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NOTE

Evaluating the Special Needs Doctrine in the Context of Higher Education

Ryan Prsha*

I. INTRODUCTION

On June 17, 2011, Linn State Technical College¹ adopted a drug-testing policy that read as follows:

Linn State Technical College will begin a drug screening program in the fall semester . . . for students who are newly classified as degree or certificate seeking and degree or certificate seeking students returning after one or more semesters of non-enrollment at the Linn State Technical College campus or any Linn State Technical College location.²

Never before had a public college or university in the United States implemented a mandatory school-wide drug-screening policy such as this.³ Each and every incoming student was to be tested, and those who failed the test or refused its administration were to have their college admission with-

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1. Linn State is a hands-on trade school that prepares its students to enter the workforce in one of a wide range of potential careers. *Programs*, STATE TECHNICAL C. MO., <https://www.statetechmo.edu/programs/> (last visited Jan. 17, 2017). Because of the inherent nature of some of these careers, a portion of the students enrolled learn how to operate heavy machinery and handle dangerous materials. *Kittle-Aikeley v. Claycomb*, 807 F.3d 913, 917 (8th Cir. 2015), *vacated* (Feb. 18, 2016). It is worth noting that in 2014, “Linn State Technical College” became the State Technical College of Missouri (“STCM”). *History*, STATE TECHNICAL C. MO., <https://www.statetechmo.edu/history/> (last visited Jan. 17, 2017). However, because the Eighth Circuit opinions still refer to the school as “Linn State,” this Note will do so as well.

2. *Kittle-Aikeley*, 807 F.3d at 917 (quoting *Drug Screening*, STATE TECHNICAL C. MO., https://eagleonline.statetechmo.edu/ICS/Drug_Screening.jnz (last visited Jan. 17, 2017)).

3. Timothy Williams, *At One College, a Fight over Required Drug Tests*, N.Y. TIMES (Oct. 10, 2011), http://www.nytimes.com/2011/10/11/us/at-linn-state-technical-a-fight-over-required-drug-tests.html?_r=0.

drawn.⁴ Unsurprisingly, members of the Linn State student body were troubled by this policy and filed suit against the college.⁵

While the case law governing school drug-testing policies is fairly well developed,⁶ this dispute marked the first time that the reasonable privacy expectation of college students had been scrutinized in such a fashion.⁷ The issue is polarizing, and the lawsuit against Linn State was handled inconsistently at various levels of the judicial system.⁸ The manner in which the case was handled will likely have broad and lasting implications on the privacy rights of college students throughout the country, not only regarding drug testing, but also in other aspects of the standard higher education experience.

Part II of this Note discusses the legal context in which this issue must be framed and gives a brief history of how the courts have handled public school drug-testing policies to this point. Part III examines the current state of drug testing in the academic setting – specifically focusing on the ongoing legal situation at Linn State. Part IV delves into questions concerning the Eighth Circuit’s current treatment of the Linn State situation, as well as the potential approaches that the judiciary could take in future cases.

II. LEGAL BACKGROUND

This Part will first review the intricacies of the Fourth Amendment’s prohibition of unreasonable searches and seizures. It will then discuss the special needs exception to the Fourth Amendment’s warrant requirement and how that exception has been applied to mandatory drug-testing policies.

4. *Kittle-Aikeley*, 807 F.3d at 917–18.

5. *See id.* at 918.

6. *See id.* at 920 (outlining Supreme Court cases that addressed student drug policies in primary schools).

7. *See id.* at 920–21 (“The current matter is a hybrid of [] two lines of cases, so while they are informative they are not wholly dispositive and ultimately do not alter the analysis that must be conducted . . .”); Williams, *supra* note 3 (“Linn State is the first public college in the country to require all adult students to submit to mandatory drug tests.”).

8. *See Kittle-Aikeley*, 807 F.3d at 916–17; Barrett v. Claycomb, 705 F.3d 315, 318 (8th Cir. 2013) (vacating the district court’s grant of a preliminary injunction in the facial challenge of the policy); Barrett v. Claycomb, 976 F. Supp. 2d 1104, 1137 (W.D. Mo. 2013) (finding policy constitutional as applied to students in certain programs), *rev’d and remanded sub nom.* Kittle-Aikeley v. Claycomb, 807 F.3d 913 (8th Cir. 2015), *and aff’d in part and rev’d in part en banc sub nom.* Kittle-Aikeley v. Strong, 844 F.3d 727 (8th Cir. 2016) (en banc); Barrett v. Claycomb, No. 11-cv-04242-NKL, 2011 WL 5827783, at *1 (W.D. Mo. Jan. 29, 2011) (issuing a preliminary injunction as to the facial challenge of the policy), *order vacated*, 705 F.3d 315 (8th Cir. 2013).

A. *The Fourth Amendment and Its Special Needs Doctrine*

The Fourth Amendment is an important, yet controversial, pillar of the U.S. legal system.⁹ By protecting against unreasonable searches and seizures, the doctrine establishes an essential limitation on government power.¹⁰ In order for the government to search or seize an individual's "person[], house[], papers, [or] effects," it must first show probable cause¹¹ and obtain a warrant.¹² If probable cause and a warrant are present, then the search is considered reasonable, and the amendment affords no protection to the individual.¹³

While this rule appears reasonably straightforward, there are a number of exceptions to the warrant requirement that create an aura of confusion in its practical application. One of these exceptions requires no warrant, requires no probable cause, and is potentially unlimited in scope: the special needs doctrine.¹⁴

9. See ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE INVESTIGATION 31 (2d ed. 2013) ("No technique of law enforcement is more important than the ability of the police to search for evidence and the ability of the police to seize what they find and to arrest individuals suspected of criminal activity. No aspect of criminal procedure has produced more Supreme Court decisions or arises more frequently in the lower courts.").

10. It is important to note that the Fourth Amendment is only implicated if the government or someone acting on the government's behalf is performing the search. *Id.* at 10 ("The Bill of Rights protects individuals against the power of the State. . . . The Fourth Amendment is the key constitutional provision governing police conduct during searches and seizures."). The Fourth Amendment provides no protection against unreasonable searches conducted by private individuals; this is known as the state action doctrine. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 519 (4th ed. 2011).

11. Probable cause essentially means that there is a fair probability or substantial chance that evidence of a crime will be found. *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983). More specifically, probable cause to search for or to seize evidence requires that an officer is possessed of sufficient facts and circumstances as would lead a reasonable person to believe that evidence or contraband relating to criminal activity will be found in the location to be searched. *Id.* Likewise, probable cause to make an arrest exists when an officer has knowledge of such facts as would lead a reasonable person to believe that a particular individual is committing, has committed, or is about to commit a criminal act. *Maryland v. Pringle*, 540 U.S. 366, 372 n.2 (2003) (citing *Brinegar v. United States*, 388 U.S. 160, 175–76 (1949)).

12. Specifically, the Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. In general, a warrant must be issued by a neutral magistrate, supported by an oath or affirmation, and state with particularity the place to be searched. CHERMERINSKY & LEVENSON, *supra* note 9, at 111–12.

13. CHERMERINSKY & LEVENSON, *supra* note 9, at 111–12.

14. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

The special needs doctrine recognizes certain instances when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”¹⁵ Such instances include administrative searches,¹⁶ searches at border crossings¹⁷ and checkpoints,¹⁸ searches in jails and prisons,¹⁹ searches of arrestees,²⁰ and certain drug-testing policies.²¹ The litigation that surrounds drug testing at public colleges and universities has focused specifically on the drug-testing portion of the special needs exception.

