug byproducts used in the production of methamphetamine, just as in *Doe*. Furthermore, the dogs were only identifying for drugs and other contraband rather than anything that would create a privacy interest.

As in *Doe*, the students here do not have a justifiable expectation of privacy in the air surrounding their bodies. As in *Place*, the dogs were searching for contraband items only, and since no one has a legitimate privacy interest in illegal or contraband things, the students could not have had a legitimate privacy interest in the contraband items.

The use of dog sniffs to detect amphetamines does not reveal information about which the students had a legitimate privacy interest. This is exemplified by the fact that the dog sniff revealed only substances that implicated the school's substance abuse policy. The dogs did not alarm because of students' body odor or possession of any otherwise embarrassing objects or character traits.

Thus, while the dog sniff may have occurred in a sensitive environment, it was not designed to, nor did it detect anything to which the students were sensitive other than objects that implicated the substance abuse policy.

**2. Any Information Regarding Medical Conditions That Could Be Exposed By The Dog Sniff Is Insufficient To Create An Expectation Of Privacy Entitled To Fourth Amendment Protection.**

Discovering students' noncompliance with the school's substance abuse policy was the goal of the dog sniff. Only students who were noncompliant with the policy were implicated by the sniff. Simply because the policy encompasses the use of drugs prescribed by a doctor does not change this fact. Failure to comply with the policy waives whatever legitimate privacy

interest students may attempt to claim with respect to the drugs they possessed in violation of the policy. *See Doe*, 475 F. Supp. at 1022.

The school's policy not only allows, as the trial court states, but requires that students hand over prescription drugs to the school nurse. When students failed to abide by this policy, they violated the policy. Considering the particular danger and distraction to the school that amphetamines were causing, it is all the more reason for students with prescription drugs to place them in the custody of the school nurse for controlled distribution. Drug abuse is simply not limited to illicit drugs; it includes the abuse and illegal distribution of prescription drugs as well. When the students made the decision not to comply with the policy, they put themselves at risk of being caught violating school rules.

**II. EVEN IF A DOG SNIFF OF A STUDENT'S BODY DOES CONSTITUTE A FOURTH AMENDMENT SEARCH, THE SCHOOL DISTRICT'S SEARCH WAS SUFFICIENTLY REASONABLE AND, THEREFORE, CONSTITUTIONAL.**

Even if the suspicionless canine sniffs establish a search under the Fourth Amendment, the canine sniffs are constitutional because they are reasonable. The protections of the Fourth Amendment extend only to *unreasonable* searches and seizures. *See* U.S. CONST. amend IV. The constitutionality of a search is based upon whether the search was reasonable under all of the circumstances. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266-67 (9th Cir. 1998); *Vernonia v. Acton*, 515 U.S. 646, 652 (1995). Given the minimally intrusive nature and character of the search on students privacy interests, alongside the schools legitimate and immediate need to combat the surging drug problem, the school's use of drug sniffing canines is reasonable and therefore constitutional under the Fourth Amendment.

**A. Any Privacy Interest the Students May Enjoy is Minimally Implicated by the School District's Use of Drug-Sniffing Dogs.**

The privacy interests of the students of Rockefeller High School were only minimally implicated by the canine sniffs. Although students admittedly do not shed their constitutional rights at the schoolhouse gate, the court has recognized that students have a lesser expectation of privacy at school because of the school's duty to protect students' health and safety. *See Tinker*, 393 U.S. at 506; *see also Bd. Of Educ. v. Earls*, 536 U.S. 822, 830 (2002); *Vernonia*, 515 U.S. at 656.

Rockefeller High's drug prevention program does not significantly invade student privacy interests because of the minimally intrusive method of identifying and seizing drug contraband. In *Vernonia*, the school district's policy required student athletes to submit to urinalysis in order to participate in school sports or activities. In considering the character of the intrusion presented by the school's policy, the court found the invasion of students' privacy interests was not significant because students submitting to the urinalysis tests faced a more private intrusion. *Vernonia*, 515 U.S. at 658. The samples taken from the students in *Vernonia* were only used to identify drug abusers. Here, the canines are only being used to identify drug contraband in the students' possession. Students have no legitimate privacy interest in possessing contraband. *See Caballes*, 543 U.S. at 408. Although the canines may conceivably alert to the presence of legitimate prescription medication, school policy already requires students to turn over prescribed medications to the school nurse. Accordingly, students should not be in possession of even prescribed medication save for when the school administers it.

