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, the Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps), the Section 8 Housing Choice Voucher program, and their precursors, have been concerned 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. 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 recently have shown a renewed interest in conditioning the receipt of governmental benefits on passing drug tests. For example, the House of Representatives, on December 13, 2011, passed a provision that would have authorized states to require drug testing as an eligibility requirement for certain unemployment benefits. Additionally, lawmakers in a majority of states reportedly proposed legislation in 2011 that would require drug testing beneficiaries of governmental assistance under certain circumstances.

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 are vulnerable to constitutional challenge. To date, only two state laws requiring suspicionless drug tests as a condition to receiving governmental benefits have sparked litigation, and neither case has been fully litigated on the merits. To date, 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." The reasonableness of searches generally requires 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 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 that limit the negative consequences of failed tests to the assistance program in question will 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 Introduction*, by Gene Falk; CRS Report R42054, *The Supplemental Nutrition Assistance Program: Categorical Eligibility*, by Gene Falk and Randy Alison Aussenberg; CRS Report RL34591, *Overview of Federal Housing Assistance Programs and Policy*, by Maggie McCarty et al.; and CRS Report RL33362, *Unemployment Insurance: Programs and Benefits*, by Katelin P. Isaacs and Julie M. Whittaker.

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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,[1] the Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps),[2] the Section 8 Housing Choice Voucher program,[3] and their precursors have been concerned 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] went a step further by explicitly authorizing 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 recently have shown a renewed interest in conditioning the receipt of governmental benefits on passing drug tests. For example, the House of Representatives, on December 13, 2011, passed a provision that would have authorized states to require drug testing as an eligibility requirement for certain unemployment benefits.[9] Additionally, lawmakers in a majority of states reportedly proposed legislation in 2011 that would require drug testing beneficiaries of governmental assistance under certain circumstances.[10]

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

[2] For more information on SNAP, see CRS Report R42054, *The Supplemental Nutrition Assistance Program: 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 et al.

[4] King v. Smith, 392 U.S. 319, 320-25 (1967) (discussing various eligibility requirements of the Aid to Families with Dependent Children (AFDC) welfare program and its precursors that attempted to distinguish between the "worthy" poor and those unworthy of assistance) (*held*: 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] H.R. 3630, the Middle Class Tax Relief and Job Creation Act of 2011, as engrossed in the House, §2127 (stating, in relevant part: "Nothing in this Act or any other provision of Federal law shall be considered to prevent a State from testing an applicant for unemployment compensation for the unlawful use of controlled substances as a condition for receiving such compensation; or denying such compensation to such applicant on the basis of the result of such testing."). On December 17, 2011, the Senate passed an amended version of H.R. 3630 that did not include the drug testing provision.

[10] A. G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, N.Y. Times, October 10, 2011, available at http://www.nytimes.com/2011/10/11/us/states-adding-drug-test-as-hurdle-for-welfare.html?pagewanted=all ("Policy makers in three dozen states this year proposed drug testing for people receiving benefits like welfare, unemployment (continued...)

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 are vulnerable 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, only two state laws requiring suspicionless drug tests as a condition to receiving governmental benefits have sparked litigation, and neither case has been fully litigated on the merits. To date, 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.

Fourth Amendment Overview

The Fourth Amendment protects the "right of the people" to be free from "unreasonable searches and seizures" by the government.[11] 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.[12] Governmental conduct generally will be found to constitute a "search" for Fourth Amendment purposes where it infringes "an expectation of privacy that society is prepared to consider reasonable...."[13] The Supreme Court, on a number of occasions, has held that government-administered drug tests are searches under the Fourth Amendment.[14] 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.

What a court determines to be reasonable depends on the nature of the search and its underlying governmental purpose. Reasonableness under the Fourth Amendment generally requires some form of individualized suspicion, which frequently takes the form of a warrant that is based on probable cause.[15] An exception to the ordinary individualized suspicion requirement has gradually

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assistance, job training, food stamps and public housing.").

[11] 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.").

[12] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[13] United States v. Jacobsen, 466 U.S. 109, 113 (1984).

[14] 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).