B. *The Drug Test*

Courts have long recognized that the administration of a drug test by an agent of the government amounts to a “search” under the Fourth Amendment.²² Therefore, any time a drug test is administered by or on behalf of the government, it must be conducted under the reasonableness standard.²³ Although this standard generally specifies a need for probable cause and a warrant, suspicionless drug-testing policies have been deemed acceptable under the special needs exception in three contexts: the workplace, public schools, and hospitals.²⁴

15. *Id.* at 873 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

16. *See* *Camara v. Mun. Court of City & Cty. of S.F.*, 387 U.S. 523, 535 (1967) (stating that “‘probable cause’ to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling”). *See also* *New York v. Burger*, 482 U.S. 691, 693 (1987) (finding a warrantless search of an automobile junkyard falls within the exception of the warrant requirement for administrative inspections of “pervasively regulated industries”).

17. *See* *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (concluding “the Government’s authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle’s fuel tank”).

18. *See* *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (concluding sobriety checkpoints do not violate the Fourth Amendment).

19. *See* *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1513–14 (2012) (holding “courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security”).

20. *See* *Maryland v. King*, 133 S. Ct. 1958, 1980 (2012) (concluding “DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure”).

21. *See* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 659–66 (1995) (holding the warrantless drug testing of students who voluntarily participate in high school athletics does not violate the Fourth Amendment).

22. *Id.* at 652, 653–54.

23. *Id.* at 652.

24. CHEMERINSKY & LEVENSON, *supra* note 9, at 257. This falls under the “special needs” warrant exception. *Id.* The underlying theory is that drug use is a signifi-

This exception was first recognized in the area of government employment.²⁵ In *Skinner v. Railway Labor Executives' Ass'n*, the Supreme Court of the United States upheld federal regulations requiring railroad workers who were involved in accidents to be drug tested.²⁶ In this case, the Court was clear that there was a “special need” to ensure the safety of the traveling public.²⁷ Further, the fact that the tested employees worked in “an industry that is regulated pervasively to ensure safety” created a diminished expectation of privacy.²⁸ Therefore, the government’s special need to ensure safety for its passengers justified the abrogation of a citizen’s Fourth Amendment protection from blood tests.²⁹

This rationale was also used in *National Treasury Employees Union v. Von Raab*.³⁰ In *Von Raab*, the Court upheld a U.S. Customs Service policy that required drug testing for any customs worker who was to hold a job in which firearms or drugs were present.³¹ Unlike in *Skinner*, there was no reason to suspect that the individuals being tested in this case were using drugs.³² Nonetheless, the Court believed that there was still a special need to make sure that any employee who carried weapons or investigated drug trafficking did not use drugs himself or herself.³³ This special need was sufficient to justify a suspicionless search.³⁴

The extent of the holdings in *Skinner* and *Von Raab* was finally limited eight years later in *Chandler v. Miller*.³⁵ In this case, the Supreme Court struck down a statute requiring all candidates running for political office to pass a drug test.³⁶ The Court found no special need because (1) there was “no evidence of a drug problem among . . . elected officials,” (2) “those officials typically d[id] not perform high risk, safety-sensitive tasks, and” (3) “the required certification immediately aid[ed] no interdiction effort[s].”³⁷ Although drug use calls into question “an official’s judgment and integrity[] . . . and undermines public confidence and trust in elected officials,” the Court was clear that no special need could be found absent some “indication of a

cant problem, and there is a special need to make sure that certain individuals in certain situations are drug free – this special need overrides the typically essential Fourth Amendment reasonableness protections. *See id.*

25. *See Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 633–34 (1989).

26. *Id.* at 634.

27. *Id.* at 620–21.

28. *Id.* at 627.

29. *Id.* at 634.

30. 489 U.S. 656, 678–79 (1989).

31. *Id.* at 674.

32. *Id.*

33. *Id.*

34. *Id.*

35. 520 U.S. 305 (1997).

36. *Id.* at 323.

37. *Id.* at 321–22.

concrete danger demanding departure from the Fourth Amendment's main rule."³⁸

It was not until *Vernonia School District 47J v. Acton* in 1995 that the special needs exception was extended to cover drug testing in public schools.³⁹ In *Acton*, the Court held a public school may implement a suspicionless drug test as long as the school has a legitimate interest in doing so and the test is not too intrusive.⁴⁰ Although the "ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" courts handling the tolerability of warrantless drug testing in public schools have used three factors in guiding their decisions.⁴¹

1. Nature of the Privacy Interest

Courts first examine the nature of the privacy interest upon which the search at issue intrudes.⁴² The greater the privacy interest, the less likely it is that a suspicionless drug test will be found reasonable.⁴³ It is well accepted that the inherent custodial responsibility schools possess over their pupils creates a lesser expectation of privacy for the students within the school environment.⁴⁴

In *Acton*, the Supreme Court of the United States held that a student's participation in school-sponsored sports programs was adequate on its own to warrant the school's suspicionless, warrantless drug test of that student.⁴⁵ Although the Court "caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts," it also explicitly stated that "the most significant element [in deciding so in this case was] . . . that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."⁴⁶

This concept was taken even further in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, in which the Supreme Court held that suspicionless drug testing of students in all extracurricular activities was "a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren."⁴⁷ As the Court reasoned, "[S]tudents who participate in competitive

38. *Id.* at 318–19.

39. 515 U.S. 646, 664–65 (1995).

40. *Id.* at 664–65.

41. *Id.* at 652 (quoting U.S. CONST. amend. IV).

42. *Id.* at 654.

43. *See id.*

44. *See id.* at 654–55; *see also* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 830 (2002); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

45. *Acton*, 515 U.S. at 664–65.

46. *Id.* at 665.

47. 536 U.S. at 838.

extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes” and should therefore be subject to the same lowered expectation of privacy.⁴⁸ This supposed consent to intrusion allowed the *Earls* Court to extend the *Acton* doctrine even further.⁴⁹

The rulings in *Acton* and *Earls* laid the foundation for how lower courts analyzed suspicionless drug tests of students in all public schools: the greater the involvement of the student, the greater the school’s custodial responsibility.⁵⁰ This increased custodial responsibility, in turn, created a lower expectation of privacy for those students, subsequently tipping the scales of reasonableness in favor of the schools in these types of cases.⁵¹

2. The Character of the Intrusion

The second factor that courts evaluate when deciding whether a suspicionless drug test in a public school fits under the special needs doctrine is “the character of the intrusion imposed by the [drug-testing p]olicy.”⁵² Specifically, “the ‘degree of intrusion’ on one’s privacy caused by [carrying out the drug test] ‘depends upon the manner in which production of the [] sample is monitored.’”⁵³ Although this factor will ultimately depend on the facts of each particular case, both the *Acton* and *Earls* Courts concluded that the invasion of students’ privacy was insignificant in light of “the minimally intrusive nature of the sample collection and the limited uses to which the test results are put.”⁵⁴ In *Earls*, “a faculty monitor wait[ed] outside [a] closed restroom stall for the student to produce a sample and [] listen[ed] for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody.”⁵⁵ Additionally, the test results were not turned over to any law enforcement authority and were used only for purposes of limiting a failed student’s privilege of participating in extracurricular activities.⁵⁶ The procedure followed by the school district in *Acton* was nearly identical to the one in *Earls*.⁵⁷

48. *Id.* at 831–32.

49. *See id.*

50. *See id.*; *see also Acton*, 515 U.S. at 657.

51. *See Earls*, 536 U.S. at 832; *Acton*, 515 U.S. at 657.

52. *Earls*, 536 U.S. at 832 (citing *Acton*, 515 U.S. at 658).

53. *Id.* (quoting *Acton*, 515 U.S. at 658).

54. *Id.* at 834; *Acton*, 515 U.S. at 660.

55. *Earls*, 536 U.S. at 832.

56. *Id.* at 833.

