Court of Appeal for the State of California

Third Appellate District

DEBORAH BROWN et al.,
Plaintiffs and Respondents,
v.
SHASTA UNION HIGH SCHOOL DISTRICT et al.,
Defendants and Appellants.

Case No. C061972

(On Appeal from an Order of the Superior Court of the State of California, County of Shasta Granting an Injunction, Case No. 164933, The Honorable Monica Marlow, Judge)

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C061972
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APPELLANT/PETITIONER: Shasta Union High School District, et al. RESPONDENT/REAL PARTY IN INTEREST: Benjamin Brown, et al.	FOR COURT USE ONLY
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1. This form is being submitted on behalf of the following party (*name*): Respondents Benjamin Brown, et al.

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 25, 2010

Thomas V. Loran III
(TYPE OR PRINT NAME)

▶ Thomas V. Loran
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INTRODUCTION

When the District decided to mandate suspicionless drug testing for students engaged in what it calls "competitive representational activities" ("CRAs")[1] – such as choir and the math team – it did not even bother to investigate whether this would violate California law. The District now urges this Court likewise to ignore our state Constitution and to evaluate this program under the Fourth Amendment. But as the court below recognized, our state Constitution is a document of independent force, with an explicit privacy provision the voters adopted to provide protections *beyond* those already afforded by the federal charter. Relying on its evaluation of competing expert testimony and a contested record, as well as a detailed analysis of California law, the trial court held that the District's program violated our state Constitution. Because that holding is supported by the record and by the law, this Court should affirm it.

STANDARD OF REVIEW

Appellate review of a trial court's grant of a preliminary injunction is deferential. A reviewing court "must interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order." (*Hilb, Rogal & Hamilton Ins. Services v.*

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[1] CT 2:390. The "District" refers, collectively, to Appellants. "CT" refers to the Clerk's Transcript. All references thereto include the volume number followed by a colon and numbers corresponding to the referenced page(s) thereof.

Robb (1995) 33 Cal.App.4th 1812, 1820 [citation omitted].)[2] This basic rule of appellate review applies even when the record consists entirely of declarations.[3] Moreover, even where the facts below were uncontradicted, this Court "discard[s] evidence unfavorable to the prevailing party," and draws all inferences in favor of the ruling below. (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

In deciding whether to uphold a grant of preliminary injunction, review is confined to whether the trial court abused its discretion in evaluating two interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the merits; and (2) the relative interim harm to the parties from issuance or non-issuance of the injunction. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109; *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678 & fn. 8; *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.)[4] The District has never contested Respondents' showing of irreparable harm, or that the relative interim harm to Respondents outweighs the harm to the District; and, as appellant, the District has the burden to "make a clear showing" that the lower court

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2 Accord, *ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1016; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.

3 *ReadyLink Healthcare*, 126 Cal.App.4th at 1016; see *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.

4 An interlocutory order granting provisional injunctive relief reflects nothing more than the superior court's evaluation of the record before it at the time of the ruling; it is not an adjudication of the ultimate merits of the dispute. (*People ex rel. Gallo*, 14 Cal.4th at 1109; *Butt*, 4 Cal.4th at 678, fn. 8; *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1421; *Slatkin v. White* (2002) 102 Cal.App.4th 963, 967.)

"exceeded the bounds of reason" in granting the injunction. (*IT Corp.*, 35 Cal.3d at 69.)

Nowhere in Appellants' Opening Brief ("AOB") does the District discuss these standards of review. Instead, citing *Cohen v. Bd. of Supervisors* (1985) 40 Cal.3d 277, and *Citizens to Save California v. California Fair Political Practices Comm.* (2006) 145 Cal.App.4th 736, 745-746 (AOB at 11), the District seeks "independent" review of the ruling below, but without acknowledging the superior court's resolution of key factual disputes adversely to the District.[5] *Cohen* and its progeny in fact state that such review of an injunction is improper where the superior court has resolved disputed facts in evaluating likelihood of success on the merits.[6]

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[5] These include the unappealed evidentiary ruling (CT 4:1038) excluding much of the testimony of Dr. Robert DuPont, the District's expert, and a specific finding that the District had presented no evidence justifying drug testing for students participating in CRA's, but not testing students participating in regular curricular activities presenting the same safety concerns. (CT 4:1036.). The judge also found there was no evidence of any greater need by the District to test students involved in CRAs for drugs, only the perception that "this is a group of people, in addition to athletes, that [the District] believes[s it] can legally target." (CT 4:1035.) Because the District did not do so in its opening brief, it has waived any challenge to these rulings. (*People v. Bonilla* (2007) 41 Cal.4th 313, 349-350; *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 84, fn. 5.)

[6] *Cohen*, 40 Cal.3d at 286-290; accord, *San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964, 969; *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1094-1095; see *Environmental Coalition of Orange County, Inc. v. Avco Community Developers, Inc.* (1974) 40 Cal.App.3d 513, 521 ["[w]here a decision on the merits requires a determination of issues of fact, granting a preliminary injunction is a matter within the sound discretion of the trial court"]. Cf. *Citizens to Save California*, 145 Cal.App.4th at 745-746 [factual dispute precludes *de novo* review].

Insofar as the likelihood of success on the merits rests on discrete legal questions, this Court reviews such pure issues of law *de novo*. (E.g., *White v. Davis* (2002) 108 Cal.App.4th 197, 209-210; *Huong Que, Inc. v. Mui Luu* (2007)150 Cal.App.4th 400, 408-409.) But, under the applicable standards just described, such review must be based on the evidence the superior court accepted in granting the injunction, and not on excluded evidence or on a factual record that the District may wish it had.

The District's appellate brief is less than candid on this critical point and has adopted a fast-and-loose approach to the appellate record. "In every appeal, the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment." *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739 [citations omitted]. Far from obeying this rule, the District's statement of facts discusses only evidence that supports its claims on appeal, completely omitting any reference to Respondents' evidence supporting the order below.[7] In fact, despite the superior court's refusal to consider the unpublished report of its expert for its truth,[8] the District nevertheless repeatedly cites this "evidence" in its

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[7] For example, the District discusses its expert's declaration at length, without mentioning that this evidence was contradicted by the testimony of Respondents' expert University of California Professor Howard Taras.

[8] Specifically, the trial judge held the District had not laid a proper foundation for admission of Dr. DuPont's purported study on student drug testing. (CT 4:1024; 4:1037; 4:1039.) Because the study was not produced in its entirety and had not been published or peer-reviewed, Dr. DuPont's conclusion that tested students were less likely to use drugs than non-tested students failed to demonstrate that drug testing did anything to reduce overall student drug use. (*Id.*) To the contrary, as Dr. Taras noted, "connecting to schools through extracurricular activities is known to be associated with lower use of illicit drugs." (CT 1:83; see CT 1:78 [citing supporting study].)

brief for its truth without even mentioning the lower court's ruling excluding it. (AOB at 26-28, 30.) This Court should therefore strike or disregard all references to the unpublished study (*Morgan v. AT & T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1251, fn. 9) and should rely entirely on Respondents' factual statement, *infra*, not on the District's.[9]

STATEMENT OF THE CASE

A. Statement of Facts.

Presented under the proper legal standard, the record, nearly all of which derives from deposition testimony of the District and its current superintendent, shows the following:

In 2008, the District created a new drug-testing policy (the "Policy"). Unlike the prior policy, which applied only to athletes, this new Policy includes all students who are involved in competitive recreational activities ("CRAs"). (CT 2:390.) CRAs include the science bowl, mock trial, the trimathalon math team, and ROTC, as well as various choirs, bands, and music ensembles, and Future Farmers of America ("FFA"). (CT 2:386.) These activities are not "extracurricular" under the Education Code;[10] to the contrary, many of them are graded components of for-credit

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[9] The District's failure to present the appellate record accurately means it has forfeited any argument that the superior court's factual findings are not supported by the evidence. *Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 53-55; see *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 950-952. It also waives any evidentiary objections. *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 90, 96-97.

[10] An activity that contributes to a student's grade is not "extracurricular." (Ed. Code § 35160.5, subd. (a)(2).)

classes, including classes required for graduation. (CT 1:173-177; 3:722; 3:715; 4:911; 4:964-965; 4:1035.)

Students involved in activities nearly identical to CRAs are not tested – the only difference between a covered activity and one that does not require monitored urinalysis is whether the District considers the activity to be "competitive." (CT 4:966.) Thus, a school's band is considered a CRA if, but only if, one of its performances in a particular year involves competition. (CT 1:186.) And a student who was barred from playing her flute in a parade under the Policy was nonetheless allowed to carry a flag in that same parade. (CT 3:716.)

Drug testing is not required for students to attend class-related field trips or to participate in gym, science, or shop classes, even those that involve the use of dangerous chemicals or equipment. (CT 4:966; 4:1036.) Similarly, students may participate in various musical theater productions without being tested. (CT 3:759; 4:966; 4:1036.) Thus, a student on the math team, who may never travel anywhere for a competition, must submit to urinalysis, but a student in a band that goes on overnight trips to perform, but does not compete, need not. And a student who plays the flute in an ensemble must submit to testing, but not one who engages in gymnastics and "combatives" (which are included in the District's physical educational curriculum) or uses "acetylene and arc welding" equipment (part of the District's industrial arts curriculum). (See Respondents' Motion for Judicial Notice ("MJN"), Ex. A at 17-18, 28-29, 35 [District course catalog].)

