No. 332A11-1

THIRTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

IN THE MATTER OF T.A.S.	)	FROM BRUNSWICK COUNTY 07-JB-196 COA10-275

****

BRIEF OF *AMICI CURIAE*
ADVOCATES FOR CHILDREN'S SERVICES OF LEGAL AID OF NORTH CAROLINA; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION; JUVENILE LAW CENTER; NATIONAL JUVENILE DEFENDER CENTER; NORTH CAROLINA OFFICE OF THE JUVENILE DEFENDER; SOUTHERN COALITION FOR SOCIAL JUSTICE; SOUTHERN JUVENILE DEFENDER CENTER; SOUTHERN POVERTY LAW CENTER; UNC CENTER FOR CIVIL RIGHTS; AND UNC JUVENILE JUSTICE CLINIC

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INTRODUCTION[1]

Through this case, the State asks the Court to significantly limit the rights of all students, especially those who attend alternative schools in North Carolina. *Amici* respectfully request that this Court decline the State's invitation to so drastically limit students' rights. The State's argument that individualized suspicion is categorically not required in student searches – *even* strip searches, and *even* searches conducted in a gender-discriminatory manner – in the State's numerous alternative schools has no basis in law. Neither the United States Supreme Court, nor any court in this federal circuit, nor any state decision compels such a sweeping eradication of students' rights.

All *Amici* have experience in students' rights cases, and recognize the careful consideration courts give to balancing those rights against the needs of schools to maintain order. *Amici* take the position that the Court can and should affirm the Court of Appeals' decision reversing the lower court's denial of the motion to suppress. The decision by the Court of Appeals is a correct application of the balancing test, holding that the blanket search of every student was constitutionally unreasonable since the officials "lacked individualized suspicion as to which students were responsible for the alleged infraction or any

[1]A detailed statement of the interests of *Amici Curiae* is included in their concurrently filed Application for Leave to File a Brief *Amici Curiae*. *Amici* accept and adopt the Appellee's Statement of the Case, Statement of Questions Presented and Statement of Facts.

particularized reason to believe the contraband sought presented an imminent threat to school safety." *In re T.A.S.*, __ N.C. App. __, 713 S.E.2d 211, 212 (2011).

STATEMENT OF THE CASE

Amici adopt by reference Appellee's Statement of the Case. N.C. R. App. P. 28(f).

Amici further note that the sweeping limitation on students' rights advocated by the State will have broad implications for many other children who find themselves in alternative school environments, not only in North Carolina but potentially nationwide.[2]

STATEMENT OF FACTS

Amici Curiae adopt by reference Appellee's Statement of Facts. N.C. R. App. P. 28(f).

ARGUMENT

Amici Curiae agree with Appellee that the Court of Appeals correctly held that the search of T.A.S.'s bra was constitutionally unreasonable for the reasons set forth in that opinion, and others, including the following: (i) a suspicionless search of all students is unconstitutional; (ii) attendance at an alternative school does not justify a suspicionless strip search; (iii) probable cause was required because the

[2] See, *infra*, Section B.

search at issue was used by law enforcement for arrest and prosecution; (iv) this search, directed only at female students, violated the Equal Protection Clause of the Fourteenth Amendment, particularly in light of the harm to girls resulting from such an intrusive search; and (v) the search in question violated the North Carolina Constitution's prohibition against general warrants.

A. <u>A Suspicionless Search of All Students is Unconstitutional.</u>

The United States Supreme Court has only authorized blanket searches of all students, absent individualized suspicion, in an extremely narrow set of circumstances, limited to where (1) the searches are conducted of students participating in voluntary extra-curricular activities and (2) they involve minimal intrusions into student privacy. Because the search at issue falls outside this narrow sphere, it violates the Constitution.

Generally, a school search for disciplinary purposes is constitutional if it is both "justified at its inception," and "reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S.Ct. 733 (1985) (citing *Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868 (1968)). For a search to be reasonable in its inception, there generally must be some quantum of individualized suspicion. "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the

search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 326.

A narrow exception to the requirement of individualized suspicion for school searches applies only for urinalysis tests of students engaging in voluntary extra-curricular activities. The United States Supreme Court has held such searches constitutional because students participating in extra-curricular activities have a reduced expectation of privacy, and because the intrusiveness of a urinalysis test is "minimal." In contrast, students in alternative schools have a significant expectation of privacy, and the search of a student's body, including a "bra-lift," is exceptionally intrusive. For these reasons, the search of T.A.S. was unconstitutional.

(1) Blanket Searches Are Constitutional Only When Applied to Students Participating in Voluntary Extra-Curricular Activities.

The United States Supreme Court has established a narrow exception to the requirement of individualized suspicion for students participating in extra-curricular activities. Because students in such programs voluntarily subject themselves to a different set of rules than the rules applied to the student body at large, the Court has concluded that more intrusive searches may sometimes be appropriate.

In *Vernonia*, the United States Supreme Court explained that random urinalysis drug tests of student athletes were appropriate because student athletes

have voluntarily relinquished the expectation of privacy as compared with their peers who do not engage in extra-curricular sports. According to the Court, while the expectation of privacy may be somewhat reduced for students in school as compared with individuals in non-school settings, "[l]egitimate privacy expectations are even less with regard to student athletes." *Vernonia*, 515 U.S. at 657. The Court emphasized that by voluntarily signing up for a sport, student athletes agreed to a different set of rules than those applied to the rest of the student body.

