SUPREME COURT OF THE UNITED STATES

No. 99–936

CRYSTAL M. FERGUSON, ET AL., PETITIONERS *v.* CITY OF CHARLESTON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[March 21, 2001]

JUSTICE KENNEDY, concurring in the judgment.

I agree that the search procedure in issue cannot be sustained under the Fourth Amendment. My reasons for this conclusion differ somewhat from those set forth by the Court, however, leading to this separate opinion.

I

The Court does not dispute that the search policy at some level serves special needs, beyond those of ordinary law enforcement, such as the need to protect the health of mother and child when a pregnant mother uses cocaine. Instead, the majority characterizes these special needs as the "ultimate goal[s]" of the policy, as distinguished from the policy's "immediate purpose," the collection of evidence of drug use, which, the Court reasons, is the appropriate inquiry for the special needs analysis. *Ante,* at 14–16.

The majority views its distinction between the ultimate goal and immediate purpose of the policy as critical to its analysis. *Ante,* at 16. The distinction the Court makes, however, lacks foundation in our special needs cases. All of our special needs cases have turned upon what the majority terms the policy's ultimate goal. For example, in *Skinner* v. *Railway Labor Executives' Assn.,* 489 U. S. 602 (1989), had we employed the majority's distinction, we would have identified as the relevant need the collection of

evidence of drug and alcohol use by railway employees. Instead, we identified the relevant need as "[t]he Government's interest in regulating the conduct of railroad employees to ensure [railroad] safety." *Id.,* at 620. In *Treasury Employees* v. *Von Raab,* 489 U. S. 656 (1989), the majority's distinction should have compelled us to isolate the relevant need as the gathering of evidence of drug abuse by would-be drug interdiction officers. Instead, the special needs the Court identified were the necessities "to deter drug use among those eligible for promotion to sensitive positions within the [United States Customs] Service and to prevent the promotion of drug users to those positions." *Id.,* at 666. In *Vernonia School Dist. 47J* v. *Acton,* 515 U. S. 646 (1995), the majority's distinction would have required us to identify the immediate purpose of gathering evidence of drug use by student-athletes as the relevant "need" for purposes of the special needs analysis. Instead, we sustained the policy as furthering what today's majority would have termed the policy's ultimate goal: "[d]eterring drug use by our Nation's schoolchildren," and particularly by student-athletes, because "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." *Id.,* at 661–662.

It is unsurprising that in our prior cases we have concentrated on what the majority terms a policy's ultimate goal, rather than its proximate purpose. By very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence. The circumstance that a particular search, like all searches, is designed to collect evidence of some sort reveals nothing about the need it serves. Put a different way, although procuring evidence is the immediate result of a successful search, until today that procurement has not been identified as the special need which justifies the search.

II

While the majority's reasoning seems incorrect in the respects just discussed, I agree with the Court that the search policy cannot be sustained. As the majority demonstrates and well explains, there was substantial law enforcement involvement in the policy from its inception. None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives. The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes. Most of those tested for drug use under the policy at issue here were not brought into direct contact with law enforcement. This does not change the fact, however, that, as a systemic matter, law enforcement was a part of the implementation of the search policy in each of its applications. Every individual who tested positive was given a letter explaining the policy not from the hospital but from the solicitor's office. Everyone who tested positive was told a second positive test or failure to undergo substance abuse treatment would result in arrest and prosecution. As the Court holds, the hospital acted, in some respects, as an institutional arm of law enforcement for purposes of the policy. Under these circumstances, while the policy may well have served legitimate needs unrelated to law enforcement, it had as well a penal character with a far greater connection to law enforcement than other searches sustained under our special needs rationale.