[15] *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 Railway Labor Executives reaffirms the (continued...)

evolved, however, for cases where a "special need" of the government, not related to criminal law enforcement, is found by the courts to outweigh any "diminished expectation" of privacy invaded by a search.[16] In instances where the government argues that there are special needs, 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.[17]

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 under the Fourth Amendment. Each of these decisions, *Skinner v. Railway Labor Executives Association*,[18] *National Treasury Employees Union v. Von Raab*,[19] *Vernonia School District v. Acton*,[20] *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[21] and *Chandler v. Miller*,[22] is analyzed in turn.

Skinner focused on Federal Railroad Administration (FRA) regulations that required breath, blood, and urine tests of railroad workers involved in train accidents.[23] 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.[24] 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.[25] 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.[26] 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...."[27] In these circumstances, the majority held, it was

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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.").

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

[17] *Id*. at 314 ("courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.").

[18] 489 U.S. 602 (1989).

[19] 489 U.S. 656 (1989).

[20] 515 U.S. 646 (1995).

[21] 536 U.S. 822 (2002).

[22] 520 U.S. 305 (1997).

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

[24] *Id.* at 617.

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

[26] *Id.* at 624.

[27] *Id.* at 627.

reasonable to conduct the tests, even in the absence of a warrant or reasonable suspicion that any employee may be impaired.[28]

In the *Von Raab* decision, handed down on the same day as *Skinner*, the Court upheld drug testing of U.S. Customs Service personnel who sought transfer or promotion to certain "sensitive" positions, namely those involving drug interdiction or carrying firearms, without a requirement of reasonable individualized suspicion.[29] 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.[30] 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.[31]

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."[32]

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 season's beginning 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.[33]

A 6 to 3 majority of the Court upheld the program against Fourth Amendment challenge. Central to the 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."[34] This relationship, in effect, "permit[s] a degree of supervision and control that could not be exercised over free adults."[35] 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

[28] *Id.* at 633.

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

[30] *Id.* at 672.

[31] *Id.* at 679.

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

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

[34] *Id.* at 654.

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

privacy in sports' locker rooms.[36] Because "school sports are not for the bashful," student athletes were found to have a lower expectation of privacy than other students.[37]

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.[38] School officials had an interest in deterring student drug use as part of their "special responsibility of care and direction" toward students.[39] 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...."[40]

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."[41]

Earls concerned a Tecumseh Public School District policy that required suspicionless drug testing of students wishing to participate "in any extracurricular activity."[42] Such activities included Future Farmers of America, Future Homemakers of America, academic teams, band, 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 show choir, marching band, and academic team.[43]

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. 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."[44] 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.[45] The fact that student athletes in the *Vernonia* case were regularly subjected to physical exams and communal undress was not deemed "essential" to the

[36] *Id.* at 657.

[37] *Id*.

[38] *Id.* at 658.

[39] *Id.* at 662.

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

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

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

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

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

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

outcome there.[46] Instead, that decision "depended primarily upon the school's custodial responsibility and authority," which was equally applicable to athletic and nonathletic activities.[47]

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*.[48] 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.[49] "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."[50]

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.[51] "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."[52]

Conversely, the Court in *Chandler* struck down a 1990 Georgia statute requiring candidates for governor, lieutenant governor, attorney general, the state judiciary and legislature, and certain other elective offices to file a certification that they have tested negatively for illegal drug use.[53] 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."[54] 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."[55] Secondly, the law did not serve as a "credible means" to detect or deter drug abuse by public officials.[56] 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.[57] 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.[58] Any drug abuse by public officials is far more likely to be detected

[46] *Id*. at 831.
[47] *Id*.
[48] *Id*. at 832-34.
[49] *Id*. at 833.
[50] *Id*. at 832-34.
[51] *Id.* at 835-37.
[52] *Id.* at 837.
[53] *Chandler*, 520 U.S. at 322.
[54] *Id.* at 318-19.
[55] *Id.* at 319.
[56] *Id*.
[57] *Id.* at 319-20.
[58] *Id.* at 321.

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 concluded:

> 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. 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.[59]

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. The *Earls* and *Vernonia* rulings show 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 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 have the potential to negatively impact multiple or significant aspects of an individual's life, are less likely to be considered reasonable.