> By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam... they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval." Record, Exh. 2, p. 30, ¶8. Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See *Skinner*, 489 U. S., at 627; *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).

Vernonia, 515 U.S. at 657.

Moreover, the Court in *Vernonia* emphasized that school sports require athletes to forego the modesty that would potentially be violated by the taking of a urine sample. Because they regularly change clothes in common areas and shower

jointly, they have essentially agreed to invasions of their privacy as a condition of participating in the sport:

> School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: no individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation," *Schaill by Kross* v. *Tippecanoe County School Corp.*, 864 F. 2d 1309, 1318 (7th Cir. 1988).

Vernonia, 515 U.S. at 657. More specifically, the Court emphasized that the precise type of search at issue – a urinalysis – was conducted as part of the physical exam students voluntarily agreed to as a condition of joining the team. *Id.* The argument that such tests invaded the athletes' privacy was unconvincing.

In *Earls*, the Court reiterated that unlike students in the general student body, those who participated in extra-curricular activities had voluntarily relinquished their privacy rights. *Bd. of Educ. v. Earls,* 536 U.S. 822, 826, 122 S.Ct. 2559 (2002). The policy at issue in *Earls* required drug testing of students participating in "competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association." *Id.* at 826. The Court noted that:

> students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have

> their own rules and requirements for participating students that do not apply to the student body as a whole . . . . We therefore conclude that the students affected by this Policy have a limited expectation of privacy.

Id. at 831-32. Although the Court recognized that one key distinction between school searches and other searches was the "school's custodial responsibility and authority," the decision applied specifically to those involved in extra-curricular activities. Indeed, as the dissent explained, the Court had never endorsed the constitutionality of a policy that would require drug testing of *all* students:

> *Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them. Many children, like many adults, engage in dangerous activities on their own time; that the children are enrolled in school scarcely allows government to monitor all such activities. If a student has a reasonable subjective expectation of privacy in the personal items she brings to school, surely she has a similar expectation regarding the chemical composition of her urine. Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words.

Id. at 844-845 (Ginsberg, J., dissenting).

Applying the same reasoning, numerous lower courts have concluded that blanket searches of all students – rather than a subset of students voluntarily participating in extra-curricular activities – are unconstitutional. In *Hough v. Shakopee Public Schools,* for example, the District of Minnesota held it unconstitutional to conduct pat-down searches of all students participating in a

special-education program, emphasizing the distinction between compulsory education programs and voluntary extra-curricular activities. The Court explained that:

> participating in a special-education program is very different from participating in athletics (as in Vernonia School District) or in competitive extracurricular activities (as in Earls). No student is entitled under the law to play football or sing in the choir, but every disabled student is entitled under the law to special-education services. Moreover, because school attendance is compulsory, a student's participation in a special-education program is not voluntary in the same way that participation in extracurricular activities is voluntary. MRVSEC "cannot reasonably claim that those subject to search have made a voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege." *Doe*, 380 F.3d at 354; 608 F. Supp. 2d at 1101.

608 F. Supp.2d 1087, 1101 (D. Minn. 2009).

The United States Court of Appeals for the Eighth Circuit has applied similar reasoning, holding unconstitutional the Little Rock School District's practice of subjecting all students to random suspicionless searches of their persons and belongings. The Court clarified that, unlike students participating in a voluntary extra-curricular program, these students had not waived their right to privacy. "[We] are not aware of any cases indicating that such searches in schools pass constitutional muster absent individualized suspicion, consent or waiver of privacy interests by those searched, or extenuating circumstances that pose a grave security threat." *Doe ex rel. Doe v. Little Rock School District*, 380 F.3d 349, 355 (8th Cir. 2004). Indeed, even students attending a school prom have not

necessarily relinquished their right to privacy – and thus, a blanket search of all dance attendees has been found unconstitutional. *Herrera v. Santa Fe Pub. Sch.*, No. CIV 11–0422 JB/KBM, 2011 WL 2433050, at *11 (D.N.M. May 20, 2011) (noting that "the search regime at issue here is imposed upon the entire student body, so the [school district] cannot reasonably claim that those subject to search have made a voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege").

Under North Carolina's compulsory school attendance laws, T.A.S must attend school, including an alternative school. Such compelled attendance cannot be equated with voluntarily participating in an extra-curricular activity that reduces her expectation of privacy. In these circumstances, the Constitution requires individualized suspicion; the suspicionless search of T.A.S is unconstitutional.

(2) Blanket Searches Requiring Female Students to Lift Their Shirts and Shake Out Their Bras Are Not Reasonable in Their Scope.

The United States Supreme Court has long made clear that suspicionless searches are constitutional only when the intrusion into privacy is minimal. In *T.L.O.*, the Court explained:

> Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Delaware v. Prouse,* 440 U.S. 648, 654-655 (1979) (citation omitted).

469 U.S. at 743. In *Vernonia,* the Supreme Court clarified that a urinalysis drug test for the purpose of enrolling students in a school-based program created a "negligible" invasion of privacy. Because students remained fully clothed and were observed only in conditions "nearly identical to those typically encountered in public restrooms," the intrusion on privacy was not significant. 515 U.S. at 658. The Court also relied heavily on the fact that the information would only be used to provide services, and not for discipline or law enforcement purposes, and would only be disclosed to those who needed the information to provide such services. *Id.* Similarly, in *Earls,* the Court emphasized that the intrusion was negligible because "the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences." *Earls*, 536 U.S. at 833.

