# United States Court of Appeals

*for the*

# Eighth Circuit

Case No. 12-1001

MICHAEL BARRETT, IV; BRANDON KITTLE-AIKELEY; JACOB CURLISS; JOHN DOE

*Plaintiffs-Appellees*

– v. –

DONALD M. CLAYCOMB, in his official capacity as President of the Linn State Technical College Board of Regents; TONI R. SCHWARTZ, in her official capacity as member of the Linn State Technical College Board of Regents; JOHN KLEBBA, in his official capacity as member of Linn State Technical College Board of Regents;

*(For Continuation of Caption See Inside Cover)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI - JEFFERSON CITY

## BRIEF ON BEHALF OF *AMICI CURIAE* NATIONAL EDUCATION ASSOCIATION, MISSOURI NATIONAL EDUCATION ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, MISSOURI CHAPTER - NATIONAL ASSOCIATION OF SOCIAL WORKERS, MISSOURI ASSOCIATION FOR SOCIAL WELFARE AND THE AMERICAN ACADEMY OF ADDICTION PSYCHIATRY

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*Defendants-Appellants*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Other Authorities

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* National Education Association, Missouri National Education Association, National Association of Social Workers, Missouri Chapter -National Association of Social Workers, Missouri Association for Social Welfare, and the American Academy of Addiction Psychiatry, hereby certify that:

(1) None of the *Amici* has a parent corporation; and

(2) None of the *Amici* issues stock.

/s/ Daniel N. Abrahamson

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Counsel for *Amici Curiae*

## STATEMENT OF INTEREST[1]

As more completely described in an Appendix to this brief, *Amici Curiae* include professional organizations in the fields of substance abuse research and treatment, social work, and education. Some *Amici* provide or oversee health and social services, including drug treatment, to adolescents and young adults; others have devoted careers to educating our nation's youth in secondary and post-secondary settings; and still others have engaged in research about inducements and barriers to effective learning and educational attainment.

A central theme of the work of *Amici* is the need to appropriately assess the health and educational needs of students in the classroom, and to respond, when warranted, with proven, evidence-based interventions tailored to meet those needs. The Linn State Technical College's (College) policy – requiring all students to be drug tested – directly implicates *Amici*'s areas of expertise and concern.

*Amici* oppose the College's drug testing policy. *Amici*'s objections to the College's drug testing policy, however, should not be construed as disputing or minimizing the dangers of substance misuse, abuse and addiction, particularly within educational settings. On the contrary, it is *Amici*'s recognition of the importance, seriousness, and complexity of these problems, and *Amici*'s

[1] No party or party's counsel authored the brief in whole or in part or contributed money intended to fund preparing or submitting it; and no person other than *Amici Curiae*, their members, or counsel, contributed money intended to fund its preparation or submission.

understanding of what can and cannot effectively address them, that informs and animates *Amici*'s position and *Amici*'s desire to provide the Court with professional insight about the issues implicated in this appeal.

Make no mistake: *Amici* are unwavering in their commitment to reducing alcohol, tobacco and drug abuse, and related risky behaviors. But it is precisely because of this commitment that *Amici* feel compelled to inform the Court that the College's drug testing policy hampers rather than advances the College's laudable interest in preventing substance abuse and reducing alcohol and drug-related harms. Indeed, research has repeatedly shown that mandatory, suspicionless student drug testing schemes like the one at issue here fail to ameliorate drug misuse and are deeply problematic with respect to the counterproductive incentives they create .

## SUMMARY OF ARGUMENT

The College seeks to address an issue (dangerous drug misuse by students) about which there is no evidence of a problem by imposing a policy (mandatory suspicionless drug testing) shown to be *in*effective at protecting the very interests that the College professes to promote: student health and safety. In addition to being unconstitutional, the College's policy is grievously misguided and fatally flawed.

Research has repeatedly *failed* to demonstrate that random, suspicionless drug testing of students prevents or reduces student alcohol or other drug use. Moreover, mandatory suspicionless drug testing policies, particularly those (like the College's) that condition access to educational opportunities on such testing, create unwarranted obstacles to students' academic enrollment, participation in school life, scholastic success and career opportunities, and may themselves pose risks to student health and well-being.