Preliminary 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*,[60] which was affirmed by the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) as a result of an evenly divided *en banc* panel,[61] involved a Michigan program that began in the late 1990s. The other ruling, *Lebron v. Wilkens*,[62] is part of ongoing litigation regarding a program instituted pursuant to Florida law. Both decisions were delivered at the preliminary stages of litigation and were not based on a complete

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

[60] Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000).

[61] Marchwinski v. Howard, 60 Fed. App'x 601 (6th Cir. 2003) (affirming the district court decision 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).

[62] Lebron v. Wilkens, Case 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).

evidentiary record. However, future courts that review similar drug testing programs may look to these decisions for guidance, and they may be useful for lawmakers who consider crafting legislation that requires individuals to pass drug tests in order to qualify for governmental benefits.

The Challenged Michigan Law—*Marchwinski v. Howard*

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.[63]

Several individuals who would be subject to the FIP drug testing program filed suit, seeking a preliminary injunction that would prevent the implementation of the program because it would violate their Fourth Amendment rights against unreasonable searches. The court granted the preliminary injunction, which, among other factors, required a finding that the plaintiffs would likely succeed on the merits of their Fourth Amendment claims.[64]

The *Marchwinski* court 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 must be grounded in public safety."[65] According to the court, the state's "primary justification ... for instituting mandatory drug testing is to move more families from welfare to work."[66] 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.[67] 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."[68] 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."[69] Thus, the court concluded that the

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

[64] *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*.

[65] *Id*. at 1143.

[66] *Id*. at 1140.

[67] *Id*.

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

[69] *Id*. at 1142.

"Plaintiffs have established a strong likelihood of succeeding on the merits of their Fourth Amendment claim."[70] The case did not progress 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."[71]

The Challenged Florida Law—*Lebron v. Wilkens*

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.[72] 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 does not require it, individuals 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.[73] However, children of an 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 is otherwise approved by Florida's Department of Children and Families (DCF). The results of positive drug tests are 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 law enforcement officials and to state attorneys who work on child abuse cases.[74]

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.[75] The court granted the motion until the matter can be fully litigated, finding that the plaintiff "has a substantial likelihood of success on the merits" of his Fourth Amendment claims.[76]

The court, citing *Skinner*, *Von Raab*, *Vernonia*, and *Earls*, found that the drug test represents a Fourth Amendment search due to "the intrusion into a highly personal and private bodily function" necessary for the urinalysis, the fact that private information such as prescription drug

[70] *Id*. at 1143.

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

[72] *Lebron*, Preliminary Injunction at 9-10.

[73] *Id*. at 10.

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

[75] *Id*. at 2.

[76] *Id*. at 34.

use could be divulged as part of the test, and that the test results could be made available to law enforcement and other non-medical third parties.[77]

The court also held that 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. The state argued that four different interests served as special needs:

> (1) ensuring that TANF funds are used for their dedicated purpose, and not diverted to drug use; (2) protecting children by "ensuring that its funds are not used to visit an 'evil' upon the children's homes and families;" (3) ensuring that funds are not used in a manner that detracts from the goal of getting beneficiaries back to employment; (4) ensuring that the government does not fund the "public health risk" posed by the crime associated with the "drug epidemic."[78]

The only evidence submitted in the record that the court considered "competent ... on this issue" was results from a pilot TANF drug testing program, called the Demonstration Project, that was commissioned by the state in the late 1990s, and the preliminary results from the first month of testing under the Section 414.0652 program.[79] According to the court, not only did this evidence not support the proffered special needs, but it also undermined them.[80]

The Demonstration Project was mandated by a Florida law enacted in 1998. It 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."[81] Under the law, only those TANF applicants for which the DCF had a "reasonable cause to believe" used illegal drugs were to be drug tested.[82] To implement the program, DCF utilized a written test to screen 6,462 TANF applicants for potential drug use. Based on this screening, 1,447 were subjected to a drug test. Of the 1,447 individuals tested, 335 tested positive for illegal drugs. This represented 5.1% of the 6,462 applicants who were screened.[83]

Regarding the first goal of study, as to whether or not the TANF applicants are likely to abuse drugs, the study noted that the 5.1% positive rate was lower than the rate found in a number of national welfare recipient drug studies. The court also noted that it was lower than the 8.13% estimated rate of drug use by Floridians, as a whole.[84] The study also did not find significant correlations between drug users and non-users on employment-related factors. The DCF report explained:

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[77] *Id*. at 14-18.

