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Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits

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Summary

For decades, federal policymakers and state administrators of governmental assistance programs, such as the Temporary Assistance for Needy Families (TANF) block grants (formerly Aid to Families with Dependent Children (AFDC)), the Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps), the Section 8 Housing Choice Voucher program, and their precursors, have expressed concern about the "moral character" and worthiness of beneficiaries. For example, the Anti-Drug Abuse Act of 1988 made individuals who have three or more convictions for certain drug-related offenses permanently ineligible for various federal benefits. A provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 went a step further by explicitly authorizing states to test TANF beneficiaries for illicit drug use and to sanction recipients who test positive. Some policymakers have shown a renewed interest in conditioning the receipt of governmental benefits on passing drug tests. For example, in February 2012, the President signed into law an amendment to the Social Security Act that authorizes states to condition the receipt of certain unemployment compensation benefits on passing drug tests. Additionally, lawmakers in a majority of states reportedly proposed legislation in 2011, 2012, 2013, and/or 2014 that would require drug testing beneficiaries of governmental assistance under certain circumstances, while at least 12 state governments over that time have enacted such legislation.

Federal or state laws that condition the initial or ongoing receipt of governmental benefits on passing drug tests without regard to individualized suspicion of illicit drug use may be subject to constitutional challenge. To date, two state laws requiring suspicionless drug tests as a condition to receiving governmental benefits have sparked litigation. The U.S. Supreme Court has not rendered an opinion on such a law; however, the Court has issued decisions on drug testing programs in other contexts that have guided the few lower court opinions on the subject.

Constitutional challenges to suspicionless governmental drug testing most often focus on issues of personal privacy and Fourth Amendment protections against "unreasonable searches." For searches to be reasonable, they generally must be based on individualized suspicion unless the government can show a "special need" warranting a deviation from the norm. However, governmental benefit programs like TANF, SNAP, unemployment compensation, and housing assistance do not naturally evoke special needs grounded in public safety or the care of minors in the public school setting that the Supreme Court has recognized in the past. Thus, if lawmakers wish to pursue the objective of reducing the likelihood of taxpayer funds going to individuals who abuse drugs through drug testing, legislation that only requires individuals to submit to a drug test based on an individualized suspicion of drug use is less likely to run afoul of the Fourth Amendment. Additionally, governmental drug testing procedures that restrict the sharing of test results and limit the negative consequences of failed tests to the assistance program in question would be on firmer constitutional ground.

Numerous CRS reports focusing on policy issues associated with governmental benefit programs also are available, including CRS Report R40946, *The Temporary Assistance for Needy Families Block Grant: An Overview*, by Gene Falk; CRS Report R42505, *Supplemental Nutrition Assistance Program (SNAP): A Primer on Eligibility and Benefits*, by Randy Alison Aussenberg; CRS Report RL34591, *Overview of Federal Housing Assistance Programs and Policy*, by Maggie McCarty, Libby Perl, and Katie Jones; and CRS Report RL33362, *Unemployment Insurance: Programs and Benefits*, by Julie M. Whittaker and Katelin P. Isaacs.

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Background

For decades, federal policymakers and state administrators of governmental assistance programs, such as the Temporary Assistance for Needy Families (TANF) block grants (formerly Aid to Families with Dependent Children (AFDC)),[1] the Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps),[2] the Section 8 Housing Choice Voucher program,[3] and their precursors have expressed concern about the "moral character" and worthiness of beneficiaries.[4] Beginning in the 1980s, the federal government imposed restrictions on the receipt of certain governmental benefits for individuals convicted of drug-related crimes as one component of the broader "War on Drugs." For example, the Anti-Drug Abuse Act of 1988[5] made individuals who have three or more convictions for certain drug-related offenses permanently ineligible for various federal benefits.[6] A provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[7] explicitly authorizes states to test TANF beneficiaries for illicit drug use and to sanction recipients who test positive.[8]

In part prompted by tight state and federal budgets and increased demand for federal and state governmental assistance resulting from precarious economic conditions, some policymakers have shown a renewed interest in conditioning the receipt of governmental benefits on passing drug tests. For example, in February 2012, the President signed into law an amendment to the Social Security Act that authorizes states to condition the receipt of certain unemployment compensation benefits on passing drug tests.[9] Additionally, lawmakers in a majority of states reportedly

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[1] For more information on TANF, see CRS Report R40946, *The Temporary Assistance for Needy Families Block Grant: An Overview*, by Gene Falk.

[2] For more information on SNAP, see CRS Report R42054, *The Supplemental Nutrition Assistance Program (SNAP): Categorical Eligibility*, by Gene Falk and Randy Alison Aussenberg

[3] For more information on the Section 8 Housing Choice Voucher and other federal housing assistance programs, see CRS Report RL34591, *Overview of Federal Housing Assistance Programs and Policy*, by Maggie McCarty, Libby Perl, and Katie Jones.

[4] King v. Smith, 392 U.S. 319, 320-25 (1967) (discussing various eligibility requirements of AFDC welfare program and its precursors that attempted to distinguish between the "worthy" poor and those unworthy of assistance) (holding that an Alabama state regulation that prohibited AFDC assistance to dependent children of a mother who had a sexual relationship with an "able-bodied man" to whom she was not married violated the Social Security Act).

[5] P.L. 100-690 §5301.