Consistent with this research, as well as their own pedagogical and clinical experience, the nation's leading experts in education and school health have voiced strong reservations about student drug testing and an increasing number vigorously oppose such testing.

Particularly worrisome is that students who are inclined towards drug experimentation may attempt to "beat" the drug test by ingesting substances, such as alcohol, which are not detected by the test but which pose far greater dangers to their health than the drugs for which the school screens. This dangerous, unintended consequence is a powerful countervailing factor that is often overlooked in the assessment of student drug testing schemes.

Also troubling is the infringement of medical privacy entailed by the administration and assessment of urine screens. In order for the College's drug testing program to proceed, students must accept the disclosure of the medications

they take and the medical conditions with which they live, no matter how closely held and personally sensitive that information may be. The College's policy of notifying the parents of adult students about positive test results almost certainly exacerbates the vulnerability felt by many students as a result of the mandatory testing scheme.

Finally, any discussion of drug testing must take account of the distinct risk of and harms engendered by inaccurate drug test results. The accuracy and reliability of drug testing programs is particularly pertinent in the school context, where testing programs operate without the benefit of binding guidelines or regulatory oversight.

Mandatory student drug testing programs like that advanced by the College *cannot* work in the way they are hoped, will do little or nothing to dissuade student drug misuse or promote school safety, and will leave some, perhaps many, students worse off than had the school not implemented a testing policy at all.

## ARGUMENT

### I. SCIENTIFIC RESEARCH DOES NOT SUPPORT THE EFFICACY OF MANDATORY, SUSPICIONLESS STUDENT DRUG TESTING

The current state of scientific research fails to support the College's assumption that mandatory, suspicionless drug testing reduces student drug use.

Leading experts on adolescent health and their professional associations have steadfastly questioned the wisdom of undertaking such testing. For example, the American Academy of Pediatrics (Academy), an organization of 60,000 pediatricians committed, *inter alia*, to the social health and well-being of all adolescents and young adults, has repeatedly opposed the involuntary drug testing of adolescents based on its review of the scientific literature. Am. Acad. of Pediatrics, Comm. on Substance Abuse and Council on School Health, *Testing for Drugs of Abuse in Children and Adolescents: Addendum—Testing in Schools and at Home*, 119 PEDIATRICS 627 (2007) ("In 1996, the AAP published (and reaffirmed in 2006) its policy statement titled 'Testing for Drugs of Abuse in Children and Adolescents' which opposed involuntary testing of adolescents for drugs of abuse.")

As the Academy observes, "there is little evidence of the effectiveness of school-based drug testing in the scientific literature." *Id.* at 628. The Academy's conclusion mirrors that of many other adolescent health professionals and professional associations. *See, e.g.*, Melissa Weddle & Patricia K. Kokotailo, *Policy Forum—Confidentiality and Consent in Adolescent Substance Abuse: An Update*, 7 VIRTUAL MENTOR: AM. MED. ASS'N J. ETHICS (2005) ("There is little evidence of the effectiveness of school-based drug testing in the scientific literature.")

Notably, the first national large-scale study of student drug testing found no association between school-based drug testing and students' reported drug use. Ryoko Yamaguchi et al., *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159 (2003). Data collected between 1998 and 2001 from 76,000 students nationwide in 8th, 10th and 12th grades led University of Michigan researchers to conclude that drug testing did *not* reduce illicit drug use among students.

Dr. Lloyd D. Johnston, an author of *Monitoring the Future*—the leading federal survey of trends in student drug use and attitudes about drugs—observed that the Michigan study "suggests that there really isn't an impact from drug testing as practiced . . . . I don't think it brings about any constructive changes in [student] attitudes about drugs or their belief in the danger associated with using them." Greg Winter, *Study Finds No Sign that Testing Deters Students' Drug Use*, N.Y. Times (May 17, 2003).

The Michigan researchers subsequently conducted a larger study encompassing more schools and yielding more data about random, suspicionless student drug testing programs. The results of this second study reinforced the researchers' earlier conclusions:

> [D]oes drug testing prevent or inhibit student drug use? Our data suggests that . . . **it does not** . . . .

> The two forms of drug testing that are generally assumed to be most promising for reducing student drug use—random testing applied to all students . . . and testing of athletes—**did not produce encouraging results**.