As a result of this expansion, 56.8% of the District's 4,616 students are subject to random, suspicionless drug testing. (CT 2:461.) Nearly half

of these – 25% of the entire student body – are eligible because they participate in music programs. (CT 3:781.)

B. The District's Adoption of the Expanded Drug Testing Policy.

According to its response to an interrogatory asking for every fact that supported its need to expand drug testing to include non-athletes, the District stated that it expanded the Policy because it:

> felt the drug uses [sic] rate among [District] students was too high and that expanding the drug testing policy beyond athletics to all [CRAs], in which more than half of the student body participates, would further the . . . District's goals. These goals included reducing drug use, providing those students who may be tempted to use drugs an excuse or another reasons [sic] for not using drugs, and providing counseling and further education to those who test positive.

(CT 2:381.) As this statement indicates, the decision was based on what District personnel "felt," and not on any facts, research, or numbers. The District did not look at any data on the rates of drug use among its students, even though such numbers are available (such as the District's California Healthy Kids Surveys). (CT 1:219, lines 17-25; see also CT 1:217-218.)[11] Nor did the Board consider state or national statistics on drug use trends or rates. (CT 1:220-221; 2:308.) Indeed, as far as the District was concerned, it "wouldn't have mattered" if student drug-use rates were going up or down. (CT 1:221.) The District admitted at deposition that the Policy was not adopted in response to any recent incidents involving drugs or alcohol. (CT 1:243-246; 2:326-327.)

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[11] These studies are conducted by California's Department of Education (CT 2:497-522) and are the best available. (CT 2:283-284.)

In short, the expansion was simply "not based on numbers or data." (CT 2:329.)[12] Instead, the District felt that any drug usage – even "[o]ne student exposed" to drugs or alcohol-- justified expanding the Policy to include as many students as possible. (CT 2:308; 2:327; 3:651 [District board minutes noting goal of "testing a greater percentage of students"]; 4:967 [District Superintendent's testimony that it is "important to test students that we are able to"].)

Likewise, the Board did not contact any outside experts in regard to the potential expansion of the Policy and possible adverse consequences, or look at any research on the efficacy (more accurately, the lack thereof) of student drug testing or its adverse effects. (CT 1:239-240; 2:285-286.) It did not even request any input from the head of its own drug diversion program. (CT 1:270-271; 1:272; 1:280.) Nor did the Board consider using less-intrusive means to accomplish its goals. (CT 1:132; 2:311-314; 2:315-326.) In the District's view, mandatory urinalysis was not an invasion of student privacy. (CT 2:311-313.) The only expert advice of any type that the District sought was a legal opinion on whether the new Policy would violate federal law; this opinion never addressed California law. (CT 1:226.)

The District's decision to single-out students involved in CRAs for testing was similarly unsupported. The Board had no reason to think that students in band, choir, FFA, or any other CRA were using drugs at a higher rate than other students. The District's drug-treatment specialist

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12 The only numbers of any type the District could cite in support of the Policy is that "many" of the "1 to 12 student expulsions" from district schools each month of the school year involve drugs in some way. (CT 2:305.)

confirms that students in CRAs do **not** use drugs at higher rates than other District students. (CT 3:802; see also CT 1:248; 3:793; 3:802; 4:967-968.)[13] Nor did anything about the nature of CRAs make it more important to test students involved in them. (See CT 4:967.) Instead, the District's expanded Policy was developed in response to nothing more, according to the trial court, than "a general concern about drug use among students in general." (CT 4:1035.)

The District chose to focus on students involved in CRAs because it believed that it could test students involved in this group (but not the entire student body) without violating federal law or its federal funding. (CT 3:677; 3:764.)[14] Indeed, the Superintendant candidly agreed that "the reason [the District is] testing the math team, [FFA], the choir, is not because there's a greater need to select those students out for testing; it is because those are the students [it was] allowed to get at." (CT 4:967.)

In addition, students in CRAs were a convenient target because the District could use the threat of excluding them from CRAs to coerce them into submitting to urinalysis: they comprised a "broader base of students" who would comply out of fear "of losing participation ... in something

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[13] The District's evidence of drug use among students in CRAs is anecdotal and based on second-hand reports and hearsay. The trial judge excluded some of it (CT 4:1029) and was free to disregard the rest, which conflicted with the actual evidence regarding drug use, and was not based on personal knowledge. (*Rodney F.*, 61 Cal.App.4th at 241.)

[14] The District had applied for a federal grant to fund the Policy; the application contained what the District now acknowledges as "meaningless," "incorrect" data. (CT 2:345; 2:350-351.) The District delayed the start of the program to increase its chance of getting funding (CT 1:259; 3:663) and also changed the rule of who would be covered in order to meet the grant requirements. (CT 3:668.)

[they] love." (CT 3:770; see CT 3:762-763.) Finally, the District was motivated to test students involved in non-athletic activities because there was "a lot of resentment among coaching staff" who felt it was "unfair" that athletes had to submit to testing, but students involved in other activities did not. (CT 1:241.)

If the Board had looked at any research on student drug use and testing, it would have seen that drug-use rates have been falling for years throughout the nation – and in the District – and that students involved in school-related activities are less likely than their peers to use drugs. (CT 1:78; see also CT 1:275 [District follows national trend].) It would further have found that all of the published scientific studies that have addressed the issue have failed to find any evidence that suspicionless drug testing reduces drug use among high school students. (CT 1:80-82.) For these reasons, the American Academy of Pediatrics recommends against suspicionless student drug testing. (CT 1:86.)

C. The District's Implementation of the Policy.

At the start of the 2008-2009 school year, the District sent parents an information packet encouraging students to "participate in our extensive co-curricular and extra-curricular programs," which it called "the greatest key to [students'] future success." (CT 2:395.) The packet included a form that parents had to sign in order to let their children use school computers or participate in school-related activities. (CT 2:395-396; 3:706.) The form stated that "[b]y signing this form the parent ... authorizes their [sic] student to be included in the drug/alcohol random testing pool." (CT 2:396.) There was no option for parents to allow computer access but to refuse consent to random drug testing, and two of the student Respondents' families signed the forms under protest. (CT 2:396; 3:706; 3:722.)

More important, there was no list of which activities actually constitute CRAs, so parents could not know whether signing the form would subject their children to random drug tests, or whether it would simply allow them access to the school computers. (CT 3:722-723.) In fact, the District's identification of CRAs was incomplete when it began testing. (CT 4:953-954.)

Between the start of the school year and January 2009, the District pulled 391 students from class and forced them to provide a urine sample while a monitor listened to the sounds of their urination from inside the restroom. (CT 2:384.) As of March 19, 2009, these tests had yielded a total of twenty false positive results for drugs and eight confirmed positive tests, of which only "one or two" related to students involved in non-athletic activities. (CT 2:278-279.)[15]

These data indicate that athletes are testing positive for drug use at much higher levels than are students in non-athletic CRAs. Although the District could not provide information about the composition of the testing pool (CT 4:955), it does report that approximately 25% of the District's students participate in music programs that make them subject to random testing. (CT 3:781.) Because 56.8% of the entire student body is subject to testing (CT 2:461), this means that musicians alone make up nearly ½ of those subject to testing and that, when students in FFA and the other non-music-related, non-athletic activities are considered, approximately ½ of the students tested are athletes, and ½ are non-athletes. Because six or seven of

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15 These numbers include students who tested positive for nicotine, which would include students old enough (*i.e.*, 18) lawfully to use tobacco. (See CT 2:473; 4:915; compare Penal Code § 308(b).)

the eight positive tests involved athletes, athletes are testing positive for drugs and alcohol at a rate three to seven times higher than that for students such as the student Respondents in this case. And the "hit-rate" for non-athletes is between .51% (under the proper standard of review) or at most 1.0%, if the facts were taken to support the District's position. Even when athletes are included, only 2% of the students tested positive (eight of 391).[16]

As these numbers suggest, the District's claim that 10% of the students tested positive misrepresents the record; the portion of the record cited as support for this inflated number actually states that approximately 10% of the 80 students enrolled in the District's drug-diversion program are there as a result of a positive test. (AOB at 24 [citing CT 3:826-827].)

Not surprisingly, the Superintendant was unable to say that the new Policy had resulted in any decrease in drug use. (CT 4:969-970.)

D. The Scope of the Expanded Policy.

The Policy works as follows: tests are not announced in advance. (See CT 4:937; see also CT 1:136.) Before a test, the District receives a list of students to be tested. (CT 1:132-136.) An assistant principal (or sometimes a school security guard) takes that list to individual classrooms

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16 These numbers likely are overstated because they are based on the total number of students tested as of **January 14, 2009**, but include all positive tests as of **March 19, 2009**. (CT 2:278-279; 2:384.) Because of this two-month gap, and because the District was testing approximately 100 students nearly every month (eight testing days in a ten-month school year) (CT 1:133; 2:456), and hoped to test 840 students before June (CT 1:133), the reported positive tests were almost certainly the result of close to 500 total tests, meaning the positive rate for non-athletes was well under 1% (one or two of 250).

and calls out the names of the students who must test and tells them to report to a bathroom. (CT 1:136-137; 4:937.) The students line up outside the bathrooms, where school personnel – which can include uniformed law enforcement -- take their names. (CT 1:106; see CT 4:949-951.) The students then go into the bathrooms, sometimes in groups, as their peers watch from the line. (CT 1:106.) A monitor stands inside the bathroom listening to the child urinate; an assistant principal stays outside. (CT 1:138; 1:142; 1:143.)

