No. _____

In The Supreme Court of the United States

MELLONY BURLISON AND DOUGLAS BURLISON,
AS PARENTS AND NEXT FRIENDS OF C.M.,
Petitioners,

v.

SPRINGFIELD PUBLIC SCHOOLS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In April 2010, Springfield Public Schools in conjunction with local law enforcement, conducted a drug interdiction operation at a high school, placing the school in "lockdown" while the operation was conducted. Students in randomly-selected classrooms were ordered to leave the classroom without their backpacks and other belongings. The students' effects were then subjected to examination by drug-sniffing dogs while out of the sight of the students. The question presented in this case is:

Does a public school violate the Fourth Amendment's prohibition on unreasonable seizures when, without any individualized suspicion and for disciplinary and law enforcement purposes, it forcibly separates students from their belongings in order to subject those belongings to an examination that is not within the sight of students?

PARTIES TO THE PROCEEDINGS

The Petitioners, who were appellants in the Court of Appeals, are Mellony Burlison and Douglas Burlison, as parents and next friends of "C.M.," *i.e.* Connor Mizer.* Respondents, who were appellees in the Court of Appeals, are Springfield Public Schools (hereinafter "SPS"), SPS Superintendent Norm Ridder, Central High School Principal Ron Snodgrass, and James Arnott, Greene County (Missouri) Sheriff.

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* While this action was pending, Connor Mizer attained the age of 18, the age of majority. A motion pursuant to Fed. R. Civ. P. 15, 17(a) and 25 to substitute Connor Mizer as the Plaintiff in this action was granted by the District Court on May 30, 2013, and formal substitution by the filing of an amended complaint is pending.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings ii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 2

Constitutional Provision 2

Statement of the Case 2

Reasons for Granting the Writ 8

I. THE FORCED SEPARATION OF STUDENTS FROM THEIR PROPERTY IN ORDER TO CARRY OUT A DRUG INTERDICTION OPERATION CONSTITUTES A SEIZURE OF THE STUDENTS' PROPERTY 11

II. THE SUSPICIONLESS SEIZURE OF STUDENT EFFECTS WAS NOT REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE THE PURPOSE OF THE OPERATION WAS PUNITIVE AND THE OPERATION WAS NOT LIMITED TO A PARTICULAR CLASS OF STUDENTS WITH A REDUCED EXPECTATION OF PRIVACY 17

Conclusion 26

Appendix

Opinion of the U.S. Court of Appeals for the Eighth Circuit entered March 4, 2013 1a

Order of the U.S. District Court for the Western District of Missouri Entered January 25, 2012 20a

TABLE OF AUTHORITIES

Cases

Audio Odyssey, Ltd. v. Brenton First Nat. Bank, 245 F.3d 721 (8th Cir. 2001), *opinion reinstated*, 286 F.3d 498 (8th Cir.), *cert. denied*, 537 U.S. 990 (2002) 15

Bd. of Educ. of Ind. School Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) .....passim

Burlison v. Springfield Public Schools, 2012 WL 220205 (W.D. Mo. Jan. 25, 2012) 1

Burlison v. Springfield Public Schools, 708 F.3d 1034 (8th Cir. 2013) 1

Carroll v. United States, 267 U.S. 132 (1925)..... 18

Chandler v. Miller, 520 U.S. 305 (1997)..... 18

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 19, 20, 22, 23

Doe v. Little Rock School District, 380 F.3d 349 (8th Cir. 2004)..... 25

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 23

Hale v. Henkel, 201 U.S. 43 (1906), *overruled on other grounds*, *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S.52 (1964) 12

Hodinka v. Delaware County, 759 F. Supp. 2d 603 (E.D. Pa. 2011) 15

Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990)..... 19, 22

New Jersey v. T.L.O., 469 U.S. 325 (1985) .....passim

Soldal v. Cook County, Ill., 506 U.S. 56 (1992)..... 12

Texas v. Brown, 460 U.S. 730 (1983)..... 12

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)..... 26

United States v. Jacobsen, 466 U.S. 109 (1984)8, 12, 13, 14

United States v. Martinez-Fuerte, 428 U.S. 543 (1976)..... 19

United States v. Place, 462 U.S. 696 (1983)..... 12

Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995).....passim

Statutes

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 1291 6

28 U.S.C. § 1343 5

28 U.S.C. § 1331 5

42 U.S.C. § 1983 5

Mo. Stat. § 195.202..... 21

Mo. Stat. § 195.211..... 21

Other Authorities

Mae C. Quinn, *The Fallout From Our Blackboard Battlegrounds: A Call for Withdrawal and a New Way Forward*, 15 J. Gender Race & Just. 541, 556 (Spring 2012)..... 9