Ryoko Yamaguchi et al, *Drug Testing in Schools: Policies, Practices, and Association with Student Drug Use*, YOUTH, EDUC. & SOC'Y (YES) OCCASIONAL PAPERS SERIES at 15-16 (The Robert Wood Johnson Foundation, 2003) (emphases added.)

The College's drug testing policy, in all relevant respects, tracks the policies that these (and other) researchers have determined to be ineffective. Irrespective of the validity of the College's concerns that its students are likely to engage in dangerous drug use, the College's "solution" for its perceived problem lacks evidentiary basis as a viable intervention.

## II. MANDATORY SUSPICIONLESS URINE SCREENING IS ILL-DESIGNED TO ADVANCE THE COLLEGE'S SAFETY INTERESTS AND MAY PROMOTE RISKIER BEHAVIOR.

As noted above, scientific research shows that mandatory student drug testing does not prevent or deter student drug use. The College's drug testing scheme is also fatally flawed in its operational details. Specifically, the urine screen at the heart of the College's policy is of limited diagnostic value. Such drug screens are likely to miss evidence of harmful drug use or abuse, misidentify myriad innocent or non-behaviors as illicit drug use, and possibly create dangerous

incentives for students to engage in even riskier drug taking behavior which the urine screens do not detect.

The College's drug testing program's stated "emphasis is on detecting, preventing and deterring drug use and abuse among students." Linn State Technical College *Student Handbook* 19 (2011). Urine drug screening, however, is diagnostically limited. A positive urinalysis result, if accurate, indicates only the presence of a drug or its metabolite in the body. It "does not", as the United States Department of Justice explains, "indicate abuse or addiction; recency; frequency, or amount of use; or impairment." Bureau of Justice Statistics, *Drugs, Crime, and the Justice System: A National Report* 119 (1992). *Accord*, U.S. Dept. of Health and Human Servs., Office of the Assistant Sec'y for Planning and Evaluation, Office of Human Servs. Policy, *Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies*, 4 (2011) ("Drug tests cannot measure frequency of use . . . severity of impairment or whether an individual has a substance use disorder that requires treatment.")

Urinalysis is ill-suited to detect all but the most recent use of common drugs of abuse. For example, amphetamines, cocaine, and heroin, among others are only detectible generally within two days of ingestion. *See* U.S. Dept. of Health and Human Servs. (2011), *supra*, at 4 ("Urine drug tests, which are the least expensive and most frequently used form of drug test, can generally detect . . . cocaine,

heroin and other 'hard' drugs used within the past two days . . . ."). Thus, a College student who ingested one of these substances four or five days before the test but refrained from doing so in the 48 hours prior to the test would likely pass the test. Only the most drug-dependent student, unable to abstain from these drugs for even a short period of time, would be "caught" by the test. But it is exceedingly likely that the erratic behavior of such a student would come to the attention of College staff and administrators and so trigger the College's suspicion-based drug testing policy. In short, it is not clear how the College's interest in thwarting drug use and promoting health and safety is advanced by its mandatory urine screening policy.

Notably, the most likely drug to be detected by the College's testing program is marijuana. That is because marijuana is the most readily detectable illicit drug in toxicological tests, in large part because marijuana takes far longer than most other drugs to be fully excreted from the body. Paul L. Cary, *The Marijuana Detection Window: Determining the Length of Time Cannabinoids Will Remain Detectable in Urine Following Smoking: A Critical Review of Relevant Research and Cannabinoid Detection Guidance for Drug Courts*, 5 Drug Court Review 23, 23-24, 31 (2005) (finding that marijuana's metabolites may be detected in the urine of regular users for days or weeks after past use.) Yet marijuana is far less likely than other drugs to affect academic achievement or job performance.

