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Drug Testing, Welfare, and the Special Needs Doctrine: An Argument in Support of Drug Testing TANF Recipients

Brianna W. McLaughlin

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DRUG TESTING, WELFARE, AND THE SPECIAL NEEDS DOCTRINE: AN ARGUMENT IN SUPPORT OF DRUG TESTING TANF RECIPIENTS

BRIANNA W. McLAUGHLIN*

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* J.D. expected, Cleveland-Marshall College of Law, May 2013; B.A. Miami University 2009. Deepest thanks to my advisor, professor, and mentor, David Forte, for his guidance in writing this Note.

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I. INTRODUCTION

I hear a lot of people say, “Well, this is going to punish children, and we should not punish the children,” as if the current system does not punish children, as if illegitimacy rates where over a third of all the children born in America are born to single moms does not punish children. That does not hurt kids not to have a father in the household? That does not hurt kids not to have the work values that are taught in the household where a mom gets up in the morning and a dad gets up in the morning and goes to work? That does not hurt kids? It does not hurt kids to have to go out and play in a playground and worry about stepping on a needle from a drug addict? Of course, it does. This system hurts kids. That is why we are here—because the system hurts kids.¹

The movie *The Blind Side* portrays the real life story of Michael Oher. In the movie, Michael’s mother lives in Section 8 housing, is a drug addict, and receives welfare. While living with his mother, Michael is illiterate, neglected, and forced to search the stands of a basketball stadium for leftover food in order to eat. However, when Michael is taken out of the drug addicted household, he flourishes. Michael learns to read, performs better in school, excels in athletics, and goes on to play professional football. Michael Oher’s obvious success after he was removed from a drug addicted household implicitly asks the question: *What would have happened to him if he had remained with his drug addict mother?*²

In 1996, Congress considered situations of children like Michael Oher when they overhauled the welfare program through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).³ One of the PRWORA’s goals is to protect children in homes receiving welfare benefits.⁴ A crucial step in the Congressional plan was authorizing states to drug test welfare recipients as a condition to receiving benefits.⁵ With this grant of authority, states enacted legislation to implement drug testing programs to protect children in welfare receiving homes from the dangers of drug addicted parents.⁶ In 2011, over thirty-six states proposed legislation requiring drug testing of welfare applicants.⁷ In addition, in 2012 “at least 28 states put forth proposals requiring drug testing for public

¹ 142 CONG. REC. 18,486 (July 23, 1996) (statement of Sen. Rick Santorum).

² See *THE BLIND SIDE* (Alcon Entertainment 2009); see also Steven Malanga, *Parenting vs. Poverty*, CITY J. (Feb. 10, 2007), <http://www.city-journal.org/html/rev2007-02-10sm.html>.

³ See generally Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of Titles 21 and 42 of the United States Code).

⁴ For a complete list of Congress’s findings, see Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101.

⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 902, 21 U.S.C. § 862b (2006).

⁶ For an in-depth discussion of the effects of drug addicted parents on children, see *infra* Part V.A.

⁷ *Drug Testing and Public Assistance*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 7, 2011), <http://www.ncsl.org/default.aspx?tabid=23676>. Of those thirty-six states, Arizona, Florida, and Missouri enacted legislation. *Id.*

assistance applicants or recipients in 2012.”⁸ Two state drug testing laws have been found unconstitutional Fourth Amendment search and seizures.⁹ These cases held that the special needs doctrine, an exception to the Fourth Amendment’s individualized suspicion requirement, did not apply to drug testing of Temporary Assistance for Needy Families (TANF) applicants.¹⁰ As more states propose drug testing legislation even after lower courts have held existing laws unconstitutional,¹¹ it is necessary to take a closer look at the testing of welfare recipients and any potential Fourth Amendment implications.

This Note argues that mandatory suspicionless drug testing is not a violation of a welfare applicant’s Fourth Amendment protection against unreasonable search and seizure. Part II of this Note explains the PRWORA’s overhaul of the welfare system. Part II also explains the two different approaches states use to institute their drug testing power, and two cases challenging state drug testing legislation. Part III provides a brief overview of the Supreme Court’s treatment of suspicionless drug testing outside of the welfare context. Part IV explains how the Fourth Amendment allows for warrantless searches in certain administrative functions, such as the special needs exception. Part V shows that the special needs doctrine eliminates the warrant requirement for drug testing. This Part also shows that the special needs doctrine’s application to suspicionless drug testing laws. Finally, Part VI addresses major criticisms of drug testing welfare recipients and explains why these criticisms are based on faulty presumptions.

II. THE HISTORY OF WELFARE REFORM AND STATE DRUG TESTING LAWS

A. *Congress Reforms Welfare Through the Personal Responsibility and Work Opportunity Reconciliation Act.*

In 1996, the United States Congress overhauled the federally funded welfare program by passing the PRWORA.¹² Prior to the PRWORA, the welfare program was known as the Aid to Families with Dependent Children (AFDC) Program.¹³ The PRWORA replaced the AFDC with the Temporary Assistance to Needy Families (TANF) Program.¹⁴ The PRWORA’s four main purposes are as follows:

⁸ *Id.* Of those twenty-eight states, Utah, Georgia, Tennessee, and Oklahoma enacted legislation. *Id.*

⁹ The Michigan and Florida drug testing laws were held unconstitutional violations of the Fourth Amendment. *See infra* Parts II.B-C.

¹⁰ This Note claims the special needs doctrine does apply to drug testing TANF applications. For a more in-depth discussion of the cases invalidating the state drug testing laws, see *infra* Parts II.B-C.

¹¹ *See* NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 7. Recently in 2011, Michigan discussed possible plans to bring back the drug testing program. *See* Maria Amante, *Department of Human Services Says Drug-Testing Welfare Recipients is "Feasible," Agency Still in Early Process of Developing Policy*, SAGINAW NEWS (Dec. 28, 2011), http://www.mlive.com/news/saginaw/index.ssf/2011/12/department_of_human_services_s.html.

¹² *See* 79 AM. JUR. 2D *Welfare Laws* § 8 (2011).

¹³ *Id.*

¹⁴ *Id.*

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- (4) encourage the formation and maintenance of two-parent families.¹⁵

The PRWORA includes specific requirements to implement the stated goals. First, because the money is intended to help families with children, in order to be eligible for TANF funds there must be a minor child or a pregnant woman residing in the household.¹⁶ Also, the PRWORA promotes personal responsibility by adding time limitations and work mandates for welfare eligibility.¹⁷ Under AFDC, there was no time limit for a welfare recipient's eligibility for benefits.¹⁸ The PRWORA instituted a sixty-month lifetime eligibility limit.¹⁹ Also, the PRWORA requires "parent[s] or caretaker[s] receiving assistance under the program to engage in work . . . once the State determines the parent or caretaker is ready to engage in work, or once the parent or caretaker has received assistance under the program for 24 months . . . whichever is earlier."²⁰ In addition, the Act requires teenage parents to live in

¹⁵ 42 U.S.C. § 601 (2006).

¹⁶ See 42 U.S.C. § 608(a)(1) (2006).

¹⁷ In the Senate debates on the PRWORA, Senator Breaux stated, "This bill is tough on work. It sets time limits for how long someone can be on welfare. It sets out work requirements. It tells teen parents, for the first time, that they have to live with an adult or with their parents. It is a tough bill on work, but it is also a bill that is good for kids." 142 CONG. REC. 18,487 (July 23, 1996) (statement of Sen. John Breaux).

¹⁸ See *Weston v. Cassata*, 37 P.3d 469, 472 (Colo. App. 2001).

¹⁹ See *id.*

²⁰ 42 U.S.C. § 602(a)(1)(A)(ii) (2006). In July 2012, President Obama's administration issued a directive under Section 115 of the Social Security Act allowing the Secretary of the Department of Health and Human Services (HHS) to issue waivers to these work requirements in order to "allow states to test alternative and innovative strategies, policies, and procedures that are designed to improve employment outcomes for needy families." Earl S. Johnson, *TANF-ACF-IM-2012-03 (Guidance concerning Waiver and Expenditure Authority Under Section 1115)*, DEP'T HEALTH & HUMAN SERVS. (July 12, 2012), <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203>. The PRWORA requires TANF recipients to participate in certain "work activities" in order to receive benefits. See 42 U.S.C. § 607(d). These categories already broadly encompass a vast amount of activities, such as "attending secondary school," "community services programs," or even "the provision of child care services to an individual who is participating in a community service program." *Id.* Despite the many endeavors that qualify as "work activities" under the PRWORA, the HHS stated that it would waive even these minimal requirements under the assumption that waiving these minimal requirements will somehow lead to a more effective implementation of the TANF goals. See Johnson, *supra* note 20 (stating the "HHS will only consider approving waivers relating to the work participation requirements that make changes intended to lead to more effective means of meeting the work goals of TANF."). Groups opposed to waiving these minimal work requirements fear that these waivers are the "end of welfare reform," and will amount to a backslide into "the past, [when] state bureaucrats have attempted to define

“adult-supervised settings”²¹ and “attend high school or other equivalent training program.”²² States can also deny funding to individuals who refuse to cooperate with the state to establish the paternity of the child.²³ In addition to the above requirements, the PRWORA explicitly authorizes states to enact legislation denying welfare benefits to individuals who test positive for drug use.²⁴

B. States Enact Drug Testing Legislation

In response to Congress’s specific authorization to drug test welfare recipients, states enacted legislation requiring their citizens to pass a drug screening in order to receive benefits. “Prior to welfare reform, few States made efforts to identify whether clients had alcohol or other drug abuse problems.”²⁵ As mentioned above, thirty-six states proposed drug testing legislation to receive TANF benefits in 2011.²⁶ Two primary approaches have emerged from those states that have passed drug testing laws. The first approach is a cause-based approach. These laws include procedures for the state to establish cause before testing an applicant.²⁷ Under this approach, not every applicant is screened for drug use before they receive benefits.²⁸ For example, Missouri requires drug testing of applicants only if “the department has reasonable cause to believe, based on the screening, [the applicant] engages in illegal use of controlled substances.”²⁹ The second approach is a suspicionless approach.

activities such as hula dancing, attending Weight Watchers, and bed rest as ‘work.’” See Robert Rector & Kiki Bradley, *Obama Guts Welfare Reform*, THE FOUNDRY (July 12, 2012, 4:10 p.m.), <http://blog.heritage.org/2012/07/12/obama-guts-welfare-reform/>.