National Center for Education Statistics, *Indicators of School Crime and Safety: 2011*, Table 20.2

(*available at* http://nces.ed.gov/programs/crimeindicators/crimeindicators2011/tables/table_20_2.asp) 9

Rules

Fed. R. Civ. P. 15..... ii

Fed. R. Civ. P. 17(a) ii

Fed. R. Civ. P. 25..... ii

Constitutional Provisions

U.S. Const. Amend. IV.....passim

Mo. Const. art. I, § 15..... 5

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MELLONY BURLISON AND DOUGLAS BURLISON, as parents and next friends of C.M.,
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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported as *Burlison v. Springfield Public Schools*, 708 F.3d 1034 (8th Cir. 2013), and is set forth in the Appendix beginning at page 1a. The opinion of the United States District Court is unofficially reported as *Burlison v. Springfield Public Schools*, 2012 WL 220205 (W.D. Mo. Jan. 25, 2012), and is set forth in the appendix beginning at page 20a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, review of which is sought by this Petition, was entered on March 4, 2013. This Court has jurisdiction to review this judgment by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Const. Amend. IV provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On April 22, 2010, C.M., then a freshman at Central High School, a public high school operated and controlled by SPS, was in his third period classroom when an announcement was made over the school's public address system by Respondent Snodgrass, the Principal of Central High School. Snodgrass announced that the school was going into

"lockdown" and that students may not leave their classrooms. At that time, deputies of the Greene County Sheriff's Office were present at Central High School along with two police dogs, Dar and Reiko. (App. at 21a-22a; J.A. Vol. I at 111).[1] Dar and Reiko were "aggressive alert response dogs" which were trained to aggressively search and bite to the odor of narcotics. (J.A. Vol. I at 112-113).

About fifteen minutes after Respondent Snodgrass's announcement, deputies of the Greene County Sheriff's Office entered C.M.'s classroom. The deputies ordered students and teachers to leave the room. C.M. and the other students were instructed to leave their belongings behind in the classroom, line up and file out into the hallway outside the classroom. (App. at 3a; J.A. Vol. I at 110). Students were told not to take any possessions or effects, such as backpacks, notebooks and purses, with them but to leave them in the classroom. (J.A. Vol. I at 37). C.M. did as instructed, leaving his possessions in the classroom and going out into the adjoining hallway to wait. (J.A. Vol. I at 110). C.M. could not see into the classroom. (App. at 3a).

After a few minutes, the law enforcement officers and their dogs left the classroom and C.M. and his classmates returned to the room. C.M. observed that although all the zippers on his backpack were shut when he left the room, when he returned the zippers on his backpack were open and items within the backpack had been moved. (App. at

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[1] "J.A." references are to the volume and page of the Joint Appendix filed in the Court of Appeals.

3a, 22a; J.A. Vol. I at 114). The lockdown concluded at approximately 11:07 a.m. (J.A. Vol. I at 115), after which the students were instructed to move on to their Fourth Period class. (J.A. Vol. I at 39).