The testing company uses a special cup that indicates an initial positive test. (CT 3:812.) Initial positive tests are sent to a lab for review by a medical review officer ("MRO"). (CT 3:679, ¶ 5.5.8.) The MRO then contacts the student's parent to discuss "any prescription medication the Participant may be taking." (*Id.*) Then, final results are given to the District's drug-testing coordinator, who notifies an assistant principal, who notifies the parent and student of "the final lab results." (*Id.*) It therefore appears that, under the District's official rules, the parents are asked about their children's medications based on the initial positive, and are later told whether the final lab report confirmed that initial positive.

Students who test positive a single time or refuse to be tested are automatically suspended from all CRAs. (CT 3:679-680.) Students who are willing and able to take six additional drug tests at their own expense and to complete a drug diversion program are allowed to return to their activity after two weeks. (*Id.*) The student's parent must attend each class. (CT 3:825.) Students whose families cannot or will not do this are suspended from their activity for nine weeks. (*Id.*) Subsequent positive tests result in more serious sanctions. (CT 3:680.)

E. Commencement of This Suit.

One of the Parent Plaintiffs contacted the District in early 2008 to complain about the Policy. (CT 3:718; 3:721.) Starting in July, Respondents' counsel corresponded with the District about the Policy's legality. (CT 3:684-703.) On November 21, the District unequivocally refused to modify the Policy. (CT 3:703.) This action was filed two weeks later. After conducting limited discovery, the student Respondents moved for a preliminary injunction, which the court granted on May 7, 2009. (CT 4:1041-1042.)

None of the student Respondents uses drugs. (CT 3:715; 3:728; 4:915.) When they applied for the injunction, all three of them were subject to random, suspicionless drug testing because of their participation in activities that were integral parts of courses they were taking for credit. Benjamin Brown ("Ben") and Brittany Dalton ("Brittany") were subject to suspicionless testing because they were enrolled in music classes that had performance components. Ben was in five band and choir classes, several of which were graded and satisfied the arts requirements for admission to the California State University and the University of California.[17] Brittany was enrolled in a symphonic band class, her grade in which depended on her participation in marching and pep bands, as well as in a competing flute ensemble and two advanced-placement classes. (CT 3:706; 3:715.) These

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[17] CT 3:721; 3:723; 3:726. The superior court admitted the students' declarations that their classes satisfied college-admission requirements only for the purpose of showing their understanding of the importance of the activities. (CT 4:1035 [lower court's ruling applying students' understanding].) Official governmental records show that the students' understanding is factually accurate. (See MJN, Ex. A at 39-41 [District course catalog]; *id.*, Ex. B at 3-4 [UC approved course list].)

classes too meet the requirements for the State university systems. (MJN, Ex. B at 3-4 [UC approved course list].) Plaintiff Jesse Simonis ("Jesse") was a sophomore and enrolled in an agricultural biology class, which required that he participate in FFA and meets the admission requirements for UC and CSU. (CT 1:106 [25% of biology grade based on FFA participation]; MJN, Ex. A at 11; Ex. C at 3.)

All of these class-related activities are "curricular" because each is a "teacher graded or required program or activity for a course that satisfies the entrance requirements for admission to the California State University or the University of California." (Ed. Code § 35160.5, subd. (a)(4).)[18]

On March 24, 2009, Jesse was directed to leave class and report to the school office, where an administrator, accompanied by a sheriff's deputy, ordered him to provide a urine sample. (CT 106-107.) Jesse, who had never been told he was subject to suspicionless drug testing, called his mother, who removed him from school for the day. (*Id.*) The next day, an administrator again pulled Jesse from class to tell him that if he did not provide a urine sample he would be kicked out of FFA and biology class. (CT 1:107.) The day after that, this same administrator told Jesse in public if he did not test by the following day he would be kicked out of FFA. (*Id.*) Jesse was upset that other students had heard this, and also that this was causing him to miss so much class. (*Id.*) In order to avoid further

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[18] Compare Ed. Code § 35160.5, subd. (a)(4) with *id.* § 35160.5, subd. (a)(2) ["an 'extracurricular activity' is not part of the regular school curriculum, is not graded, does not offer credit, and does not take place during classroom time"]; *id.* § 35160.5, subd. (a)(3) ["a 'cocurricular activity' is defined as a program that may be associated with the curriculum in a regular classroom"].

repercussions, Jesse provided a urine sample. (CT 1:107-108.) The urinalysis was negative for any substance. (CT 4:915.)

On April 8, 2009, Brittany called her father to report she had been pulled from her statistics class and directed to submit to drug testing. (CT 4:937.) Her father met with the Principal to object to Brittany's being tested at the school but offered to allow her to be tested privately and to disclose the test results to the District. (*Id.*) The Principal never responded to this offer. (*Id.*) Brittany was scheduled to participate in a state-wide flute competition on May 9th. (CT 4:938.)

ARGUMENT

The District's suspicionless drug testing program violates the student Respondents' right to privacy under article I, section 1 of the California Constitution because the District's interest in testing students not involved in athletics does not outweigh the students' privacy rights. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1.)

In addition, the Policy violates the student Respondents' right to be free from unreasonable searches under article I, section 13 of the State Constitution, which prohibits school authorities from searching students without individualized suspicion of wrongdoing. (*In re William G.* (1985) 40 Cal.3d 550, 563-564.)

Finally, because privacy is a fundamental interest under the California Constitution (as is the right to education), equal protection requires that the District have a compelling reason to target students involved in competitive activities, while ignoring students who leave school when the last bell rings. (*Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal.3d 937, 948.) Testing students involved in these

activities is irrational because those students are least likely to use drugs; it therefore violates the student Respondents' rights to equal protection under the California Constitution.

I. THE DISTRICT'S SUSPICIONLESS DRUG TESTING PROGRAM VIOLATES THE STUDENT RESPONDENTS' RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 1 OF THE CALIFORNIA CONSTITUTION.

Article I, section 1 of the California Constitution explicitly protects the right to privacy: "All people are by nature free and independent and have inalienable rights. Among these are ... privacy." This explicit privacy protection, which has no federal constitutional counterpart, was added by the voters in 1972 in order to provide Californians with privacy protections above and beyond that already implicitly protected by the federal Constitution. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325-326 (plurality opinion).) It is therefore "broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts." (*Id.* at 326 (citations omitted); accord, *In re Carmen M.* (2006) 141 Cal.App.4th 478, 491 fn. 11.) Thus, the governing law is not, as the District would have it, the Fourth Amendment; it is the line of California cases examining drug testing under our state Constitution. (See *Committee To Defend Reproductive Rights v. Myers* (1985) 29 Cal.3d 252, 260-263; Cal. Const., art. I, § 24.)

The California Supreme Court has examined drug testing under article I, section 1 in two cases: *Hill, supra*, 7 Cal.4th 1, which involved a private organization's decision to test elite college athletes for steroids and other drugs, and *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 890-891,

which involved the testing of government employees. These cases establish the framework for analyzing the constitutionality of such programs:

> 1. The plaintiff states a *prima facie* case by showing a legally protected privacy interest, a reasonable expectation of privacy, and conduct by the defendant constituting a serious invasion of that privacy;[19]
>
> 2. The defendant may rebut that case by negating any of these elements "or by proving, as an affirmative defense, that the invasion of privacy is justified because it substantially furthers one or more countervailing interests;"
>
> 3. The plaintiff may then prevail "by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests."[20]

A. The District's Drug-Testing Program Seriously Invades Student Privacy.

The superior court determined, based on the facts before it and a thorough review of California law, that the student Respondents would "likely . . . prevail on the merits in establishing that random, suspicionless drug testing of students not involved in athletics is a *serious* invasion of privacy." (CT 4:1035 (original emphasis).) This is a mixed question of

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[19] These three sub-elements are "threshold elements" that are "used to screen out claims that do not involve a significant intrusion on a privacy interest." (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 999 [quoting *Loder*, 14 Cal.4th at 893 (lead opn. of George, J.)].) Although there was no majority opinion in *Loder*, subsequent cases have largely adopted the reasoning of then-Justice George's lead opinion. (See, e.g., *Sheehan,* 45 Cal.4th at 999-1001; *Carmen M.*, 141 Cal.App.4th at 490.) Citations to *Loder* are therefore to the lead opinion unless otherwise noted.

[20] *Hill*, 7 Cal.4th at 39-40; *Loder*, 14 Cal.4th at 889-898; accord, *Sheehan*, 45 Cal.4th at 999-1001; *Carmen M.*, 141 Cal.App.4th at 491-492 & fn. 13.

fact and law. (*Hill*, 7 Cal.4th at 40.) Thus, if it "requires application of experience with human affairs" it must be affirmed if supported by substantial evidence; if it involves "legal principles and their underlying values" it is reviewed *de novo*. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) Under either standard, the lower court's determination should be affirmed.

1. The Court's Finding that District Drug Testing Seriously Invades Student Privacy is Supported by Ample Evidence.

As the trial judge recognized, analysis of "the seriousness of the invasion" of student privacy here depends on "the context of the activities of the targeted students and the normal conditions under which the activities are undertaken." (CT 4:1034 [citing *Hill*, 7 Cal.4th at 41].) Because this context-sensitive analysis necessarily requires application of experience with human affairs, this Court must uphold this finding if it is supported by substantial evidence. (See *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 586 [application of law to stipulated facts reviewed for substantial evidence].)