57. In *Acton*, the school district’s policy required male students to produce samples at a urinal. *Acton*, 515 U.S. at 658. The students “remain[ed] fully clothed and [were] only observed from behind, if at all.” *Id.* Furthermore, the female students were required to “produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering.” *Id.* Additionally, the tests in *Acton* looked only for “standard” drugs, and the test did not change depending on the identity of the student. *Id.* Equally important to the *Acton* Court, “the results of the

3. Immediacy of Concern

The final factor courts consider in these types of cases is the nature and immediacy of the government's concerns.⁵⁸ Once again, both the *Acton* and *Earls* Courts reached similar conclusions.⁵⁹ The Court in *Acton* reasoned that “[d]eterring drug use by our Nation’s schoolchildren is at least as important as [deterring drug use in government employees who perform dangerous jobs].”⁶⁰ The *Acton* Court was clear in its assertion that “[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe” and that “[m]aturing nervous systems are more critically impaired by intoxicants than mature ones are.”⁶¹ While the nature and immediacy of drug use by young school children is clearly seen as significant enough by the court, it is unclear if the same logic holds for older college-aged students. This distinction is particularly noteworthy in light of recent developments.

III. RECENT DEVELOPMENTS

Linn State was the first public college in the country to implement a school-wide suspicionless drug-testing policy for all incoming students.⁶² Therefore, in *Kittle-Aikeley v. Claycomb* – the lawsuit dealing with Linn State’s policy – the Eighth Circuit faced a matter of first impression.⁶³ Prior to the enactment of Linn State’s policy, suspicionless drug-testing policies in colleges and universities had generally been limited to student-athletes.⁶⁴

tests [were] disclosed only to a limited class of school personnel who have a need to know; and they [were] not turned over to law enforcement authorities or used for any internal disciplinary function.” *Id.* In a fashion similar to the policy in *Acton*, the school district’s policy in *Earls* required “a faculty monitor [to] wait[] outside [a] closed restroom stall for the student to produce a sample.” *Earls*, 536 U.S. at 832–33. The *Earls* opinion itself notes that “[the] procedure [used by Pottawatomie] is virtually identical to that reviewed in [*Acton*], except that it additionally protects privacy by allowing male students to produce their samples behind a closed stall.” *Id.*

58. *See Acton*, 515 U.S. at 660.

59. *See id.* at 661; *see also Earls*, 536 U.S. at 834.

60. *Acton*, 515 U.S. at 661 (first citing Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989); and then citing *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 628 (1989)).

61. *Id.* (quoting Richard A. Hawley, *The Bumpy Road to Drug-Free Schools*, 72 PHI DELTA KAPPAN 310, 314 (1990)).

62. Jeremy L. Kahn, *Shedding Rights at the College Gate: How Suspicionless Mandatory Drug Testing of College Students Violates the Fourth Amendment*, 67 U. MIAMI L. REV. 217, 217 (2012); *see also* Rachel Bloom, *Pass a Drug Test Before You Can Pass a Class*, ACLU: BLOG (Sept. 8, 2011, 5:05 PM), <http://www.aclu.org/blog/criminal-law-reform/pass-drug-test-you-can-pass-class>; Williams, *supra* note 3.

63. *See* 2 KEVIN B. ZEESE, DRUG TESTING LEGAL MANUAL § 8:7 (2d ed. 2016).

64. *See id.*; *see also* Kahn, *supra* note 62, at 233.

Therefore, the result of this case will have a significant impact on the future rights of college students. Prior to *Kittle-Aikeley*, the circumstances under which college-aged students had been tested were extremely limited.⁶⁵ The only notable instances of student drug testing happened at Liberty University and the University of Maryland.⁶⁶

A. College Drug Testing Prior to Linn State

In 1988, Liberty University, a private Christian school in southwestern Virginia, became the first college in the United States to implement a drug-testing policy for non-athletes.⁶⁷ Under its policy, Liberty required all students to sign a waiver consenting to random tests.⁶⁸ Those who refused were expelled.⁶⁹ Although it was estimated that two-thirds of the student body were opposed, no litigation ensued because “testing by a *private* institution is legal if it is incorporated in the [waiver] agreement [that the] students sign.”⁷⁰ The school then tested about 200 students per month, most of whom were actually still chosen on the basis of some sort of probable cause.⁷¹

Some public institutions, such as the University of Maryland, have instituted drug-testing policies as a disciplinary measure.⁷² At Maryland, any student previously found guilty of a drug-related offense becomes subject to periodic drug testing.⁷³ While not suspicionless, this policy represents the most notable use of student drug testing at a public university to date. Other public schools, such as the University of North Carolina, have actively rejected any form of mandatory drug testing whatsoever.⁷⁴ While student-athletes at North Carolina are subject to the standard NCAA drug-testing requirements, the university itself has declined to implement any separate policies of its own.⁷⁵ The university, which had “substantial concerns regarding the constitutionality and basic fairness of [a] mandatory program,” decided that even student-athletes “should be not singled out” by the school itself.⁷⁶

65. See ZEESE, *supra* note 63, § 8:7; Kahn, *supra* note 62, at 233.

66. See ZEESE, *supra* note 63, § 8:7; Donald P. Baker, *Liberty U. to Test for Drugs*, WASH. POST (Apr. 24, 1988), <https://www.washingtonpost.com/archive/local/1988/04/24/liberty-u-to-test-for-drugs/8fe0daf5-e869-4f41-9bbb-6b778cc3fb28/>.

67. ZEESE, *supra* note 63, § 8:7.

68. Baker, *supra* note 66.

69. *Id.*

70. *Id.* (emphasis added).

71. ZEESE, *supra* note 63, § 8:7.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

B. Suspicionless Testing in Public Universities

Kittle-Aikeley v. Claycomb dealt with the imposition of a mandatory, suspicionless drug-testing policy by Linn State Technical College.⁷⁷ The Appellees – a group acting on behalf of current and future students of the college – sought a declaratory judgment that the school’s mandatory, school-wide drug-testing policy was in violation of the Fourth Amendment.⁷⁸

The drug-testing policy was adopted in June 2011 for the purpose of “provid[ing] 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.”⁷⁹ Any student who refused to submit to the screening was subjected to “administrative or student-initiated withdrawal.”⁸⁰ Shortly after the testing began, the Appellees brought suit, claiming the policy was “facially unconstitutional” and sought an injunction prohibiting the school from carrying out the policy.⁸¹ It was the students’ belief that because the policy required neither a warrant nor probable cause, the tests were unreasonable and thus violated the students’ Fourth Amendment right of protection against unreasonable searches and seizures.⁸² Both the U.S. District Court for the Western District of Missouri and the Court of Appeals for the Eighth Circuit have heard this case repeatedly.⁸³ This case was initially filed in the U.S. District Court for the Western District of Missouri under the name *Barrett v. Claycomb*⁸⁴ and assumed the title *Kittle-Aikeley v. Claycomb* after being remanded and appearing in front of the Eighth Circuit a second time.⁸⁵ Most recently, the Eighth Circuit reheard the case en banc – vacating its panel deci-

77. 807 F.3d 913, 917 (8th Cir. 2015), *vacated* (Feb. 18, 2016).

78. *Id.* at 918.

79. *Id.* at 917. The policy read as follows: “Linn State Technical College will begin a drug screening program in the fall semester of 2011 for students who are newly classified as degree or certificate seeking and degree or certificate seeking students returning after one or more semesters of non-enrollment at the Linn State Technical College campus or any Linn State Technical College location.” *Id.* (quoting *Drug Screening*, *supra* note 2).

80. *Id.* at 917–18. Under the policy, “if a test returned positive, the student would have 45 days ‘to rescreen and test negative to remain enrolled.’” *Id.* at 918 (quoting *Drug Screening*, *supra* note 2). It was estimated that “[a]pproximately 550 students paid a \$50 fee for the drug test that fall and were tested.” *Id.* The test results were not revealed to law enforcement personnel regardless of the outcome. *Id.* at 917.

81. *Id.* at 918.

82. See Brief of Appellees at 16, *Kittle-Aikeley v. Claycomb*, 807 F.3d 913 (8th Cir. 2015) (Nos. 13-3264, 14-1145), 2014 WL 2158892, at *16.