The lockdown operation executed at Central High School on April 22, 2010, was conducted pursuant to a Policy JFG of SPS dealing with School Police Services, titled "Protocol For Use of Drug Dogs in School Buildings" and SPS's formally promulgated Standard Operating Procedure 3.4.1. (App. at 4a; J.A. Vol. I at 90). Under S.O.P. 3.4.1, SPS works in cooperation with the Respondent Greene County Sheriff's Office and their drug detection dogs. (J.A. Vol. I at 91). S.O.P. 3.4.1 also provides that "[s]tudents will not be present in an area/room when the drug detection dog is working." (J.A. Vol. I at 92). The search policy provides that the Greene County Sheriff's Office dogs will be used to sniff "back packs, book bags, gym bags, purses or other similar items, when such items are not in the physical possession of a student or person[.]" (J.A. Vol. I at 92). S.O.P. 3.4.1(b) also provides as follows:

> **Discipline** – Students who are found to have violated the Student Discipline Guidelines will be processed pursuant to the appropriate Board of Education Policy, Administrative Guideline or the Student Handbook.
>
> (1) Normally, no student will be subject to arrest by law enforcement officers at the time the search is conducted by District personnel unless unusual

> situations exist or the student could be charged with a felony.
>
> (2) Current procedures regarding students who are juveniles will be followed as required by Section 211.411, RSMo.

(J.A. Vol. I at 92).

Petitioners Mellony and Douglas Burlison filed this action on behalf of C.M. in the United States District Court for the Western District of Missouri seeking relief under 42 U.S.C. § 1983 and alleging that the lockdown operation conducted jointly by SPS and the Greene County Sheriff's Office violated C.M.'s right to be free from unreasonable searches and seizures under the Fourth Amendment and Mo. Const. art. I, § 15.[2] (J.A. Vol. I at 18-19). Each party filed a motion for summary judgment, and the District Court granted the motions of SPS, Ridder, Snodgrass and Arnott.[3] (J.A. Vol. II at 400-401).

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[2] The District Court had jurisdiction over the action under 28 U.S.C. §§ 1331 and 1343.

[3] As to Ridder and Snodgrass, the District Court ruled that the evidence did not show that either was personally involved in the constitutional violations alleged, and so they were entitled to judgment on the claims against them in their individual capacities. (App. at 27a-28a). With respect to Respondent Arnott, the District Court ruled that because Arnott was not present during the April 22, 2010 lockdown exercise he was not liable in his individual capacity for any constitutional deprivation. (App. at 26a-27a). It was also found that Arnott was not liable in his

As to SPS, the District Court concluded that C.M. had not suffered any violation of his right to be free from unreasonable searches and seizures as a result of a policy of SPS. Although S.O.P. 3.4.1 provides for and authorizes school officials to deploy canine units in the schools to sniff student belongings and requires that students will not be present in any area or room when a drug detection dog is working, the District Court concluded that this policy did not result in an unconstitutional seizure of C.M.'s belongings. The District Court acknowledged that "a seizure of property occurs when there is some meaningful interference with an individual's possessory interest in the property," but made the conclusory ruling that "C.M.'s backpack was not subject to a seizure. . . . Therefore, the provisions of SOP 3.4.1. do not reflect a procedure which would constitute a constitutional violation." (App. at 31a).

The Petitioners timely appealed the District Court's judgment to the Court of Appeals,[4] which affirmed the entry of summary judgment in favor of the Respondents. However, the Court of Appeals decision that C.M.'s Fourth Amendment rights were

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official capacity because even though the Greene County Sheriff's Office had in effect an officially-adopted policy and procedure regarding the use of canine teams to assist in the detection of controlled substances, the District Court determined that this policy did not cause any constitutional deprivation alleged by the Plaintiffs. (App. at 30a).

[4] The Court of Appeals had jurisdiction over the appeal under 28 U.S.C. § 1291.

not violated was based on a different ground than the District Court. Thus, the Court of Appeals assumed "that C.M.'s belongings were seized in this case when the school police officer directed that they be left in the classroom for approximately five minutes while the drug dog survey occurred." (App. at 9a). Nonetheless, it found that the Fourth Amendment was not violated because "the seizure was part of a reasonable procedure to maintain the safety and security of students at the school." (App. at 9a).

The Court of Appeals referred to three factors to support the reasonableness of the "lockdown" drug interdiction operation and attendant seizure of student belongings. First, it noted that a student's privacy interests are limited because of a school's "'legitimate need to maintain an environment in which learning can take place.'" (App. at 8a, quoting *New Jersey v. T.L.O.,* 469 U.S. 325, 340 (1985)). Second, C.M. was separated from his belongings "only" for about 5 minutes and C.M. did not have complete freedom regarding those belongings during the school day. (App. at 9a-10a). Third, the Court of Appeals determined that there was an "immediate need for a drug dog procedure because there is substantial evidence showing there was a drug problem in district buildings." (App. at 10a).