The evidence below was ample: besides the testimony of the student Respondents and parents, the lower court considered expert testimony by Howard Taras, M.D., a professor of pediatric medicine at the University of California who is the past chair of the American Academy of Pediatrics Committee on School Health and currently serves as the medical consultant to ten California school districts. (CT 1:72-73.)

Dr. Taras explained that forcing a young person to urinate in a cup with a monitor listening can be an embarrassing – even humiliating – invasion of privacy, which can have serious, lasting consequences. "The notion that someone will hear the tinkling of their urination can be very

embarrassing to an adolescent. The notion that someone will feel the warmth of their urine in a cup is humiliating to some." (CT 1:83.) This type of drug testing can be more traumatic for youths than it would be for adults: "[a]dolescents are at a developmental state where many feel estranged from their ever-changing bodies. Some students will feel this high level of embarrassment acutely." (*Id.*)

The declarations of the students subject to testing confirm Dr. Taras's conclusions. When she wrote her initial declaration, Brittany Dalton thought that she "would feel extremely uncomfortable urinating into a cup while at school, especially with a stranger listening." (CT 3:715.) When she was actually pulled from her statistics class for testing, it was worse than she had predicted: she "felt shaky and nervous," even though she knew that any test would be negative. (CT 4:937.) Part of the reason for her anxiety was that a good friend of hers, who was tested three times (with negative results), told her "that the process made her extremely uncomfortable, because the monitors are standing right there." (CT 4:938.) Brittany would find urinating while "another person hovers nearby to listen" "very invasive." (*Id.*)

When he considered how he might feel if he was called for drug testing, Ben Brown explained that he could not "even imagine how that would feel." (CT 3:727.) He also described seeing his classmates taken away for drug testing and explained that he would feel stigmatized if he were selected. (*Id.*)

Finally, Jesse Simonis described his experience being pulled from class for drug testing, seeing a Sheriff's Deputy involved in the process, and standing in line with twenty other students watching his classmates being sent into the bathrooms in groups for drug testing. (CT 1:106.) The

embarrassment most adolescents will feel from this type of testing only can be magnified by the presence of peers.

Dr. Taras also explained that the infringement of informational privacy that occurs when a parent is notified of a positive drug test may lead to family violence. (CT 1:82.) Finally, the students who are embarrassed that a school administrator is involved in drug testing may be less likely to approach that person, or any school staff, "to confide in a personal problem such as suicidal ideation or to report being abused at home." (CT 1:84.) Thus, the evidence strongly supports the lower court's finding that the District's program constitutes a serious invasion of privacy that can have serious consequences.

The invasiveness of the testing is magnified by the context in which it occurs. (See *Hill*, 7 Cal.4th at 41.) As the trial judge observed, "[u]nlike participation in athletics, students participating in a math club, chess club, choir, band, symphony, or FFA are not involved in routine regulation and scrutiny of their physical fitness and bodily condition. Nor are they typically involved in exchanging private medical information." (CT 4:1035.) Unlike athletes, they do not shower with teammates, or submit to a trainer to probe a sore muscle or check for injury or get a massage or athletic taping. In our society, drug testing "is not a reasonably expected part of the life of a member of the choir or math club." (*Id.*) The superior court thus correctly concluded, based on its interpretation of the evidence and experience in human affairs, that random, suspicionless drug testing constitutes a serious invasion of privacy for students participating in these non-athletic activities. (*Id.*) Because this conclusion is supported by substantial evidence, this Court should affirm it.

2. As a Matter of Law, the District's Drug-Testing Program Seriously Invades Student Privacy.

De novo review leads to the same result. Drug testing by urinalysis seriously invades the privacy protections written into our state Constitution in two distinct ways: taking the sample invades the subject's interest in keeping excretory functions private, and testing the sample invades her right to informational privacy. (*Hill*, 7 Cal.4th at 40-41.) Thus, every court in this state to have considered the issue – including our supreme court, twice – has held that such programs implicates significant privacy interests under article I, section 1 so as to shift the burden to the government to justify them.[21] The District's invitation to "follow the *Earls* decision and find the invasion to a student's privacy is not significant" (AOB at 26) is really a request for this Court to ignore its obligation to follow our state Constitution as interpreted by the California Supreme Court. (See *Myers*, 29 Cal.3d at 261-262.) Because the District's program involves drug testing by urinalysis, plaintiffs, as the lower court expressly found (CT 4:1035) have stated a *prima facie* case, shifting the burden to the District to justify its program. *Hill*, 7 Cal.4th. at 43-44.

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[21] E.g., *Loder*, 14 Cal.4th at 896 ["drug testing program unquestionably implicates privacy interests protected by the state Constitution"]; *id.* at 917 (conc. & dis. opn. of Mosk, J.) ["drug testing is precisely the kind of privacy invasion with which the privacy clause is concerned". . .[and that] "the act of governmental monitoring of urination that occurs during a drug test is ... deeply invasive of individual privacy"]; *id.* at 919 (conc. & dis. opn. of Kennard, J.) ["monitored urination" is "a type of search particularly destructive of privacy and offensive to personal dignity"]; *Hill*, 7 Cal.4th at 40-41; *Edgerton v. State Personnel Bd.* (2000) 83 Cal.App.4th 1350, 1360, 1361; *Carmen M.*, 141 Cal.App.4th at 490-492 [drug testing of 16-year-old]; *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 193 [urine sample in private bathroom].

Moreover, the District's program constitutes a **serious** invasion of student privacy, because it is conducted in more invasive manner than were drug testing programs that California courts have held to constitute significant invasions of privacy. For example, in *Loder*, testing occurred at a private medical office during a scheduled, routine pre-employment medical examination. (*Loder*, 14 Cal.4th at 897, 854-855.) Significantly, no separate sample was demanded for drug-testing purposes, and there was no direct monitoring of urination. (*Id.* at 854, 897.) A majority of our Supreme Court nonetheless held the intrusion to be significant even though "the testing [did] not impose the usual intrusion on privacy that results when an individual is required to provide a separate urine sample on demand." (*Loder*, 14 Cal.4th at 897; accord, *id.* at 917 (conc. & dis. opn. of Mosk, J.); *id.* at 919 (conc. & dis. opn. of Kennard, J.).) And the Court so held even though nobody with whom the testee would ever later interact was involved. (*Loder*, 14 Cal.4th at 854, 904; accord, *Hill*, 7 Cal.4th at 12 [test administered by NCAA official].)

Similarly, in *Kraslawsky*, the monitoring was much less invasive than what District students must endure – the employee to be tested reported to a medical facility, where she urinated in a private bathroom, while a nurse stood outside the door. (56 Cal.App.4th at 184 fn. 2, 193.) The employer defended its program by arguing that "unobserved testing ... is at most a slight, not serious, intrusion." (*Id.* at 193.) But the court rejected this argument and upheld Kraslawsky's claim under article I, section 1. (*Id.*)

The District's Policy is more intrusive than these programs. Rather than privately reporting to a doctor's office for a scheduled appointment, the students are publicly and without notice pulled from a room full of their

classmates and immediately ordered to report to a bathroom for no other reason than to provide a urine sample. (CT 4:937.) School staff, law enforcement, and other students watch the student enter the bathroom, and a monitor stands inside the bathroom listening to the student urinate. (CT 1:138 [District testimony that students urinate "in the presence of the monitors"]; 1:136-139 [monitor inside bathrooms with students]; 1:106 [sheriff]; 1:143 [assistant principal].) Students may enter bathrooms in groups to be drug tested. (CT 1:106.) This public testing procedure means that other students will learn of a positive test when a student who was pulled from class for testing – and seen by other students entering the bathroom for testing – suddenly stops participating in activities. (CT 1:162; 2:360.) Also, unlike in the cases discussed above, persons with whom the student will regularly interact run the testing and are privy to the results, including the principal, an assistant principal, and the faculty advisor in charge of the CRA. (CT 1:128; 1:160; 2:475.) The District's Policy is thus in many ways less protective of privacy than the protocols reviewed in *Loder*, *supra,* 14 Cal.4th 846, *Hill*, *supra,* 7 Cal.4th 1, and *Kraslawsky*, *supra*, 56 Cal.App.4th 179.

The District's Policy is also more invasive than the programs examined in prior cases because of who is being tested and the context of the testing, which are crucial considerations. (*Hill*, 7 Cal.4th at 41.) The *Hill* Court's analysis of the magnitude of the intrusion focused on the fact that the persons subject to the testing were elite athletes, operating under a set of "social norms that effectively diminish the athlete's reasonable expectation of personal privacy in their or her bodily condition, both internal and external." (*Id.* at 42; see *id.* at 9 ["highly disciplined physical activity conducted in accordance with a special set of social norms"].)

These athletes were participating in "highly competitive postseason championship events," and were therefore subject to "close regulation and scrutiny of the[ir] physical fitness and bodily condition." (*Id.* at 41-42.) This regulation already required them to undergo "physical examinations (including urinalysis)" for purely medical purposes, so mandatory urinalysis was already a requirement for them. (*Id.* at 41.) Furthermore, these athletes had given up other privacy interests as part of being on the team: they "frequently disrobe" and shower in the presence of peers and coaches; they exchange medical and other private information with trainers, coaches, and others. (*Id.* at 41-42; accord, *id.* at 71 (conc. & dis. opn. of George, J.).) Simply put, athletes are different from other students. (*Id.* at 41.)