*See e.g.*, Lynn Zimmer and John P. Morgan, *Marijuana Myths, Marijuana Facts: A Review of the Scientific Evidence* 63-68 (1997) (marijuana users are similar to non-users in most employment related measures, including grade-point average, diligence on the job, and earning capacity). *See also* Joel B. Bennett and Wayne E. K. Lehman, eds., *Preventing Workplace Substance Abuse: Beyond Drug Testing to Wellness* 10 (2003) (observing that "testing appears to detect primarily recreational use of less harmful drugs that may or may not affect performance"). Marijuana is also *less* dangerous to individual and social health than other illegal drugs and many commonly used licit drugs. *See e.g.* Robin Room et al., *Cannabis Policy: Moving Beyond Stalemate: Report of the Global Cannabis Commission*, Extended Summary 5 (2010) ("From a public health perspective, the harms associated with cannabis are modest when compared to legal drugs (alcohol and tobacco) and illegal drugs (amphetamines, heroin and cocaine)."); David J. Nutt, *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 396 The Lancet 1047 (2007); Wayne Hall et al., *A Comparative Appraisal of the Health and Psychological Consequences of Alcohol, Cannabis, Nicotine and Opiate Use*, World Health Organization (1995).

As researchers, clinicians and classroom educators recognize from professional experience, for students who desire, for whatever reason, to experiment with alcohol or drugs, "it is fairly easy to defeat drug tests, and most

drug-involved youth are all too familiar with ways to do so." Am. Acad. Pediatrics, *supra*, at 629. Sadly, these evasive techniques can involve engaging in drug-taking behaviors that can increase risks to health and safety.

Because marijuana use is more readily detectible by urine screens than other drugs such as amphetamines, cocaine, and heroin, a foreseeable but unintended and negative consequence of College's testing scheme is to encourage students who desire an intoxicant to use one of the more harmful substances that have shorter detection windows. *Id*. (warning that mandatory student drug testing can lead some students to engage in more dangerous drug use to avoid detection). Still other students will avoid detection by ingesting potentially more harmful substances, such as inhalants, for which the urine screen does not test *at all*. *Id.*

On this point, it is critical to note that the College's drug testing scheme entirely fails to test for the most ubiquitous drug of abuse in Missouri, the nation and on college campuses, and the principal cause of drug-related morbidity, impairment and death across all socioeconomic classes: **Alcohol**. *See* Substance Abuse & Mental Health Servs. Admin., *Results from the 2010 National Survey on Drug Use and Health, 3.1., Alcohol Use among Persons Aged 12 or Older* (2011) (reporting that among full-time college students in 2010, "63.3 percent were current [past-month] drinkers, 42.2 percent were binge drinkers, and 15.6 percent were heavy drinkers."); David J. Nutt, *Drug Harms in the UK: a Multicriteria*

*Decision Analysis*. 376 Lancet 1558 (2010) (finding alcohol was by far the most harmful drug for both users and society compared to a wide variety of commonly used controlled substances); Ralph Hingson et al., *Magnitude of Alcohol-Related Mortality and Morbidity Among U.S. College Students Ages 18-24*, 26 Annu. Rev. Public Health 259 (2005) (noting that risky alcohol-related behaviors are commonplace on college campuses, with attendant injury, death and illness a national problem). As a result, a negative urine screen administered by the College provides little real comfort that campus safety is not being jeopardized by intoxication-impaired conduct.

In short, because "[s]tandard drug testing panels . . . do not detect many of the drugs most frequently abused by adolescents," Am. Acad. Pediatrics, *supra*, at 629:

> Widespread implementation of drug testing may . . . inadvertently encourage more students to abuse alcohol, which is associated with more adolescent deaths than any illicit drug . . . [and] may also motivate some drug involved adolescents to change from using drugs with relatively less associated morbidity and mortality, such as marijuana, to those that pose greater danger (e.g., inhalants) but are not detected by screening tests.

*Id*.

Of course, a sure-fire way to escape detection—and to avoid the compulsory divulgence of personal medical information, or a potential false-positive test result (discussed below) — is to not matriculate, or to drop out of the College and thereby dodge the test. But this option, writ large, is not without undesirable drug-related

consequences, for, as research reveals, non-college graduates report significantly higher rates of drug use than do college graduates. Substance Abuse & Mental Health Servs. Admin. (2011), *supra*, at 2., *Illicit Drug Use: Education* (reporting "[i]llicit drug use in 2010 varied by the educational status of adults aged 18 or older, with the rate of current [past-month] illicit drug use lower among college graduates (6.3 percent) than those with some college (10.7 percent), high school graduates (8.5 percent), and those who had not graduated from high school (10.8 percent)").