²¹ See 42 U.S.C. § 608(a)(5) (2006).

²² 42 U.S.C. § 608(a)(4) (2006).

²³ 42 U.S.C. § 608(a)(2) (2006). The statute, in relevant part, states as follows:

If the agency responsible for administering the State plan . . . determines that an individual is not cooperating with the State in establishing paternity or in establishing, modifying, or enforcing a support order with respect to a child of the individual, and the individual does not qualify for any good cause or other exception established by the State . . . then the State . . . may deny the family any assistance under the State program.

Id.

²⁴ 21 U.S.C. § 862b (2006) (cited in *Marchwinski v. Howard*, 309 F.3d 330, 335 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) and *reh'g en banc*, 60 F. App'x 601 (6th Cir. 2003)).

²⁵ LAURA RADEL, KRISTEN JOYCE & CARLI WULFF, U.S. DEP'T OF HEALTH & HUMAN SERVS., *DRUG TESTING WELFARE RECIPIENTS: RECENT PROPOSALS AND CONTINUING CONTROVERSIES 1* (Oct. 2011), available at <http://aspe.hhs.gov/hsp/11/DrugTesting/ib.pdf>.

²⁶ See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 7.

²⁷ See generally MO. REV. STAT. § 208.027 (2011). As discussed below, Michigan’s suspicionless drug testing program was found unconstitutional in *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1136 (E.D. Mich. 2000).

²⁸ See MO. REV. STAT. § 208.027 (2011).

²⁹ *Id.* The Missouri law, in relevant part, is as follows:

Under this approach every TANF applicant is required to pass a drug test as a condition to receiving benefits. In these states, there is no probable cause requirement in order to be screened.³⁰ For example, Florida's drug testing laws "require a drug test . . . to screen each individual who applies for Temporary Assistance for Needy Families (TANF)."³¹ This Note advocates that the suspicionless drug testing approach does not violate the applicant's Fourth Amendment rights.

C. Recent Challenges to the Suspicionless Drug Testing Approach

In 1999, Michigan implemented a pilot program for suspicionless drug testing of welfare applicants.³² The Michigan program required all applicants to pass a drug screening before they could receive welfare funding.³³ In *Marchwinski v. Howard*, the district court granted a preliminary injunction against the pilot program, finding the state was not likely to succeed on the merits of the case because there was no threat to public safety.³⁴ The Sixth Circuit reversed on appeal, finding that the

The department of social services shall develop a program to screen each applicant or recipient who is otherwise eligible for temporary assistance for needy families benefits under this chapter, and then test, using a urine dipstick five panel test, *each one who the department has reasonable cause to believe, based on the screening, engages in illegal use of controlled substances*. Any applicant or recipient who is found to have tested positive for the use of a controlled substance, which was not prescribed for such applicant or recipient by a licensed health care provider, or who refuses to submit to a test, shall, after an administrative hearing conducted by the department under the provisions of chapter 536, be declared ineligible for temporary assistance for needy families benefits for a period of three years from the date of the administrative hearing decision unless such applicant or recipient, after having been referred by the department, enters and successfully completes a substance abuse treatment program and does not test positive for illegal use of a controlled substance in the six-month period beginning on the date of entry into such rehabilitation or treatment program. The applicant or recipient shall continue to receive benefits while participating in the treatment program. . . . [A] recipient who tested positive for the use of a controlled substance under this section to an appropriate substance abuse treatment program approved by the division of alcohol and drug abuse within the department of mental health.

Id. (emphasis added).

³⁰ Michigan used the suspicionless approach in their pilot program in 1999. In 2011, Florida also enacted a suspicionless approach. For more information on these two cases, see *infra* Part II.C.

³¹ See FLA. STAT. § 414.0652 (2011), *invalidated by* Lebron v. Wilkins, F. Supp. 2d 1273 (M.D. Fla. 2011).

³² See *Marchwinski*, 113 F. Supp. 2d at 1136 (citing MICH. COMP. LAWS § 400.57). This law was later invalidated by *Marchwinski v. Howard*, 309 F. 3d 330 (6th Cir. 2003), *aff'd by an equally divided court*, *Marchwinski v. Howard*, 60 F. App'x 601 (6th Cir. 2003).

³³ See *Marchwinski*, 113 F. Supp. at 1136.

³⁴ See *id.* at 1139-40. The *Marchwinski* court found that a threat to public safety was a requirement to trigger the special needs exception to the Fourth Amendment's requirement for individualized suspicion. *Id.* For an in-depth discussion of the special needs doctrine, see *infra* Part V.

public safety concern was only one of the possible triggers to the special needs exception to the individualized suspicion requirement.³⁵ The Sixth Circuit found that since TANF funds are issued to households with children, there was a special need to protect the safety of the children in those households from drug abusers.³⁶ On appeal, the Sixth Circuit was equally divided sitting en banc.³⁷ The rules of procedure therefore affirmed the decision of the district court declaring the policy unconstitutional.³⁸

In 2011, Florida enacted a similar law requiring all welfare applicants to pass a suspicionless drug test in order to receive welfare benefits.³⁹ In *Lebron v. Wilkins*, the plaintiff's welfare application was denied after he refused to comply with the state drug screening requirement.⁴⁰ The plaintiff was "eligible for TANF benefits, aside from his failure to provide proof that he has tested negative for controlled substances."⁴¹ At trial, Florida asserted the following interests qualified as a special need:

- (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."⁴²

Similar to *Marchwinski*, the district court enjoined the program, finding there was no special need to alleviate the government's warrant requirement.⁴³ The court found that, while they were "undeniably laudable objectives" none of Florida's interests qualified as a special need.⁴⁴

³⁵ See *Marchwinski*, 309 F.3d at 335.

³⁶ See *id.* at 336.

³⁷ See *Marchwinski*, 60 F. App'x 601.

³⁸ See *id.*

³⁹ FLA. STAT. § 414.0652 (2011), *invalidated by* *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011).

⁴⁰ See *Lebron*, 820 F. Supp. 2d, at 1273.

⁴¹ *Id.*

⁴² *Id.* at 1286. On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's decision. See *Lebron v. Fl. Dep't of Children & Families*, 710 F.3d 1202 (11th Cir. 2013). In its decision, the court was careful to note that it did "not resolve the *merits of the constitutional claim*, but instead address[ed] whether the district court abused its discretion" in granting the preliminary injunction. *Id.* at 1206.

⁴³ See *Lebron*, 820 F. Supp. 2d at 1292.

⁴⁴ Although the court found there was not sufficient evidence to establish any of the special needs asserted by Florida, the court mentioned it was not presented with any evidence at the preliminary injunction stage about the effects of drug abusing parents on children. *Id.* at 1288. The court noted "[i]mportantly, *Earls* was decided on summary judgment after an opportunity to offer up competent evidence. Considering, as the Court must, this record as it is currently presented, there is no evidence at this stage of the litigation . . . that the children of

III. SUMMARY OF THE SUPREME COURT'S CASE LAW ON DRUG TESTING

From 1989 until the present, the Supreme Court has examined suspicionless drug testing policies multiple times. The Court has examined drug testing policies of United States railroad⁴⁵ and customs⁴⁶ workers, student athletes,⁴⁷ candidates running for state political office,⁴⁸ and students participating in extra-curricular activities.⁴⁹ In all of the circumstances that the Court has examined a drug testing policy, the Supreme Court has only once ruled an administrative suspicionless drug testing program unconstitutional.⁵⁰

A. Early Cases

The Supreme Court first addressed suspicionless drug testing policies in 1989 in *Skinner v. Railway Labor Executives Association*⁵¹ and *National Treasury Employees Union v. Von Raab*.⁵² In *Skinner*, the Court upheld the Federal Railroad Administration's regulation instituting mandatory drug testing of railroad employees after specified kinds of accidents occurred.⁵³ The Court upheld the warrantless search under the special needs doctrine.⁵⁴ The Court found the special need of

[TANF] applicants are at any heightened risk from the dangers of drug abuse." *Id.* at 1288 (citing *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002)). For an in-depth explanation of the *Earls* case, see *infra* Part III.C. While there may not have been evidence in the *Lebron* case regarding the heightened risk of children of drug and other substance abuse problems, there is overwhelming empirical evidence that these parents pose significant risks to the health and safety of their children. See *infra* Part V.A.