In contrast, the search here was highly intrusive both because it was a personal search and because the information would be used for law enforcement purposes. The United States Supreme Court has never upheld a school-wide suspicionless personal search for law enforcement purposes. Indeed, the United States Supreme Court has repeatedly recognized – and reiterated in *T.L.O.* – that "even a limited search of the person is a substantial invasion of privacy." 469 U.S. at 337 (quoting *Terry v. Ohio,* 392 U.S. at 24-25). Here, T.A.S. was required not only to have her person searched – but to lift her shirt, inevitably revealing her bare

midriff, and to shake out her bra. Indeed, even much less intrusive searches have been held unconstitutional because of the importance courts accord to protecting students' privacy. *See, e.g, Doe ex rel. Doe v. Little Rock School District*, 380 F.3d 349, 354 (8th Cir. 2004) ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."); *Hough v. Shakopee Public Schools*, 608 F. Supp.2d 1087, 1105 (D. Minn. 2009) (characterizing a search in which students had to "partially disrobe (i.e., to take off their shoes and socks, and sometimes coats, sweaters, or sweatshirts) and to permit school employees to look inside their clothes (i.e., under their waistbands and pant legs)" as "extraordinarily intrusive," and "far more intrusive than the searches approved in *Vernonia School District* and *Earls*").

B. Attendance At An Alternative School Does Not Justify a Suspicionless Strip Search.

In its brief, the State relies on the dissent's untenable assertion that, in addition to the diminished expectation of privacy of public school students, "T.A.S.'s expectation of privacy was . . . lowered by her attendance at an alternative school which more strictly monitored its student population, similar to adults working in a highly regulated industry." *In re T.A.S.*, 713 S.E.2d 211, 227 (N.C. Ct. App. 2011) (Steelman, J., dissenting). This conclusion lacks both legal and factual support.

(1) The Dissent's Position Lacks Legal Support.

There is a lack of legal support for this position. The cases cited by the dissent do not stand for the proposition that students in alternative schools have an expectation of privacy that is lower than the already-diminished expectation of privacy afforded students in traditional schools. The dissent relies on *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386 (1995) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 627, 109 S.Ct. 1402 (1989). In *Vernonia*, urine testing of student athletes who volunteered for extracurricular activities was upheld as a valid search because the school's interest in preventing student athletes from using drugs outweighed the privacy invasion of a urine test. *Vernonia*, 515 U.S. at 664-65. The Court explained that the privacy invasion was minimal because student athletes often participate in "communal undressing" and undergo preseason physical exams. *Id.* at 657. In *Skinner*, suspicionless drug testing of railroad employees was upheld because the interests of the state in preventing railroad accidents outweighed the "minimal" privacy interests implicated in the search. *Skinner*, 489 U.S. at 624.

Both *Vernonia* and *Skinner* allowed generalized, suspicionless drug testing where the state had an interest that outweighed the limited privacy invasion. Furthermore, the search in these two cases was a private urine test, not a physical search of clothing and undergarments by school officials and law enforcement.

Neither case supports the dissent's contention that alternative school students have an even more diminished expectation of privacy simply by virtue of their attendance at an alternative school.

Placement in an alternative school is not akin to voluntarily participating in an extracurricular activity; on the contrary, placement in an alternative school is often either mandatory or a student's best chance at succeeding in school. Student athletes or students participating in other extracurricular activities could simply drop these activities if they objected to being searched. An alternative school student should not have to choose between an intrusive search and attending school; indeed, students like T.A.S. could not remove themselves from the alternative school without significant consequences.

(2) "At Risk" Students Are Placed in Alternative Schools for a Variety of Reasons, Including Non-Disciplinary Reasons, And Should Not Be Treated Like Criminals.

In addition to the lack of legal support noted above, the dissent's conclusion also lacks factual support. Alternative learning programs (ALPs) in this State serve students of all ages, who attend these programs for many reasons. *See, e.g.,* North Carolina State Board of Education and Department of Public Instruction, *Alternative Learning Programs Evaluation: 2001-2002* 21-22 (2003) http://www.ncpublicschools.org/data/reports/ (reporting that students attended alternative schools for academic, behavioral, and personal reasons in fairly equal

numbers). Determining the mission and population of ALPs begins with the North Carolina State Board of Education ("the Board"), which has a legislative mandate to "adopt standards for assigning students to alternative learning programs." N.C. Gen. Stat. § 115C-12(24). The statute also requires the Board to provide a description of the recommended programs and services for the students so assigned.

Thus, the state Board has directed local school systems to provide alternative learning options for "students at risk of truancy, academic failure, behavior problems, and/or dropping out of school." North Carolina State Board of Education and Department of Public Instruction, *Alternative Learning Programs and Schools Standards and Implementation Procedure* 53, http://www.ncpublicschools.org/alp/develop/. Many alternative schools exist to provide "at-risk" students a chance to obtain an education so that they can become productive members of society. North Carolina Dept. of Pub. Instruction, Alternative Learning Programs and Schools: Standards and Implementation Procedures 5 (2009), *available at* http://www.ncpublicschools.org/docs/alp/develop/alp-standards.doc. [3]

[3] This trend persists nationally. Thirty-nine percent of school districts reported having alternative programs for "at-risk" students during the 2000-2001 school year. In total, approximately 1.3 percent of all public school students, or 612,900 students, were enrolled in alternative programs during that school year. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT IF EDUCATION, PUBLIC SCHOOLS AND PROGRAMS FOR STUDENTS AT RISK OF EDUCATION FAILURE

Separate schools, like Brunswick County Academy, are one type of alternative learning program accepted by the Board, which has enacted the following guiding definition for such a school:

> It serves **at-risk** students . . . An alternative school is different from a regular public school and provides choices of routes to completion of school. For the majority of students, the goal is to return to the regular public school. Alternative schools may vary from other schools in such areas as teaching methods, hours, curriculum, or sites, and they are intended to meet particular learning needs.