In stark contrast, the student Respondents – a flutist, a choir singer, and a participant in FFA – do not share this same "special set of social norms" that diminish athletes' privacy. They do not take communal showers or share intimate information about their medical and physical conditions or their use of medications with fellow athletes and coaches. (Cf. *id.* at 9, 41-42, 52-53 [college athletes do all of these].) In fact, students may choose to take part in non-athletic activities in school precisely because they prefer not to expose their bodies to scrutiny in the locker room.

Students subject to testing in the District are not elite athletes: they simply want to participate in class-related activities, classes that will help them get into college. Taking band in high school simply does not require anywhere near the level of sacrifice, discipline, and willingness to accept a "special set of social norms" as does winning a national intercollegiate athletic championship. Student Respondents are the "other students," who

do not share the "special regulation of sleep habits, diet, fitness, and other activities" as do elite athletes. (*Id.* at 41.) They thus retain the same privacy rights as any other high-school students in our state, rights that "must be respected." (*William G.*, 40 Cal.3d at 563.)

That it is children, rather than adults, who are observed during the act of urination does not mitigate the privacy invasion. Our state constitutional privacy right applies to adolescents as well as to adults. (*American Academy of Pediatrics*, 16 Cal.4th at 334-335 & fn. 18 [no "distinction between the informational privacy rights of minors and adults"]; *Carmen M.*, 141 Cal.App.4th at 490.)[22] Although a child's right to privacy must often yield to parental rights and responsibilities, that is not an issue here, because both the students and their parents object to the testing. As such, the Policy invades both the parents' and the child's rights. (See *American Academy of Pediatrics*, 16 Cal.4th at 335-336; *Carmen M.*, 141 Cal.App.4th at 492-494.) If anything, minors should have a heightened privacy protection against having persons other than their parents observe their excretory functions, because of their physical and psychological vulnerability. They "feel estranged from their ever-changing bodies" and many of them will feel more embarrassed that somebody is listening to them urinate than would an adult. (CT 1:83.)

The District is incorrect that schools should have more leeway to invade privacy than employers or the NCAA because schools have a duty to "protect students from foreseeable harm." (AOB at 20.) Employers also

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22 Although minors under fourteen years may not be sufficiently mature to share these privacy rights, (*American Academy of Pediatrics*, 16 Cal.4th at 373), high school students are generally older than fourteen.

have a duty to use reasonable care to protect their employees and their customers from foreseeable harm. Just as school districts are liable if their employees' negligence results in harm to students, so are employers liable if their employees' negligence results in harm to a customer.[23] Likewise, the NCAA is also liable if its negligence results in injury to a player.[24] Thus, the District's duty to use reasonable care to protect its students from intruders on campus does not give it a right to invade its students' privacy by administering random suspicionless drug tests, any more than a landlord or business owner's identical duty would allow it – or require it – to drug test tenants, customers, or all employees. Respecting a student's constitutional right cannot constitute negligence.

The District is also wrong that schools can force students to undergo physical examinations over a parent's objection – the Education Code specifically allows parents to opt-out of physical exams. (Ed. Code §§ 49451, 48980.) Schools cannot exclude these students without "good reason to believe that the child is suffering from a recognized contagious or infectious disease." (*Id.*, § 49451.) Thus, our legislature has rejected the

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[23] Compare *Thompson v. Sacramento City Unified School Dist.* (2003)107 Cal.App.4th 1352, 1371-1372 [holding, in suit against school, "a student must prove traditional elements of actionable negligence"] with *Franklin v. The Monadnock Co.* (2007) 151 Cal.App.4th 252, 258-260 [employer's duty to protect employees from injuries, illness, or violence]; *Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1033-1034 [employer's duty of reasonable care to protect employees from unsafe physical condition]; cf. *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 234-236, 244-247 [business owner's duty to protect customer from crime].

[24] *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703 [denying summary judgment to NCAA for negligently increasing danger to players by allowing use of aluminum baseball bats].

notion that a school can invade a student's privacy by conducting the sort of examination here at issue over a parent's objection.

And contrary to the District's claim (see AOB at 13, 20), the common-law doctrine of *in loco parentis* cannot be used to justify an invasion of student privacy by a California school because there is a statutory scheme in place that governs student rights and responsibilities. (*William G.*, 40 Cal.3d at 560 ["common law doctrine of *in loco parentis* has given way in this state to a statutory directive"]; *id.* at 566, fn. 16.)

Finally, a privacy intrusion is more serious when it is caused by the government, rather than a private entity, because of the government's greater power over the lives of its citizens, its monopoly on many services, and the fact that private entities have their own, countervailing associational and free-speech rights. (*Hill*, 7 Cal.4th at 38-39, 43.) Thus, the privacy provision protects privacy against government intrusion much more strongly than it protects it against infringement by private entities such as the NCAA. (*Id.*; see *id.* at 59-60 (conc. & dis. opn. of Kennard, J.); see also *Sheehan*, 45 Cal.4th at 1002-1003.) The already-reduced privacy rights of the athletes in *Hill* were further diminished because they had chosen to join a private association which had a right to set its own membership criteria. (*Id.* at 42-43.) Participation in the NCAA is neither a right nor even a government benefit. (*Id.*) In contrast, secondary education is a public benefit, and plaintiffs – like all Californians under the age of eighteen – have both a statutory duty to attend school and a state constitutional right to participate fully in curricular, co-curricular, and extracurricular activities such as band, choir, and FFA. (*Hartzell v. Connell* (1984) 35 Cal.3d 899; *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1089-1091.) The District may not force students to waive their constitutional rights to

privacy in order to avail themselves of their constitutional right to an education: "A student cannot be penalized for demanding respect for his or her constitutional rights." (*William G.*, 40 Cal.3d at 567; see *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 212-214 [cannot condition welfare benefits on waiver of privacy under art. I, § 1, even though no right to such benefits].)

B. The District Cannot Meet its Burden of Justifying this Privacy Intrusion, Because its Program does Nothing to Further its Interest of Reducing Student Drug Use.

Because the Policy infringes upon privacy, the District must plead and prove as an affirmative defense that the Policy is "justified because it substantially furthers one or more countervailing interests." (*Hill*, 7 Cal.4th at 40.)[25] The District's justification for its Policy is that it believes random, suspicionless drug testing of non-athletes will reduce drug use. (AOB at 26-29; see CT 3:770.) The District thus had the burden to bring forth actual facts – not just argument and assertions or even legislative findings – to convince the trial court that suspicionless drug testing would substantially further this goal. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1207; *American Academy of Pediatrics*, 16 Cal.4th at 349-359; *Robbins*, 38 Cal.3d at 214 fn. 20.) Although its goal is a worthy one, the District failed to meet its burden of proof because the evidence in this case – like every published study on the topic – demonstrates that suspicionless drug testing of high-school students fails to reduce student drug use.

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25 "The burden of proving this affirmative defense is, of course, on the party seeking to benefit by it." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 54; see Evid. Code § 500; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794-795.)

The efficacy of the District's drug-testing program was the topic of two expert declarations, by Drs. Taras and DuPont. The court below accepted the Taras declaration in full but rejected much of the DuPont declaration. (CT 4:1024; 4:1037; 4:1039.) Dr. Taras's declaration was based on his experience as a physician, an expert in pediatrics, a consultant to numerous California school districts, and, most importantly, a review of all the published studies and medical papers on the effectiveness of student drug testing. (CT 1:72-104.) The DuPont declaration, in contrast, did not even cite, much less discuss, any published research on the efficacy of student drug testing (doubtless because none of the studies support his position). And although he discussed the Taras declaration at length, Dr. DuPont fails even to mention, let alone critique or rebut, any of the studies or papers that Taras cites.

Instead, DuPont relied only on excerpts from his own, unpublished study, without revealing its methodology. The trial court held that these excerpts, like much of the DuPont declaration, would be received only for the limited purpose of understanding the basis for DuPont's conclusion, not for their truth. (CT 4:1024-1028.) The District does not challenge this ruling on appeal. The trial judge then rejected Dr. Dupont's study's conclusions, as discussed above, based on a serious flaw in his reasoning. (CT 4:1037; see *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563-564 [value of opinion is not in conclusion, but in reasoning and evidence that support it].) The trial judge also rejected Dupont's opinion that drug testing is effective, finding instead found that "[t]here is no evidence that requiring the drug testing as a condition of engaging in the activities has an effect on drug usage among students," and that the District had therefore failed to meet its burden of proof. (CT 4:1036; 4:1037.)