⁴⁵ *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989).

⁴⁶ *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

⁴⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁴⁸ *Chandler v. Miller*, 520 U.S. 305 (1997).

⁴⁹ *Earls*, 536 U.S. at 826.

⁵⁰ See generally *Chandler v. Miller*, 520 U.S. 305 (1997). For a more in-depth discussion of the *Chandler* case, see Parts III.B. and V.A.3. The Supreme Court has also ruled warrantless drug testing of pregnant women suspected of illegal drug use while pregnant by hospitals was unconstitutional in *Ferguson v. Charleston*, 532 U.S. 67 (2001). This case is inapplicable here because the testing was based on suspicion of drug use and the results of a positive test were given to law enforcement. *Id.* Under the welfare drug testing laws, the results of a positive drug test are not given to law enforcement and do not result in criminal liability.

⁵¹ *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989).

⁵² *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

⁵³ *Skinner*, 489 U.S. at 609. The regulations required a toxicology screening of the railroad employees involved in a "major train accident" (defined in the regulations as "any train accident that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of \$500,000 or more[")], an "impact accident" (defined in the regulations as "a collision that results in a reportable injury, or in damage to railroad property of \$50,000 or more[")], or "[a]ny train incident that involves a fatality to any on-duty railroad employee." *Id.* (citations omitted).

⁵⁴ *Id.* at 633.

“ensuring the safety of the traveling public and of the employees themselves” amounted to a compelling governmental interest.⁵⁵ When weighed against the high amount of regulations railroad employees already were required to comply with, the additional privacy infringement was minimal.⁵⁶ The Court balanced the two competing interests and concluded “the compelling Government interests served by the FRA’s regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee.”⁵⁷

In *Von Raab*, the Court upheld suspicionless drug testing of United States customs workers seeking promotions to a position that involved “drug interdiction or enforcement of related laws,” handling a firearm, or handling classified material. In order to receive the promotion, the applicants were required to pass a drug test.⁵⁸ “Petitioners, a union of federal employees and a union official,” challenged the law as a Fourth Amendment violation.⁵⁹ The Court found there was a compelling interest in deterring drug use in customs workers involved in “positions directly involving the interdiction of illegal drugs . . . [and] . . . positions that require the incumbent to carry a firearm.”⁶⁰ The Court noted “that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment.”⁶¹ The Court also found the government had a compelling interest in ensuring that customs works who handle firearms do not “suffer from impaired perception and judgment . . . [in] positions where they may need to employ deadly force.”⁶² Noting that these employees “should expect effective inquiry into their fitness and probity[.]”⁶³ the Court concluded “we believe the Government has demonstrated that its compelling

⁵⁵ *Id.* at 621.

⁵⁶ *Id.* at 628.

⁵⁷ *Id.* at 633.

⁵⁸ Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 661 (1989).

⁵⁹ *Id.* at 663.

⁶⁰ *Id.* at 670. The Court vacated the decision involving positions where the employee handles classified material. *Id.* at 664-65. However, the Court did not cite lack of a public safety implication as a reason that position was vacated. *Id.* The syllabus of the court stated:

The record is inadequate for the purpose of determining whether the Service’s testing of those who apply for promotion to positions where they would handle “classified” information is reasonable, since it is not clear whether persons occupying particular positions apparently subject to such testing are likely to gain access to sensitive information. *On remand, the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric and should, in assessing the reasonableness of requiring tests of those employees, consider pertinent information bearing upon their privacy expectations and the supervision to which they are already subject.*

Id. at 658 (emphasis added).

⁶¹ *Id.* at 670.

⁶² *Id.* at 671.

⁶³ *Id.* at 672.

interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees.”⁶⁴

B. *The Political Office Case*

In *Chandler v. Miller*, the Supreme Court struck down a Georgia law requiring candidates for government office to pass a drug test as a qualification to run for certain state offices.⁶⁵ The law mandated “in order to qualify for a place on the ballot, a candidate must present a certificate from a state-approved laboratory . . . that the candidate submitted to a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the results were negative.”⁶⁶ Libertarian Party nominees for the office of Lieutenant Governor, the Commissioner of Agriculture, and a member of the General Assembly challenged the law as violating their First, Fourth, and Fourteenth Amendment rights.⁶⁷ As a compelling governmental interest, Georgia claimed that the “use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials.”⁶⁸ These concerns, the Court stated, lacked “any indication of a concrete danger demanding departure from the Fourth Amendment's main rule.”⁶⁹ The Court found the need was “symbolic” rather than special because there was no evidence of a drug abuse problem within Georgia public officials, even though the Court acknowledged that there is no requirement of a drug abuse problem.⁷⁰ Ultimately the court held, “where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”⁷¹

C. *School Cases*

In 1995, the Court upheld a suspicionless drug testing program of student athletes in *Vernonia School District v. Acton*.⁷² In this case, the Court examined a school's policy of suspicionless drug testing for all student athletes.⁷³ In order to be eligible to participate in interscholastic athletics, a student and his parents were required to sign a testing consent form.⁷⁴ “In the fall of 1991, respondent James Acton, then a seventh grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the

⁶⁴ *Id.* at 677.

⁶⁵ *See Chandler v. Miller*, 520 U.S. 305 (1997).

⁶⁶ *Id.* at 309 (citing GA. CODE ANN. § 21-2-140 (repealed 1999)).

⁶⁷ *Id.* at 310.

⁶⁸ *Id.* at 318.

⁶⁹ *Id.* at 318-19.

⁷⁰ *Id.* at 322.

⁷¹ *Id.* at 323.

⁷² *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁷³ *See, e.g., id.*

⁷⁴ *Id.* at 650.

testing consent forms.”⁷⁵ The Supreme Court upheld the school’s drug testing policy finding the compelling governmental interest of “[d]eterring drug use by our Nation’s schoolchildren”⁷⁶ outweighed the students’ diminished expectation of privacy.⁷⁷

This compelling interest of deterring drug use in children justified expanding the drug testing from student athletes to all students participating in extracurricular activities in *Board of Education v. Earls*.⁷⁸ In *Earls*, the school district instituted a program that “require[d] all middle and high school students to consent to drug testing in order to participate in any extracurricular activity.”⁷⁹ The Court upheld the policy, finding it was “reasonable means of furthering the School District’s important interest in preventing and deterring drug use among its schoolchildren.”⁸⁰ The Supreme Court has never granted certiorari to determine the constitutionality of suspicionless drug testing of welfare applicants.

IV. FOURTH AMENDMENT PROTECTIONS

In both *Marchwinski*⁸¹ and *Lebron*,⁸² the courts struck down mandatory suspicionless drug testing as an unconstitutional Fourth Amendment search and seizure. Based on this reasoning, in order to determine the constitutionality of suspicionless drug testing it is necessary to examine the Fourth Amendment’s protections and application. The Fourth Amendment guarantees protection against unreasonable searches and seizures.⁸³ The Amendment states,

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.⁸⁴

In practice, courts use a multi-step process to analyze alleged Fourth Amendment violations. First, the court will look to see if the action at issue even amounts to a search under the Fourth Amendment.⁸⁵ Next, if the court determines the action did

⁷⁵ *Id.* at 651.

⁷⁶ *Id.* at 661.

⁷⁷ *Id.*

⁷⁸ *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002).

⁷⁹ *Id.* at 826.

⁸⁰ *Id.* at 838.

⁸¹ *See, e.g., Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000).

⁸² *See, e.g., Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011).

⁸³ U.S. CONST. amend. IV.

⁸⁴ *Id.*

⁸⁵ Not all government inspections amount to a search under the Fourth Amendment. For example, in *Wyman v. James*, 400 U.S. 309, 316 (1972), the Supreme Court held that home inspections of welfare recipients did not amount to a search under the Fourth Amendment.

amount to a search, the court will look to see if the search was reasonable.⁸⁶ As explained below, usually the search requires a warrant based on probable cause for a court to find a search reasonable.⁸⁷ If there is no warrant, the court will look to see if any exception to the warrant requirement applies.⁸⁸ Therefore, a warrantless search can be constitutional as long as the search falls into one of the warrant requirement exceptions. Applying this analysis below, the suspicionless drug testing policy is not an unconstitutional Fourth Amendment search and seizure.

A. Is the Drug Testing a Fourth Amendment Search?

As mentioned above, the first step to a Fourth Amendment analysis is to determine if the activity complained of amounts to a legal search.⁸⁹ The law is clear that collecting a urine sample constitutes a search under the Fourth Amendment.⁹⁰ In *Skinner*, the Supreme Court agreed with the unanimous federal courts of appeals' conclusions that "collection and testing of urine . . . are searches under the Fourth Amendment."⁹¹ Therefore the collection of a urine sample under the suspicionless drug testing laws is a Fourth Amendment search.