Two concurrences were also filed by the Court of Appeals panel members. Judge Loken opined that there was no seizure of C.M.'s belongings at issue in this case (App. at 14a). Citing precedent holding that a Fourth Amendment seizure results from a "meaningful interference" with a person's possessory interest in property, Judge Loken wrote that "[i]n my

view, instructing C.M. to leave his backpack and wait in the hall while a drug dog briefly sniffed the classroom was, at most, an inconsequential interference." (App. at 15a). Responding to this concurrence, Judge Colloton wrote that "there is a substantial argument on the other side," (App. 17a), noting that this Court has ruled that the temporary exertion of dominion and control over a person's property by government agents for their own purposes clearly constitutes a seizure for purposes of the Fourth Amendment. (App. at 18a, citing *United States v. Jacobsen*, 466 U.S. 109, 121 n. 8 (1984)). "Similarly," Judge Colloton wrote, "the authorities here separated C.M. from his property, thus depriving him of custody of the backpack, . . ., and the authorities did so 'for their own purposes' of investigating the presence of contraband in the property, as in *Jacobsen,* not to facilitate a fire drill or school assembly unrelated to the property." (App. at 18a).

REASONS FOR GRANTING THE WRIT

This case presents a question of great public importance concerning the use of schools as arms of law enforcement and practices that subject students to an environment similar to a "police state" environment instead of a nurturing place conducive to learning. With increasing frequency, our nation's children are subjected to practices and conditions which teach them that their privacy and right to self-determination are inconsequential and in all events subject to the overriding interest of the government in security. As one commentator noted recently:

> In fact, thousands of public school students enter the school-house gates today by passing a security clearance post manned by uniformed personnel, forcing them to endure physical examination by a body scanner and to experience intrusive use of metal detector wands and school bag checks--and this all occurs before homeroom. As if these students were clearing a military checkpoint in a conflict zone, school personnel violate students' personal space and autonomy as a matter of course and routinely ignore their privacy, and a presumption of suspicion abounds. The message is clear: such students are the enemy, cannot be trusted, and are in need of surveillance and forcible scrutiny.

Mae C. Quinn, *The Fallout From Our Blackboard Battlegrounds: A Call for Withdrawal and a New Way Forward*, 15 J. Gender Race & Just. 541, 556 (Spring 2012). The National Center for Education Statistics issued a report showing that 47.5% of all schools, and 60.1% of high schools, conduct random dog sniff checks for drugs. National Center for Education Statistics, *Indicators of School Crime and Safety: 2011*, Table 20.2 (*available at* http://nces.ed.gov/programs/crimeindicators/crimeindicators2011/tables/table_20_2.asp).

It is imperative that if school administrators and law enforcement impose this kind of extreme and

oppressive system of security and surveillance upon students that it be done in conformity with the Fourth Amendment. The policy and procedures under which Respondent SPS acted in this case offend the Fourth Amendment and its protection against unreasonable seizures. C.M. and other students were forced to divest themselves of their personal property in order to facilitate an examination of their property by law enforcement assets in an effort to ferret out evidence of criminal misconduct. This kind of mass, suspicionless seizure for law enforcement and school disciplinary purposes has never been sanctioned by this Court and violates the long-established principle that, absent exceptional circumstances, suspicionless searches or seizures are intolerable and unreasonable.

The fact that this mass seizure occurred in the public school setting is not an exceptional circumstance which renders the SPS drug interdiction operation reasonable. It was conducted in a way which prevented students from monitoring how their belongings were being handled by school police officers, raising a danger that officials could go beyond suspicionless seizures and conduct secret searches of student property. Indeed, C.M. presented evidence below indicating his property was searched while he was separated from it. Seizures are neither inconsequential nor reasonable for Fourth Amendment purposes if they are done for law enforcement purposes and in a way that does not assure the individual's privacy interest is not subject to the discretion of officials.