[6] This provision has since been amended. See 21 U.S.C. §862a.

[7] P.L. 104-193.

[8] P.L. 104-193 §902, *codified* at 21 U.S.C. §862b ("Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances."). This provision, in and of itself, does not raise constitutional concerns because it does not directly impose drug testing; however, state drug testing programs that are implemented pursuant to this authority may be vulnerable to constitutional challenge.

[9] P.L. 112-96 §2105, the Middle Class Tax Relief and Job Creation Act of 2011. The provision states:

> (1) Nothing in this chapter or any other provision of Federal law shall be considered to prevent a State from enacting legislation to provide for-
>
> (A) testing an applicant for unemployment compensation for the unlawful use of controlled substances as a condition for receiving such compensation, if such applicant-
>
> (i) was terminated from employment with the applicant's most recent employer (as defined under the State law) because of the unlawful use of controlled substances; or
>
> (ii) is an individual for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the

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proposed legislation in 2011, 2012, 2013, and/or 2014 that would require drug testing beneficiaries of governmental assistance under certain circumstances, while at least 12 state governments over that time have enacted such legislation.[10]

Federal or state laws that condition the initial or ongoing receipt of governmental benefits on passing drug tests without regard to individualized suspicion of illicit drug use may be subject to constitutional challenge. Constitutional challenges to suspicionless governmental drug testing most often focus on issues of personal privacy and Fourth Amendment protections against "unreasonable searches." To date, two state laws requiring suspicionless drug tests as a condition to receiving governmental benefits have sparked litigation.[11] The U.S. Supreme Court has not rendered an opinion on such a law; however, the Court has issued decisions on drug testing programs in other contexts that have guided the few lower court opinions on the subject. These Supreme Court opinions also likely will shape future judicial decisions on the topic.

To effectively evaluate the constitutionality of laws requiring suspicionless drug tests to receive governmental benefits, this report first provides an overview of the Fourth Amendment. It then reviews five Supreme Court decisions that have evaluated government-administered drug testing programs in other contexts and provides an analysis of the preliminary lower court opinions directly on point. The report concludes with a synthesis of the various factors that likely will be important to a future court's assessment of the constitutionality of these laws, which also may guide policymaking on the subject.

Overview of the Fourth Amendment and the "Special Needs" Exception

The Fourth Amendment protects the "right of the people" to be free from "unreasonable searches and seizures" by the government.[12] This constitutional stricture applies to all governmental action—federal, state, and local—by its own force or through the Due Process Clause of the Fourteenth Amendment.[13] Governmental conduct generally will be found to constitute a "search"

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> Secretary of Labor); or
> (B) denying such compensation to such applicant on the basis of the result of the testing conducted by the State under legislation described in subparagraph (A).

Much like the TANF provision discussed in the *supra* footnote, this amendment to the Social Security Act does not raise constitutional concerns because it does not directly impose drug testing; however, state drug testing programs that are instituted under this authority may be susceptible to Fourth Amendment-based challenges.

[10] National Conference of State Legislatures, *Drug Testing and Public Assistance*, available at http://www.ncsl.org/issues-research/human-services/drug-testing-and-public-assistance.aspx.

[11] See the "Lower Court Opinions on the Michigan and Florida Laws" section below.

[12] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[13] Mapp v. Ohio, 367 U.S. 643, 655 (1961). The Supreme Court has never held that Fourth Amendment protections extend to purely *private* action. See, e.g., United States v. Jacobsen, 466 U.S. 109, 113-14 (1984) ("This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.") (internal citations and quotations omitted) and Chandler v. (continued...)

for Fourth Amendment purposes where it infringes "an expectation of privacy that society is prepared to consider reasonable...."[14] The Supreme Court, on a number of occasions, has held that government-administered drug tests are searches under the Fourth Amendment.[15] Therefore, the constitutionality of a law that requires an individual to pass a drug test before he may receive federal benefits likely will turn on whether the drug test is reasonable under the circumstances.[16]

Whether a search is reasonable depends on the nature of the search and its underlying governmental purpose. Reasonableness under the Fourth Amendment generally requires individualized suspicion, which frequently takes the form of a warrant that is based on probable cause.[17] However, the Supreme Court has recognized an exception to these general requirements "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,"[18] and the government's needs outweigh any "diminished expectation" of privacy invaded by a search.[19] In instances where the government argues that there are special needs to support suspicionless searches, courts determine whether such searches are reasonable under the circumstances by assessing the competing interests of the government conducting the search and the private individuals who are subject to the search.[20]

Supreme Court Precedent

The Supreme Court has assessed the constitutionality of governmental drug testing programs in a number of contexts. Five opinions are especially relevant to the question of whether a mandatory, suspicionless drug test for the receipt of governmental benefits would be considered an unreasonable search in violation of the Fourth Amendment. Each of these decisions, *Skinner v. Railway Labor Executives Association*,[21] *National Treasury Employees Union v. Von Raab*,[22]

(...continued)

Miller, 520 U.S. 305, 323 (1997) ("And we do not speak to drug testing in the private sector, a domain unguarded by Fourth Amendment constraints.").

[14] *Jacobsen*, 466 U.S. at 113.

[15] See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002); Chandler v. Miller, 520 U.S. 305 (1997); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Nat'l Treasury Emp. Union v. Von Raab, 489 U.S. 656 (1989); and Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602 (1989).