B. Is the Search Reasonable?

Having established that collecting a urine sample amounts to a Fourth Amendment search, the next step is to determine if the search was reasonable.⁹² As a general rule, search warrants issued upon probable cause are required for a search to be reasonable.⁹³ A warrant ensures a search is reasonable because a judge examines the scope and purpose of the search before the search is commenced.⁹⁴ In order to obtain a search warrant, the party seeking the warrant must show some individualized reasonable suspicion and probable cause.⁹⁵

Although the general rule requires individualized suspicion, not every warrantless or non-probable cause based search by the government is barred by the Fourth Amendment.⁹⁶ In fact, in certain situations the government can dispose of these requirements entirely.⁹⁷ Justice Scalia explained in *Vernonia* that, "a warrant

⁸⁶ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

⁸⁷ *See infra* Part IV.B.

⁸⁸ *See id.*

⁸⁹ *See supra* note 85.

⁹⁰ *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 617 (1989).

⁹¹ *Id.*

⁹² *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

⁹³ *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989).

⁹⁴ *See Skinner*, 489 U.S. at 621-22; *see also Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528-29 (1967) ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.").

⁹⁵ *See Vernonia*, 515 U.S. at 653.

⁹⁶ *See id.*

⁹⁷ *See Von Raab*, 489 U.S. at 665.

is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either.”⁹⁸ In upholding the suspicionless drug testing of railway workers in *Von Raab*, the Court reaffirmed “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.”⁹⁹

As explained above, the law recognizes the reality that certain tasks simply do not require a showing of probable cause to be reasonable.¹⁰⁰ In *Von Raab*, the Court noted that “the probable cause requirement ‘is peculiarly related to criminal investigations’ . . . [and] may be unhelpful in analyzing the reasonableness of routine administrative functions.”¹⁰¹ The law recognizes this reality “especially where the Government seeks to . . . detect violations that rarely generate articulable grounds for searching any particular place or person.”¹⁰² In fact, “the government’s interest in dispensing with the warrant requirement is at its strongest when . . . ‘the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.’”¹⁰³ “Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”¹⁰⁴

States requiring mandatory suspicionless drug testing conduct the testing without any individualized suspicion or search warrant.¹⁰⁵ These states require every person to pass a drug test in order to receive funds.¹⁰⁶ Since these searches are conducted without a warrant or any probable cause, it is necessary to determine if the testing serves a “special need, beyond the need for law enforcement, [that] make[s] the warrant and probable cause requirement impracticable.”¹⁰⁷

V. THE SPECIAL NEEDS DOCTRINE AND ITS APPLICATION TO SUSPICIONLESS DRUG TESTING

Suspicionless drug testing of welfare applicants does not violate the Fourth Amendment because the special needs doctrine eliminates the need for individualized suspicion. The special needs doctrine is an exception to the Fourth Amendment’s warrant requirement. As mentioned above, this doctrine is triggered

⁹⁸ *Vernonia*, 515 U.S. at 653.

⁹⁹ *See Von Raab*, 489 U.S. at 665 (citations omitted).

¹⁰⁰ *See id.* at 667-68.

¹⁰¹ *Id.* (citing *Colorado v. Bertine*, 479 U.S. 367, 371 (1987)).

¹⁰² *Von Raab*, 489 U.S. at 668.

¹⁰³ *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 623 (1989) (quoting *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 533 (1967)).

¹⁰⁴ *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829 (2002).

¹⁰⁵ *See supra* Part II.B.

¹⁰⁶ *See id.*

¹⁰⁷ *Earls*, 536 U.S. at 829.

“when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”¹⁰⁸ Courts use a balancing test to “balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”¹⁰⁹ The court examines the governmental interest at issue, the legitimate privacy expectations of the individual, and the nature of the intrusion into the privacy interests. If after conducting this analysis the court finds the governmental interest outweighs the privacy interests of the individual, then under the special needs doctrine there is no warrant or probable cause requirements. Here, the governmental interests of promoting self-sufficiency, ensuring public funds are used for their intended purposes, and protecting children in drug addicted homes outweigh the welfare applicant’s minimal expectation of privacy and minimal privacy intrusions of the search.

A. There is a Compelling Governmental Interest in Promoting Self-Sufficiency, Ensuring Public Funds are Used for Their Intended Purpose, and Protecting Children in Homes with Drug Addicted Parents.

In order for a special need to be present, there must be some compelling governmental interest to justify abandoning the warrant and probable cause requirements.¹¹⁰ In *Vernonia*, Justice Scalia described the test to determine a compelling governmental interest as “an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”¹¹¹ The Supreme Court has found a compelling governmental interest in protecting the nation’s borders from drug importation,¹¹² deterring drug use in railroad workers,¹¹³ and deterring drug use in student athletes¹¹⁴ and students participating in any competitive extracurricular activity.¹¹⁵ Here, the government has a compelling interest in promoting self-sufficiency, ensuring public funds are used for their intended purpose, and protecting children in homes with drug addicted parents.

1. The PRWORA Serves the Compelling Governmental Interest of Promoting Self-Sufficiency.

The government has a compelling interest in promoting self-sufficiency. Drug abuse in welfare recipients has a direct effect on achieving the legislation’s main purpose of getting individuals off welfare and back to work. Astronomically high

¹⁰⁸ *Skinner*, 489 U.S. at 619 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

¹⁰⁹ *Id.*

¹¹⁰ The compelling governmental interest term has a special meaning in the special needs evaluation.

¹¹¹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995).

¹¹² *See Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668 (1989).

¹¹³ *See Skinner*, 489 U.S. at 628.

¹¹⁴ *See Vernonia*, 515 U.S. at 664-65.

¹¹⁵ *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 838 (2002).

unemployment rates across the United States¹¹⁶ further burdened an already overstressed welfare system. Drug addiction among welfare recipients is important enough to justify the search because drug use creates a high employment barrier.¹¹⁷ Research indicates that welfare recipients abusing drugs are less likely to become and remain self-sufficient.¹¹⁸ “One study found that women receiving [welfare aid] were more likely to be unemployed if they had used drugs in the past month—30 percent were unemployed compared with 21 percent among all females in [welfare receiving] households.”¹¹⁹ Further, a welfare recipient who is using drugs is automatically disqualified from over half of private employment opportunities. A poll conducted by the Society for Human Resource Management released on September 7, 2011, found “[f]ifty-seven percent of the survey participants’ organizations require all job candidates to take a pre-employment drug test.”¹²⁰ Certainly, a court can find that increasing a recipient’s ability to become employed is important enough to constitute a compelling governmental interest, especially when unemployment levels have become a national crisis.¹²¹

2. The PRWORA Serves the Compelling Governmental Interest of Ensuring Public Funds are Used for Their Intended Purpose.

As the Supreme Court noted in *Wyman v. James*¹²² and the Sixth Circuit noted in *Marchwinski*,¹²³ the government has a compelling interest in ensuring that taxpayer dollars are not fraudulently spent. While the *Wyman* Court held that the home inspection did not amount to a search under the Fourth Amendment,¹²⁴ the Court

¹¹⁶ In September 2011, the Federal Reserve Chairman described the near ten percent unemployment rate as an “unheard of” national crisis. See Joshua Zumbrun & Vivien Lou Chen, *Bernanke Says High U.S. Unemployment Poses ‘National Crisis’*, BLOOMBERG (Sept. 29, 2011, 12:00 AM), <http://www.bloomberg.com/news/print/2011-09-29/bernanke-says-u-s-facing-national-crisis-as-high-unemployment-persists.html>.

¹¹⁷ The Center on Budget and Policy Priorities cited substance abuse as a reason that TANF recipients were unable to find work. See Liz Schott, *Policy Basics: An Introduction to TANF*, CTR. ON BUDGET & POL’Y PRIORITIES, <http://www.cbpp.org/cms/?fa=view&id=936> (last visited July 6, 2011).

¹¹⁸ See generally GRETCHEN KIRBY & JACQUELYN ANDERSON, MATHEMATICA POL’Y RESEARCH, ADDRESSING SUBSTANCE ABUSE PROBLEMS AMONG TANF RECIPIENTS: A GUIDE FOR PROGRAM ADMINISTRATORS 3 (July 19, 2000), available at <http://www.mathematica-mpr.com/PDFs/addresssubstance.pdf> (internal citation omitted).

¹¹⁹ *Id.*

¹²⁰ See Bill Leonard, *SHRM Poll: Drug Testing Applicants Favored by More than Half of Employers*, SOC’Y FOR HUM. RESOURCE MGMT. (Sept. 16, 2011), <http://www.shrm.org/Publications/HRNews/Pages/DrugTestingFavored.aspx>.

¹²¹ See Zumbrun & Chen, *supra* note 116.

¹²² See *Wyman v. James*, 400 U.S. 309, 319 (1971).