Id. at 54. For further clarification, the Board has described the "at risk" student these alternative schools are specifically designed to serve:

> A student at risk is a young person who, because of a wide range of individual, personal, financial, familial, social, behavioral or academic circumstances, may experience school failure or other unwanted outcomes unless interventions occur to reduce the risk factors. Circumstances which often place students at risk may include but are not limited to: not meeting state/local proficiency standards; grade retention; unidentified or inadequately addressed learning needs; alienation from school life; unchallenging curricula and/or instruction; tardiness and/or poor school attendance; negative peer influence; unmanageable behavior; substance abuse and other health risk behaviors; abuse and neglect; inadequate parental, family, and/or school support; and limited English proficiency.

Id., *see also* North Carolina State Board of Education and Department of Public Instruction, *Policies and Procedures for Alternative Learning Programs and Schools Grades K-12* 10 (2003).

2000-01 at 33-34 (2002).

Contrary to the State's extremely narrow and prejudicial view of an "at risk" student, the Board has taken pains to list a myriad of circumstances which may place a student at risk of school failure, including "unidentified or inadequately addressed learning needs," "alienation from school life," "not meeting state/local proficiency standards," "grade retention," "abuse and neglect," and "unchallenging curricula and/or instruction." At the core of the Board's alternative learning program standards is the idea that some students, in order to succeed, need different – alternative – options than those a traditional school can provide. *See id.* at 53. ("Alternative learning programs provide individualized programs outside of a standard classroom setting in a caring atmosphere in which students learn the skills necessary to redirect their lives.").

The Board clearly recognizes that substance abuse, misbehavior and potential participation in juvenile crime are also risk factors facing many of the children who need alternative education, that many students will be assigned to alternative schools because they break the rules of their sending school, and that school safety is paramount. *Id.* However, the published Standards clearly direct alternative schools to avoid treating their students, those who choose to go there or those involuntarily assigned, like criminals:

> They [ALPs] should not be designed as punitive programs where placement is a punishment, but as an additional resource to help students most at-risk and in need so they can succeed while in school and later in their communities. The needs of the individual student,

> whether they are behavioral, social or academic should always be carefully considered when placement decisions are made so that individual needs are adequately addressed, making success more probable. Many methods can be used to educate, and many different environments can allow education to occur successfully. The basic belief is that not all students learn in the same structured way, and that each student has individual strengths, talents and interests that can be built upon.

Id. at 51, *see also* North Carolina State Board of Education and Department of Public Instruction, *Policies and Procedures for Alternative Learning Programs and Schools Grades K-12* 8 (2003) (listing, as "characteristics of less effective programs," programs that are punitive in mission, purpose, design, or operation).

By repeatedly mischaracterizing "at risk" alternative school students, the State directly contradicts the clear guidance of the agency responsible for alternative schools. These schools must not be viewed as punishment and these students have not been sent there for punitive purposes. These students are in need of support and educational engagement, not treatment as criminals.

(3) Minority Students and Students from Economically Disadvantaged Families Are Overrepresented in North Carolina's Alternative Learning Programs and Are Disproportionately Impacted by Laws and Policies Affecting These Programs.

African-American students, economically disadvantaged students, and students with disabilities are significantly overrepresented in North Carolina's alternative schools and other alternative learning programs. During the nine years

for which data on alternative school attendance has been reported to the state legislature, an average of 51% – more than half – of alternative school students have been African-American. *See* North Carolina Department of Public Instruction ("NC DPI") and State Board of Education ("SBOE"), *Annual Study of Suspensions and Expulsions* (school years 2001-2002, 2002-2003, 2003-2004, 2005-2006, 2006-2007) (reporting, in one section of the study each school year, on all alternative school enrollment), and *Consolidated Data Report* (school year 2007-2008 through school year 2009-2010) (reporting same), *available at* http://www.dpi.state.nc.us/research/discipline/reports/. African-American students composed, on average, only 31% of the entire North Carolina Public School student body during those same years. *See* NC DPI and SBOE, *Statistical Profile* 18 (2009), *available at* http://www.ncpublicschools.org/docs/fbs/resources/data/statisticalprofile/2009profile.pdf. African-American students who attend alternative schools would thus be disproportionately impacted by any law or policy applicable to alternative schools.