83. *Kittle-Aikeley*, 807 F.3d at 918–19. See also *Barrett v. Claycomb*, 705 F.3d 315, 319–20 (8th Cir. 2013); *Barrett v. Claycomb*, No. 11-cv-04242-NKL, 2011 WL 5827783, at *1 (W.D. Mo. Nov. 18, 2011), *order vacated*, 705 F.3d 315 (8th Cir. 2013).

84. *Barrett*, 2011 WL 5827783, at *1.

85. See *Kittle-Aikeley*, 807 F.3d 913.

sion that reversed the district court's permanent injunction – and affirmed the district court's permanent injunction.⁸⁶ This iteration of the case assumed the name *Kittle-Aikeley v. Strong* to reflect the name of the new President of Linn State, Shawn Strong. The reinstatement is fresh, and it is unclear whether Linn State will appeal to the Supreme Court, leaving uncertainty in this area of the law.

1. *Barrett* and the Initial Ruling

The U.S. District Court for the Western District of Missouri first heard the case back in 2011 to determine whether a preliminary injunction was necessary to cease testing.⁸⁷ The district court not only found that the challengers met the “fair chance” of success standard necessary for the injunction, but it went even further in asserting the injunction would still be appropriate under “the more rigorous ‘likely to prevail’ standard.”⁸⁸ On interlocutory appeal, the Eighth Circuit reversed the preliminary injunction.⁸⁹ The case was subsequently remanded to the district court for a full proceeding.⁹⁰

When the Western District heard the case on remand, the challengers “clarified that they sought as-applied relief.”⁹¹ In order to analyze the drug-testing policy as it was being applied, the district court conducted a program-by-program investigation to “ensure that the category of students subject to the drug-testing policy [was not] defined more broadly than necessary to meet the policy’s purposes.”⁹²

86. *Kittle-Aikeley v. Strong*, 844 F.3d 727, 731 (8th Cir. 2016) (en banc).

87. *Barrett*, 2011 WL 5827783, at *1. The number of students who were initially subject to drug testing was relatively insignificant. See *Barrett*, 705 F.3d at 319. Approximately one week after Linn implemented the policy, the Western District granted a temporary restraining order, “enjoining any further testing of samples and any reporting of results to the school.” *Id.* at 320. A few months later, the court granted the full preliminary injunction discussed in this section. *Id.*

88. *Barrett*, 705 F.3d at 320.

89. *Id.* at 325. The Eighth Circuit overruled the preliminary injunction on the grounds that it was impossible “to hold that the drug-testing policy [was] unconstitutional on its face in every conceivable circumstance.” *Kittle-Aikeley*, 807 F.3d at 918.

90. *Kittle-Aikeley*, 807 F.3d at 918 (citing *Barrett*, 705 F.3d at 320–21, 321 n.4, 324–25). The court “reiterate[ed] that in order to receive injunctive relief, no matter whether the court applied a ‘likelihood of success on the merits’ or a ‘fair chance of prevailing’ standard, the appellees could not satisfy their ultimate burden in mounting a facial challenge under the Fourth Amendment that no set of circumstances existed under which the policy would be valid.” *Id.* This is an interesting response to the district court’s assertion that the evidence was so overwhelmingly in favor of the Appellees that they would prevail even on a higher standard than what is required by the law.

91. See *id.* (discussing *Barrett v. Claycomb*, 976 F. Supp. 2d 1104 (W.D. Mo. 2013)).

92. *Barrett*, 976 F. Supp. 2d at 1107. See *infra* notes 97–98 and accompanying text for a complete list of the programs offered. Linn State offers programs in a wide

In making a decision, the district court weighed the students' expectation of privacy against Linn State's special need to administer the test in order to assure a safe educational environment.⁹³ The students who were enrolled in programs preparing them for professions in heavily regulated industries⁹⁴ were given a lower expectation of privacy.⁹⁵ Students enrolled in all other programs were judged as having the typical privacy expectation adults generally enjoy.⁹⁶ The district court ultimately held that drug testing was acceptable for students enrolled in only some⁹⁷ of Linn State's many degree programs.⁹⁸ Therefore, the mandatory school-wide policy was struck down as unconstitutional.⁹⁹

2. The Vacated Opinion

In the subsequent appeal, the Eighth Circuit once again reversed the district court's decision and reinstated the original drug-testing policy.¹⁰⁰ The court stated that "the current matter is a hybrid of [] two [previously established] lines of cases,^[101] so while [the existing case law is] informative[, it is] not wholly dispositive and ultimately do[es] not alter the analysis that must be conducted" in each instance.¹⁰² In concluding that the original drug-

variety of specialty areas, each of which can be categorized into either the mechanical, electrical, civil, or computer industry. *Kittle-Aikeley*, 807 F.3d at 917. Most students take approximately 75 percent of their courses in their chosen field, and each program allows the student extensive hands-on experience. *Id.*

93. *Kittle-Aikeley*, 807 F.3d at 919 (summarizing *Barrett*, 976 F. Supp. 2d 1104).

94. A regulated industry is one that is "controlled by government rules." *Regulated Industry*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/regulated-industry> (last visited Jan. 17, 2017).

95. *Kittle-Aikeley*, 807 F.3d at 919 (summarizing *Barrett*, 976 F. Supp. 2d 1104).

96. *See id.*

97. Specifically, "the district court determined that Linn State could reasonably conduct drug testing in the following program areas: Aviation Maintenance, Industrial Electricity, Electrical Distribution Systems, Power Sports, and CAT Dealer Service Technician." *Id.*

98. *Id.* Further, "the court held that it was unconstitutional for Linn State to drug test students participating in the following programs: Auto Body; Auto Mechanics; Heavy Equipment Technology; Medium/Heavy Truck Technology; Electronics Engineering Technology; Electrical Power Generation; Heating, Ventilation and Air Conditioning; Commercial Turf and Grounds Management, Machine Tool Technology; Computer Programming; Construction and Civil Technology; Networking Systems Technology; Design Drafting and the remainder of Linn State's approximate twenty-eight distinct academic programs." *Id.*

99. *Id.*

100. *See generally id.*

101. That is, those cases dealing with government employment and those dealing with public schools. *See id.* at 920.

102. *Id.* at 920–21.

testing policy should be reinstated, the court pointed to four main considerations behind its analysis:

(1) the public has a valid interest in deterring drug use among students engaged in programs posing significant safety risks to others; (2) “some college students that attend Linn State have a diminished expectation of privacy because they are seeking accreditation in heavily regulated industries and industries where drug testing, in practice, is the norm[]”; (3) Linn State’s testing procedures significantly minimize the intrusiveness of Linn State’s drug-screening program and are relatively noninvasive, thus the invasion of students’ privacy is not significant[]; and (4) the need to prevent and deter the substantial harm that can arise from a student under the influence of drugs while engaging in a safety-sensitive program provides the necessary immediacy for Linn State’s testing policy.¹⁰³

This court made it clear that while deterring drug use among students who pose a safety risk to others is an important concern, it is not the only concern.¹⁰⁴ Most notably, deterring drug use among students who pose a safety risk to *themselves* also creates a significant special need.¹⁰⁵

The Eighth Circuit next claimed that the unique atmosphere at Linn State, alone, “establish[es] a special need sufficient to support the balancing of interests necessary in these circumstances.”¹⁰⁶ Indeed, the court noted that “[u]sing drugs while attending classes at a technical school uniquely limited to instruction . . . where a large percentage of the students on campus are performing hands-on work . . . on a daily basis[] poses a unique safety risk that does not necessarily exist on other college campuses.”¹⁰⁷ It was the court’s opinion that “[t]he very nature of these programs and the unique vocational focus of the college itself involves dangerous aspects and creates safety risks [rising to the level of special need].”¹⁰⁸ Therefore, rather than the program-by-program approach used by the district court, the Eighth Circuit saw the nature of the school itself as sufficient to establish a blanket “special need” classification for the entire student body.¹⁰⁹

103. *Id.* at 921 (internal citations omitted) (quoting *Barrett v. Claycomb*, 705 F.3d 315, 322 (8th Cir. 2013)).