¹²³ See *Marchwinski v. Howard*, 309 F.3d 330, 338 (6th Cir. 2002) (“[T]he public has a strong interest in ensuring that the money it gives to recipients is used for its intended purposes.”).

¹²⁴ *Wyman*, 400 U.S. at 317. This reasoning was recently echoed to satisfy a special need by the Ninth Circuit. See *Sanchez v. Cnty. of San Diego*, 464 F.3d 916 (9th Cir. 2006). The *Sanchez* court examined California’s 100% Project, which required welfare recipients to

listed many reasons to support the reasonableness of the suspicionless search *even if it did* amount to Fourth Amendment search. One of the reasons asserted by the Court was that the public has “an interest in and expects to know”¹²⁵ how their funds are being used. The Court went further to explain that the public “has not only an interest but an obligation” to ensure public funds are used for their intended purpose.¹²⁶ Further, the Sixth Circuit had the same reasoning in *Marchwinski*.¹²⁷ In upholding the drug testing policy as a special need, the court noted, “[h]ere, the public interest lies insuring both that the public moneys are expended for their intended purposes and that those moneys not be spent in ways that will actually endanger the public.”¹²⁸

The public’s interest in the use of their tax dollars is even more compelling due to the record high unemployment rates and the corresponding strain on the available public funds.¹²⁹ The mortgage crisis of 2008, characterized as “the largest financial shock since the Great Depression,”¹³⁰ created a severe and long-lasting impact on the United States economy. America’s economy is still struggling to recover from the shock, especially in regard to the high unemployment rates. For example, approximately fourteen million American workers were unemployed in August 2011.¹³¹ According to a paper published by the Center on Budget and Policy Priorities, from “December 2007 through December 2009, the unemployment rate more than doubled, increasing from 4.9 percent to 10 percent.”¹³²

consent to a home inspection as a condition to receiving welfare benefits. *Id.* at 919. If the recipient refused to consent to the home inspection, it resulted in denial of the applicant’s benefits. *Id.* The court held, like in *Wyman*, that the home inspections did not amount to searches under the Fourth Amendment, but *even if they were* searches under the Fourth Amendment, they were reasonable. *Id.* at 923. The court found that not only was ensuring that “aid provided from tax dollars reaches its proper and intended recipients” an important governmental interest, California had a special need in administering its welfare system. *Id.* at 926.

¹²⁵ *Wyman*, 400 U.S. at 319.

¹²⁶ *Id.*

¹²⁷ *Marchwinski*, 309 F.3d at 338.

¹²⁸ *Id.* The *Lebron* court agreed that the government has a “general interest in fighting the ‘war on drugs’ and the associated ills of drug abuse generally . . . [and] that TANF funds should not be used to fund the drug trade.” *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1291 (M.D. Fla. 2011). The court even went on to recognize that “the interest in preserving public funds by ensuring that money is intended for one purpose is not used instead to purchase illegal drugs.” *Id.* at 1290 (citing *Sanchez*, 464 F.3d at 928).

¹²⁹ *Zumbrun & Chen*, *supra* note 116.

¹³⁰ See Heather Stewart, *IMF Says US Crisis is 'Largest Financial Shock Since Great Depression'*, GUARDIAN (Apr. 9, 2008, 11:14 EDT), <http://www.guardian.co.uk/business/2008/apr/09/useconomy.subprimecrisis>.

¹³¹ *Id.*

¹³² LADONNA PAVETTI, DANILO TRISI & LIZ SCHOTT, CTR. ON BUDGET & POL’Y PRIORITIES, TANF RESPONDED UNEVENLY TO INCREASE IN NEED DURING DOWNTURN, FINDINGS SUGGEST NEEDED IMPROVEMENTS WHEN PROGRAM REAUTHORIZED 2 (Jan. 25, 2011), *available at* <http://www.cbpp.org/files/1-25-11tanf.pdf>.

While the economic crisis is at a national level, it imposes different constraints on different state budgets. This difference in constraints illustrates the special need of the citizens of each individual state to ensure their state's funds are being used for their intended purpose. The Center on Budget and Policy Priorities report explains how the effect of the high unemployment rates on TANF programs varies by state.

For example, in Michigan, with a peak unemployment rate of 14.5 percent, the TANF caseload increased by just 6 percent, whereas in Nevada, with a peak unemployment rate of 13.0 percent, the TANF caseload increased by 30 percent. Oklahoma and Montana both had peak unemployment rates of 6.7 percent, but Montana's TANF caseload increased by 21 percent while Oklahoma's increased by 10 percent.¹³³

The difference in correlation between unemployment rates and TANF applications illustrates the different constraints on state budgets. "The TANF Emergency Fund, created as a part of the 2009 Recovery Act, provided much-needed assistance to help states respond to increased need . . . [making] \$5 billion available to states to provide additional help to needy families."¹³⁴ Despite the differing levels of constraint on the state TANF budgets, "[b]y the time the fund expired on September 30, 2010, 49 states . . . had received assistance from the [emergency] fund."¹³⁵ Even those states that did not experience the drastic increase in TANF applications still needed the extra assistance from the Emergency Fund.¹³⁶ Further, the drastic variance of the effects on state TANF budgets between different states makes it even more important for those individual states to choose their own methods to control their TANF funds and ensure that use of the funds are for their intended purpose.¹³⁷

3. There is No Requirement for a Threat to Public Safety in Order to Trigger the Special Needs Doctrine.

Opponents to the drug testing policy assert that a public safety concern is the only compelling governmental interest to justify a special needs analysis.¹³⁸ The Supreme Court has found other governmental interests, outside of public safety, to justify a special need. For example, in *Earls* the Supreme Court rejected the argument that public safety was a "crucial factor" in the special needs analysis.¹³⁹

¹³³ *Id.* at 5.

¹³⁴ *Id.* at 8.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ The special need of ensuring public funds are used for their intended purpose was claimed in support of the discussed resurrection of Michigan's resurrection of a drug testing program. See Amante *supra*, note 11. Representative Ken Horn stated: "We want to make sure tax dollars are being paid in the state of Michigan are being used for their intended purpose." *Id.*

¹³⁸ See Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Silent Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 793 (2011) (citing Chandler v. Miller, 520 U.S. 305, 323 (1997)).

¹³⁹ Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 836 (2002).

The Court stated “safety factors into the special needs analysis”¹⁴⁰ but did not accept the argument that the special needs doctrine requires “extraordinary safety and national security hazards.”¹⁴¹

Opponents asserting a public safety threat requirement rely heavily on the Court’s decision in *Chandler v. Miller* for the proposition that a public safety concern is an absolute requirement to apply the special needs doctrine.¹⁴² As explained above, the Supreme Court in *Chandler* struck down a Georgia law requiring candidates to public office to submit a negative drug test result as unconstitutional under the Fourth Amendment.¹⁴³ The Court refused to find a special need in drug testing candidates for public office because the alleged need was “symbolic,”¹⁴⁴ and “the public safety [was] not genuinely in jeopardy.”¹⁴⁵

However, as the State of Florida asserted in *Lebron*, there is an important factual distinction between *Chandler*’s holding and drug testing welfare applicants.¹⁴⁶ In *Chandler*, the testing situation at issue implicates a person’s access to an extrinsic constitutionally guaranteed right which is not implicated in drug testing welfare applicants.¹⁴⁷ In *Chandler*, the requirement to produce a negative drug test was a precondition to running for public office.¹⁴⁸ “The impact of candidate eligibility requirements on voters implicates basic constitutional rights.”¹⁴⁹ The Court has determined “in setting such conditions [to hold public office], [states] may not disregard basic constitutional protections.”¹⁵⁰ However, “[i]n the context of TANF benefits . . . there is no constitutional right of access; such benefits are expressly a matter of the government’s discretion.”¹⁵¹ While the Fourth Amendment protects

¹⁴⁰ *Id.* (emphasis added). The *Earls* court found there was a substantial safety interest in drug testing “all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children; including death from overdose.” *Id.* at 836-37. “Of further support is *Vernonia Sch. Dist. 47J v. Acton*, in which the Court upheld drug testing of high school athletes, not primarily because of safety issues, but instead on the basis of deterring drug use among the children entrusted to the school’s care.” *Marchwinski v. Howard*, 309 F.3d 330, 335 (6th Cir. 2002) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646) (internal citation omitted) *reh’g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) and *reh’g en banc*, 60 F. App’x 601 (6th Cir. 2003).

¹⁴¹ *Earls*, 536 U.S. at 836-37.

¹⁴² *See Chandler*, 520 U.S. at 323; *see also supra* Part III.B.

¹⁴³ *See Chandler*, 520 U.S. at 323.

¹⁴⁴ *Id.* at 322.

¹⁴⁵ *Id.* 323.

¹⁴⁶ *See Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1285 (M.D. Fla. 2011).

¹⁴⁷ *See id.* (citing *Chandler*, 520 U.S. at 308).

¹⁴⁸ *See id.* (citing *Chandler*, 520 U.S. at 308).

¹⁴⁹ *See Anderson v. Celebrezze*, 460 U.S. 780, 786-87 (1983).

¹⁵⁰ *See Chandler*, 520 U.S. at 317.