The same is true of students who have disabilities identified under the Individuals with Disabilities in Education Improvement Act. Though the North Carolina Department of Public Instruction discontinued, after school year 2006-2007, its reporting of the number of disabled students attending alternative schools statewide, reports from that year and prior years show that, on average, 21% of

alternative school students have identified disabilities, compared to the 14% statewide average disabled student population during the same years. *See* NC DPI and SBOE, *Annual Study of Suspensions and Expulsions* (school years 2001-2002, 2002-2003, 2003-2004, 2005-2006, 2006-2007), and *Statistical Profile* (2002, 2003, 2005, 2006, 2007). These students suffered from a range of diagnoses, ranging from intellectual disabilities (low IQ) to specific learning disabilities and emotional disabilities. *Id.*

Though the NC DPI has not reported statistics about alternative school students' economic status since 2002, the available numbers are alarming. In the 2000-2001 school year, 39% of North Carolina public school students were eligible for a federal program that provides free and reduced lunches to impoverished students. National Center for Education Statistics, *Digest of Education Statistics* (2010), *available at* http://nces.ed.gov/programs/digest/d10/tables/dt10_044.asp. However, a far greater percentage of the reported alternative school students – 62% – qualified for this poverty program the same year. *See* NC DPI and SBOE, *Alternative Learning Programs Evaluation: 2001-2002* 26 (2003). The following year, the percentage of alternative school students statewide who were eligible for free and reduced lunch jumped to 76.2%. *Id.*

And significantly, many of the students who attend alternative schools are still in elementary school. In the last ten years, 3031 students in fifth grade or younger have been placed in alterative learning programs. *See* NC DPI and SBOE, *Annual Study of Suspensions and Expulsions* (school years 2001-2002, 2002-2003, 2003-2004, 2005-2006, 2006-2007). These numbers underscore the need for the courts to reject an effort by the State to carve out alternative schools for adverse constitutional treatment.

(4) Lowering the Expectation of Privacy for Alternative School Students May Ultimately Lower the Expectation of Privacy for *All* Students.

The Supreme Court has articulated a standard that is meant to clarify for school officials the level of suspicion they need to search individual students for contraband. Even with a sufficient amount of suspicion, the search must not be more invasive than necessary. *T.L.O.*, 469 U.S. at 341-42. Requiring "reasonable suspicion" instead of "probable cause" reflects the Court's recognition that school officials need to maintain order in their schools. This standard is applicable to *all* public schools. There is no reason to lower the expectation of privacy for students based on the type of school they attend; such a standard would result in inconsistency in school searches and could result in further diminishment of student privacy expectations in all schools.

A clear standard for school searches – no matter the type of school – is essential for safeguarding the privacy interests of all students. *See* Emily J. Nelson, *Note: Custodial Strip Searches of Juveniles: How* Safford *Informs a New Two-Tiered Standard of Review*, 52 B.C. L. REV. 339, 341-342 (2011) ("The need for a clear standard is further illuminated by the disparity in the way some courts address strip searches of juveniles as opposed to adults."). School officials need to know what is required of them when it comes to searches and seizures of students. Adopting a "sliding scale" of privacy rights will lead to widespread confusion and severe privacy invasions.

Moreover, lowering the expectation of privacy for students who attend alternative schools or schools that employ heightened security measures would turn public school students into presumptive juvenile delinquents.[4] The Supreme Court has been clear that school students should not be equated with prisoners.

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[4] Even in the context of juvenile detention facilities, courts still afford minors protection against unreasonable searches. *See Smook v. Minnehaha Co.*, 457 F.3d 806 (8th Cir. 2006) (strip search of juvenile arrested and taken to juvenile detention facility was reasonable where state's interest in protecting confined children from weapons and drugs outweighed the level of invasion of search of juvenile's outer clothing); *N.G. v. Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004) ("Strip searches of children pose the reasonableness inquiry in a context where both the interests supporting and opposing such searches appear to be greater than with searches of adults confined for minor offenses. Where the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (in loco parentis) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm. . . . At the same time, the adverse psychological effect of a strip search is likely to be more severe upon a child than an adult . . . ."). "[T]he determination of the reasonableness under the Fourth Amendment of a strip search of a juvenile delinquent in a detention facility requires us to balance 'the need for the particular search against the invasion of personal rights that the search entails.'" *Reynolds v. City of Anchorage*, 379 F.3d 358, 364 (6th

C. Because the Search of T.A.S. Was Used By Law Enforcement Authorities for Arrest and Prosecution, No "Special Needs Exception" Applies, and Probable Cause Was Required.

The search of T.A.S. cannot be categorized as one conducted solely for purposes of maintaining school safety -- such that the reasonableness standard or special needs exception applies -- when the fruit of that search was in fact obtained with school officials working in concert with police and then used by law enforcement authorities for arrest and prosecution. Thus, the traditional Fourth Amendment requirement of probable cause applied.

Generally, a search is reasonable, and therefore constitutional under the Fourth Amendment, when the government official has both a warrant and probable cause. *Vernonia School Dist.47J v. Acton*, 515 U.S. at 652-653. However, when meeting that standard is impracticable, and the search is conducted for non-law enforcement goals, the Supreme Court has established that the search falls under a "special needs" exception, and may proceed with a lower degree of suspicion. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (A search unsupported by probable cause can be constitutional if it involves "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause

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Cir. 2004) (citing *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861 (1979)). "The situation of the juvenile delinquent inmates . . . lay somewhere between that of prison inmates and students in school." *Id.* The Eleventh Circuit has upheld strip searches of incarcerated juveniles, but only upon a showing of reasonable suspicion of possession of contraband. *See Justice v. City of Peachtree City*, 961 F.2d 188, 193 (11th Cir. 1992). The Supreme Court has not addressed the privacy expectations of juveniles in the context of a juvenile detention facility. *See Smook*, 457

requirement impracticable."); *Ferguson v. City of Charleston*, 532 U.S 67, 84 n.20, 121 S.Ct. 1281 (2001).