For these reasons, leading medical organizations like the American Academy of Pediatrics and educational experts, including *Amici* on this brief, consider intoxicant "substitution" to be a genuine risk and so caution against mandatory, suspicionless student drug testing as something that can actually *undermine* rather than promote student well-being. Even without an especially searching review, these basic facts of urine testing call into question two of the core purposes of the College's scheme: to "deter" harmful drug use and to identify students who endanger campus and community safety.

## III. THE COLLEGE'S DRUG TESTING SCHEME UNDERMINES STUDENT MEDICAL PRIVACY.

The mandatory suspicionless drug testing policy at the College requires testing of all new students and those returning to the College after a period of absence. There is an important dimension of this testing protocol that is little

discussed but nonetheless is troubling for a substantial number of students: the corrosive effect that such testing has on their medical privacy and bodily integrity.

Because of the procedural posture of this appeal, a detailed record has yet to be developed below on how the College's drug testing protocol affects the collection, retention, and dissemination of personal medical information. But one thing is for certain: in order for drug test results to be accurately assessed for illicit drug use, it is essential that students divulge to drug test administrators a comprehensive list of private information about what medications they are using or have recently used, and a "legitimate medical explanation" for such use. Karen E. Moeller et al., *Urine Drug Screening: Practical Guide for Clinicians*, 83 Mayo Clin. Procdgs. 66, 73 (2008) ("Understanding how to evaluate urine for adulterations, substitutions, and potential false-positive results [requires a] . . . detailed medication history, including prescription, nonprescription, and herbal medications"); Linn State Technical College, *Drug Screening, Frequently Asked Questions*, available at https://myinfo.linnstate.edu/ics/Drug_Screening.jnz.

In that urine samples may divulge numerous physiological facts about the student being tested that he or she may not want shared with others, such as the use of contraceptives, or any number of medical conditions, including diabetes, depression, heart trouble, HIV, epilepsy, and various sexually transmitted diseases, this forced medical accounting, as a condition of academic enrollment, is

potentially fraught with powerful feelings of shame and extreme vulnerability. *See, e.g.*, Allen Crocker et al., *Supports for Children with HIV Infection in School: Best Practices Guidelines*, 64 J. Sch. Health 32 (1994) (recommending that "few, if any, school personnel should receive information about a student's HIV status" and stressing that decision to inform school concerning student's sensitive medical information should rest with student); Judith W. DeCew, *Drug Testing Balancing Privacy and Public Safety*, 24 Hastings Center Report 17, 18 (March-April 1994).

Understandably, students fear that this sensitive, highly personal information will become known to educators and administrators whose decisions could influence their lives—a fear that promises of confidentiality may not wholly assuage. *Cf. Board of Ed. of Independent School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 833 (2002) (noting teacher viewed list of high school student's prescription medications related to drug test and left list in plain view of students). But fear of improper disclosure is actually justified, even compounded, by the College's troubling policy providing that parental notification of drug test results may occur for students younger than age 21.

In short, by mandating suspicionless drug testing of all students, the College is wading deep into important issues of student medical privacy. Moreover, it is doing so with little apparent regard for the sensitivities involved or robust protections needed to safeguard highly personal information. Against this

backdrop, it is entirely conceivable that students would refuse to reveal pertinent medical data, or even choose to forego enrollment rather than subject themselves to such disclosure. These are still further examples of how the College's drug testing scheme can cause more harm to students than it is likely to prevent.

## IV. DRUG TESTING IS RIFE WITH THE POTENTIAL FOR ERROR

Accuracy and reliability are essential components of drug testing. A false-positive drug test can have devastating academic, personal and professional consequences for an aspiring college student, particularly under the rules promulgated by the College where continued college enrollment is predicated on a negative test result. *See* Moeller, *supra*, at 73 ("Accurate interpretation of the validity and reliability of [drug screens] is critical for making decisions that will ultimately have social and legal ramifications.")