Additionally, the purpose of SPS's drug interdiction program is punitive. If drugs are found, students are not simply suspended from athletics or extracurricular activities, but are subject to school discipline or criminal prosecution. And the program is not one which a student can avoid by forgoing extracurricular activities. Any and all students may be subject to a suspicionless seizure under SPS's policies and procedures.

Because the SPS policy at issue in this case is symptomatic of the growing erosion of the constitutional rights of students in schools, this Court should grant the instant Petition.

I. THE FORCED SEPARATION OF STUDENTS FROM THEIR PROPERTY IN ORDER TO CARRY OUT A DRUG INTERDICTION OPERATION CONSTITUTES A SEIZURE OF THE STUDENTS' PROPERTY

Although the Court of Appeals did not definitively decide whether the property and effects of C.M. and other students were subject to a "seizure" as a result of the "lockdown" drug interdiction operation at Central High School, it should initially be pointed out that such a seizure certainly occurred. The undisputed facts in this case demonstrate that an SPS police officer entered C.M.'s classroom during the school day and ordered C.M. and other students to leave the room. The students also were ordered to leave their belongings behind, and so were unwillingly separated from their property (App. at

2a-3a). This forced separation of students from their effects was done in conformity with a formally promulgated school policy on the use of drug dogs in SPS schools, S.O.P. 3.4.1, which provides that "[s]tudents will not be present in an area/room when the drug detection dog is working." (J.A. Vol. I at 92).

These facts demonstrate that there was, at the very least, a seizure of C.M.'s property during this drug interdiction operation. This Court long ago recognized that a Fourth Amendment "seizure contemplates a forcible dispossession of the owner[.]" *Hale v. Henkel*, 201 U.S. 43, 76 (1906), *overruled on other grounds*, *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S.52 (1964). The interest protected by the Fourth Amendment's prohibition on unreasonable seizures is the interest of citizens in retaining possession of property. *Texas v. Brown*, 460 U.S. 730, 747 (1983) (Stevens, J., concurring). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984).

For a seizure to occur, there need not be an associated invasion of an individual's privacy interests arising to the level of a Fourth Amendment "search." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 62-63 (1992). Thus, taking possession of property away from a person in order to subject the property to examination by a dog trained to detect the odor of controlled substances constitutes a "seizure" even if the dog's examination of the of property is not a Fourth Amendment "search." *United States v. Place*, 462 U.S. 696 (1983). Even if C.M.'s belongings were

not searched, a matter on which there is some question here, *see* App. at 3a and 22a, the seizure was an independent transgression of his Fourth Amendment rights.

The crucial fact here is that SPS officials compelled C.M. to give up custody and control of his belongings, which is sufficiently meaningful to constitute a seizure. In *Jacobsen*, this Court ruled that government agents seized a package where they took the package into custody while it was being handled by a common carrier. "Although respondents had entrusted possession of the items to Federal Express, the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a 'seizure[.]'" *Jacobsen*, 466 U.S. at 122, n. 18. In the instant case, the interference with C.M.'s right to possession was even more egregious because he had not entrusted his belongings to a third party; they were in his direct control and custody prior to the seizure.

Additionally, the separation of C.M. from his property and dominion, custody and control over it was particularly meaningful in this context because it prevented C.M. from monitoring and observing the actions of the officers and dogs with respect to his belongings. C.M. was unable to determine what exactly a dog may or may not have done when it approached his belongings, whether there was really any action by the dog indicating an alert, and what the officers did with respect to his belongings. Because C.M. was separated from his belongings, we have only the word of the officers as to whether there

was an alert by a dog and whether they searched through C.M.'s belongings. This is particularly alarming since by all accounts, based upon C.M.'s observations of his belongings, the officers did open and search them and yet no contraband was found within. (App. at 11a, 22a, 24a). Thus, the seizure here was certainly meaningful not only because it deprived C.M. of possession and control of his belongings, but because he was unable to protect his right to be free of an illegal search by observing the conduct of the dogs and officers.