A key distinction between special needs searches and searches requiring probable cause is the involvement of law enforcement. Thus, the existence of a legitimate need alone will not necessarily justify a special need search: "extensive entanglement of law enforcement cannot be justified by reference to legitimate needs." *Ferguson*, 532 U.S at 84 n.20 (also noting that a "benign" motive cannot "justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement" with a particular search or seizure). Indeed, "special needs" cases generally involve searches *not* performed for the purposes of detecting or investigating criminal activity. *See, e.g., Skinner,* 489 U.S. at 621 (1989) (drug testing of railroad employees constitutional as drug and alcohol use was related to increases in railway accidents and fatalities, and ensuring railway safety was important governmental interest); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666, 109 S.Ct. 1384 (1989) (purposes of drug testing program "are to deter drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions. . . .").

F.3d 806, *cert. denied*, 549 U.S. 1317 (2007).

The special needs exception has generally rested on either the lack of an association with law enforcement or restrictions on the use of the information obtained in the prosecution of a crime. *See Ferguson*, 532 U.S. at 79 (the "critical" marker of "a valid "special need" is that the objective is "divorced from the State's general interest in law enforcement."). Without these limiting parameters, most governmental functions and programs with important, legitimate goals could routinely insulate themselves from Fourth Amendment requirements.

The fact that a search is conducted by a school official or other government actor rather than a law enforcement officer does not convert it into a special needs search. In *Ferguson*, for example, a hospital's drug testing program for pregnant women, developed in concert with law enforcement officials, could result in criminal charges being filed against the women. *See Ferguson*, 532 U.S at 86. The Court thus concluded that it was pervaded by a law enforcement purpose, and therefore not subject to a special needs test. Indeed, the mere presence of a law enforcement official in searches and seizures can be *per se* coercive. *See, e.g., Calabretta v. Floyd*, 189 F. 3d 808, 813 (9th Cir. 1999) (police officer who did not play an active role in interrogation of child abuse suspect was present at request of child welfare agency to intimidate suspect to open door and allow entrance into home).

Neither the North Carolina Supreme Court nor the United States Supreme Court has explicitly decided what standard – probable cause or reasonable suspicion – the lower courts should apply to assess the constitutionality of a school search when school officials work in concert with law enforcement to execute the search.[5] United States Supreme Court case law, however, suggests that no special needs exception exists for such a search, particularly when the ultimate consequence may be arrest and justice system involvement.

At its core, the special needs exception aids school officials in their efforts to implement the legitimate state goal of preserving order to create a positive learning environment for students. As a result, it does not apply when attached to law enforcement consequences. The special needs exception provides school officials with a "certain degree of flexibility *in school disciplinary procedures*" so that they can root out "conduct [that] is destructive of school order or of a proper educational environment." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)

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[5] Regarding the United States Supreme Court position, *see New Jersey v. T.L.O.,* 469 U.S. 325, 341, n.7, 105 S.Ct. 733 (1985) (expressly reserving judgment on the appropriate legal standard for determining the constitutionality of searches conducted by school officials in conjunction with, or at the behest of, law enforcement officers.) North Carolina intermediate appellate courts have held that the reasonableness standard applies to those school search cases where a school official initiates a search on his own, law-enforcement involvement is minimal, and/or or officers act in conjunction with school officials. *In re D.D.*, 146, N.C. App. 309, 554 S.E.2d 346, 352-53 (2001), *appeal dism'd and rev. denied*, 558 S.E.2d 867 (2001). These courts have stated that the traditional probable cause requirement, as opposed to reasonableness requirement, governs cases in which outside law enforcement officers search students as part of independent investigation or cases in which school official searches students at request or behest of outside law-enforcement officers and agencies. *Id.* However, *Amici*'s research did not yield any decisions by the North Carolina Supreme Court holding that this is indeed the constitutional test when school and law

(emphasis added). Key to this exception is the Court's finding that the needs of teachers and administrators to uphold order and discipline justify relaxing the usual warrant requirement. *Vernonia*, 515 U.S. at 653 (citing *T.L.O.*, 469 U.S. at 340-41) (Rigid application of the warrant requirement "'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'")

The fact that the search triggers school disciplinary consequences rather than juvenile or criminal justice system involvement is central to this analysis. In *Vernonia*, for example, the Court concluded that random drug testing of student athletes was constitutional under the special needs exception to the Fourth Amendment probable cause requirement in part because drug test results were not turned over to the police. 515 U.S. at 658. The Court emphasized that the *only* consequence for students caught with positive drug tests was a school-based treatment program. Similarly, in *Earls*, the Court extended *Vernonia* to drug testing of students participating in extracurricular activities where "the School District's Policy *is not in any way* related to the conduct of criminal investigations." *Earls*, 536 U.S. at 829. (emphasis added).

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enforcement officials jointly conduct a search of students at school.

The United States Supreme Court's recent holding in the case of *In re J.D.B.*, 131 S.Ct. 2394 (2011), a case coming out of North Carolina, further supports the treatment of the T.A.S. search as a police, rather than a school discipline, search. In *J.D.B.*, the United States Supreme Court considered the question of the appropriate standard for determining if a youth is in custody when jointly *interrogated* by schools administrators and police at school. In that case, a 13 year-old boy was removed from his classroom by a school resource officer and escorted to a conference room, where he was questioned by the school resource officer, a second police officer, and two school administrators for 30-45 minutes behind a closed door. *Id.* at 2399. The Supreme Court applied the long-standing test to determine if the youth was in custody when he was jointly questioned by police and school staff such that *Miranda* warnings were warranted – whether, given the totality of the circumstances surrounding the interrogation, a reasonable person would have felt that he or she was free to terminate the interrogation and leave the room. *Id.* at 2402. The Court held that held that a child's age properly informs the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer. *Id.* at 2406.