Drug testing, like many other forensic disciplines, is highly technical and imperfect. *See generally* Nat'l Acad. of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (finding serious deficiencies in the nation's forensic science system, great disparities among forensic science operations, lack of protocols and standards embraced by forensic practitioners, and lack of mandatory certification programs within forensic disciplines including toxicology and drug analysis). Myriad problems infect drug testing techniques and analyses, including the substantial risk of false positive test results, false negative

test results, specimen contamination, and chain of custody, storage and re-testing issues. Laxmaiah Manchikanti et al., *Protocol for Accuracy of Point of Care (POC) or In-Office Urine Drug Testing (Immunoassay) in Chronic Pain Patients: A Prospective Analysis of Immunoassay and Liquid Chromatography Tandem Mass Spectrometry*, 13 Pain Physician E1 (2010) ("[U]rine drug testing is associated with multiple methodological flaws."); Sharon Levy et al., *Drug Testing of Adolescents in Ambulatory Medicine: Physician Practices and Knowledge*, 160 Archives Pediatric Adolescent Med. 146 (2006); *Nat'l Acad. Of Sciences* (2009), *supra*, at 116-117 (discussing intrinsic risk of error with respect to the laboratory analysis of drugs, including, *inter alia*, equipment error, operator error, environmental conditions, sample mix-ups and contamination, and transcription error); Nat'l Acad. of Sciences, *Drug Testing* in *Under the Influence?: Drugs and the American Work Force* 8 (1994) ("Urine collections systems are a critical component of the drug-testing process, but they are the most vulnerable to interference or tampering.").

As the toxicological literature makes clear, "a number of routinely prescribed medications have been associated with triggering false-positive [urine drug screen] results." Nancy C. Brahm et al., *Commonly Prescribed Medications and Potential False-positive Urine Drug Screens*, 67 Am. J. Health Syst. Pharm. 1344 (2010). Indeed, positive results have been reported for a wide range of

commonly used formulary and nonprescription medications, including "brompheniramine, bupropion, chlorpromazine, clomipramine, dextromethorphan, diphenhydramine, doxylamine, ibuprofen, naproxen, promethazine, quetiapine, quinolones (ofloxacin and gatifloxacin), ranitidine, sertraline, thioridazine, trazodone, venlafaxine, verapamil, and a nonprescription nasal inhaler." *Id.* *See also* Am. Acad. Pediatrics, *supra*, at 629 (noting over-the-counter decongestants can cause false-positive results for amphetamine on the initial drug screen and confirmation tests).

What is more, even routinely ingested foods can trigger positive drug test results. *See* Nat'l Acad. of Sciences (1994), *supra*, at 192 ("Poppy seeds, which are commonly used on bagels and other baked foods, often . . . contain sufficient amounts of morphine to cause detectable concentrations of morphine"); Chris Vincent et al., *What Common Substances Can Cause False Positives on Urine Screens for Drug Abuse*?, 55 Journal of Family Practice 893, 897 (2006).

For these reasons, a simple positive toxicology result from a urine screen is not particularly reliable or informative. Indeed, the annals of drug testing are littered with examples of unreliable drug tests administered by purportedly trustworthy entities, *see, e.g.*, Associated Press, *Drug Test Error Rate Raises Worry About Wrongful Convictions* (June 19, 2011) (reporting that audit of Indiana crime lab found that nearly one in three drug tests failed to meet acceptable

scientific criteria); N. Rowland, *97% Error Rate Found in Positive Urine Tests*, Army Times, 1, Col. 2 (April 2, 1984), including professional sports, notwithstanding the high financial stakes and intense public scrutiny attached to accurate testing.[2] Many laboratories that perform drug screens, however, are not certified by an authoritative accrediting body, employ persons inadequately trained to analyze samples, fail to follow strict testing protocols, and neglect to track and catalogue error rates. *See* Hugh J. Hansen et al., *Crisis in Drug Testing. Results of CDC Blind Study*," 253 J. Am. Med. Ass'n. 2382 (1985); Nat'l Acad. Sciences (2009), *supra*.