[78] *Id.* at 23 (quoting the state's response to the plaintiff's motions, docket no. 19).

[79] The state offered three additional studies as evidence that were disregarded by the court because they were outdated and not based on the specific population relevant to the case. *Id*. at 24-25.

[80] *Id*. at 34 ("Florida has already conducted its experiment. It commissioned a Demonstration Project that proceeded unchallenged, and it was based on suspicion of drug use. Through this effort, Florida gathered evidence on the scope of this problem and the efficacy of the proposed solution. The results debunked the assumptions of the State, and likely many laypersons, regarding TANF applicants and drug use. The State nevertheless enacted Section 414.0652, without any concrete evidence of a special need to do so—at least not that has been proffered on this record.").

[81] *Lebron*, Preliminary Injunction at 4.

[82] *Id*. at 4 (citing Fla. Stat. §414.70(1) (1998) (repealed 2004)).

[83] *Id*. at 4-5.

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

> 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.[85]

Drug testing pursuant to Florida Statute Section 414.0652 began in July 2011.[86] According to the preliminary results of the first month of testing that were presented to the court, approximately 2% of TANF applicants tested positive for illicit drugs. An additional 7.6% of applicants refused to submit to testing, but the court pointed out that

> ... it is difficult to draw any conclusions concerning the extent of drug use or the deterrent effect of the statute from this fact because declining to take the drug test can be attributed to a number of factors in addition to drug use, including an inability to pay for the testing, a lack of laboratories near the residence of an applicant, inability to secure transportation to a laboratory or, as in the case at bar, a refusal to accede to what an applicant considers to be an unreasonable condition for receiving benefits.[87]

Thus, the state could only demonstrate that between 2% and 5.1% of TANF applicants used illegal drugs.[88]

According to the court, both the findings of the Demonstration Project and the preliminary results from the Section 414.0652 testing undercut each of the four special needs proffered by the state.[89] The evidence provided to the court suggests that the rate of illicit drug use by TANF applicants is lower than that of the general public and that there were no significant differences between drug-using applicants and drug-free applicants pertaining to employment, income, and level of governmental support.[90] Additionally, the state was unable to show that the drug testing would provide net cost savings for the TANF program due to the reimbursements for negative drug tests and the protective payee provision.[91]

[85] *Id*. at 7.

[86] *Id*. at 8.

[87] *Id*. at 12.

[88] *Id*. at 12-13.

[89] *Id*. at 34.

[90] *Id*. at 31-32.

[91] *Id*. at 33.

In the absence of evidence in the record to justify any of the special needs asserted by the state,[92] the "Plaintiff has shown a substantial likelihood of success on the merits of [his Fourth Amendment claims]."[93]

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 susceptible to constitutional challenge. Drug tests historically have been considered searches for the purposes of the Fourth Amendment. The reasonableness of searches generally requires 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, at least thus far, in *Lebron* has 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 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.[94] 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.[95]

Additionally, the way drug testing programs are implemented can affect a court's constitutional analysis of the program. For instance, the fact that Florida's Section 414.0652 program requires 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,

[92] In dicta, the court seemed to suggest that the third asserted special need, that is, transitioning TANF beneficiaries to gainful employment, may not have qualified as a special need, but did not have to reach that conclusion because the state failed to offer evidence to support the contention. *Id*. at 28-29 ("Even if this interest qualified as a special need, *see contra Marchwinski*, 113 F. Supp. at 1140, the evidence does not support its application.").

[93] *Lebron* Preliminary Injunction at 34.

[94] 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. This dicta seems to be limited to the context of drug testing minors in public schools.

[95] It should be noted that, while the Demonstration Project may have raised few constitutional concerns, the empirical study of the project suggested that it may not have served its legislative objectives.

increases 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. As a result, applicants who fail drug tests under the Florida program also could be subject to criminal drug investigations or investigations of child abuse, in addition to losing their TANF benefits. 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 will be on firmer constitutional ground.

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