In light of these findings and under the proper standard of review, the evidence shows that student drug testing fails to decrease student drug use and may in fact lead to increased abuse of the most dangerous drugs. Dr. Taras reviews all the published studies that have tried to find a connection between drug testing like the District's Policy and reduced drug use and he concludes: "Although it may seem intuitive that drug testing serves as a deterrent to illicit student drug use, there is very little evidence to support this." (CT 1:74; 1:80-82.) The American Academy of Pediatrics Committee on School Health agrees "there is little evidence of the effectiveness of school-based drug testing in the scientific literature." (CT 1:86.) The inference to be drawn from this – the most reasonable inference, and certainly the one most favorable to the judgment below – is that these programs are completely ineffective at decreasing student drug use.[26]

Dr. Taras also concludes that suspicionless "student drug testing fails as a public health screen to identify and protect the health of students." (CT 1:80.) Suspicionless drug testing actually can harm students by deterring them from participating in the very activities that will reduce student drug use and by exacerbating violence at home (which itself may increase the chance a student will abuse drugs); it also can lead students to abuse less detectable – but often more dangerous – drugs such as inhalants and alcohol. (CT 1:82-85.) These concerns about the risks of student drug

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[26] Unlike many retained experts, Professor Taras speaks in the measured tone of an academic, rather than the strident absolutes of an advocate, and writes that there is "little evidence" when a more partisan witness might declare that there is absolutely no evidence. The clear meaning of his Declaration is that suspicionless drug testing does not work to reduce student drug use, and the superior court plainly so understood it. Dr. Taras received no compensation for his work in this matter. (CT 1:73.)

testing, combined with its lack of effectiveness in reducing drug use, have led the American Academy of Pediatrics to determine as a matter of official policy that "[p]ediatricians should not support drug testing in schools." (CT 1:86.)

A party that fails to meet its burden of proof in the trial court must demonstrate on appeal that its evidence was both overwhelming and uncontradicted. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279.) The District's evidence was neither. Dr. DuPont's claim that suspicionless drug testing reduces student drug use was unsupported, flawed, and properly rejected by the trial court. And, it was directly contradicted by Dr. Taras, who cited ample evidence that supports his conclusions.

Nor can the District rely on prior case law to meet its burden of proof. Even if that were a valid way to meet a factual burden, the District's justification for testing differs from that in cases involving athletes or employees. In *Hill*, the primary goal of drug testing was to maintain the integrity of competitive athletics by eliminating performance-enhancing drugs in the face of evidence that more than 80% of highly competitive athletes in certain sports used steroids, with rates of use in other sports increasingly rapidly. (7 Cal.4th at 44-46.) This both destroyed the integrity of the sport and also created real incentives for other athletes to start using steroids themselves to try to get a competitive advantage (or to avoid a disadvantage against those who were using steroids). (See *id.* at 44-46; *id.* at 71-72 (conc. & dis. opn. of George, J.).) Testing the winners of a bowl

game serves interests completely unrelated to deterrence – a positive test retroactively disqualifies the athlete or team and thereby ensures fairness.[27]

In addition, in the context of competitive athletics, drug-testing programs like the one in *Hill* may well deter drug use. Elite athletes take steroids for a single, calculated, and perhaps rational purpose: to increase their chances of winning. (See *id.* at 44-46.) A testing program that disqualifies athletes who take steroids serves to remove their reason for taking the drugs in the first place. But, students who use recreational drugs are not engaged in the same type of calculated use, and suspending them for testing positive does not remove the reasons for taking drugs. If anything, the District's Policy makes students more likely to take drugs by discouraging or prohibiting them from engaging in school-related activities. (See CT 1:78; 1:82-83.)

Similarly, pre-employment testing of all prospective hires serves the employer's "interest in determining whether or not an applicant currently is" using drugs. (*Loder*, 14 Cal.4th at 897.) The goal is not to deter applicants from using drugs; it is to prevent the "mistaken hiring of an individual who is abusing drugs." (*Id.*) The program relies not on deterrence but on exclusion. The District has consistently disclaimed any intent to use drug testing to exclude or punish students, and it cannot rely upon such a justification. (CT 3:770-771.)

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[27] The *Hill* Court also recognized that the NCAA had a business need to maintain its reputation for holding fair competitions, and that performance-enhancing drugs, like betting scandals or other corruption, would cost it money by harming its reputation among viewers. (*Id.* at 46.) The NCAA thus had a business need to show it was responding to the steroid problem, regardless whether that response was efficacious. A public school is not a business.

Prior cases also differ from this one because of the data presented regarding the magnitude of the drug problem. In *Hill*, the evidence showed that rates of steroid use among some classes of elite athletes was "between 80 and 100 per cent." (7 Cal.4th at 45-46.) In *Loder*, the City implemented its program only after a pilot project resulted in 21% positive drug tests from job applicants. (14 Cal.4th at 853.) In contrast, as discussed *supra*, the District did not enact its Policy in response to some sudden crisis or because it was experiencing any unusual rate of student drug use, in CRAs or otherwise. A government program that invades the privacy of Californians must be supported by facts, not merely a "feeling" that the program might be helpful.

Nor could the District support its Policy on the grounds that testing athletes but not the choir is "unfair." Math and choir competitions do not involve the "risks of physical injury" that may justify testing athletes. (See *Hill*, 7 Cal.4th at 46.) Just as the government may test employees who operate heavy machinery but may not test office secretaries in the name of "fairness," a school's authority to test athletes does not extend to "mathletes."[28] As the Pennsylvania Supreme Court observed in invalidating a program like the District's Policy before it was enjoined, "[s]tudents in the band, chess club, drama club, or academic clubs simply do not pose the same sort of danger to themselves or others" as do student

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[28] Compare *Kraslawsky,* 56 Cal.App.4th at188 [prohibiting random drug testing of "executive secretary whose job duties were neither safety nor security sensitive"] with *Smith v. Fresno Irrigation Dist.* (1999) 72 Cal.App.4th 147, 164-165 [allowing testing of employee who operated heavy equipment where mistake "could be lethal"]. See also *Loder*, 14 Cal.4th at 881, fn. 12.

athletes. (*Theodore v. Delaware Valley School Dist.* (Pa. 2003) 836 A.2d 76, 92.) The California Attorney General agrees: "Since the risk of physical injury is minimal in [non-athletic after-school activities], the basic justification for applying the drug surveillance program to athletic activities is missing." (62 Ops.Cal.Atty.Gen. 344 (1979) [legality of suspicionless drug testing of high-school students].)

C. Finally, Even If the District Could Demonstrate That It Had A Drug Problem Requiring Such An Invasive Response, The District Has Feasible and Effective Alternatives to Suspicionless Drug Testing That Have A Lesser Impact on Privacy.

Even if the District's evidence could satisfy its burden of showing an affirmative defense, its Policy would still be unconstitutional because of the availability of less-intrusive means. (See *Hill*, 7 Cal.4th at 40; compare *Edgerton*, 83 Cal.App.4th at 1361 [government defendant is "required to show that no less intrusive alternatives were available"] with *Sheehan*, 45 Cal.4th at 1002 [private entity need only show policy is reasonable]; *Hill*, 7 Cal.4th at 50 [different legal standards for privacy invasions by private and governmental actors].) These less-intrusive alternatives include observing students during the school day, testing based on individualized suspicion, and providing education to students and student testing programs to parents who want them. The District has admitted it never even considered these less intrusive approaches. (CT 2:313.)[29]

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[29] Apparently, this was because the District mistakenly considers suspicionless drug testing of students to be "unrestrictive" and "not . . . an invasion of privacy." CT 2:311-313.

Teachers and staff can observe student behavior, demeanor, and performance during the school day and during after-school activities. These hours of daily observation, along with the teacher's knowledge of each student's usual behavior, eliminate the need for random, suspicionless drug testing. For just this reason, the Court in *Loder* ruled that the government could test all prospective employees without suspicion, but not all current employees. (14 Cal.4th at 883; see *Kraslawsky*, 56 Cal.App.4th at 188.) Unlike the athletes in *Hill*, who interacted with NCAA officials only at competitions, high school students – particularly those involved in after-school activities – spend hours every day interacting with their teachers, administrators, and faculty advisors; District personnel thus have ample opportunity to observe whether students are under the influence, eliminating any need for suspicionless testing. (*Hill*, 7 Cal.4th at 50; *Loder*, 14 Cal.4th at 883, 897.) And unlike the performance-enhancing drugs at issue in *Hill*, the drugs for which the District is testing for do cause observable symptoms of intoxication. (See 7 Cal.4th at 50.)[30]

Rather than testing honor students who give nobody any reason to think they have done anything wrong, the District could focus on students whose behavior provides some indication that they are involved with drugs. (See *York v. Wahkiakum School Dist. No. 200* (Wash. 2008) 178 P.3d 995,

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30 Although the District is apparently unsure of which drugs it is testing for – including whether it is testing for steroids (see CT 1:235; 4:952; 4:980) – the panel of drugs for which Jesse was tested included cocaine, marijuana, morphine, amphetamines, methamphetamine, PCP, benzodiazepine, barbiturates, methadone, tricyclic antidepressants, oxycodone, propoxyphene, and nicotine. (CT 4:915.)

1006, 1008, 1010-1011 (conc. opn. of Madsen, J.).)[31] A program based on individualized suspicion is a viable, less intrusive, effective alternative to random, suspicionless testing. (See *Loder*, 14 Cal.4th at 883, 897; *Kraslawsky*, 56 Cal.App.4th at 188.)