The concurring opinion of Judge Loken in the Court of Appeals and the order of the District Court suggest that the interference with C.M.'s possessory interest in this case was insufficiently meaningful to constitute a seizure, citing two factors: students were dispossessed for "only" about five minutes during the drug interdiction operation, and the students have a limited interest in their property while at public school. (App. at 15a, 31a). As to the supposed "brief" nature of the dispossession, in *Jacobsen*, this Court rejected the idea that the duration of a governmental interference with a person's property rights controls whether a seizure has occurred:

> While the concept of a "seizure" of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the "seizure" of a person within the meaning of the Fourth Amendment--meaningful interference, *however brief*, with an individual's freedom of movement.

Id. 466 U.S. at 114 (emphasis added). This is consistent with the rulings of other courts. *See Audio Odyssey, Ltd. v. Brenton First Nat. Bank*, 245 F.3d 721, 735-36 (8th Cir. 2001), *opinion reinstated*, 286 F.3d 498 (8th Cir.), *cert. denied*, 537 U.S. 990 (2002) (police ejection of owner from his store, changing of locks, and posting of "No Trespassing" signs constituted a seizure of the property even if only for a rather brief period of time) and *Hodinka v. Delaware County*, 759 F. Supp. 2d 603, 612 (E.D. Pa. 2011) (even a relatively brief interference with property possession can qualify as a seizure).

That dispossession of C.M.'s property occurred while he was attending public school also does not remove this situation from the ambit of the Fourth Amendment. Indeed, the idea that students have virtually no privacy or possessory interest in belongings brought to school was rejected in this Court's seminal school search case, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In establishing the standard for school intrusions upon student Fourth Amendment rights, this Court emphasized that the Constitution protects the owner of every container that conceals its contents and that the search of a bag carried by a student "is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 338. It went on to write as follows:

> The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation

> of privacy in articles of personal property "unnecessarily" carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school. *Both premises are severely flawed*.

Id. at 338 (emphasis added). *T.L.O.* holds that a school's interest in maintaining discipline is not so compelling that students may claim no legitimate expectation of privacy and that students have a legitimate reason for bringing belongings to school. "In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." *Id.* at 339.

Thus, *T.L.O.* directly contradicts the premise underlying the opinions of Judge Loken and the District Court that the school setting renders a student's possessory interest in effects meaningless. Instead, *T.L.O.* confirms that students do not give up their constitutional protection against unreasonable seizures at the schoolhouse gate. If this Fourth Amendment right of students is to have any substance, it must extend to forbid the kind of coercive dispossession to which C.M. and other SPS students were subjected. This is particularly so

when the practice at issue allows for clandestine searches of student belongings. School officials must not be given license to engage in practices that tempt them, in the name of preventing drug abuse, to disregard the constitutional rights of students.

Therefore, the Court of Appeals correctly assumed that SPS officials seized the property of C.M. and other students in the course of the "lockdown" drug interdiction operation.

II. THE SUSPICIONLESS SEIZURE OF STUDENT EFFECTS WAS NOT REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE THE PURPOSE OF THE OPERATION WAS PUNITIVE AND THE OPERATION WAS NOT LIMITED TO A PARTICULAR CLASS OF STUDENTS WITH A REDUCED EXPECTATION OF PRIVACY

After assuming that C.M.'s possessions were seized in the course of the law enforcement operation, the Court of Appeals went on to rule that this seizure was reasonable under the Fourth Amendment. (App. at 12a). It did so despite the fact that seizure of the property of C.M. and the other students was a mass, indiscriminate one; SPS officials had no particularized suspicion that any specific students were in possession of drugs at the time the lock-down was launched. The Court below concluded the seizure was reasonable primarily on the basis of two of this Court's decisions upholding suspicionless drug testing of public school students

who participate in extra-curricular activities. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), and *Bd. of Educ. of Ind. School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

But these drug-testing cases and the searches they approved are distinguishable from the instant case on two crucial points: (1) SPS did not limit the purposes for which evidence obtained as a result of the mass seizures, and such evidence could be used against the student in disciplinary or criminal proceedings; and (2) the SPS operation was not limited to a particular segment of the student body which could be found to have surrendered a degree of privacy because of their voluntary participation in extracurricular activities. These distinguishing factors require the conclusion that there was and is a significant invasion of students' Fourth Amendment interests under the SPS drug interdiction policy that did not exist in *Vernonia* or *Earls*, and that the SPS policy, which allows for suspicionless seizures and secret searches by officials, violates the Fourth Amendment.