¹⁵¹ *See Lebron*, 820 F. Supp. 2d at 1285 (citing 42 U.S.C. § 601(b)). In this section, the PRWORA specifically states, “[t]his part . . . shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.” 42 U.S.C. § 601(b) (2006).

against *unreasonable* search and seizures, if the suspicionless drug testing creates an exception to this requirement, there is no separate constitutional restraint inherent in receiving welfare aid.

4. Even if the Special Needs Doctrine Requires a Threat to Public Safety, the Drug Testing Requirements Sufficiently Implicate Public Safety by Promoting the Compelling Governmental Interest of Protecting Children.

Even if there is a requirement of a public safety concern to constitute a compelling governmental interest, the PRWORA sufficiently implicates and combats the public safety concern of protecting children in households with drug addicted parents. One of the stated goals of the legislation is to, “provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives.”¹⁵² Because the goal is for children to be cared for in their own homes and TANF funds are only available to households with children,¹⁵³ it is also a goal of the PRWORA to protect children in those homes receiving TANF benefits.

Concern for the safety of children in homes receiving TANF benefits was consistently discussed in the Senate debates on the Act.¹⁵⁴ Both republicans and democrats agreed that protecting children was a fundamental purpose of the PRWORA. Democratic senator Jon Kerry stated, “there is nothing more important to this debate today than constantly reminding ourselves that our focus ought to be this Nation's children and their well-being.”¹⁵⁵ Further, Republican Senator Pete Domenici stated,

Now, frankly, kids are us, and this bill is about our kids, because if anybody thinks the children that are under this welfare system are getting a good deal today, then, frankly, I do not know what could be a rotten deal, because they are getting the worst of America.¹⁵⁶

a. *The PRWORA Protects Children in Households with Drug Addicted Parents from Abuse and Neglect.*

There are several public safety concerns for children with parents suffering from substance abuse problems. These safety concerns for children living with a drug addicted parent include “inadequate supervision, exposure to second-hand smoke, accidental ingestion of drugs, possibility of abuse, HIV exposure from needles used by the parent, and parents who exhibit poor judgment, confusion, irritability, paranoia, and violence.”¹⁵⁷ Children in homes with a drug addicted parent likely experience “chronic neglect . . . their home life is often chaotic, and their households may lack food, water, and utilities. They may go without medical and dental care and

¹⁵² 21 U.S.C. § 601(a) (2006).

¹⁵³ See 42 U.S.C. § 608(a)(1) (2006).

¹⁵⁴ See 142 CONG. REC. 18,486 (July 23, 1996) (statement of Sen. Rick Santorum).

¹⁵⁵ 142 CONG. REC. 18,482 (July 23, 1996) (statement of Sen. John Kerry).

¹⁵⁶ 142 CONG. REC. 18,487 (July 23, 1996) (statement of Sen. Pete Domenici).

¹⁵⁷ Jennifer Michael, *Growing Up with Meth*, 15 CHILD. VOICE 22 (Jan.-Feb. 2006), available at <http://www.cwla.org/voice/0602meth.htm>.

immunizations.”¹⁵⁸ Further, if that parent is involved in the trafficking of the illegal drugs they “may expose the child to violence and weapons, as well as physical or sexual abuse by people visiting the household.”¹⁵⁹ If the parent begins manufacturing the drug in their home, the child is exposed to additional health risks “from exposure to the drugs and the conditions under which they are manufactured and distributed.”¹⁶⁰ A study by the National Center on Addiction and Substance Abuse at Columbia University found, “[c]hildren whose parents abuse drugs and alcohol are almost three times . . . likelier to be abused and more than four times . . . likelier to be neglected than children of parents who are not substance abusers.”¹⁶¹ The study further found that “most commonly, cases of abuse and neglect by substance-abusing parents involve alcohol in combination with other drugs such as crack cocaine, methamphetamine, heroin and marijuana.”¹⁶² The study concluded, “[s]ubstance abuse and addiction is almost guaranteed to lead to neglect of children.”¹⁶³

b. The PRWORA Protects Children in Households with Drug Addicted Parents from Developing Substance Abuse Problems.

In addition to the concern of protecting abused and neglected children in households with drug addicted parents, there is also a need to protect these children from becoming addicted to illegal drugs themselves. As mentioned above, the Supreme Court has found a compelling governmental interest in, “prevent[ing] and deter[ing] the substantial harm of childhood drug use.”¹⁶⁴ Drug testing parents who receive TANF funds protects children because children have a higher likelihood of being addicted to drugs if their parents are drug abusers. The Center on Addiction and Substance Abuse found, “[c]hildren whose parents abuse drugs and alcohol are almost three times . . . likelier to be abused and more than four times . . . likelier to

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Child Welfare Info. Gateway, *Parental Substance Use and the Child Welfare System*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (2009), <https://www.childwelfare.gov/pubs/factsheets/parentalsubabuse.cfm>.

¹⁶¹ NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE, NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS 16 (1999), available at <http://www.casacolumbia.org/articlefiles/379-No%20Safe%20Haven.pdf>. Empirical research has found that drug abuse is particularly prevalent in mothers receiving welfare aid. A study conducted by Mathematica Policy Research found “studies have shown that the prevalence of alcohol and drug problems among women receiving welfare is higher than among the general population.” See KIRBY & ANDERSON, *supra* note 118, at 2. The study also found that “mothers over age 14 receiving [welfare aid] are about three times as likely to be abusing alcohol or other drugs than other women.” *Id.*

¹⁶² NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE, *supra* note 161.

¹⁶³ *Id.* at 3.

¹⁶⁴ Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 824 (2002). The Supreme Court relied on this reasoning when upholding drug testing of student athletes in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995). In *Vernonia*, the Court stated, “[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe.” *Id.*

be neglected than children of parents who are not substance abusers.”¹⁶⁵ Likewise, a 2009 report from the Department of Health and Human Services found “[a]dolescents whose parents have [substance abuse disorders] are more likely to develop [substance abuse disorders] themselves.”¹⁶⁶ The study also found children “mimic behaviors they see in their families, including ineffective coping behaviors such as using drugs.”¹⁶⁷ Therefore, by requiring TANF recipients to pass a drug test, the regulation addresses a compelling governmental need to protect children in those households from also becoming drug addicts.

B. Welfare Recipients’ Expectations of Privacy are Diminished.

Having established that suspicionless drug testing furthers the compelling governmental interests of protecting children in homes of drug addicted parents receiving TANF funds and promoting employment eligibility among TANF recipients, the next step is to weigh those interests against the welfare recipients’ legitimate expectation of privacy. The fact that an industry is highly regulated is sufficient to establish that members of the industry have a diminished expectation of privacy.¹⁶⁸ In *Skinner*, the Court relied on the fact that the railroad industry was highly regulated to determine the employees’ reasonable expectation of privacy was diminished.¹⁶⁹ The Supreme Court has expanded this “highly-regulated industry” justification outside of traditional employment industries to include students participating in school athletics.¹⁷⁰ By expanding the application of a highly regulated industry standard, the Supreme Court has opened the door to apply the standard to other non-employment “industries.”

Similar to the railroad industry in *Skinner*,¹⁷¹ the welfare “industry” is so pervasively regulated that recipients’ expectations of privacy are diminished. First, in order to even be eligible for welfare aid, applicants are required to submit information proving their low income or unemployment status.¹⁷² Once they have

¹⁶⁵ NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE, *supra* note 161, at 3.

¹⁶⁶ CHILDREN’S BUREAU ET. AL., U.S. DEP’T HEALTH & HUMAN SERVS., PROTECTING CHILDREN IN FAMILIES AFFECTED BY SUBSTANCE ABUSE 26 (2009), *available at* <http://www.childwelfare.gov/pubs/usermanuals/substanceuse/chapterthree.cfm>. The definition of a “substance abuse disorder” varies greatly depending upon “how problem use is defined.” John Morgenstern & Kimberly A. Blanchard, *Welfare Reform and Substance Abuse Treatment for Welfare Recipients*, NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh291/63-67.htm> (last visited May 20, 2013). Some studies cited within this paper include alcohol abuse in the substance abuse definition. The author has attempted to limit the empirical evidence cited herein to only illegal drug abuse. *Id.*

¹⁶⁷ Morgenstern & Blanchard, *supra* note 166.

¹⁶⁸ *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 627 (1989).

¹⁶⁹ *Id.*

¹⁷⁰ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995). “Somewhat like adults who participate in a ‘closely regulated industry,’ students who voluntarily participate in school athletics have a reason to expect intrusions upon normal rights and privileges, including privacy.” *Id.* (quoting *Skinner*, 489 U.S. at 627).

¹⁷¹ *Skinner*, 489 U.S. at 627.

¹⁷² See Defendant’s Response to Plaintiff’s Motion for Summary Judgement at 4-5, *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011).

been approved into the program, welfare recipients are subject to unannounced home inspections as an effort to prevent welfare fraud.¹⁷³ In addition, the Act further invades the privacy of single and minor parents in order to serve the legislation's paternalistic goals.¹⁷⁴ As explained above, in order to receive funds, the Act requires teenage parents to attend high school or an equivalent program, and live in an "adult-supervised setting."¹⁷⁵ The Act also requires applicants to establish paternity of the child upon request, and benefits can be reduced or refused for failure to comply with the state's efforts to establish paternity.¹⁷⁶ By forcing the welfare recipients to comply with the above regulations to receive benefits, the welfare program in its nature creates a diminished expectation of privacy for recipients.