[16] The constitutionality of such a law also may turn on whether individuals have provided a valid consent to the testing and whether mandatory testing is an unconstitutional condition for the receipt of government benefits. For a discussion of these issues, see *infra* n. 88.

[17] *Von Raab*, 489 U.S. at 665 ("While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, our decision in [*Skinner v.*] *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." (internal citations omitted)); *Chandler*, 520 U.S. at 313 ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.").

[18] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (internal quotations omitted).

[19] *Chandler*, 520 U.S. at 313-14.

[20] *Id*. at 314 ("When such 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.").

[21] 489 U.S. 602 (1989).

[22] 489 U.S. 656 (1989).

Vernonia School District v. Acton,[23] *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[24] and *Chandler v. Miller*,[25] is analyzed in turn.

Skinner v. Railway Labor Executives Association

Skinner centered on Federal Railroad Administration (FRA) regulations that required breath, blood, and urine tests of railroad workers involved in train accidents.[26] The Supreme Court held that because "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable," FRA testing for drugs and alcohol was a "search" that had to satisfy constitutional standards of reasonableness.[27] However, the "special needs" of railroad safety—for "the traveling public and the employees themselves"—made traditional Fourth Amendment requirements of a warrant and probable cause "impracticable" in this context.[28] Nor was "individualized suspicion" deemed by the majority to be a "constitutional floor" where the intrusion on privacy interests is "minimal" and an "important governmental interest" is at stake.[29] According to the Court, covered rail employees had "expectations of privacy" as to their own physical condition that were "diminished by reasons of their participation in an industry that is regulated pervasively to ensure safety...."[30] In these circumstances, the majority held, it was reasonable to conduct the tests, even in the absence of a warrant or reasonable suspicion that any employee may be impaired.[31]

National Treasury Employees Union v. Von Raab

In the *Von Raab* decision, handed down on the same day as *Skinner*, the Court upheld suspicionless drug testing of U.S. Customs Service personnel who sought transfer or promotion to certain "sensitive" positions—namely positions that require carrying guns or are associated with drug interdiction.[32] A drug test was only administered when an employee was conditionally approved for a transfer or promotion to a sensitive position and only with advanced notice by the Customs Service.[33] According to the Court:

> the Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotions to those positions, who enjoy a diminished expectation of privacy by virtue of the special physical and ethical demands of those positions.[34]

[23] 515 U.S. 646 (1995).

[24] 536 U.S. 822 (2002).

[25] 520 U.S. 305 (1997).

[26] *Skinner*, 489 U.S. at 606.

[27] *Id.* at 617.

[28] *Id.* at 621, 631.

[29] *Id.* at 624.

[30] *Id.* at 627.

[31] *Id.* at 633.

[32] *Von Raab*, 489 U.S. at 679.

[33] *Id.* at 672.

[34] *Id.* at 679.

Neither the absence of "any perceived drug problem among Customs employees," nor the possibility that "drug users can avoid detection with ease by temporary abstinence," would defeat the program because "the possible harm against which the Government seeks to guard is substantial [and] the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal."[35]

Vernonia School District v. Acton

In *Vernonia*, the Court first considered the constitutionality of student drug testing in the public schools. At issue was a school district program for random drug testing of high school student athletes, which had been implemented in response to a perceived increase in student drug activity. All student athletes and their parents had to sign forms consenting to testing, which occurred at the start of the season and randomly thereafter for the season's duration. Students who tested positive were given the option of either participating in a drug assistance program or being suspended from athletics for the current and following seasons.[36]

A 6-to-3 majority of the Court upheld the program against Fourth Amendment challenge. The Court noted a prior holding that "'special needs' [] exist in the public school context" where compliance with the traditional probable cause requirement "would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools."[37] Central to the *Vernonia* majority's rationale was the "custodial and tutelary" relationship that is created when children are "committed to the temporary custody of the State as schoolmaster."[38] This relationship, in effect, "permit[s] a degree of supervision and control that could not be exercised over free adults."[39]

Additionally, students had diminished expectations of privacy by virtue of routinely required medical examinations, a factor compounded in the case of student athletes by insurance requirements, minimum academic standards, and the "communal undress" and general lack of privacy in sports' locker rooms.[40] Because "school sports are not for the bashful," student athletes were found to have a lower expectation of privacy than other students.[41]

Balanced against these diminished privacy interests were the nature of the intrusion and importance of the governmental interests at stake. First, the school district had mitigated actual intrusion by implementing urine collection procedures that simulated conditions "nearly identical to those typically encountered in public restrooms"; by analyzing the urine sample only for presence of illegal drugs—not for other medical information, such as the prevalence of disease or pregnancy; and by insuring that positive test results were not provided to law enforcement officials.[42] Second, school officials had an interest in deterring student drug use as part of their

[35] *Id.* at 673-75.

[36] *Vernonia*, 515 U.S. at 649-50.

[37] *Id*. at 653 (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1989)).

[38] *Id*. at 654.

[39] *Id.* at 654-56.

[40] *Id.* at 657.

[41] *Id*.

[42] *Id.* at 658.