II. THE DISTRICT'S SUSPICIONLESS DRUG TESTING PROGRAM VIOLATES ARTICLE I, SECTION 13 OF THE CALIFORNIA CONSTITUTION.

Article I, section 13 prohibits the suspicionless searches of high school students. (*William G.*, 40 Cal.3d at 564.)[32] Any type of search requires that the official have a reasonable suspicion that the student has committed a violation of the law or of a school rule. (*Id.* at 564.) Drug testing by means of compelled urinalysis constitutes a search. (*Loder*, 14 Cal.4th at 876.) Suspicionless drug testing is therefore a violation of a student's right to freedom from unreasonable search and seizure. (See *William G.*, 40 Cal.3d at 564; *Loder*, 14 Cal.4th at 876.) Indeed, it would be irrational to allow suspicionless mass searches by urinalysis to determine whether a student has smoked a cigarette or taken drugs over the weekend

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31 Stating that "the school has failed to show a suspicion-based testing regime is not a feasible means of maintaining student order, discipline, and safety. Students . . . are under almost constant surveillance by teachers, coaches, peers, and others. Drug and alcohol use often involves observable manifestations that would supply the particularized suspicion necessary to support a search." (*Id.*)

32 Although *William G.* noted that this standard is "consistent" with the Fourth Amendment and relied on both the state and federal constitutions, as the dissent explained, in application *William G.* is more protective than the federal rule. Compare 40 Cal.3d at 564 with *id.* at 572-574 (dis. opn. of Mosk, J.).

but to prohibit suspicionless searches to determine whether a student is carrying drugs or a weapon at school and thus poses a serious and immediate danger.

That *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls* (2002) 536 U.S. 822, upheld the drug testing of students involved in extracurricular activities against a Fourth Amendment challenge does not change this conclusion. As the leading guide to California school law explains, "the California constitution is more protective of the student right to be free from searches and seizures than is the federal constitution." (Kemerer, Sansom, and Kemerer, California School Law (2005) at 391 [citing *William G.*].) Thus, whereas the United States Supreme Court in *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 342 fn. 8, did "not decide whether individualized suspicion is an essential" prerequisite to school searches under the Fourth Amendment, *William G.* squarely holds that reasonable suspicion is an absolute minimum requirement for a search of a student, or a group of students, under article I, section 13. (*William G.*, 40 Cal.3d at 564.)

Nor have any California cases "adopted" the federal standard for school searches under article I, section 13. (See AOB at 32). Rather, the cases the District cites for this claim were decided only under the Fourth Amendment, because they all were decided after Proposition 8 eliminated the exclusionary rule as a remedy for violations of state law. See *In re Lance W.* (1985) 37 Cal.3d 873, 886-887.

Finally, there is no reason to think that the California Supreme Court will overrule *William G.*'s, *supra*, 40 Cal.3d. 550, individualized-suspicion requirement and follow *Earls*, *supra*, 536 U.S. 822. "Respect for our Constitution as a document of independent force forbids us to abandon

settled applications of its terms every time changes are announced in the interpretation of the federal charter." (*Catholic Charities of Sacramento Inc. v. Superior Court* (2004) 32 Cal.4th 527, 561 [citations omitted].) In deciding whether to conform article I, section 13 to *Earls*, the California Supreme Court would consider the language and history of the state and federal provisions; whether *Earls* limited previously established federal rights; whether the decision was unanimous and had been well received by courts and commentators; and whether, if followed, it would overturn established California rights. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 510-511.)

Under this test, California courts will not and should not follow *Earls*. The history of our Supreme Court's interpretation of article I, section 13 shows that it is more protective than the Fourth Amendment.[33] The California Constitution differs from the federal charter because it provides every child in this state with a right to an education. (*Butt*, 4 Cal.4th at 683.)[34]

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[33] "California citizens are entitled to greater protection under the California Constitution against unreasonable searches and seizures that that required by the United States Constitution." (*People v. Brisendine* (1975) 13 Cal.3d 528, 545, 551; see, e.g., *People v. Mayoff* (1986) 42 Cal.3d 1302; *People v. Laiwa* (1983) 34 Cal.3d 711; *People v. Blair* (1979) 25 Cal.3d 640, 653-654.) Although these decisions are no longer relevant to criminal cases, they still define the substantive reach of the "independent and more exacting standards of article I, section 13." (*In re Lance W.*, 37 Cal.3d at 879, 886-887.) Thus, the District is wrong when it claims that no "California case can be found where a distinction was made" "between the federal and state search and seizure provisions." (AOB at 32.)

[34] Also, because suppression is not a remedy for violations of state law, providing students with additional privacy protection under state law will (continued...)

Earls, supra, 536 U.S. 822, was a 5-4 decision, which effectively overruled the Supreme Court's decision in *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, which itself overturned prior precedent that had protected student rights.[35] It has been harshly criticized by courts and academics, including the leading Fourth Amendment treatise.[36] And its assertion that urinalysis causes only a "negligible" intrusion into personal privacy is completely inconsistent with the California law discussed above.

Allowing suspicionless searches of students would require overturning *William G., supra,* 40 Cal.3d. 550. It also would abrogate the California Attorney General's longstanding opinion that suspicionless drug testing of high-school students must be limited to athletes. (62 Ops.Cal.Atty.Gen. 344 (1979).) Unless our Supreme Court revisits *William G.,* the schools of our state must not search students by means of mandatory urinalysis without reasonable suspicion.

Two state supreme courts have already taken this approach. The Pennsylvania Supreme Court has rejected *Earls* and held that suspicionless

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(continued...)
not impose the same costs as expanding the Fourth Amendment right would. (See *Lance W.*, 37 Cal.3d at 881-883, 888-890.)

[35] See, e.g., *Earls*, 536 U.S. at 842 (dis. opn. of O'Connor, J.); *id.* at 842-855 (dis. opn. of Ginsberg, J.); *Vernonia*, 515 U.S. at 666-686 (dis. opn. of O'Connor, J.); *Theodore,* 836 A.2d at 89 [discussing *Earls*'s departure from prior law]; 5 LaFave, Search and Seizure: A Treatise on the Fourth Amendment (4th ed. 2004) § 10.11(c), p. 521-531.

[36] 5 LaFave, *supra*, at 521-531 [extended criticism of *Earls* majority opinion]; *id.* at 513-520 [criticizing *Vernonia*]; see *York*, 178 P.3d at 1010, 1012; *Theodore*, 836 A.2d at 90 [noting that student privacy rights were "rather summarily dismissed by *Earls*"]; see also *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1500 [citing LaFave, *supra*, as leading text].

drug testing of students involved in extracurricular activities violates that state's constitutional protection against unreasonable searches and seizures. (*Theodore*, 836 A.2d at 96.) Notably, Pennsylvania law is less protective of student privacy than article I, section 13. For example, in Pennsylvania, unlike in California, school officials may conduct suspicionless mass searches of students' lockers, a practice that *William G.* expressly forbids. (Compare *id.* at 90 [court "approved of general and suspicionless searches of all student lockers for evidence of drug use"] with *William G.*, 40 Cal.3d at 564 ["Neither indiscriminate searches of lockers nor more discrete searches of...a student, can take place . . . [without] reasonable suspicion."].)

Similarly, Washington's Supreme Court has held that suspicionless drug testing of students violates the state's constitution. (*York*, 178 P.3d 995.) Because urinalysis is as intrusive as are other searches, the court unanimously held that drug testing, like any search of a student, is unconstitutional absent individualized suspicion. (*Id.* at 997; *id.* at 1016-1018 (conc. opn. of Johnson, J.); *id.* at 1009-1011 (conc. opn. of Madsen, J.).)

The two cases from other states the District cites are distinguishable. *Joye* relied on data "specifically defining the scope of the schools' drug and alcohol problems" and also on the school's anticipated switch from urinalysis to oral-swab sampling. (*Joye v. Hunterdon Cent. High Sch.* (N.J. 2003) 826 A.2d 624, 644, 652.) Similarly, the district in *Linke* proved that drug use among its students was higher than in the rest of the state; the plaintiffs themselves were both involved in school athletics as well as other activities. (*Linke v. Northwestern School Corp.* (Ind. 2002) 763 N.E.2d 972, 974, 976.) Both cases were decided by one-vote margins over

persuasive dissents. (*Id.* at 987-997; *Joye*, 826 A.2d at 655-672.) Neither opinion suggests that students in those states have rights to participate in school-related activities, as do California students, rights which vitiate any idea that students here are voluntarily consenting to drug testing. And, most importantly, neither court is bound by the protections of student privacy articulated in *William G.*

III. THE DISTRICT'S SUSPICIONLESS DRUG TESTING PROGRAM VIOLATES PLAINTIFFS' RIGHT TO EQUAL PROTECTION UNDER THE CALIFORNIA CONSTITUTION.

California's equal protection clause prohibits the government from creating irrational classifications of people. (*Hays v. Wood* (1979) 25 Cal.3d 772, 786-787, 790-791; see *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, 1202.) And when those classifications affect fundamental rights, they violate equal protection unless the government proves that the distinctions drawn by the law are necessary to further a compelling government interest. (*Long Beach*, 41 Cal.3d at 948; accord, *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298-299.) Because the District's drug-testing program affects the fundamental rights to privacy and education, it is subject to strict scrutiny. And, because testing students who are unlikely to use drugs, while ignoring students who are more likely to use drugs, is irrational, it can withstand neither strict scrutiny nor even rational basis scrutiny. This California provision, too, differs from its federal counterpart. (*Darces v. Woods* (1984) 35 Cal.3d 871, 892 & fn. 23.)