C. The Means Used to Collect Urine Samples are Likely Only a Minimal Privacy Intrusion.

Having determined the compelling governmental interest and the diminished privacy expectations of welfare recipients, the next step is to examine the nature of the privacy intrusion. In examining the degree of intrusion for collecting urine samples to test student athletes, Justice Scalia explained, "the degree of intrusion depends upon the manner in which production of the urine sample is monitored."¹⁷⁷ When conducting this analysis, the court generally examines if steps have been taken to minimize the privacy intrusion while collecting the sample.¹⁷⁸ For example, in *Skinner*, the Court noted that the regulations did not require direct observation and the samples were collected in a medical environment as an effort to reduce the intrusion into privacy.¹⁷⁹ Also, the Court in *Vernonia* examined the procedures of collecting the urine sample that required male students to "produce samples at a urinal along a wall"¹⁸⁰ and female students to "produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering."¹⁸¹ The Court determined these procedures, which were "nearly identical to those typically encountered in public restrooms," were a "negligible" intrusion into the students' privacy.¹⁸² Based on this reasoning, if state collection procedures use means similar to those in *Skinner* and *Vernonia*, the Supreme Court will likely regard the procedures as adequate steps to reduce the privacy intrusion.

¹⁷³ *Wyman v. James*, 400 U.S. 309, 326 (1972).

¹⁷⁴ *See supra* Part II.A.

¹⁷⁵ *See supra* Part II.A.

¹⁷⁶ *See supra* Part II.A.

¹⁷⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (citing *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 626 (1989)).

¹⁷⁸ *See, e.g., Skinner*, 489 U.S. at 626-27.

¹⁷⁹ *See id.*

¹⁸⁰ *Vernonia*, 515 U.S. at 658.

¹⁸¹ *Id.*

¹⁸² *Id.* at 647.

VI. CRITICISMS OF SUSPICIONLESS DRUG TESTING ARE BASED ON FAULTY PRESUMPTIONS.

Opponents to drug testing welfare recipients claim there is no compelling governmental interest to support the testing because the prevalence of drug use among welfare recipients is no higher than individuals who are employed,¹⁸³ a small percentage of individuals tested positive in state pilot programs,¹⁸⁴ and the program lacks efficacy because the cost of testing exceeds any potential amount of savings of taxpayers' dollars.¹⁸⁵ Each of these arguments is flawed. First, there is no constitutional requirement to show evidence of a drug use problem in order to qualify as a special need.¹⁸⁶ In addition, early studies courts relied upon to support the limited prevalence of use argument examined "self-report" data that cannot accurately reflect the true prevalence of use.¹⁸⁷ Second, the small percentage of positive test results in the pilot programs are not reliable because these programs were hastily shut down and did not receive the adequate time to truly analyze their possible failures or successes.¹⁸⁸ Third, screening approaches have been shown to produce unreliable results.¹⁸⁹ Finally, if the courts allowed these programs adequate time to function and collect reliable data, the results will likely save taxpayer dollars.

A. There is No Constitutional Requirement for Welfare Recipients to have a Strong Prevalence of Drug Abuse in Order for the Suspicionless Drug Testing to Serve a Special Need.

Critics of the suspicionless drug testing program claim there is no compelling governmental interest because "[w]elfare recipients are no more likely to use drugs than the rest of the population."¹⁹⁰ These opponents claim without the higher drug usage in TANF recipients there is no need to test the applicants.¹⁹¹ However, the Supreme Court has made clear that a finding of prevalence of use is not required to uphold a suspicionless drug testing policy. The Supreme Court noted in *Von Raab*

¹⁸³ See *infra* Part VI.A.

¹⁸⁴ See *infra* Part VI.A.

¹⁸⁵ See *infra* Part VI.E.

¹⁸⁶ See Morgenstern & Blanchard, *supra* note 166.

¹⁸⁷ "Most recent studies cite survey data that relies exclusively on administrative data or self-reports of substance use . . . both of which are likely to underestimate the true prevalence of substance use disorders." Morgenstern & Blanchard, *supra* note 166.

¹⁸⁸ See *infra* Part VI.B.

¹⁸⁹ See *infra* Part V.C.

¹⁹⁰ *Drug Testing of Public Assistance Recipients as a Condition for Eligibility*, AM. CIVIL LIBERTIES UNION (Apr. 8, 2008), <http://www.aclu.org/drug-law-reform/drug-testing-public-assistance-recipients-condition-eligibility>; see also Budd, *supra* note 138, at 776-78 (stating "the correlation between poverty and drug addiction is quite weak").

¹⁹¹ See Matthew Bodie, *Welfare Assistance is Not Parental Oversight*, U.S. NEWS OPINION (Dec. 15, 2011), <http://www.usnews.com/debate-club/should-welfare-recipients-be-tested-for-drugs/welfare-assistance-is-not-parental-oversight> (Because "[l]awmakers have not established that TANF recipients . . . are more likely to have drug problems . . . there is no particular reason to . . . target them for drug testing.").

“[t]he mere circumstance that all but a few of [those] tested are entirely innocent of wrongdoing does not impugn the program's validity.”¹⁹² Also, in *Chandler v. Miller* the Supreme Court noted, “evidence of drug abuse problem . . . [is] not in all cases necessary to [establish] the validity of a testing regime.”¹⁹³ A showing of prevalence of use is simply not required to find a special need to support the testing.

B. Earlier Studies Indicating that Welfare Recipients are No More Likely to have Substance Abuse Problems Rely on Inaccurate Self-Reported Data.

Despite the fact that there is no constitutional requirement of a high prevalence of drug use to find a special need, critics claim welfare recipients do not have higher rates of substance abuse as support that there is no special need for the warrantless search.¹⁹⁴ However, recent studies have found these reports unreliable and inaccurate because previous studies relied on self-reporting for collection.¹⁹⁵ “The exclusive reliance on self-report data is a serious limitation of these findings. Many experts now consider data on the prevalence of substance use drawn from the [National Household Survey on Drug Abuse] to be unreliable because of underreporting.”¹⁹⁶ A 1998 study on welfare recipients in New Jersey, for example, “found that 12 percent self-reported cocaine use, but 25 percent tested positive for cocaine use based on hair sample analyses.”¹⁹⁷ In addition to the self-report data, study results “have varied widely in their findings, with rates of between 4 and 37 percent reported. Much of the difference in prevalence rates found in these studies is due to different data sources, definitions and measurement methods, particularly the different thresholds used to define substance abuse.”¹⁹⁸

C. Caused-Based “Screening” Approaches are Not Reliable.

In addition to the inaccurate data collected in self report studies, suspicion based testing also produces unreliable results. As explained above, the lack of a strong showing of drug abuse among Florida welfare recipients was cited in *Lebron* as evidence of the absence of a special need for Florida’s drug testing policy.¹⁹⁹ Shortly after the PRWORA was passed in 1996, Florida conducted a two-year feasibility study to determine the costs and benefits of instituting a drug testing policy for

¹⁹² Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 674 (1989).

¹⁹³ Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 835 (2002) (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

¹⁹⁴ See Budd, *supra* note 138, at 776-78.

¹⁹⁵ See Morgenstern & Blanchard, *supra* note 166. “Most recent studies cite survey data that relies exclusively on administrative data or self-reports of substance use . . . both of which are likely to underestimate the true prevalence of substance use disorders.” *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (citation omitted).

¹⁹⁸ See RADEL, JOYCE & WULFF, *supra* note 25, at 3.

¹⁹⁹ See *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1277 (2011). The court acknowledged that “the Supreme Court did not require overwhelming evidence of a drug problem among the specific populations to be tested”, but interpreted the precedent to require a ““veritable crisis” in order to institute the “preventative measures.” *Id.* citing (Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989)).

welfare applicants.²⁰⁰ This study, the “Demonstration Project,” only drug tested “those [welfare applicants] whom the department had ‘reasonable cause’ to believe engaged in illegal use of controlled substances.”²⁰¹ In order to establish reasonable cause, the Florida Department of Children and Families administered “a paper and pencil test . . . called the Substance Abuse Subtle Screening Inventory, or SASSI . . . [which was] developed in 1977 to differentiate between substance abusers and non abusers, regardless of denial or deliberate deception on the part of the test subject.”²⁰² If the applicant’s answers to the written test “flagged [them] as potential substance abusers” the applicant was “required to undergo urinalysis.”²⁰³ “Only 335 of those individuals subjected to drug testing—5.1% of the total population who were screened—tested positive.”²⁰⁴

However, similar to the deficiencies found in self report studies, it is highly likely that Florida’s suspicion based testing produced inaccurate data. In fact, the prevalence of use numbers were so low the study commented they may actually be unreliable. The results “confounded the expectations of the researchers, who observed . . . the percentage of positive drug tests was so low in comparison to previous studies that the researchers opined that the results ‘raise some questions about the procedures employed by the State to identify drug use among welfare recipients.’”²⁰⁵ The study commented, “the way in which the SASSI was employed in Florida may have biased the outcome of the urine tests”²⁰⁶ and that their “research shows that the procedures employed in Florida produced results that were, at best, conflicting.”²⁰⁷ The researchers also stated “[t]he numbers produced by the urine test are likely to under-represent the numbers of drug users in the welfare population as a whole.”²⁰⁸

Despite the serious reservations about the reliability of the Demonstration Project, the court relied on this research to determine “the *concrete scientific evidence* gathered clearly undermined the underlying assumption regarding

²⁰⁰ *Id.* at 1273.