"special responsibility of care and direction" toward students.[43] That interest was magnified in *Vernonia* by judicial findings that, prior to implementation of the program, "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion ... fueled by alcohol and drug abuse...."[44]

Consequently, the Court approved the school district's drug testing policy, reasoning that the Fourth Amendment only requires that government officials adopt reasonable policies, not the least invasive ones available. The majority in *Vernonia*, however, cautioned "against the assumption that suspicionless drug-testing will readily pass muster in other constitutional contexts."[45]

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

Earls concerned a Tecumseh Public School District policy that required suspicionless drug testing of students wishing to participate "in any extracurricular activity."[46] Such activities included Future Farmers of America, Future Homemakers of America, academic teams, band, and chorus, cheerleading, and athletics. Any student who refused to submit to random testing for illegal drugs was barred from all such activities, but was not otherwise subject to penalty or academic sanction. Lindsay Earls challenged the district's policy "as a condition" to her membership in the high school's band, show choir, and academic team.[47]

By a 5 to 4 vote, the Court held that the Tecumseh school district's drug testing program was a "reasonable means" of preventing and deterring student drug use and did not violate the Fourth Amendment. The majority, citing *Vernonia*, stated that "this Court has previously held that 'special needs' inhere in the public school context."[48] In its role as "guardian and tutor," the majority reasoned, the state has responsibility for the discipline, health, and safety of students whose privacy interests are correspondingly limited and subject to "greater control than those for adults."[49] Moreover, students who participate in extracurricular activities "have a limited expectation of privacy" as they participate in the activities and clubs on a voluntary basis, subject themselves to other intrusions of privacy, and meet official rules for participation.[50] The fact that student athletes in the *Vernonia* case were regularly subjected to physical exams and communal undress was not deemed "essential" to the outcome there.[51] Instead, that decision "depended primarily upon the school's custodial responsibility and authority," which was equally applicable to athletic and nonathletic activities.[52]

[43] *Id.* at 662.

[44] *Id.* at 662-63.

[45] *Id.* at 664-65.

[46] *Earls*, 536 U.S. at 826.

[47] *Id*. at 826-27. The plaintiff did not contest the policy as applied to student athletics.

[48] *Id*. at 829-30 (citing *Vernonia*, 515 U.S. at 653 and *T.L.O.*, 469 U.S. at 336-37).

[49] *Id*. at 830-31.

[50] *Id.* at 831-32.

[51] *Id*. at 831.

[52] *Id*.

The testing procedure itself, involving collection of urine samples, chain of custody, and confidentiality of results, was found to be "minimally intrusive" and "virtually identical" to that approved by the Court in *Vernonia*.[53] In particular, the opinion notes test results were kept in separate confidential files only available to school employees with a "need to know," were not disclosed to law enforcement authorities, and carried no disciplinary or academic consequences other than limiting extracurricular participation.[54] "Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant."[55]

The majority concluded that neither "individualized suspicion" nor a "demonstrated problem of drug abuse" was a necessary predicate for a student drug testing program, and there is no "threshold level" of drug use that must be satisfied.[56] "Finally, we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use."[57]

Chandler v. Miller

Conversely, the Court in *Chandler* struck down a 1990 Georgia statute requiring candidates for governor, lieutenant governor, attorney general, the state judiciary, the state legislature, and certain other elective offices to file a certification that they have tested negatively for illegal drug use.[58] The majority opinion noted several factors distinguishing the Georgia law from drug testing requirements upheld in earlier cases. First, there was no "fear or suspicion" of generalized illicit drug use by state elected officials in the law's background that might pose a "concrete danger demanding departure from the Fourth Amendment's main rule."[59] The Court noted that, while not a necessary constitutional prerequisite, evidence of historical drug abuse by the group targeted for testing might "shore up an assertion of special need for a suspicionless general search program."[60]

In addition, the law did not serve as a "credible means" to detect or deter drug abuse by public officials.[61] Since the timing of the test was largely controlled by the candidate rather than the state, legal compliance could be achieved by a mere temporary abstinence.[62] Another "telling difference" between the Georgia case and earlier rulings stemmed from the "relentless scrutiny" to which candidates for public office are subjected, as compared to persons working in less exposed work environments.[63] Any drug abuse by public officials is far more likely to be detected in the ordinary course of events, making suspicionless testing less necessary than in the case of safety-sensitive positions beyond the public view. The Court explained:

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[53] *Id*. at 832-34.

[54] *Id*. at 833.

[55] *Id*. at 832-34.

[56] *Id.* at 835-37.

[57] *Id.* at 837.

[58] *Chandler*, 520 U.S. at 322.

[59] *Id.* at 318-19.

[60] *Id.* at 319.

[61] *Id*.

[62] *Id.* at 319-20.

[63] *Id.* at 321.

