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STUDENT POLICY NOTE

**FLORIDA'S LEGISLATION MANDATING SUSPICIONLESS  
DRUG TESTING OF TANF BENEFICIARIES: THE  
CONSTITUTIONALITY AND EFFICACY OF IMPLEMENTING  
DRUG TESTING REQUIREMENTS ON THE WELFARE  
POPULATION.**

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I. Introduction

Luis Lebron is a thirty-five year old<sup>8</sup> who balances his duties as sole caretaker of his four year-old son with pursuing a degree at the University of Central Florida.<sup>9</sup> To help support himself and his child while in school, Lebron applied to the Florida Department of Children and Families for Temporary Assistance for Needy Families (TANF) benefits in July 2011.<sup>10</sup> However, Lebron refused to take the drug test<sup>11</sup> required by a recently passed Florida statute, requiring prospective TANF beneficiaries to undergo drug testing prior to receiving benefits.<sup>12</sup> Lebron insists that he has never used illegal drugs, but refuses to take the test claiming that requiring him to pay for drug testing when there is no reason to suspect him of drug use is

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<sup>8</sup> Rebecca Catalanello, *Florida's Welfare Drug Testing Halted by Federal Judge*, TAMPA BAY TIMES, Oct. 25, 2011, [www.tampabay.com/news/florida-judge-blocks-drug-testing-of-welfare-applicants/1198389](http://www.tampabay.com/news/florida-judge-blocks-drug-testing-of-welfare-applicants/1198389) (“[A] 35-year-old Navy veteran and single father from Orlando who is finishing his degree.”).

<sup>9</sup> *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (order granting preliminary injunction).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> FLA. STAT. § 414.0652 (2011).

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unreasonable and a violation of his Fourth Amendment right.<sup>13</sup>

Because Lebron refused the drug test, the State denied Lebron benefits pursuant to the statute.<sup>14</sup> However, Lebron is bringing a class action lawsuit against the state of Florida, relying on the premise that the required drug testing violates his Fourth Amendment right and the right of others similarly situated.<sup>15</sup> Also concerned with the constitutionality of the law, Judge Mary Scriven issued an order granting a preliminary injunction against the state until the proceedings are fully decided.<sup>16</sup>

The controversy derives from HB 353<sup>17</sup> that was signed into law on May 21, 2011 by Governor Rick Scott of Florida.<sup>18</sup> The bill mandates suspicionless drug testing of all TANF applicants.<sup>19</sup> Furthermore, the law requires that the individual applying bear the initial cost of the test.<sup>20</sup> Individuals that test clean are refunded the testing cost; but, individuals that test positive for controlled substances are not refunded the testing cost, are denied benefits, and are not allowed to reapply for one year (or six months if they successfully complete a substance abuse program at their own expense).<sup>21</sup> Governor Rick Scott claims that by requiring drug testing of applicants, TANF beneficiaries

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<sup>13</sup> Lebron, 820 F. Supp. 2d 1273.

<sup>14</sup> § 414.0652 (requiring beneficiaries to pass a drug test before receiving benefits).

<sup>15</sup> Lebron v. Wilkins, 227 F.R.D. 664 (M.D. Fla. 2011) (order granting class action certification).

<sup>16</sup> Lebron, 820 F. Supp. 2d 1273 (demanding the state to refrain from requiring drug testing in order to issue TANF benefits for the plaintiff until motion fully decided on the merits).

<sup>17</sup> H.B. 353, 113th Reg. Sess. (Fla. 2011).

<sup>18</sup> Catalanello, *supra* note 1.

<sup>19</sup> FLA. STAT. § 414.0652 (2011).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

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will focus less on using illegal drugs.<sup>22</sup> Gov. Scott also contends that the measure ensures that taxpayer money is not spent funding drug habits.<sup>23</sup> Furthermore, Scott has also touted that by implementing drug testing, the state will save \$77,000,000 in taxpayer dollars.<sup>24</sup>

Critics of the legislation are less enthusiastic about the program's ultimate cost efficiency. Those disfavoring the legislation argue that testing and administrative costs will contribute to the expense of running and maintaining the program.<sup>25</sup> Furthermore, TANF applicants who pass the drug test are refunded the cost of the test.<sup>26</sup> Since only about two percent of applicants have tested positive for drug use since Florida implemented the drug testing requirement,<sup>27</sup> Florida is currently bearing most of the costs of testing. This low percentage of positives is less surprising after considering the plethora of research indicating that, contrary to popular belief, drug use is no more prevalent in people on welfare than in the working population.<sup>28</sup> In fact, one Florida study found that TANF

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<sup>22</sup> Catalanello, *supra* note 1 (“Hopefully more people will focus on not using illegal drugs.”).

<sup>23</sup> *Id.*

<sup>24</sup> Aaron Sharockman, *Bill Amended to Expand Drug Testing Requirement*, POLITIFACT (Apr. 14, 2011), [www.politifact.com/florida/promises/scott-o-meter/promise/600/require-drug-screening-for-welfare-recipients](http://www.politifact.com/florida/promises/scott-o-meter/promise/600/require-drug-screening-for-welfare-recipients) (discussing Governor Scott's seven-step plan to create 700,000 private-sector jobs and save taxpayers \$77 million by adding drug testing requirements for welfare recipients).