This conclusion is mandated by the long-standing principle that in order for a seizure or search to be reasonable under the Fourth Amendment, it must, except in special circumstances, be supported by individualized suspicion. *Chandler v. Miller*, 520 U.S. 305, 308 (1997). It was recognized long ago that mass, suspicionless searches and seizures are "intolerable and unreasonable" and violate the Constitution. *Vernonia*, 515 U.S. at 668-69 (O'Connor, J., dissenting). Thus, *Carroll v. United States*, 267 U.S.

132, 153-54 (1925), held that "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully on the highways to the inconvenience and indignity of such a search."

More recently, this Court declared unconstitutional in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), a municipal drug interdiction program that set up checkpoints to stop vehicles for examination by drug detection dogs. As in the instant case, the seizure effected by the stop lasted five minutes or less. *Id.* at 35. After recognizing that a search or seizure is ordinarily unreasonable absent individualized suspicion of wrongdoing, *id.* at 37, the Court determined that this drug interdiction program was unlike other vehicle checkpoint programs previously found reasonable[5] because the primary purpose of the Indianapolis drug interdiction program was law enforcement:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in [*Delaware v.*]*Prouse*[,

[5] *See Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

> 440 U.S. 648, 659 n. 18 (1979),] that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. . . . Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

Edmond, 531 U.S. at 41-42.

The program at issue in *Edmond* stands in sharp distinction to the school drug testing programs considered in *Vernonia* and *Earls*. In those cases, this Court stressed that the results of the drug testing "are disclosed to only a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function." *Vernonia*, 515 U.S. at 658. In deeming the intrusion effected by drug testing minimal, the *Earls* decision similarly stressed that the results of the test were kept strictly confidential and separate from the educational records. Test results at issue in *Earls* were not turned over to law enforcement authorities, would have no disciplinary or academic repercussions, and the only consequence was to limit the student's

participation in extracurricular activities. *Earls*, 515 U.S. at 833.

The SPS policy under which the mass, suspicionless seizure of the property of C.M. and other students was undertaken is not similarly limited; to the contrary, it is intended to ferret out drugs so that students may be disciplined or criminally charged. S.O.P. 3.4.1(3)(b) provides that "[s]tudents who are found to have violated the Student Discipline Guidelines will be processed pursuant to the appropriate Board of Education Policy, Administrative Guideline or the Student Handbook." (J.A. Vol. I at 92). SPS Policy JFCH provides that any student found in possession of any drug on school property "shall be suspended or expelled." (J.A. Vol. I at 135; also available at https://isharesps.org/websitedoc/CommunityRelations/Board/PolicyJ/FileJFCH.pdf).

Additionally, while S.O.P 3.4.1(3)(b) provides that students "normally" will not be arrested "at the time the search is conducted," an arrest and a criminal charge against a student is an available option and appears to be the standard response if "the student could be charged with a felony." (J.A. Vol. I at 92). Under Missouri law, possession of any controlled substance is a Class C felony, unless it involves 35 grams or less of marijuana. Mo. Stat. § 195.202. Additionally, possession of any amount of a controlled substance on or near school property is a felony in Missouri. Mo. Stat. § 195.211. Unlike the search results at issue in *Vernonia* and *Earls*, which under no circumstances could be used for disciplinary or criminal purposes, evidence obtained as a result of

the suspicionless seizures conducted by SPS under S.O.P 3.4.1 is available for punitive use. The character of the intrusion under S.O.P 3.4.1 is much more intrusive than the school drug testing policies this Court has previously found reasonable.

It will not do for SPS to argue that S.O.P. 3.4.1 falls within the class of suspicionless Fourth Amendment intrusions authorized by *Vernonia* and *Earls* because that policy states that its primary purpose is to "protect the safety and health of the District's faculty, staff and students[.]" However, in *Edmond*, 531 U.S. at 42, this Court rejected an argument by the city that its vehicle checkpoint program was intended to serve a government interest in health and safety by removing drugs from the community, noting that the "special needs" exception to the Fourth Amendment's requirement of particularized suspicion cannot be based upon an interest articulated only at a "high level of generality[.]" Thus, the Court distinguished the case from roadside sobriety checkpoints, writing as follows:

> Nor can the narcotics-interdiction purpose of the checkpoints be rationalized in terms of a highway safety concern similar to that present in *Sitz*. The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only with respect to a smaller class of offenses, however, is society confronted

> with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.