> We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports and at entrances to courts and other official buildings.[64]

The Court went on to stress that searches conducted without individualized suspicion generally must be linked to public safety in order to be reasonable. "But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."[65]

Synthesis of Supreme Court Precedent

Skinner and *Von Raab* indicate that "compelling" governmental interests in public safety or national security may, in appropriate circumstances, override constitutional objections to testing procedures by employees whose privacy expectations are diminished by the nature of their duties or the workplace scrutiny to which they are otherwise subject. In *Earls* and *Vernonia*, the Court concludes that specials needs are inherent to the public school setting in which the government serves as "guardian and tutor" to minor students. The *Earls* and *Vernonia* rulings also make clear that minors have diminished privacy expectations relative to adults, especially when drug testing is implemented by individuals in a guardian or tutor capacity. Although not dispositive, *Earls*, *Vernonia*, and *Chandler* also illustrate that drug testing programs imposed on a subset of the population that has a "demonstrated problem of drug abuse" may tilt the balancing test in the government's favor, especially if the testing program is designed to effectively address the problem. The extent to which drug test results are shared or kept confidential also may be relevant to a court's review of the competing public and private interests. Drug testing programs that require results to be kept confidential to all but a small group of non-law enforcement officials, are not conducted for criminal law enforcement purposes, and that only minimally impact an individual's life are more likely to be considered reasonable. On the other hand, programs that allow drug test results to be shared, especially with law enforcement, or that otherwise have the potential to negatively impact multiple or significant aspects of an individual's life, may be less likely to be considered reasonable.

Lower Court Opinions on the Michigan and Florida Laws

Two state laws that established mandatory, suspicionless drug testing programs as a condition to receiving TANF benefits have been challenged on Fourth Amendment grounds. The federal district court ruling in *Marchwinski v. Howard*,[66] which was affirmed by the U.S. Court of

[64] *Id*. at 323 (internal citations omitted).

[65] *Id*.

[66] Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000). A unanimous three-judge panel decision of the Sixth Circuit Court of Appeals (Marchwinski v. Howard, 309 F.3d 330 (2002)) was vacated when the appellate court granted a motion to rehear the case *en banc*. Marchwinski v. Howard, 319 F.3d 258 (6th Cir. 2003). The vacated three-judge panel decision would have reversed the district court's grant of a preliminary injunction because the lower court "applied an erroneous legal standard" by "holding that only a public safety concern can qualify as a 'special need'" and because "the evidence in the case at hand establishes that Michigan's special need does encompass public safety concerns, as well as other needs beyond the normal need for law enforcement." Marchwinski v. Howard, 309 F.3d 330 (2002) (*vacated*) (internal quotations omitted).

Appeals for the Sixth Circuit (Sixth Circuit) as a result of an evenly divided *en banc* panel,[67] involved a Michigan program that began in the late 1990s. This decision was delivered at the preliminary stages of litigation and was not based on a complete evidentiary record. In the other case, *Lebron v. Secretary, Florida Department of Children and Families*,[68] a three-judge panel of the Court of Appeals for the Eleventh Circuit unanimously affirmed a district court's ruling[69] that a mandatory drug testing law in Florida is unconstitutional. (The state of Florida chose not to appeal the Eleventh Circuit's ruling to the U.S. Supreme Court.)[70] Future courts that review similar drug testing programs may look to these decisions for guidance, and they may be useful for lawmakers reviewing proposed legislation that requires individuals to pass drug tests in order to qualify for or maintain governmental benefits.

The Challenged Michigan Law—*Marchwinski*

Marchwinski concerned Michigan Compiled Laws Section 400.57*l*, which imposed a pilot drug testing component to Michigan's Family Independence Program (FIP). Under the FIP program, individuals would have to submit a urine sample for testing as part of the TANF application process. The applications of those who refused to submit to the test would be denied. Individuals who tested positive for illicit drugs would have to participate in a substance abuse assessment and, potentially, would have to comply with a substance abuse treatment plan. Those who failed to comply with a treatment plan and could not show good cause would have their applications denied. Additionally, individuals who were already receiving TANF benefits would be subject to random drug tests. Active participants who tested positive for drug use or failed to adhere to the random drug testing requirements would have their benefits reduced and possibly terminated.[71]

Several individuals who would be subject to the FIP drug testing program filed suit, seeking a preliminary injunction to prevent the implementation of the program because it would violate their Fourth Amendment rights. The court granted the preliminary injunction, which, among other factors, required a finding that the plaintiffs would likely succeed on the merits of their constitutional claims.[72]

The district court in *Marchwinski* stated that "the *Chandler* Court made clear that suspicionless drug testing is unconstitutional if there is no showing of a special need, and that the special need

[67] Marchwinski v. Howard, 60 Fed. App'x 601 (6th Cir. 2003) (affirming the district court judgment in accordance with *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996), because a 12-member *en banc* panel of appellate judges was evenly split, with six judges wanting to affirm and six judges wanting to reverse the district court's opinion).

[68] Lebron v. Sec. of the Fla. Dep't of Children and Families, 772 F.3d 1352 (11th Cir. 2014) (hereinafter, *Lebron*, 11th Cir. Affirmation of Final Summary Judgment).

[69] Case No. 6:11-cv-1473-MSS-DAB, Order Granting Plaintiff's Motion for Summary Judgment (M.D. Fla. 2013), available at https://s3.amazonaws.com/s3.documentcloud.org/documents/1001068/court-bans-tanf-drug-testing.pdf (hereinafter, *Lebron*, Dist. Ct. Final Summary Judgment). See also, Case No. 11-15258, Appeal from the U.S. Dist. Ct. M.D. Fla. (11th Cir. 2013), available at http://www.ca11.uscourts.gov/opinions/ops/201115258.pdf (hereinafter, *Lebron*, Affirmation of Preliminary Injunction) (affirming Lebron v. Wilkins, Docket No. 6:11-cv-01473-Orl-35DAB, Order Granting Motion for Preliminary Injunction (M.D. Fla. 2011), available at http://www.aclufl.org/pdfs/2011-10-24-ACLUTanfOrder.pdf (hereinafter, *Lebron*, Preliminary Injunction))

[70] Curt Anderson, *Florida drops appeals in welfare drug testing case*, Associated Press, Mar. 4, 2015, available at http://bigstory.ap.org/article/8d1feceb405e4abd82eb3bfea98236d9/florida-drops-appeals-welfare-drug-testing-case.