Privacy under article I, section 1 is a fundamental interest for purposes of equal protection. (*Long Beach*, 41 Cal.3d at 946; *Sakotas v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 262, 272.) Thus, our Supreme Court applied strict scrutiny to a statute that forced some, but not all, government employees to take a polygraph test that included questions about illegal drug use and prescription medications, because it "impinge[d] on the fundamental right of privacy." (*Long Beach*, 41 Cal.3d at 946, 948 [striking down statute]; see also *Hill*, 7 Cal.4th at 34 & fn. 11 [reaffirming equal-protection holding of *Long Beach*].)[37]

The District is infringing on the privacy interests of certain students (on the math team or in the choir) but not of their peers who take a science laboratory or gym class or perform in a musical. (CT 4:1031.)

All of these students are similarly situated for purposes of equal protection analysis. "Similarly situated" does not mean identical – it simply means that the groups are similar enough that the government should be required to explain why it treats them differently. (*McKee*, 47 Cal.4th at 1202-1203.) Thus, police officers and other public employees –secretaries, managers, and custodial staff – are similarly situated when their privacy rights were at stake, even though these two classes of employees do very different jobs. (*Long Beach*, 41 Cal.3d at 951-952.) So too are public and private employees. (*Id.* at fn. 19.) That some students

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[37] Education is also a fundamental interest under the California equal protection guaranties. (*Butt*, 4 Cal.4th at 683.) Students have a right to participate fully in classes such as band and choir and in cocurricular and extracurricular activities other than "purely recreational" activities such as "weekend dances or athletic events." (*Hartzell*, 35 Cal.3d at 909-914 & fn. 14; *id.* at 902-903.) The District acknowledges that "[CRAs] are an integral part of the school curriculum...." (CT 1:33.)

participate in activities that the District considers "competitive" does not mean the government can, without justification, treat them worse than it does their peers who participate in similar activities that are not competitive. (See *McKee*, 47 Cal.4th at 1202-1203; *Hofsheier*, 37 Cal.4th at 1200.) If the District believes this distinction merits different treatment, then it must demonstrate why.

Because the drug-testing Policy impairs the fundamental rights of some – but not all – District's students, it violates equal protection unless the District can show "not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (*Hernandez*, 41 Cal.4th at 298-299 (citations omitted).)[38]

The District's suspicionless drug testing program singles out those students who are least likely to be involved with drugs. (CT 1:75-80; see also *Theodore*, 836 A.2d at 92 [observing that "[n]ationwide, students who participate in extracurricular activities are significantly less likely to

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[38] The case the District cites as raising an "identical issue" is irrelevant. (See AOB at 35-36 [citing *Citizens for Parental Rights v. San Mateo County Bd. of Educ.* (1975) 51 Cal.App.3d 1].) Plaintiffs there claimed that because they were allowed to opt out of a sex-education class, they were denied equal protection because they would then not participate in that same class. (*Citizens for Parental Rights*, 51 Cal.App.3d at 27-28.) The court held there was no "state action" because the school had not excluded the students from anything – it merely allowed them not to participate if they so chose. (*Id.*) Here, the students do not want to opt-out of CRAs: to the contrary, they want to participate fully in these educational activities, as is their constitutional right. But the District is excluding them unless they submit to urinalysis. That they might have chosen to forgo these activities does not strip them of their equal protection rights. (See *Long Beach*, 41 Cal.3d at 950-951.)

develop substance abuse problems than are their less-involved peers"].) Students in school-related activities are less likely to use drugs and alcohol than their peers who simply leave when the bell rings. (See *id.* [citing N. Zill, C. Nord, & Loomis, Adolescent Time Use, Risky Behavior and Outcomes (1995) p. 52]; CT 1:75.) This is confirmed by the results of the testing the District has already conducted as part of its expanded program: as discussed above, of the hundreds of students tested for their participation in these activities, only "one or two" tested positive.[39] Even the District now admits that students involved in CRAs do not use drugs at any higher rate than do other students. (AOB at 38 (citing CT 3:802).)

Nor is there any other reason to single out this group of students. As discussed above, the reasons that justify testing student athletes do not apply to students in choir or FFA. The Policy, without any justification, thus invades the privacy of those students least likely to require intervention, while ignoring those students who are most likely to be involved with drugs. The Policy lacks a "fair and reasonable relationship to the stated legislative objective and therefore is in violation of the principles of equal protection." (*Hays*, 25 Cal.3d at 795.)[40]

Nor can the District point to the nature of the CRAs as justification for treating those who participate in them differently. The trial judge so found in rejecting the Districts' purported safety concerns as justifying drug testing for students involved in CRAs:

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[39] See fn. 15, *supra*, and accompanying text.

[40] The District's comparison of mandatory drug testing with its other requirements for participating in activities (AOB at 36) is inapposite, because those requirements do not invade student privacy and may well have legitimate justifications – an issue not before this Court.

> [T]his concern logically cannot be limited to the students participating in the targeted activities. Unlike competitive sports, the risks of the targeted activities are not unusual...Field trips are common in regular curricular classes. Machinery, equipment, appliance and chemicals are present in regular curricular classes. Gym class requires physical activity that could endanger a drug user.... There is no evidence of why drug testing is required of students participating in the targeted activities, but not required of students participating in regular curricular activities.... [T]he Court fails to see the justification for the invasion of privacy of students involved in the targeted activities when that same privacy invasion ... is not imposed upon similarly situation students.

(CT 4:1036.)[41] Moreover, the District's course catalog, which Respondents have asked this Court to judicially notice (MJN, Ex. A), includes courses offerings in building trades, automotive technology, and firefighting (CT 2:405) and thus provides even more illustrations of why the nature of CRAs cannot justify testing students involved in them but not their peers.[42] Many curricular courses offered by the District involve significantly greater physical hazards to students than do singing in the choir or playing the flute.[43]

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41 As noted above, Defendants have waived any claim that these findings are not supported by substantial evidence, and court below was justified in taking judicial notice. (See MJN, at 10.)

42 See MJN, Ex. A at 17 [power tools, acetylene, and welding in Agricultural Mechanics class]; *id.* at 18 [livestock in Animal Science classes]; *id.* at 25 [hazardous machines and power tools in Industrial Technology classes]; *id.* at 29, 32, 35 [automotive technology, veterinary, firefighter training, and gym classes with sports such as fencing, archery, martial arts, and other contact sports].

43 Moreover, Education Code sections 33352, subdivision (b)(7) and 51222 require students in grades 9-12 to participate in gym classes that include "aquatics, gymnastics and tumbling, individual and dual sports, rhythms and dance, team sports, and combatives," all of which involve the same or greater risks of physical injury than do CRAs.

As this suggests, the District's asserted justification that CRAs involve more hazardous activities than do regular educational curriculum is not the District's actual reason for drug testing. The only evidence that attempts to justify the Policy on these grounds is a declaration by Superintendent Cloney. (CT 4:891.) But at his deposition two weeks before he signed that declaration, Mr. Cloney agreed that there was no reason to test the students involved in CRAs, as opposed to testing the general student body; instead, Mr. Cloney explained that the District tested students in CRAs only because those are the students the District thought it could legally test. (CT 4:967; see CT 4:961-962.) At his deposition, Mr. Cloney had not even heard that it was "dangerous" for students in CRAs be using drugs because of the nature of those CRAs. (*Id.*) A court properly disregards a witness's self-serving declaration that conflicts with his deposition testimony. (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451; *Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258, 1270.)[44] And the superior court plainly did so, writing that the District focuses on students in CRAs simply to "cast a wider net," "not because there is a greater need to test these students." (CT 4:1036.)

When applying strict scrutiny, it is the actual purpose, not *post hoc* rationalization, that must justify the unequal treatment. (*Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 404-405; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 38; see *American Academy of Pediatrics*, 16 Cal.4th at 357-358.) Even under rational-basic scrutiny a law cannot be upheld based on "fictitious purposes." (*Hofsheier*,

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[44] Accord, *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 539, 548-549; *Schiff v. Prados* (2001) 92 Cal.App.4th 692, 705.

37 Cal.4th at 1201.) And *whenever* the government must justify an invasion of constitutional rights it must do so with facts, not mere arguments and assertions. (*McKee*, 47 Cal.4th at 1206-1207.) As the trial court noted, the District's reason for expanding its program was to "attempt to cast a wide net for drug testing of students based on the general concern about drug use among students in general." (CT 4:1036.) This does not provide a rational basis to single-out students in CRAs for testing, particularly in light of the evidence that they are less likely than their peers to use drugs. (See *Hofsheier*, 37 Cal.4th at 1201-1207.) And the program certainly does not pass strict scrutiny.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the superior court's order granting a preliminary injunction.

Dated: February 25, 2010.

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CERTIFICATE OF WORD COUNT

In compliance with Rule 8.504(d)(1) of the California Rules of Court, I hereby certify that this brief consists of 13,991 words, not including the cover sheet, tables of contents and authorities, or this certificate, as counted by Microsoft Word computer program used to generate this brief.

Dated: February 25, 2010.

Thomas V. Loran III

Docket No. C061972

PROOF OF SERVICE BY MAIL

I, Amara Getzell, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of San Francisco, California.

2. My business address is 50 Fremont Street, San Francisco, CA 94105-2228. My mailing address is 50 Fremont Street, P. O. Box 7880, San Francisco, CA 94120-7880.

3. On February 25, 2010, I served a true copy of the attached document titled exactly **RESPONDENTS' BRIEF** by placing it an addressed sealed envelope and depositing it in the United States mail, first class postage fully prepaid, to the following:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of February, 2010, at San Francisco, California.

Amara Getzell