Edmond, 531 U.S. at 43.

As the *Edmond* decision pointed out, *Vernonia* and the special needs exception to the particularized suspicion requirement is limited to programs designed to serve special needs "beyond the normal needs of law enforcement." 531 U.S. at 37. SPS's generalized interest in safety and health does not bring its drug interdiction program within the special needs exception because those interests are served by disciplinary and criminal sanctions. Indeed, in establishing that the school setting may present "special needs" allowing for the adjustment of Fourth Amendment rights, this Court noted that such adjustment is appropriate only where the Fourth Amendment intrusion is carried out by school authorities on their own, distinguishing searches conducted by school officials "in conjunction with or at the behest of law enforcement agencies[.]" *T.L.O.*, 469 U.S. at 341 n. 7. Law enforcement officers were intimately involved in the seizure of C.M.'s property. (App. at 2a). Under these circumstances, SPS' drug interdiction program cannot be deemed to fall within the "special needs" exception to the Fourth Amendment. *See also Ferguson v. City of Charleston*, 532 U.S. 67, 79-82 (2001) (program for testing pregnant women for evidence of drug use was not valid under special needs exception where results of tests were not used for treatment of women or babies, but turned over to law enforcement for prosecution).

Moreover, in *T.L.O.*, 469 U.S. at 342 n. 8 (citations omitted), this Court pointed out that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[.] . . . Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." In this case, the fact that C.M. and other students were unable to observe what went on inside the classroom and what was happening to their belongings shows that the kind of necessary safeguards against official misconduct did not exist in this case.

The school drug testing cases relied upon by the Court of Appeals also are not controlling because they each involved suspicionless searches upon students who were deemed to have forfeited a measure of privacy by engaging in school sports or extracurricular activities. A key basis for upholding the drug testing program in *Vernonia* was the fact that "[b]y choosing to 'go out for the team,' [students] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . . [S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*, 515 U.S. at 657. The *Earls* decision similarly concluded that students who choose to participate in competitive extracurricular activities "voluntarily subject themselves to many of

the same intrusions on their privacy as to athletes." *Id.*, 536 U.S. at 831-32.

The fact that the drug testing programs were not imposed on the entire student body was crucial to the result in *Earls*. Justice Breyer, who provided the crucial fifth vote in *Earls*, wrote a concurring opinion in which he emphasized that "the testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school." *Earls*, 536 U.S. at 841 (Breyer, J., concurring). The dissenters also stressed this theme, writing that "*Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them." *Id.* at 845 (Ginsburg, J., dissenting). In another case, the Eighth Circuit held that a program allowing searches of an entire student body cannot be justified by the decisions in *Vernonia* and *Earls* because "the search regime at issue here is imposed upon the entire student body, so the [school district] cannot reasonably claim that those subject to search have made a voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege." *Doe v. Little Rock School District*, 380 F.3d 349, 354 (8th Cir. 2004).

Unlike the drug testing programs upheld in *Vernonia* and *Earls*, the drug interdiction program implemented by SPS under S.O.P 3.4.1 is imposed on the entire student bodies of the several high schools operated by SPS. These students and C.M. did not

voluntarily relinquish their Fourth Amendment rights to property and privacy as had the students participating in sports and extracurricular activities in *Vernonia* and *Earls*. Certainly, the simple act of attending a public school did not constitute a relinquishment of Fourth Amendment rights; students do not shed their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Even though Fourth Amendment rights are modified in the public school context, the *T.L.O.* decision establishes that students do not forfeit their Fourth Amendment rights with respect to property they bring to school. *Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 373 n. 3 (2009).

CONCLUSION

For the reasons set forth above, the Petitioners respectfully request that the Petition be granted and that a writ of certiorari issue to the Eighth Circuit Court of Appeals.

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