104. *Id.* at 921–22.

105. *Id.* at 922. To justify this need, the court pointed to *Skinner*, in which case “the Court acknowledged the axiomatic nature of the governmental interest in ensuring the safety of the public ‘and of the employees themselves.’” *Id.* (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 621 (2004)). See also *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 669–71 (recognizing that both the physical safety of border employees themselves and the safety of others are threatened by employees in an impaired state).

106. *Kittle-Aikeley*, 807 F.3d at 922.

107. *Id.*

108. *Id.*

109. *Id.* at 923.

In doing so, the Eighth Circuit used the three-part balancing test specified in both *Acton* and *Earls*.¹¹⁰ The court stated that the fact that “this case involves students is a key component of the privacy interest at stake although not determinative on its own.”¹¹¹ The court recognized that the lowered expectation of privacy realized in both *Acton* and *Earls* “rel[ies] heavily on the tutelary aspect of our nation’s public schools, ‘permitting a degree of supervision and control that could not be exercised over free adults.’”¹¹² However, even though “the privacy interests of college students in a public technical school are more akin to those we bestow upon individual adults,” the court still found that “Linn State certainly maintains a level of supervision appropriate for students in this particular college setting.”¹¹³

Noting that the privacy interest here was a combination between that of an adult employed in a dangerous government job and that of a student in a more protected educational setting, the court decided that “the expectation of privacy for all Linn State students is somewhat diminished as they are either entering into areas of instruction and future fields of employment in highly regulated and safety-sensitive positions; or they are *juxtaposed* with students who are doing so.”¹¹⁴ Therefore, the court found that “[Linn’s] unique environment requires a heightened level of supervision and somewhat diminished expectation of privacy [for all the students].”¹¹⁵

The second factor in the balancing test – the character of the intrusion – was only briefly mentioned in the opinion and found to be fulfilled.¹¹⁶ The court simply stated that compared to the policies prevalent in existing case law, “[t]he [drug-testing] procedures [used at Linn State] significantly minimize the intrusiveness of Linn State’s drug-testing policy and the invasion of students’ privacy is not significant.”¹¹⁷

Regarding the third factor – the immediacy of the harm – the court mirrored the Supreme Court’s reasoning in *Acton* and *Earls*, which both found a requisite need to drug test in order to prevent drug use among a school’s student population.¹¹⁸ Although the demographics of the student body at Linn State are different from the student bodies discussed in *Acton* and *Earls* – the former comprised of college students and the latter two of high school students – the Eighth Circuit deemed this difference insignificant in light of the

110. That is, the nature of the privacy interest, character of the intrusion, and nature and immediacy of the harm. *See supra* Part II.B.

111. *Kittle-Aikeley*, 807 F.3d at 924.

112. *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

113. *Id.*

114. *Id.* (emphasis added).

115. *Id.* at 925.

116. *Id.*

117. *Id.*

118. *Id.* at 925–26. *See also* *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 834–35 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995).

government's need to prevent drug use among the Linn State student population.¹¹⁹

Specifically in *Kittle-Aikeley*, the court pointed to studies establishing that “[d]rug use has been found linked to . . . injuries and deaths, and . . . that the incidence of drug abuse and addiction on college campuses is steadily rising, which is particularly acute in a vocational setting where the programs involved have dangerous and safety-sensitive components.”¹²⁰ Although these studies were clearly directed at “drug use . . . among our Nation’s young people,” the court was confident that “the problem [does not] abate[] the day after high school graduation” and thus avowed that “the data [were] certainly relevant to the instant discussion.”¹²¹ Taking this into account, the court concluded that “the need to prevent and deter the substantial harm that can arise from a student under the influence of drugs while engaging in a safety-sensitive program provides the necessary immediacy for Linn State’s testing policy.”¹²²

Because the immediacy of the harm outweighed the nature of the privacy interest and character of the intrusion, the court held that the school-wide drug-testing policy instituted by Linn State adequately fell under the “special needs” exception to the warrant requirement and was therefore a reasonable search under the Fourth Amendment.¹²³ Thus, the majority found that the district court erred by “permanently enjoining Linn State from administering its drug-testing program to students in specific, enumerated programs.”¹²⁴

3. A Vocal Dissent

The dissenting judge in this case believed that a permanent injunction from Linn State’s suspicionless drug-testing policy should have been granted for all but five of the academic programs available at the school.¹²⁵ This conclusion was reached on the grounds that “Linn State ha[d] only met its burden of demonstrating a drug-related public safety concern for five academic programs” because when “public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”¹²⁶ Because there are only five programs in which “a concrete risk of injury to others” exists, the dissent disagreed with the implementation of the policy for the remaining twenty-three programs.¹²⁷ Nonetheless, tracking the majority opinion, the dissent walked through the Fourth Amendment

119. *Kittle-Aikeley*, 807 F.3d at 926.

120. *Id.* at 925–26 (first and second alterations in original).

121. *Id.* at 926.

122. *Id.* at 925.

123. *See id.* at 926.

124. *Id.* at 921.

125. *Id.* at 927 (Bye, J., dissenting).

126. *Id.* at 928 (quoting *Chandler v. Miller*, 520 U.S. 305, 323 (1997)).

127. *Id.*

analysis from a school-wide perspective¹²⁸ in order to determine whether the policy – as upheld by the majority – was constitutional.¹²⁹

Using the same balancing test, the dissenting judge, Judge Bye, concluded that the drug-testing program is unconstitutional.¹³⁰ It is his belief that “adults have a strong Fourth Amendment privacy interest in being free from warrantless search and seizure,” and that “[t]he majority discount[ed] this position by attempting to analogize the privacy interests of high school students as being consistent with the privacy interests of adult college students.”¹³¹ Under this theory, “the mere possibility of cross enrollment between programs [should not be] enough evidence to justify drug testing for all students.”¹³² The dissent essentially argued it is age that creates the nature of the privacy interest rather than a person’s status as a student, and that college students have a greater expectation of privacy than those dealt with in *Acton* and *Earls*.¹³³ Therefore, Judge Bye concluded that without substantial evidence that extensive cross-enrollment into dangerous classes actually happens – which could create a public safety concern – there should be no diminished expectation of privacy for adult college students.¹³⁴

Additionally, the dissent found the character of the intrusion and the immediacy of the concern to be inadequate justifications under *Earls* and *Acton*.¹³⁵ Judge Bye specifically took issue with Linn State’s “parental notification clause,” which would allow the school to share a student’s results with his or her parents.¹³⁶ Furthermore, he accused the majority of using “fear-ridden rationale[s]” in order to justify an unconstitutional policy.¹³⁷ He noted that Linn State has “successfully operated for fifty years before deciding . . . that a drug-testing policy was essential for safeguarding its students.”¹³⁸ Consequently, it was Judge Bye’s belief that, while drug abuse is a serious problem, there was no evidence or specific event that created the immediate interest necessary to invoke the special needs doctrine.¹³⁹

The vastly differing opinions held by not only the district court and the Eighth Circuit, but by the individual judges on the Eighth Circuit, shows the way the law handles a college student’s reasonable expectation of privacy is currently at a crossroad.

128. Essentially assuming (unwillingly) that Linn State had met its burden of proving special need. *Id.* at 929.

129. *Id.*

130. *Id.* at 931.

131. *Id.* at 929.

132. *See id.*

133. *Id.*

134. *See id.* at 929–30.

135. *Id.* at 930–31.

136. *Id.* at 930.

137. *Id.* (discussing the majority’s view on the massive drug problem in society).