²⁰¹ *Id.* at 1277.

²⁰² Robert E. Crew, Jr. & Belinda Creel Davis, *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits*, 17 J. HEALTH & SOCIAL POL’Y 39, 42 (2003).

²⁰³ *Lebron*, 820 F. Supp. 2d at 1277.

²⁰⁴ *Id.* The Demonstration Project administered the SASSI to “over eight thousand (8,797) separated individuals . . . but over two thousand of these people (2,335)” did not receive welfare benefits between the time they were screened and the conclusion of the project. Crew & Davis, *supra* note 202, at 44. Instead of conducting follow up research with the over two thousand people who did not receive benefits “[t]o allay fears that the 2,335 individuals who were eliminated from the analysis might have been people who dropped out of TANF because they were substance abusers who didn’t want help”, the project simply “compared the performance on the SASSI and the urinalysis of those who received benefits after testing to those who did not” to reach the conclusion that the lack of information on those 2,335 individuals did not bias their results. *Id.* at 44-45.

²⁰⁵ *Id.* (citing Crew & Davis, *supra* note 202).

²⁰⁶ Crew & Davis, *supra* note 202, at 47.

²⁰⁷ *Id.* at 50.

²⁰⁸ *Id.* at 51.

prevalence of substance abuse among TANF applicants.”²⁰⁹ The court rejected other evidence presented by Florida²¹⁰ stating they failed to “address the only competent evidence before the Court” of the Demonstration Project and the low results of the two month pilot program.²¹¹ The fact that the Demonstration Project’s researchers had serious doubts about the validity of the test results²¹² raises serious doubts as to the validity of this evidence.

D. States Need Sufficient Time to Conduct Pilot Programs to Receive Accurate Data to Determine the Costs and Benefits of Suspicionless Drug Testing Programs.

The small percentage of negative drug tests in pilot programs does not provide enough evidence in and of itself to show the policies do not further compelling governmental interests. The main flaw in relying on the results of pilot programs is that the programs cannot accurately reflect the results of long-term implementation of a drug testing requirement. There are simply too many unconsidered factors to determine the success of a program on the pilot programs. First, a drug testing program can serve as a deterrent to prevent drug abusers from even applying to receive welfare payments. Therefore, data must be collected to account for any people who did not show up to receive their welfare because of fear of prosecution. Simply relying on those collecting their benefits during the pilot program does not take into account people who did not apply or those recipients who simply were not due to renew their benefits.

Second, data must be collected to examine the long term benefits of the drug testing program, including a cost-benefit analysis of requiring treatment as a condition to receive aid after testing positive.²¹³ In order to truly judge the effectiveness of drug testing policies, states need the opportunity to exercise the power granted to them by the PRWORA. By hastily granting injunctions barring drug testing programs,²¹⁴ it is impossible to determine the long-term success of a

²⁰⁹ *Lebron*, 820 F. Supp. 2d at 1277 (emphasis added).

²¹⁰ *Id.* at 1287. The court rejected these studies for a variety of different reasons. *Id.* One reason the court cited is that the studies submitted by Florida were “outdated.” *Id.* It is interesting to note that the “Women’s Employment Surveys,” which the court characterized as “outdated,” were completed at roughly the same time as the Demonstration Project. *Id.* The Demonstration Project was conducted from 1999-2001. *Id.* The “Women’s Employment Surveys [were] taken between 1997 and 1999.” *Id.* This one-year lapse in time is not likely to produce significant “outdated” evidence of the prevalence of substance abuse.

²¹¹ *Id.* For a more in-depth discussion of the problems associated with the short time period of pilot programs, see text and accompanying footnotes *infra* Part VI.D.

²¹² See Crew & Davis, *supra* note 202.

²¹³ It is true Florida’s Demonstration Project, “to make ‘recommendations based in part on a cost benefit analysis, as to the feasibility of expanding the program,’” lasted for two years. *Lebron*, 820 F. Supp. 2d at 1276. However, as explained above, the results of this analysis are likely unreliable. See *supra* Part VI.C. In order to accurately conduct a cost-benefit analysis, the legislature must have accurate data.

²¹⁴ The Florida drug testing law, HB 353, was effective for only three months before an injunction was granted. See generally *Lebron*, 820 F. Supp. 2d 1273 (2011) (referring to An Act Relating to Drug Screening of Potential Existing Beneficiaries of Temporary Assistance for Needy Families, 2011 Fla. Sess. Law Serv. Ch.2011-81 (West 2011)).

program. As Justice Brandeis stated, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²¹⁵ Without allowing time to let the drug testing program function, states cannot receive accurate results of their social experiments.

E. If States were Allowed Sufficient Time to Conduct Testing, the Results Would Show that Drug Testing Policies Save Taxpayer Dollars.

One of the biggest criticisms of the suspicionless drug testing policy is the efficacy of the program. The main issue is if the drug testing will save the state money. Many reports claim that extrapolating the small amounts testing positive in some state pilot programs is conclusive evidence that drug testing welfare recipients is not a cost-effective social plan.²¹⁶ However, a report from the Foundation for Government Accountability in Florida found the opposite.²¹⁷ This report analyzed the first month of Florida’s implementation of the suspicionless drug testing program.²¹⁸ Opponents cite the two percent positive test results as a evidence of a failed policy.²¹⁹ However, as the report explains, this number was so low because “denials for incomplete applications due to missing drug test results do not appear until the following month.”²²⁰ The report explains

in July there were only 9 applicants denied for a drug-related reason, but the number of drug-related denials climbed to 565 in August (reflecting the one month lag). Of these 574 total drug-related denials, only 9 were for a positive test. Almost all remaining applicants never completed a drug test even though these individuals completed all other steps in the application process and were determined eligible once DCF received negative drug test results.²²¹

This data is more accurate because it reflects individuals who chose not to complete their application due to the testing requirement. Taking this additional factor into consideration, the study concluded “July 2011 represent[ed] annualized savings to Florida taxpayers of \$922,992. The cost of reimbursing the 5,390 approved applicants with a negative drug test (\$30 average for each) reduces this annualized savings figure by \$161,700, for a net savings to taxpayers of \$761,292

²¹⁵ *New State Ice Co. v. Lieberman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²¹⁶ See generally David Edwards, *Florida’s Welfare Drug Testing Costs More than it Saves*, RAWREPLAY (Aug. 19, 2011), <http://www.rawstory.com/rawreplay/2011/08/floridas-welfare-drug-testing-costs-more-than-it-saves/>.

²¹⁷ See Tarren Bradgon, *The Impact of Florida’s New Drug Test Requirement for Welfare Cash Assistance*, FOUND. FOR GOV’T ACCOUNTABILITY (Sept. 14, 2011), <http://www.floridafga.org/2011/09/the-impact-of-florida-new-drug-test-requirement-for-welfare-cash-assistance/>.

²¹⁸ See *id.*

²¹⁹ See Edwards, *supra* note 216.

²²⁰ See Bradgon, *supra* note 217.

²²¹ *Id.*

for the first month of the program alone.”²²² The report estimated that “if these July trends continue[d] throughout the first year, the drug testing requirement w[ould] save Florida taxpayers \$9,135,504 from July 2011 through June 2012.”²²³ Similar to the variance in unemployment rates, drug use prevalence will vary between different states. Therefore, it is best left to each state to conduct its own cost-benefit analysis according to its individual situation.

VII. CONCLUSION

As more states begin to enact legislation requiring drug testing as a condition for welfare benefits, there will be constitutional challenges to the policy. These laws should be upheld under the special needs exception to the Fourth Amendment. First, suspicionless drug testing policies serve the compelling governmental interests of promoting self-sufficiency and protecting children. Although there is no requirement for a threat to public safety, even if there was legitimate safety concerns exist for children in drug addicted households to justify the warrantless search. Welfare recipients have a diminished expectation of privacy due to the pervasiveness of existing eligibility requirements. Also, the means used are likely adequate steps to mitigate the privacy invasion. Finally, Congress correctly left this issue to the states to determine, though their voters, which experiments to conduct in their social laboratories. Therefore, suspicionless drug tests of welfare recipients do not violate the Fourth Amendment.

²²² *Id.* The *Lebron* court found this report was not an “expert opinion” and disagreed with the report’s findings. *See Lebron v. Wilkins*, 820 F. Supp. 2d. 1273, 1290 (M.D. Fla. 2011).

²²³ *Id.*