[71] *Marchwinski*, 113 F. Supp.2d at 1136-37.

[72] *Id*. at 1137. Other factors that the court weighed were "the probability that granting the injunction will cause substantial harm to others; and [] whether the public interest is advanced by the issuance of the injunction." *Id*.

must be grounded in public safety."[73] According to the court, the state's "primary justification ... for instituting mandatory drug testing is to move more families from welfare to work."[74] This worthy legislative objective, however, is not "a special need grounded in public safety" that would justify a suspicionless search, in the view of the court.[75] The court also was unmoved by the state's argument that the drug testing served a special need of reducing child abuse and neglect. Upon an examination of the programs' express legislative purposes, the court found that neither TANF nor FIP was designed specifically to address child abuse and neglect. Therefore, "... the State's financial assistance to parents for the care of their minor children through the FIP cannot be used to regulate the parents in a manner that erodes their privacy rights in order to further goals that are unrelated to the FIP."[76] Further, allowing the state to conduct suspicionless drug tests in this context would provide a justification for conducting suspicionless drug tests of all parents of children who receive governmental benefits of any kind, such as student loans and a public education, which "would set a dangerous precedent."[77] Thus, the court granted the plaintiffs' motion for a preliminary injunction, concluding that the "Plaintiffs have established a strong likelihood of succeeding on the merits of their Fourth Amendment claim."[78]

On appeal, a 12-member *en banc* panel of the Sixth Circuit Court of Appeals split evenly, with six judges voting to affirm and six judges voting to reverse the district court's ruling.[79] Pursuant to Sixth Circuit precedent, an even split of an *en banc* panel results in the affirmation of the judgment of the lower court.[80] The case did not progress beyond the preliminary injunction phase because the FIP administrators, as part of a settlement with the American Civil Liberties Union (ACLU), which represented the plaintiff, agreed to modify the program so that tests would be conducted only when "there is a reasonable suspicion that [a] recipient is using drugs."[81]

The Challenged Florida Law—*Lebron*

Facts

The *Lebron* case involves Florida Statute Section 414.0652, enacted on May 31, 2011, which requires all new TANF applicants to submit to a drug test and all current beneficiaries to be subject to random drug testing as a condition to receiving benefits.[82] The up-front cost of the drug test must be born by the applicant/recipient; however, individuals whose results are negative for illicit drugs will be reimbursed for the cost of the test using TANF funds. Although the statute

[73] *Id*. at 1143.

[74] *Id*. at 1140.

[75] *Id*.

[76] *Id*. at 1141-42.

[77] *Id*. at 1142. The court also disagreed with the state's argument "that the voluntary nature of applying for welfare benefits diminishes the applicants [*sic*] expectation of privacy," arguing that *Chandler* "involved an even more voluntary activity...run[ning] for public office," and in that case, the Supreme Court made clear that the drug tests were unconstitutional searches. *Id*. at 1143.

[78] *Id*. at 1143.

[79] Marchwinski v. Howard, 60 Fed. App'x 601 (6th Cir. 2003).

[80] *Id*. (citing Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996)).

[81] See *Settlement Reached In Lawsuit Over Mandatory Drug Testing of Welfare Recipients*, Am. Civil Liberties Union Press Release, Dec. 18, 2003, available at http://www.aclumich.org/issues/search-and-seizure/2003-12/1044.

[82] *Lebron*, Dist. Ct. Final Summary Judgment at 5.

does not require it, individuals generally must disclose information about all prescription and over-the-counter medications they use to avoid false-positive results for illicit drugs. Individuals who test positive are barred from receiving benefits for one year unless they complete a substance abuse treatment class and pass another drug test, at which point they may regain eligibility in six months. Applicants must pay for both the treatment programs and the additional drug tests, and those costs will not be reimbursed by the state.[83] The children of any applicant who failed a drug test may receive TANF benefits through another adult, called a "protective payee," if that adult passes a drug test and otherwise is approved by Florida's Department of Children and Families (DCF).[84]

Procedural History

An applicant, who met all eligibility requirements for TANF benefits except that he refused to submit to a drug test, filed a motion with a federal district court seeking a preliminary injunction of the enforcement of the drug testing requirements of the Florida law because it violates his Fourth Amendment protections against unreasonable searches.[85] The court granted the motion until the matter could be fully litigated, finding that the plaintiff "has a substantial likelihood of success on the merits" of his Fourth Amendment claims.[86]

The state appealed the district court's preliminary injunction order to the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit). Citing the same Supreme Court precedents and following similar legal reasoning, the Eleventh Circuit affirmed the district court's order imposing a preliminary injunction against implementation of the drug testing program.[87]

While the parties awaited the Eleventh Circuit's preliminary injunction ruling, they each filed a motion for summary judgment with the district court. Although they were given the opportunity by the court, neither party submitted supplemental memoranda to take into account the Eleventh Circuit's affirmation of the preliminary injunction order.[88]

District Court Final Summary Judgment Order

The district court granted the plaintiff's motion for summary judgment, which required a finding that "there is no genuine issue of material fact" between the parties and that the plaintiff "is entitled to judgment as a matter of law" in spite of reviewing the evidence "in the light most

[83] *Id*. at 5-6.