138. *Id.* at 930–31.

139. *Id.* at 931.

4. The Rehearing – The Fragile State of the Law

It should be of no surprise that shortly after it came to a decision, the Eighth Circuit's panel opinion was vacated and reheard en banc.¹⁴⁰ This time, the Eighth Circuit "affirm[ed] the district court's order permanently enjoining Linn State from drug testing students 'who were not, are not, or will not be enrolled' in safety-sensitive programs."¹⁴¹ In coming to this decision, the majority walked through a three-part "Special-Needs Analysis."¹⁴²

First, the majority analyzed safety as a special need. Here, the opinion focuses particularly on the Supreme Court's rulings in *Skinner* and *Von Raab*. The majority noted that "[a]lthough the Supreme Court mentioned the safety of the individual employees [in those cases], the Court upheld the suspicionless drug testing in those cases based on the broader interests of public safety and security."¹⁴³ Therefore, the *Strong* majority concluded that the district court did not err in refusing to strike down Linn State's drug testing policy "'based on [the risk of harm to the individual students themselves]' or . . . whether a particular program poses a significant safety risk to others."¹⁴⁴

Next, the majority looked at whether fostering a drug-free environment could act as a special need. In this section, the majority relied largely on *Chandler*, *Acton*, and *Earls* in holding that "Linn State has not demonstrated that fostering a drug-free environment is a special need."¹⁴⁵ The majority focused on the fact that, like in *Chandler*, "no crisis sparked the . . . decision to adopt the drug-testing policy," and "Linn State does not believe it has a student drug-use problem greater than that experienced by other colleges."¹⁴⁶ The majority noted that *Chandler* requires Linn State to "shore up an assertion of special need," yet Linn State's claims in this case were made "[w]ithout any evidence."¹⁴⁷ Additionally, the majority found it "most significant[]" that, "[i]n contrast to [*Acton*] and *Earls*, . . . Linn State's students are not children committed to the temporary custody of the state."¹⁴⁸ Thus, the *Strong* majority was clear that the state does not have the same magnitude of responsibility in preventing drug use here as it did in *Acton* and *Earls*. Thus, with no evidence of "an 'immediate crisis'" or unusually high drug use, coupled with a lowered standard of responsibility, the majority concluded that

140. *Kittle-Aikeley v. Strong*, 844 F.3d 727 (8th Cir. 2016) (en banc).

141. *Id.* at 742 (quoting *Barrett v. Claycomb*, 976 F. Supp. 2d 1104, 1137 (W.D. Mo. 2013), *rev'd and remanded sub nom. Kittle-Aikeley v. Claycomb*, 807 F.3d 913 (8th Cir. 2015), *and aff'd in part and rev'd in part en banc sub nom. Kittle-Aikeley v. Strong*, 844 F.3d 727 (8th Cir. 2016) (en banc)).

142. *Id.* at 736.

143. *Id.* at 737.

144. *Id.* at 737–38 (first alteration in original) (quoting *Barrett*, 976 F. Supp. 2d at 1113).

145. *Id.* at 740.

146. *Id.* at 738.

147. *Id.* at 737–38.

148. *Id.* at 740.

the need to foster a drug-free environment was not sufficient to warrant suspicionless drug testing in this situation.¹⁴⁹

Finally, the majority evaluated the validity of the program-by-program analysis as applied by the district court. Like the district court, the majority here “f[ound] unpersuasive Linn State’s argument that the possibility of cross-enrollment renders its drug-testing policy reasonable under the Fourth Amendment.”¹⁵⁰ The majority noted that Linn State still has not provided any evidence that cross-enrollment actually poses an issue, and that “unsupported assertions . . . are insufficient to justify the mandatory drug testing of all incoming students.”¹⁵¹ Therefore, the court held that the district court’s program-by-program analysis was properly applied.¹⁵²

Despite the decision to rehear the case, the dissent still held strong to the arguments made by the panel majority opinion that was vacated. The dissenting judges spent a large portion of their opinion reiterating nationwide drug use statistics.¹⁵³ Citing to a Surgeon General Report, the Addiction and Recovery Act of 2016, and the U.S. Sentencing Commission Statistical Information Packet for fiscal year 2015, the dissent articulated significant evidence of a general drug-use problem across the country.¹⁵⁴ However, the dissent again provided no evidence of a drug problem at Linn State specifically.¹⁵⁵ Instead, the dissent asserted “the Supreme Court does not require specific evidence of drug use or abuse among those tested to support a drug-testing policy as that in place at Linn State.”¹⁵⁶

Additionally, the dissent argued that creating a safe school environment is Linn State’s job as opposed to the judicial system’s. Essentially, it is the dissent’s belief that the school administrators are in a better position than a judge to make decisions impacting the safety of a school environment.¹⁵⁷ Accordingly, the dissent held that “the court should not, and cannot, operate as course-of-study-content experts discerning the relative safety issues arising from or around various programs, educational or otherwise, offered at a technical school where significant safety risks abound.”¹⁵⁸

149. *Id.* at 739–40.

150. *Id.* at 741.

151. *Id.* at 742.

152. *Id.*

153. *Id.* at 743 (Beam, J., concurring and dissenting).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 745. Finally, the dissent took issue with the fact that “several lawyers associated with the ACLU spent several days on the Linn State campus attempting to recruit students to represent a Rule 23(b)(2) class opposing the testing,” and that “[i]t is now virtually certain that no named class plaintiff is any longer a student at Linn State.” *Id.* at 744. This led the dissent to conclude that “this litigation, as it is now positioned, could reasonably be captioned *ACLU v. Linn State College.*” *Id.*

Strong is set to become an important precedent in future deliberations involving the privacy rights of college students. As of now, it is unclear whether Linn State will continue to appeal its case. As such, it is important to address the merit of the arguments being made by both sides.

IV. DISCUSSION

In this litigation, the Eighth Circuit was faced with a decision of potentially far-reaching significance for college students. The legality of Linn State's drug-testing policy should ultimately come down to the court's "balanc[ing] [of] the invasive nature of [the policy] against its benefit[] to society."¹⁵⁹ This balancing act has been performed hundreds of times in courts all across the country.¹⁶⁰ While Linn State's drug-testing policy was far from the first to be challenged in court,¹⁶¹ the college context in which it took place raised novel questions. There are several issues with the reasoning of the *Strong* dissent. This Part attempts to shed light on the directions in which the law should proceed. Additionally, this Part will delve into the potentially broad implications that could result from handling future cases in the mold of Linn State under the standards of *Acton* and *Earls*.

A. Lingering Concerns with Allowing Mandatory Drug Testing in Situations Like Linn State

At the moment, it is unclear whether the issues brought in *Strong* will be heard again on appeal. Additionally, this issue has not been raised in any other jurisdiction, and the rationales for both sides could potentially be seen as persuasive. The reasoning suggested in the Eighth Circuit's vacated panel opinion and repeated in the en banc dissent is troubling for several reasons. These erroneous rationales will be discussed in this Part.

1. Failure to "Shore Up"

First, the manner in which the vacated panel opinion approached the special needs balancing test was concerning, particularly in its assessment of the strength of the government interest at hand. While the en banc majority addressed this in part, this Part will delve deeper into the ramifications of such reasoning. The focal point of the vacated panel majority's argument

159. Stephen F. Brock et al., *Drug Testing College Athletes: NCAA Does Thy Cup Runneth over?*, 97 W. VA. L. REV. 53, 56 (1994).

160. *Id.* See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 830–38 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–54 (1995).