It is because a "urine drug screen can be falsely positive for many scientific reasons," Morris J. Panner & Nicholas A. Christakis, *The Limits of Science in On-the-Job Drug Screening*, 16 Hastings Cntr. Report 7, 9 (Dec. 1986), that the federal government requires that federal employees who are subject to drug testing

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[2] *See, e.g.*, Jorge L. Ortiz, *Ryan Braun Wins Appeal, Won't Be Suspended*, USA Today (Feb. 23, 2012) (reporting failure to follow proper protocol for urine screening of professional athlete); Juliet Macur, *Contador Is Cleared of Doping Charges and Will Return to Racing*, The New York Times (February 15, 2011) (describing exoneration of three-time Tour de France champion stemming from false positive drug test caused by contaminated beef); Mechelle Voepel, *Diana Taurasi Cleared in Doping Issue: Doubt about Testing Procedures and Labs that Do Them Undermines Anti-Doping Efforts*, ESPN.com (February 16, 2011); Bonnie D. Ford, *Healing Begins for Gasquet, Nadal*, ESPN.com (September 1, 2009) (recounting professional tennis player's false positive drug test resulting from kissing a woman who ingested cocaine); Donald A. Berry, *The Science of Doping*, 454 Nature 692 (2008) ("[W]hen an athlete tests positive, is he or she guilty of doping? Because of…inherent flaws in the testing practices of doping laboratories, the answer, quite possibly, is no.").

because of their safety-sensitive positions be tested only by laboratories certified by the U.S. Department of Health and Human Services pursuant to the rigorous standards established by the National Laboratory Certification Program as set forth in 49 Code Fed. Reg. Part 40 (requiring that labs follow rigorous protocols for specimen collection, specimen transportation, analysis, and evaluation; chain of custody, quality control and medical review; documentation and reporting; and on-site inspection and accuracy examination). *See also* Michael Peat & Alan Davis, *Analytical Considerations and Approaches for Drugs*, in Steven B. Karch ed., *Drug Abuse Handbook* (1998) 751 ("[HHS] Certification has become the 'standard of care' for all drug testing"). *But cf.* U.S. General Accountability Office, *Drug Testing, Undercover Tests Reveal Significant Vulnerabilities in DOT's Drug Testing Program*, GAO-08-225T (2007) (finding all 24 federally certified toxicology laboratories examined by the GAO failed to follow at least some of the federally mandated procedures for laboratory accuracy and specimen or facility integrity).

In stark contrast to federal workplace testing, school-based drug testing is largely unregulated. No binding regulations, accreditation or oversight govern the drug testing of students. As a result, the accuracy and reliability of school-based drug testing programs is not merely unknown, but potentially unknowable absent such standards. The College's description of its drug testing procedures appears to

underscore this shortcoming. The College states simply that a "reputable company will conduct the screening and maintain official records." *Student Handbook*, *supra*, at 18. The College, though, does not identify the company that will do the screening. Furthermore, while the College states that the lab follows federal guidelines for urine specimen *collection*, the College does not claim that the lab is federally *certified* to conduct urine *testing*. *See* Substance Abuse and Mental Health Servs. Admin., *Current List of Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies*, 85 Fed Reg 77, 26023 (May 2, 2012) (reporting that only one federally certified urine testing lab operates in Missouri). Nor does the College say to what extent its testing procedures (as opposed to collection methods) comply with federally mandated protocols, not least the proper use of confirmatory testing. *See* Nat'l Acad. of Sciences (1994), *supra*, at 192 ("It cannot be overemphasized that without confirmatory testing and careful medical review, treating the results of urine drug screening as evidence of drug use is unacceptable and scientifically indefensible.")

The risk of error inherent in urine drug screening is not an abstract concern. When drug testing is mandated across an entire student body, such mass testing will inevitably give rise to false positive test results, and thus false accusations, even when all parties act properly and above reproach. When a student is unjustly

accused by his or her academic institution, the student is plunged into a "Kafkaesque predicament," forced to confront not "a human accuser, but rather a faceless test result." Panner, *supra*, at 11.

Absent transparency about the laboratory's identity, accreditation status and procedures, the College's blanket assurance that "Lab based (sic) testing is extremely accurate," Linn State Technical College *Drug Screening FAQ's*, rings hollow. If the evidentiary basis that supported the College's decision to implement mandatory student drug testing is any guide, the College's claims for the reliability of its testing methods merit skepticism.

## CONCLUSION

For the reasons stated above, *Amici* request that the Court find the College's policy unconstitutional.