Notably, the Court did not apply – or even discuss applying – a different, more deferential standard to determine whether J.D.B. was in custody simply

because he was interrogated in school and/or because he was jointly questioned by school staff and police. And the Court clearly recognized that school resource officers are still full law enforcement officers despite their assignment to a school setting. *See J.D.B.*, 131 S.Ct. at 2399 (noting that "the uniformed police officer on detail to the school (a so-called school resource officer)" interrogated the youth in concert with another police officer and two school staff persons).

The United States Supreme Court's refusal to dilute the traditional *Miranda* custody analysis simply because a youth was jointly interrogated by police and school officials as opposed to school officials acting alone, *J.D.B.*, *supra*; its recognition that regardless of the title, a school resource officer is still a uniformed police officer; and its emphasis on the fact that the fruits of school searches would not be turned over to law enforcement as a rationale for applying a more deferential standard than probable cause to searches conducted by school officials, *see Vernonia and Earls*, *supra*, all indicate that courts should apply the traditional probable cause test when school officials and law enforcement officers conduct joint searches.

Consequently, the search of T.A.S. cannot be categorized as one conducted solely for purposes of maintaining school safety – such that the reasonableness standard or special needs exception applies. The fruit of that search was in fact obtained with school officials working in concert with police and then used by law

enforcement authorities for arrest and prosecution. It was lacking in probable cause and was therefore unconstitutional.

D. <u>The Search of T.A.S. Violated Her Equal Protection Rights, As the Administrators Only Subjected Girls to a Strip Search.</u>

Incredibly, the evidence suggests that the blanket strip search at issue in this case was conducted on girl students *only – and with a male official in the room.* Consequently, in addition to the constitutional infirmities set forth above, the search at issue in this case also violates the Equal Protection clause of the Fourteenth Amendment.

Government classifications drawn on the basis of gender have been viewed with suspicion for decades, beginning in *Reed v. Reed,* 404 U.S. 71, 77, 92 S.Ct. 251 (1971), in which the Supreme Court condemned "dissimilar treatment for men and women who are . . . similarly situated." As noted by the Fourth Circuit in *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001), the Supreme Court did not view gender classifications as "'benign.'" (quoting *Frontiero v. Richardson,* 411 U.S. 677, 686, 93 S.Ct. 1764 (1973)); *United States v. Virginia,* 518 U.S. 515, 532, 116 S.Ct. 2264 (1996) ("Since *Reed,* the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature . . . .").

Thus, a gender classification is subject to heightened scrutiny and will fail unless it "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives." *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451 (1976); *see Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 150, 100 S.Ct. 1540 (1980); *see also Mitchell v. Commissioner of the Social Security Administration,* 182 F.3d 272, 274 (4th Cir. 1999) ("[C]ertain quasi-suspect classifications, such as gender and illegitimacy, are subject to an intermediate form of scrutiny and will be upheld if 'substantially related to a sufficiently important governmental interest.'" (quoting *City of Cleburne, Texas v. Cleburne Living Ctr.,* 473 U.S. 432, 441, 105 S.Ct. 3249 (1985))).

Government entities must demonstrate an "'exceedingly persuasive justification'" for a gender-based action, even when that action is designed to assist a particular gender. *VMI,* 518 U.S. at 524 (quoting *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724, 102 S.Ct. 3331, 3336 (1982) Here, however, the gender-based action was "degrading, demeaning, and highly intrusive," as set out in the opinion of the Court of Appeals, *In re T.A.S.,* __ N.C. App. __, 713 S.E.2d 211, 220 (2011), and had the potential to cause significant emotional harm to the girls at Brunswick County Academy. *See Safford Unified Sch. Dist. #1 v. Redding,* 129 S.Ct. 2633, 2641 (2009) ("Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and

humiliating."); *Hough*, 608 F. Supp.2d at 1105 (suggesting that much less intrusive searches in which students had to "partially disrobe (i.e., to take off their shoes and socks, and sometimes coats, sweaters, or sweatshirts) and to permit school employees to look inside their clothes (i.e., under their waistbands and pant legs)" served to "wholly obliterat[e]" students' privacy interests). This type of harmful gender-based discrimination simply cannot stand in North Carolina schools, or in any school in this nation.

E. The Search of T.A.S. Was Also Unconstitutional Under the North Carolina Constitution's Prohibition Against General Warrants.

As Judge Hunter noted in his concurrence, the search at issue here also violates the North Carolina Constitution's prohibition against general warrants. N.C. CONST. art. I, Sec. 20. The North Carolina Constitution has generally been held to provide greater individual protections than those granted by the United States Constitution. Courts are permitted to interpret the North Carolina Constitution differently than the Federal Constitution so long as citizens are not granted fewer rights under the North Carolina Constitution. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101 (1998). In other words, the Federal Constitution provides a floor for individual rights upon which a State may create additional protections for its citizens. *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 475, 515 S.E.2d 675 (1999).