161. See generally Brock et al., *supra* note 159, at 63–103 (discussing challenges made by college athletes subject to mandatory drug testing by the NCAA and universities).

was that the governmental interest in authorizing Linn State's drug-testing policy outweighed both the students' privacy interests and the character of the intrusion of the individual being tested.¹⁶² In finding so, the court asserted that "the need to prevent and deter the substantial harm that can arise from a student under the influence of drugs while engaging in a safety-sensitive program provides *the necessary immediacy* for Linn State's testing policy."¹⁶³

In reality, the government failed to put forth significant evidence of an immediate need. The only support for the government's immediacy theory was that "*proponents* [of the new drug policy have spoken of] research [showing] that [d]rug use [is] linked to . . . injuries and deaths," and that, in general, "the incidence of drug abuse and addiction on college campuses is steadily rising."¹⁶⁴ The research alluded to, whose source was unclear from the opinion, was non-specific to Linn State.¹⁶⁵ In fact, the evidence demonstrates no more of an immediate government interest in drug testing at Linn State than it does any other university in the country.¹⁶⁶

The dissent in the Eighth Circuit's en banc opinion continued to cling to the notion that an analysis of whether there is a special need for suspicionless drug testing "does not require specific evidence of drug use . . . among those tested."¹⁶⁷ Instead, the dissent asserted that "a drug use comparable to other public colleges in America today almost certainly presents Linn State's governing apparatus and its executive administrators with substantial health, safety and, security problems, all of which are specifically ameliorated by the College's well-conceived drug-testing and screening program."¹⁶⁸

While the court's belief that "drug abuse is one of the most serious problems confronting our society today" may hold merit, nonetheless, the fact that a general governmental interest exists does not necessarily mean that the interest will outweigh the other side of the balancing test in each circumstance.¹⁶⁹

In *Earls*, the Supreme Court was clear that "[while a] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime,' [it is necessary that] some showing does 'shore up an asser-

162. *Kittle-Aikeley v. Claycomb*, 807 F.3d 913, 925 (8th Cir. 2015), *vacated* (Fe. 18, 2016).

163. *Id.* (emphasis added).

164. *Id.* at 925–26 (third and fifth alterations in original) (emphasis added) (internal quotation marks omitted).

165. *Id.*

166. *See id.* at 931 (Bye, J., dissenting) ("Despite asserting the immediate necessity of the drug-testing policy, neither Linn State nor the majority cites any specific events or studies applicable to Linn State . . .").

167. *Kittle-Aikeley v. Strong*, 844 F.3d 727, 743 (8th Cir. 2016) (en banc) (Beam, J., concurring and dissenting).

168. *Id.*

169. *Kittle-Aikeley*, 807 F.3d at 926.

tion of special need for a suspicionless general search program.”¹⁷⁰ Therefore, for Linn State’s policy to be valid, there must actually be evidence that the government’s interest in testing is greater than the privacy interests of the students.

It appears that the vacated panel decision and en banc dissent side-stepped this requirement. Instead of putting forth real evidence that the government interest outweighed the privacy interest, both chose to simply establish the governmental interest’s existence and accept that as sufficient.¹⁷¹ Just because a governmental interest exists should not be an adequate substitute for showing that the governmental interest outweighs the students’ privacy concerns. Unlike in *Earls*, Linn State failed to “shore up” its assertion for a special need.¹⁷²

2. Reliance on an Ambiguous “Juxtaposition” Criterion

Finally, to justify a lower expectation of privacy, the vacated panel opinion also relied on the premise that every student enrolled at the university is either participating in “safety-sensitive positions” that warrant testing or is “juxtaposed” with students who are.¹⁷³ However, the term juxtaposed¹⁷⁴ has no apparent meaning in this context. The court provided an inadequate explanation for how such “juxtaposition” exists and why this juxtaposition of students would warrant suspicionless drug testing of an entire student body. The en banc dissent appears to justify this rationale on the grounds that hard evidence of crossover is not necessary here because a special needs analysis “actually demands a high order of generality in the matter of permitting testing.”¹⁷⁵

Linn State offers twenty-eight different programs, ranging from computer science to heavy equipment maintenance.¹⁷⁶ It was not disputed that suspicionless drug testing for students enrolled in certain inherently dangerous programs, such as industrial electricity, was perfectly acceptable under the special needs doctrine.¹⁷⁷ However, just because a student is enrolled at

170. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. *Earls*, 536 U.S. 822, 835 (2002) (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

171. See *Kittle-Aikeley*, 807 F.3d at 926; *Strong*, 844 F.3d at 745–46 (Beam, J., concurring and dissenting).

172. See *Kittle-Aikeley*, 807 F.3d at 928 (Bye, J., dissenting).

173. *Id.* at 924 (majority opinion) (emphasis added).

174. Juxtaposed means “to place (different things) together in order to create an interesting effect or to show how they are the same or different.” *Juxtapose*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/juxtapose> (last visited Jan. 18, 2017).

175. *Strong*, 844 F.3d at 747 (Beam, J., concurring and dissenting).

176. See *supra* notes 97–98 and accompanying text.

177. See *Kittle-Aikeley*, 807 F.3d at 928 (Bye, J., dissenting) (“Linn State had the burden of establishing its academic programs posed a genuine public safety risk. Linn State met this burden for five academic programs because it demonstrated the

the same institution as someone participating in dangerous activities does not mean that student should have a lower expectation of privacy. While there is bound to be some cross-enrollment between programs at any university, there was no proof offered by the court that cross-enrollment into dangerous classes happens at any significant rate at Linn State.¹⁷⁸ The vacated panel majority merely noted that the chance of cross-enrollment exists, without putting forth any evidence that it actually happens.¹⁷⁹ Therefore, the court could only mean one of two things when it referenced the juxtaposition of students between majors: either that only the *possibility* of cross-enrollment exists or simply that students attending class in a geographically proximate area to one another is sufficient on its own. Under either interpretation, the reasoning is inadequate.

Under the Linn State drug-testing policy, the students who do not participate in the dangerous programs have a lowered expectation of privacy – either because those students have the theoretical opportunity to participate in the dangerous activities or because they are near those who already do.¹⁸⁰ It is not a stretch to see how either of these rationales could be applied to countless situations beyond this case. If opportunity and proximity were the significant factors in gauging the expectation of privacy, anyone who works or goes to school in the vicinity of someone who participates in dangerous activities (or could possibly participate himself or herself) could be susceptible to the same lowered expectations of that individual. A student's constitutional rights cannot be abridged solely because of the classwork of another student nearby. Any further application of this rationale would create a significant danger to everyone's Fourth Amendment rights.

Instead, the burden should be on Linn State to track who is cross-enrolling in classes that involve dangerous activities and test only those students. In a school of fewer than 1500 students, simply keeping track of those who are enrolled in dangerous classes and only testing those students would constitute an eminently more reasonable policy than depriving every student of his or her Fourth Amendment rights. Thankfully, the Eighth Circuit took the opportunity to remedy this with its en banc decision.

particular program presented a concrete risk of injury to others in the vicinity or simply that drug testing was the industry norm.”); *see also* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 669–71 (1989); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 620–21 (1989).

178. *Kittle-Aikeley*, 807 F.3d at 930 (Bye, J., dissenting) (“Linn State did not meet its burden of proof and the mere possibility of cross enrollment is insufficient to justify a Fourth Amendment exception.”).

179. The majority states the fact that students do not go to class “in a vacuum” as its only evidence of cross-enrollment. *Id.* at 925 (majority opinion). This does nothing to actually prove cross-enrollment's existence. The en banc dissent did not mention cross-enrollment.

180. *Id.* at 924.

B. What Now? The Implications of Treating College Students Under an Acton Standard of Reasonable Expectation

It is well established that the government needs a warrant and probable cause to administer a drug test to an adult unless that adult is a government worker whose job involves an element of danger to himself or others.¹⁸¹ It is also recognized that high school students who participate in sports or other extracurricular activities are susceptible to a lowered expectation of privacy.¹⁸² However, it is still unclear how the law should treat public college students who seem to fall somewhere between typical working adults and high school students.