[84] *Id*. at 6-7. Originally, the results of positive drug tests were shared with the Florida Abuse Hotline, which triggers a referral to the Florida Safe Families Network database. Information in the Florida Safe Families Network database is available to law enforcement officials. Additionally, information provided to the Florida Abuse Hotline may be disclosed to both law enforcement officials and state attorneys who work on child abuse cases. However, the state, through administrative rulemaking that went into effect in March 2012, barred the sharing of information with law enforcement and referrals to the Florida Abuse Hotline in response to the federal district court's preliminary injunction order. *Id*. 6

[85] *Lebron*, Preliminary Injunction at 2.

[86] *Id*. at 34.

[87] *Id*. at 30-31. The state petitioned the Eleventh Circuit for a rehearing *en banc* but that petition was denied. *Lebron*, Dist. Ct. Final Summary Judgment at 3.

[88] *Lebron*, Dist. Ct. Final Summary Judgment at 3.

favorable to [the state]."[89] In granting the motion, the court held that Florida's TANF drug testing statute is unconstitutional and may not be enforced.[90]

The district court, citing *Skinner*, *Von Raab*, *Chandler*, *Vernonia*, *Earls*, and the Eleventh Circuit's affirmation of the preliminary injunction order, found that the drug tests in question represent Fourth Amendment searches[91] and the state had failed to show a valid "special need" for testing TANF recipients justifying a deviation from the Fourth Amendment's traditional requirement of individualized suspicion.[92]

The district court, quoting the Eleventh Circuit's preliminary injunction order, determined that Supreme Court precedent acknowledges only two "special needs" in which government-imposed, suspicionless drug testing are permissible: where there is "the specific risk to public safety by employees engaged in inherently dangerous jobs and the protection of children entrusted to the public school system's care and tutelage."[93] Instead of contending that its TANF drug testing program was designed to address either of these "special needs," the state argued that the testing was necessary because drug use by beneficiaries would undermine the purpose of TANF.[94] While the state may have an interest in encouraging family stability and helping TANF beneficiaries gain employment, those goals do not amount to "special needs" that the Supreme Court has recognized as justifying the circumvention of traditional Fourth Amendment protections.[95] Consequently, the court held that the Florida statute violates the Fourth Amendment.

Eleventh Circuit Court of Appeals Affirmation of Final Summary Judgment

The state of Florida appealed the district court's decision to the Eleventh Circuit Court of Appeals. A unanimous three-judge panel of the Eleventh Circuit affirmed the district court's grant

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[89] *Id*. at 1 and 8.

[90] *Id*. at 9.

[91] *Id*. at 10-11.

[92] *Id.* at 10-13. In addition to arguing that there were "special needs" to justify the drug tests, the state also contended that the drug tests were not searches for the purposes of the Fourth Amendment because an individual would only be tested with the consent of the beneficiary—"if there is no consent to the testing, there is no drug test and, thus, no search." *Id*. at 28. The district court disagreed, stating that "the Supreme Court has always applied the same special needs analysis even when it was shown that the affected population has the option to consent to the drug tests," while also holding that rather than "consent," what was at play in this context was a "submission to authority." *Id*. at 28-29.

[93] *Id*. at 12.

[94] The court further concluded "[b]ecause the State has failed to meet the threshold requirement of establishing a substantial special need, the Court need not weigh any competing individual and governmental interests in this case." *Id*. at 28.

[95] *Id*. at 16-17. While "the Court's analysis as to the constitutionality of the statute should end there," the state, without citing a single legal precedent in support, argued that "evidence of drug use within the Florida TANF population would, in and of itself, suffice to establish a special need for suspicionless, mandatory drug testing of that entire population." *Id*. at 17-18. Although the district court doubted the constitutionality of this argument, it reasoned that, even assuming that it did pass constitutional muster, the state failed to produce evidence to support its argument. *Id*. at 17-28. The court explained:

> In sum, there simply is no competent evidence offered on this record of the sort of pervasive drug problem the State envisioned in the promulgation of this statute. Hence, even if the State intended to hinge its demanded exception to the Fourth Amendment on this thin reed, a proposition the Eleventh Circuit already strongly cautioned against, it has failed to make the evidentiary showing that would be required.