Furthermore, under the Program, like the students in *Vernonia* who faced urinalysis tests in a private setting which included only testing monitors, if the canines alerted to a student, school officials subjected the selected students to a more vigorous search in the gymnasium –

rather than in the classroom in the potentially embarrassing presence of their peers. Moreover, because the canines were trained to identify the presence of drugs, there was no risk that other innocent information would be divulged by their use. *See Doe*, 475 F. Supp. at 1022 (finding the similar use of drug detecting canines “does not expose non-contraband items that otherwise would remain hidden from public view.”). Therefore the nature and character of school official’s intrusion into students’ privacy is markedly limited because of the method of drug identification and seizure and the limited use to which the canines were put.

**B. The School’s Interest in Controlling Drug Use Among Students Outweighs the Students’ Privacy Interests.**

The suspicionless canine sniff of Rockefeller High students is reasonable and therefore constitutional because the school’s legitimate interest in deterring and eradicating drug use in school outweighs the privacy interests of the students. Generally, the reasonableness of a search depends on individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 313 (1997). However, the reasonableness inquiry cannot be divorced from the schools’ “custodial and tutelary responsibility” for students. *Earls*, 536 U.S. at 830. When evaluating the reasonableness of a search in public schools, the court balances the nature of the student’s privacy interests and the character of the intrusion with the nature and immediacy of the school’s concern in performing the search. *Vernonia*, 515 U.S. at 654, 660. Additionally, the court considers the effectiveness of the means chosen to address the school’s concern. *Id.* The Court in *Vernonia* found the school district’s policy that required student athletes to submit a waiver consenting to random drug testing was reasonable because the school district had an important and immediate interest in deterring drug use. *Id.* at 664. Similarly, the use of drug sniffing canines is reasonable because of the growing and documented drug abuse problem in the neighborhood surrounding Rockefeller High School.

Rockefeller High School has a legitimate and immediate interest in preventing and eradicating drug use in school. The Supreme court has recognized curbing drug use as an important –if not compelling interest. *Vernonia* 515 U.S. at 661. Indeed the Court recently affirmed a school’s legitimate interest in protecting students from drug use in *Morse v. Frederick*, 127 S. Ct. 2618, 2618 (2007). In *Morse v. Frederick*, a group of high school students unfurled a banner reading “Bong Hits for Jesus,” and thus, from the school’s perspective, promoted illegal drug use. 127 S. Ct. at 2622. One student refused to take the banner down and was suspended. *Id.* Considering the special characteristics of the school environment and the government interest in stopping drug abuse, the Court held that schools were entitled to take steps to safeguard those entrusted to their care from speech that could reasonable be regarded as encouraging illegal drug use. *Id.* at 2618. Although the case ultimately concerned the First Amendment, it is also instructive because it shows that where a school is attempting to guard against student drug abuse, the Court is willing to broaden the scope of what constitutes a legitimate interest. Identifying the type of drugs that has plagued the Rockefeller High School community through the use of drug sniffing canines is an effective means of deterring and eradicating drug use in the school community. It is beyond dispute that preventing drug use in students is an important—if not compelling---school interest. *See Vernonia*, 515 U.S. at 660-61.

### **CONCLUSION**

For the foregoing reasons, Respondent respectfully asks that this Court affirm the district court’s decision that the use of drug sniffing canines was not a search and therefore did not implicate the prohibitions of the Fourth Amendment. Respondent also asks that even if the Court finds that the dog sniffs constitute a search, that the court finds the searches were reasonable, and therefore constitutional, because of the minimal intrusion imposed on students and the school’s

legitimate and immediate need to prevent and combat the growing drug abuse problem in and around Rockefeller High School.