Decisions such as *Acton* and *Earls* – the cornerstones of the law in the context of public schools – both heavily rely on the custodial relationship that a high school has with its students, and it is this relationship that provides the basis of the students' lowered expectation of privacy.¹⁸³ Despite a school's additional responsibility in this context, judges initially granted the ability to use suspicionless drug tests very hesitantly.¹⁸⁴ Not only did the *Acton* majority feel the need to distinguish between the typical high school student's expectation of privacy and that of the general public, but it also felt the need to distinguish between the students in question – student athletes – and others enrolled at the same school.¹⁸⁵ The *Acton* Court alleged that athletes were the “leaders of the drug culture” and cited factors such as pre-existing regulation and the increased risk of injury to justify such lowered expectations.¹⁸⁶ These sorts of concerns do not generally exist for college students.¹⁸⁷

Further, the *Earls* Court justified its extension of the *Acton* rule on the grounds that students participating in extracurricular activities “subject themselves to many of the same intrusions on their privacy as do athletes.”¹⁸⁸ These intrusions include off-campus travel, communal undress, and the existence of other rules and requirements that do not apply to the student population as a whole.¹⁸⁹ Once again, these factors do not apply to the typical college student, and any attempt to stretch these rulings to cover such individuals would be improper.

181. See generally *Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656.

182. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 831–32 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

183. See generally *Earls*, 536 U.S. at 822; *Acton*, 515 U.S. at 646.

184. See *Acton*, 515 U.S. at 665 (“We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.”).

185. *Id.* at 657, 664–65.

186. *Id.* at 649.

187. See *Kittle-Aikeley v. Claycomb*, 807 F.3d 913, 929 (8th Cir. 2015) (Bye, J., dissenting), *vacated* (Feb. 18, 2016).

188. *Earls*, 536 U.S. at 831.

189. *Id.* at 831–32.

The Supreme Court of the United States actually made this point in the *Acton* majority opinion, noting that “[it] caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.”¹⁹⁰ The Court stated that “[t]he *most significant* element [in its decision was] . . . that the Policy was undertaken in furtherance of the government’s *responsibilities . . . as guardian and tutor* of children entrusted to its care.”¹⁹¹ This focal point of the Court’s stance does not apply to college students in the same fashion. Few college students would consider their college or university to have guardian or tutelary responsibility over them. Unlike a high school, which treats students as dependents, a college or university has comparatively little custodial responsibility.¹⁹² As such, analysis of a college drug-testing policy should – as the dissent in the vacated panel decision noted – follow more closely those cases dealing with on-the-job, government employment drug-testing policies such as those implemented in *Skinner*, *Von Raab*, and *Chandler*. In reality, the experience of college students is much more similar to that of the government employee, and the rules governing their Fourth Amendment rights should parallel those of government employees.

Therefore, like in the government employment cases, the main factor in deciding the constitutionality of a college’s suspicionless drug-testing policy should be whether the students “perform high risk, safety-sensitive tasks.”¹⁹³ Like the adults in *Chandler*, the special needs exception should not apply to college students unless there is an “indication of a concrete danger demanding departure from the Fourth Amendment’s main rule.”¹⁹⁴ Most college students are not subject to such dangers any more than a typical adult is. Because of this, most college students deserve the same privacy rights as a typical adult.

The special needs exception must be handled with care. Applying the holdings of *Acton* and *Earls* to college students could have sent the law down a slippery slope. The warrant and probable cause requirements are necessary aspects of Fourth Amendment jurisprudence.¹⁹⁵ The special needs exception was originally intended to apply *only* in situations in which it was absolutely necessary to fulfill a compelling purpose.¹⁹⁶

190. *Acton*, 515 U.S. at 665.

191. *Id.* (emphasis added).

192. *See id.* at 656–57 (describing the custodial responsibility of a high school).

193. *Chandler v. Miller*, 520 U.S. 305, 321–22 (1997); *see also* Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 669–71 (1989); *Skinner v. Ry. Labor Excs.’ Ass’n*, 489 U.S. 602, 620–21 (1989).

194. *Chandler*, 520 U.S. at 319.

195. U.S. CONST. amend. IV.

196. There is an argument to be made that the Fourth Amendment was never even intended to provide an answer to the problems caused by random drug testing in the first place. David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263, 264 (2003) (“The framers sought to proscribe physical searches of residences pursuant to a general

It is hard to fathom that an individual's status as a college student in and of itself – when there is no reason to believe that there is a drug problem to begin with – is a compelling enough reason to disregard a constitutional right. Extending the special needs doctrine to cover the kinds of situations dealt with in Linn State's case would have risked allowing the exception to swallow the rule. If the court were willing to extend the scope of the special needs exception to cover the average college student, extending it to all adults would not be an inconceivable extension.¹⁹⁷

The Supreme Court of the United States has only struck down a suspicionless drug test under the special needs doctrine a single time.¹⁹⁸ Several scholars fear that “[i]t is only a small stretch of logic to apply the . . . rationale [currently being used by the courts] to condone a law that required suspicionless drug testing [of everyday activities].”¹⁹⁹ What should be required in order to designate a special need is a truly “substantial” need. Reinstating the Western District opinion appears to reinforce this belief.

V. CONCLUSION

For the first time, a public college within the United States instituted a mandatory drug testing policy for all incoming students.²⁰⁰ The manner in which the courts handled this case represents a crossroad for the Fourth Amendment as it is applied to college students. The state of the law appears to be fragile, as the Western District of Missouri and Eighth Circuit were at one time unable to agree on how to evaluate the case, and the Eighth Circuit itself disagreed internally to the extent that it reheard Linn State's case en

warrant, or without any warrant at all. The Fourth Amendment simply never was intended to govern the issues raised by random drug tests.”).

197. *See id.*

198. *See Chandler*, 520 U.S. 305 (evaluating a Georgia law requiring all candidates for certain state-wide elected offices to certify that they had passed the drug test that was challenged). According to Jennifer E. Smiley, this “represents the first, and thus far the only, time that the Supreme Court has struck down a suspicionless drug-testing policy under the auspices of the special needs doctrine.” Jennifer E. Smiley, *Rethinking the “Special Needs” Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811, 824 (2001). *See also* Steinberg, *supra* note 196, at 270–71 (“The Fourth Amendment was conceived to serve a single, specific purpose – to prevent the physical search of residences without a warrant, or pursuant to a general warrant. Courts may attempt to develop a coherent regulation of random drug tests based on the Fourth Amendment, but such attempts are doomed to failure. The Fourth Amendment never was intended to govern such controversies. With respect to the validity of random drug tests in the public schools, the Fourth Amendment says nothing at all.”).

199. *See, e.g., Smiley, supra* note 198, at 838. One example is the drug testing of automobile drivers involved in car accidents, “a step which at least one state has already taken.” *Id.* at 838–39.

200. Bloom, *supra* note 62.

banc.²⁰¹ The Eighth Circuit has most recently reinstated the Western District's holding in favor of the Linn State student body. This is hopefully an indication that the courts believe that college drug-testing policies should be analyzed in the same manner as policies within the government employment context. College students' reasonable expectations of privacy should mirror those of adults – not high school students.

201. See *Kittle-Aikeley v. Claycomb*, 807 F.3d 913 (8th Cir. 2015), *vacated* (Feb. 18, 2016); *Barrett v. Claycomb*, 705 F.3d 315 (8th Cir. 2013); *Barrett v. Claycomb*, 976 F. Supp. 2d 1104 (W.D. Mo. 2013), *rev'd and remanded sub nom.* *Kittle-Aikeley v. Claycomb*, 807 F.3d 913 (8th Cir. 2015), *and aff'd in part and rev'd in part en banc sub nom.* *Kittle-Aikeley v. Strong*, 844 F.3d 727 (8th Cir. 2016) (en banc). See also *Kittle-Aikeley v. Claycomb*, Nos. 13-3264, 14-1145, 2016 U.S. App. LEXIS 2843 (8th Cir. 2016).