Id. at 28 (internal citations omitted).

of summary judgment on behalf of the plaintiffs. Even while "viewing all facts in the light most favorable to the State,"[96] the appellate panel concluded that "the State has not demonstrated a substantial special need to carry out the suspicionless search—we see no concrete danger, only generalized public interests."[97] The Court also determined that the state had not provided evidence to support the notion that drug use within the TANF community was any different than that of the Florida population at-large, and even if it had, this "drug-testing program is not well designed to identify or deter applicants whose drug use will affect employability, endanger children, or drain public funds."[98] Finally, the court held that the state could not alleviate constitutional concerns by "exact[ing]" consent from applicants by conditioning their receipt of TANF benefits on passing drug tests.[99] "We respect the State's overarching and laudable desire to promote work, protect families, and conserve resources. But, above all else, we must enforce the Constitution and the limits it places on government. If we are to give meaning to the Fourth Amendment's prohibition on blanket government searches, we must—and we do—hold that §414.0652 crosses the constitutional line."[100]

Implications for Future Federal or State Legislation

Based on the case law analyzed above, state or federal laws that require drug tests as a condition of receiving governmental benefits without regard to an individualized suspicion of illicit drug use may be subject to constitutional challenge. Drug tests historically have been considered searches for the purposes of the Fourth Amendment. For searches to be reasonable, they generally must be based on individualized suspicion unless the government can show a special need warranting a deviation from the norm. However, governmental benefit programs like TANF, SNAP, unemployment compensation, and housing assistance do not naturally evoke the special needs that the Supreme Court has recognized in the past.

The implementation of governmental assistance programs and the receipt of their benefits do not raise similar public safety concerns as those at issue in *Skinner* and *Von Raab*. In implementing these programs, the government also does not clearly act as tutor or guardian for minors, as the Court considered important in *Earls* and *Vernonia*. Finally, the evidence in *Lebron* failed to show a pervasive drug problem in the subset of the population subjected to suspicionless testing that strengthened the government's interests in *Earls* and *Vernonia*. Thus, if lawmakers wish to pursue the objective of reducing the likelihood of taxpayer funds going to individuals who abuse drugs through drug testing, legislation is less likely to run afoul of the Fourth Amendment[101] if it only requires individuals to submit to a drug test based on an individualized suspicion of drug use, for

[96] *Lebron*, Affirmation of Final Summary Judgment at 2.

[97] *Id*. at 53-54.

[98] *Id*. at 44.

[99] *Id*. at 54.

[100] *Id*.

[101] But see *Earls*, 536 U.S. at 837 ("In this context, the Fourth Amendment does not require a finding of individualized suspicion, and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students. Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.") (internal citations omitted); *Vernonia*, 515 U.S. at 663-664. These dicta seem to be limited to the context of drug testing minors in public schools.

example by providing that only those TANF applicants whom administrators have a "reasonable cause to believe" use illegal drugs be drug tested.[102]

Additionally, the way drug testing programs are implemented can affect a court's constitutional analysis of the program. For instance, until a subsequent administrative rulemaking promulgated in response to issues raised in the district court's preliminary injunction order,[103] Florida's Section 414.0652 program required positive drug test results to be shared with government officials outside of the TANF program, such that the information ultimately could be made available to law enforcement officials. As a result, prior to the administrative rulemaking, applicants who failed drug tests under the Florida program also could have been subject to criminal drug investigations or investigations of child abuse, in addition to losing their TANF benefits. This information sharing increased the level of intrusion into the privacy interests of TANF applicants more than if the results were kept confidential to all but the administrators of the TANF program, who had a legitimate need to know the information. In contrast, the testing programs that complied with the Fourth Amendment at issue in *Von Raab*, *Earls*, and *Vernonia* limited the number of people who had access to the test results, prohibited the results from being passed to law enforcement officials, and restricted the negative consequences of failing a drug test to the specific activities the testing was designed to address (e.g., school extracurricular activities). Although they may not have been determinative, these factors reduced the privacy intrusion of the plaintiffs and seem to have played a role in the Court's balancing test evaluation. Therefore, governmental drug testing procedures that restrict the sharing of test results and that limit the negative consequences of failed tests to the assistance program in question likely would be on firmer constitutional ground.

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[102] For example, Florida implemented a "Demonstration Project" in accordance with a state law enacted in 1998. The law required Florida's DCF to conduct an empirical study to determine if "individuals who apply for temporary cash assistance or services under the state's welfare program are likely to abuse drugs," and if "such abuse affects employment and earnings and use of social service benefits." *Lebron*, Preliminary Injunction at 4 (citing Fla. Stat. §414.70(1) (1998) (repealed 2004)). Although it was never challenged in the courts, the drug testing component of Florida's Demonstration Project raised fewer constitutional concerns, in part, because individuals were only tested after administrators determined there was reason to believe the individual abused drugs based on a minimally intrusive written screening. *Id*.

It should be noted that, even if the statutory language explicitly limits drug tests to instances in which there is "reasonable suspicion" of illicit drug use, the law could still be implemented in an unconstitutional way. Also, while the Demonstration Project may have raised fewer constitutional concerns, the empirical study of the project suggested that it may not have served its legislative objectives. The DCF report explained:

> First, [the findings] emphasize the difficulty of determining the extent of drug use among welfare beneficiaries. Any test utilized for this purpose is likely to provide, at best, an estimate of these numbers. Such estimates are suitable only for planning purposes and not for sanctioning.
>
> Secondly, the findings suggest that states may not need to test for drug use among welfare beneficiaries. Evidence from the Florida demonstration project showed very little difference between drug users and non-users on a variety of dimensions. Users were employed at about the same rate as were non-users, earned approximately the same amount of money as those who were drug free and did not require substantially different levels of governmental assistance. If there are no behavioral differences between drug users and non-users and if drug users do not require the expenditure of additional public funds, then policymakers are free to concentrate on other elements of welfare policy and to avoid divisive, philosophy-laden debates.

Lebron, Preliminary Injunction at 7.

[103] See *supra* n. 80.

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