Relevant to the case at hand is the State Constitution's prohibition of general warrants. This provision is analogous to the Fourth Amendment prohibition against "unreasonable searches and seizures;" however, the North Carolina protections can be read more broadly than those provided for in the Fourth Amendment. North Carolina's Article I, section 20 provides:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

N.C. CONST. art. I, § 20; *Jones v. Graham County Bd. of Educ.*, 197 N.C. App. 279, 288, 677 S.E.2d 171, 178 (2009) (Article 1, Section 20 provides protection "similar" to that provided by the Fourth Amendment.).

In order for a search to be deemed reasonable, there must have been "some quantum of individualized suspicion." *Jones*, 197 N.C. App. at 290, *see also Chandler v. Miller*, 520 U.S. 305, 308, 117 S.Ct. 1295 (1997) ("A search . . . is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."). Here, school administrators received a tip that pills were coming into the school hidden in the bras and underwear of students. The complaint did not name any particular student so all 134 students in the school were individually searched.

As highlighted by Judge Hunter in his concurrence, the search at issue in this case is analogous to that in *Jones v. Graham County Board of Education*, 197 N.C. App. 279, 288, 677 S.E.2d 171, 178 (2009), where the Court found that the school board's policy of requiring random, suspicionless drug and alcohol testing of all school board employees violated the state Constitution's guarantee against unreasonable searches. In *Jones*, the Board of Education implemented a new drug and alcohol testing policy for its staff, which required all staff to be tested upon implementation of the policy and thereafter be subject to random, suspicionless testing. In testimony at the district court level, members of the school board stated that no student had ever been in put in danger or been injured while under the care of an employee "whose body contained 'a detectable amount of an illegal drug or alcohol.'" *Id.* at 284.

In *T.A.S.*, the school principal had only a tip that pills that could "cause students to be unsafe" were coming into the school. She knew nothing else about the nature of the pills or which students possessed them. There was no particularized suspicion of *T.A.S.* or any other student – the school conducted a blanket search of all students. There was also no clear indication of danger to the students.

As *Jones* explains, in order to determine the reasonableness of a government search, the "nature of the intrusion on the individual's privacy" must be balanced

"against the promotion of legitimate governmental interests." *Id.* at 290. In the instant case, as in *Jones*, the search in question was quite invasive. In *Jones*, the school board policy for drug and alcohol testing provided for a variety of means by which an employee could be tested for drugs and alcohol, however, the lab the employees were referred to generally conducted urine tests, which the *Jones* court determined to be "remarkably intrusive." *Id.* at 293. The Court of Appeals in the case at hand found that "at the point the Academy required T.A.S. to pull out her bra in searching her person for evidence of pills of an unknown nature and quantity, 'the content of the suspicion failed to match the degree of intrusion,'" *Safford Unified Sch. Dist. #1 v. Redding*, 129 S.Ct. 2633, 2636 (2009), and the search was accordingly unreasonable." *In re T.A.S.*, 713 S.E.2d at 213. The invasive nature of the search at issue here and the one analyzed in *Jones*, were both unreasonable and went beyond the bounds of what is permitted under the North Carolina constitution.

The North Carolina Constitution's prohibition on overly broad searches and general warrants prohibits government actors from "search[ing] suspected place without evidence of the act committed"; such a search is "tantamount to issuing a general warrant expressly prohibited in the North Carolina Constitution." *In re Stumbo,* 357 N.C. 279, 582 S.E.2d 255 (2003). Here, there was no individualized suspicion of *T.A.S.* and the District Court exceeded the bounds of permissible

searches under the North Carolina Constitution when it dismissed the defendant's motion to suppress the evidence obtained through this unlawful search.

Finally, this case is easily distinguished from cases in which school searches have been upheld. In the cases where searches of students were found to be constitutional, individual students were searched based on individualized suspicion. For example, in *In re Murray,* 135 N.C. App. 648, 523 S.E.2d 110 (2000), the search was upheld because school authorities were acting on a tip regarding a specific student and the search was limited to the student's backpack where the tip suggested the contraband would be hidden.

Similarly, in *In re D.D.*, a search by the principal of students from another school who had come on campus was upheld because the principal received a specific tip that a group of non-students was coming to campus to fight; the principal had an obligation to stop all non-students on the premises without permission; there had been past incidents of non-students bringing weapons on the campus in order to fight; and the non-students became aggressive when approached by the principal. *In re D.D.*, 146, N.C. App. 309, 321-22, 554 S.E.2d 346 (2001). Yet in *T.A.S.*, the principal conducted an invasive, blanket search of all students based on a total lack of individualized suspicion. Thus, not only did the search violate T.A.S.'s Fourth and Fourteenth Amendment rights, it violated her rights under the North Carolina Constitution.

CONCLUSION

For the reasons above, *Amici Curiae* Advocates for Children's Services of Legal Aid of North Carolina; American Civil Liberties Union Foundation; American Civil Liberties Union of North Carolina Legal Foundation; Juvenile Law Center; National Juvenile Defender Center; North Carolina Office of the Juvenile Defender; Southern Coalition for Social Justice; Southern Juvenile Defender Center; Southern Poverty Law Center; UNC Center for Civil Rights; and UNC Juvenile Justice Clinic respectfully submit that the Court of Appeals correctly applied the law in finding that the blanket search of the entire school that led to T.A.S.'s arrest was constitutionally unreasonable. For that reason, *Amici* respectfully request that this Court affirm the decision of the Court of Appeals.

Respectfully submitted, this the 4th day of November, 2011.

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I certify that a copy of the foregoing Brief *Amici Curiae* was served upon counsel for the parties by depositing a copy in the United States Mail, postage pre-paid and addressed as follows:

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