Respectfully submitted,

/s/ Daniel N. Abrahamson

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief was produced using the Times New Roman 14-point font and contains 4, 883 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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# APPENDIX

## DESCRIPTION OF *AMICI CURIAE*

*Amicus Curiae* the National Education Association ("NEA") is a nationwide employee organization with more than three million members, the vast majority of whom are employed by public school districts, colleges and universities. In addition, NEA has over 63,000 student members enrolled in institutions of higher education who potentially would be impacted by drug testing policies similar to the one at issue in this case. NEA has long had a policy opposing suspicionless drug testing of students because it is unconstitutional and violates the bond of trust between students and schools that is necessary for effective learning. Adopted by the NEA Representative Assembly, NEA highest governing body, Resolution C-35 provides, in part: "The National Education Association believes that mandatory drug and alcohol testing of students without probable cause is an unwarranted and unconstitutional invasion of privacy and opposes such testing."

*Amicus Curiae* Missouri National Education Association ("Missouri-NEA") is a statewide advocate for public schools, public school students and public school employees. Missouri-NEA's 35,000 members are public school teachers, librarians, counselors, coaches, school psychologists and psychiatrists, administrators and faculty in state schools, colleges (including community colleges) and universities. Its members also belong to all categories of education support professionals. Missouri NEA is a state affiliate of the 3.2 million-member National Education Association, and its mission is to keep the promise of a quality public education through a great public school for every pupil in Missouri, and to ensure that all Missouri educational environments maintain the highest standards of professionalism, fairness, dignity and respect.

*Amicus Curiae* the National Association of Social Workers ("NASW") is the largest association of professional social workers in the world with nearly 145,000 members and 56 chapters throughout the United States and internationally. The NASW, Missouri Chapter has 2,216 members. Established in 1955 with the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW and its members have a significant interest in policies, such as the one at issue in the present case, that negatively affect students entering college, especially social work education programs. In NASW's policy statement, *Civil Liberties and Justice*, the Association expressed concern about the unwarranted invasion of privacy that

occurs when mandatory drug testing is used as a precondition for the receipt of services for which an individual would otherwise be eligible. NASW, SOCIAL WORK SPEAKS, 50, 53 (9th ed., 2012). NASW's policy statement, *Alcohol, Tobacco, and Other Drugs*, indicates that NASW supports "an approach to ATOD problems that emphasizes prevention and treatment," rather than on programs of suspicionless drug testing. NASW, SOCIAL WORK SPEAKS, 28, 32-33 (9th ed., 2012).

*Amicus Curiae* The Missouri Association for Social Welfare ("MASW") is a statewide non-profit whose mission for more than 100 years has been to to provide quality leadership, research, advocacy and community education to improve public policies and programs impacting the health and welfare of all Missourians. MASW works on a wide range of social welfare issues including: Healthcare, Economic Justice, Hunger, Affordable Housing and Homelessness, Human Rights, Education, and Criminal Justice. MASW strives to increase access to educational opportunity and improve the educational climate for all Missourians, and it believes that punitive and invasive policies such as suspicion-less drug testing have no place in the educational setting.

*Amicus Curiae* American Academy of Addiction Psychiatry ("AAAP") is an international professional membership organization founded in 1985 with approximately 1,000 members consisting of psychiatrists working with addiction, faculty at various academic institutions, medical students, residents and fellows, and related health professionals making a contribution to the field of addiction psychiatry. AAAP dedicates itself to promoting accessibility to the highest quality treatment for all who need it, promoting excellence in clinical practice in addiction psychiatry, educating the public and influencing public policy regarding addictive illness, providing continuing education for addiction professionals, disseminating new information in the field of addiction psychiatry, and encouraging research on the etiology, prevention, identification and treatment of addiction.

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2012, I caused a copy of the foregoing ***Amici Curiae*** **National Education Association, Missouri National Education Association, National Association of Social Workers, Missouri Chapter - National Association of Social Workers, Missouri Association for Social Welfare, and the American Academy of Addiction Psychiatry** to be served on all counsel of record registered as CM/ECF users by filing with the Clerk for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF electronic system.

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Upon approval of the Court 10 paper copies will be sent to court via Express Mail.

/s/Elissa Matias