In my view, it is necessary and prudent to be explicit in explaining the limitations of today's decision. The beginning point ought to be to acknowledge the legitimacy of the State's interest in fetal life and of the grave risk to the life and health of the fetus, and later the child, caused by cocaine ingestion. Infants whose mothers abuse cocaine during pregnancy are born with a wide variety of physical and neurological abnormalities. See Chiriboga, Brust, Bateman, & Hauser, Dose-Response Effect of Fetal Cocaine Exposure on Newborn Neurologic Function, 103 Pediatrics 79 (1999) (finding that, compared with unexposed infants, cocaine-exposed infants experienced higher rates of intrauterine growth retardation, smaller head circumference, global hypertonia, coarse tremor, and extensor leg posture). Prenatal exposure to cocaine can also result in developmental problems which persist long after birth. See Arendt, Angelopoulos, Salvator, & Singer, Motor Development of Cocaine-exposed Children at Age Two Years, 103 Pediatrics 86 (1999) (concluding that, at two years of age, children who were exposed to cocaine in utero exhibited significantly less fine and gross motor development than those not so exposed); Chasnoff et al., Prenatal Exposure to Cocaine and Other Drugs: Outcome at Four to Six Years, 846 Annals of the New York Academy of Sciences 314, 319–320 (J. Harvey and B. Kosofsky eds. 1998) (finding that four to six year olds who were exposed to cocaine in utero exhibit higher instances of depression, anxiety, social, thought, and attention problems, and delinquent and aggressive behaviors than their unexposed counterparts). There can be no doubt that a mother's ingesting this drug can cause tragic injury to a fetus and a child. There should be no doubt that South Carolina can impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing him or her lifelong damage and suffering. The State, by taking special measures to give reha-

bilitation and training to expectant mothers with this tragic addiction or weakness, acts well within its powers and its civic obligations.

The holding of the Court, furthermore, does not call into question the validity of mandatory reporting laws such as child abuse laws which require teachers to report evidence of child abuse to the proper authorities, even if arrest and prosecution is the likely result. That in turn highlights the real difficulty. As this case comes to us, and as reputable sources confirm, see K. Farkas, Training Health Care and Human Services Personnel in Perinatal Substance Abuse, in Drug & Alcohol Abuse Reviews, Substance Abuse During Pregnancy and Childhood, 13, 27–28 (R. Watson ed. 1995); U. S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, Pregnant, Substance-Using Women 48 (1993), we must accept the premise that the medical profession can adopt acceptable criteria for testing expectant mothers for cocaine use in order to provide prompt and effective counseling to the mother and to take proper medical steps to protect the child. If prosecuting authorities then adopt legitimate procedures to discover this information and prosecution follows, that ought not to invalidate the testing. One of the ironies of the case, then, may be that the program now under review, which gives the cocaine user a second and third chance, might be replaced by some more rigorous system. We must, however, take the case as it comes to us; and the use of handcuffs, arrests, prosecutions, and police assistance in designing and implementing the testing and rehabilitation policy cannot be sustained under our previous cases concerning mandatory testing.

III

An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because ad-

verse consequences, (*e.g.*, dismissal from employment or disqualification from playing on a high school sports team), will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word. See *Skinner,* 489 U. S., at 615; *Von Raab,* 489 U. S., at 660–661; *Acton,* 515 U. S., at 650–651. The consent, and the circumstances in which it was given, bear upon the reasonableness of the whole special needs program.

Here, on the other hand, the question of consent, even with the special connotation used in the special needs cases, has yet to be decided. Indeed, the Court finds it necessary to take the unreal step of assuming there was no voluntary consent at all. Thus, we have erected a strange world for deciding the case.

My discussion has endeavored to address the permissibility of a law enforcement purpose in this artificial context. The role played by consent might have affected our assessment of the issues. My concurrence in the judgment, furthermore, should not be interpreted as having considered or resolved the important questions raised by JUSTICE SCALIA with reference to whether limits might be imposed on the use of the evidence if in fact it were obtained with the patient's consent and in the context of the special needs program. Had we the prerogative to discuss the role played by consent, the case might have been quite a different one. All are in agreement, of course, that the Court of Appeals will address these issues in further proceedings on remand.

With these remarks, I concur in the judgment.