<sup>25</sup> *Stereotyping the Welfare Recipient*, LANCASTER NEW ERA (Oct. 10, 2011), [http://lancasteronline.com/article/local/476019\\_Stereotyping-the-welfare-recipient.html](http://lancasteronline.com/article/local/476019_Stereotyping-the-welfare-recipient.html).

<sup>26</sup> FLA. STAT. § 414.0652 (2011).

<sup>27</sup> *Stereotyping the Welfare Recipient*, *supra* note 18.

<sup>28</sup> See News Release, NIAAA Researchers Estimate Alcohol and Drug Use, Abuse, and Dependence Among Welfare Recipients, Nat'l Inst. of Health Press Release (Oct. 24, 1996), *available at* [www.nih.gov/news/pr/oct96/niaaa-23.htm](http://www.nih.gov/news/pr/oct96/niaaa-23.htm) (finding that the prevalence of alcohol and drug use was comparable among welfare recipients and

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beneficiaries that tested positive for drug use had employment levels and salaries comparable with TANF beneficiaries that tested negative for drug use.<sup>29</sup>

In light of these recent developments and the controversy regarding mandatory drug testing of welfare recipients, this paper will explore the history leading up to Florida's decision to implement a mandatory drug testing scheme. Furthermore, this paper will discuss the various issues surrounding mandatory drug testing of welfare recipients and will argue that if *Lebron v. Wilkins* is heard by the Supreme Court, the Supreme Court will most likely rule mandatory drug testing, as proposed in the relevant Florida statute, unconstitutional.

## II. History and Development of Mandatory Drug Testing for Welfare Recipients

The United States has, for a long time, sought to restrict or regulate the use of various drugs and chemical substances. The Nixon Administration first used the term "war on drugs,"<sup>30</sup> and presidents have used that term, as

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the general population); *Mandatory Drug Testing and Treatment of Welfare Recipients Position Statement*, CENTRE FOR ADDICTION AND MENTAL HEALTH (Nov. 8, 2006, 4:15 PM), [www.camh.net/Public\\_policy/Public\\_policy\\_papers/manddrugtesting.html](http://www.camh.net/Public_policy/Public_policy_papers/manddrugtesting.html) (explaining that substance abuse is no more prevalent among welfare recipients than the working population and recommending a shift in focus from mandatory drug testing to providing welfare recipients suspected of abusing drugs with the necessary support to help them leave the welfare system).

<sup>29</sup> Matt Lewis & Elizabeth Kenefick, *Random Drug Testing of TANF Recipients is Costly, Ineffective and Hurts Families*, CLASP (Feb. 3, 2011), <http://www.clasp.org/admin/site/publications/files/0520.pdf> ("This is also true of the general population, as most drug users have full time employment.").

<sup>30</sup> Corinne A. Carey, Comment, *Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State*

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well as other strong anti-drug rhetoric, repeatedly ever since.<sup>31</sup> In an effort to combat drug usage, various anti-drug acts have been passed in the past three decades. In 1988, the Anti-Drug Abuse Act provided harsh sanctions that included denying contracts, loans, and licenses to convicted drug possessors and traffickers, imposing the death penalty for certain drug-related killings, and allowing for the eviction of persons involved with drug-related criminal activity from public housing.<sup>32</sup> Proposed in 1987, the Family Welfare Reform Act attempted to deny benefits to welfare beneficiaries who withdrew from drug treatment programs before completion until the beneficiary either completed the program or was medically determined to be drug free, but these provisions were ultimately dropped.<sup>33</sup>

Finally, in 1996 Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act.<sup>34</sup> This Act replaced several previous welfare programs with the Temporary Assistance for Needy Families (TANF) program.<sup>35</sup> TANF provides funding to states to cover benefits, administrative expenses, and services targeted toward needy families.<sup>36</sup> The goals of the TANF program

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*Response as the Most Recent Chapter in the War on Drugs*, 46 BUFF. L. REV. 281, 285 (1998).

<sup>31</sup> *Id.* at 285-303 (discussing the rhetoric of the Reagan and Bush Administrations, Congress, and the Office of National Drug Control Policy up until 1997).

<sup>32</sup> *Id.* at 290.

<sup>33</sup> Carey, *supra* note 23 (“[P]rovided for the denial of benefits to any welfare recipient who had withdrawn from a treatment program before its completion.”).

<sup>34</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

<sup>35</sup> *About TANF*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES (Dec. 7, 2011), [www.acf.hhs.gov/programs/ofa/tanf/about.html](http://www.acf.hhs.gov/programs/ofa/tanf/about.html).

<sup>36</sup> *Id.* See generally Walker Newell, *Tax Dollars Earmarked for Drugs? The Policy and Constitutionality of Drug Testing Welfare Recipients*, 43 COLUM. HUM. RTS. L. REV. 215, 215-18 (2011) (explaining history of TANF program and program eligibility requirements).

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include helping needy families to achieve self-sufficiency, promoting job preparation and employment, and encouraging two-parent families.<sup>37</sup> Complimenting TANF, 21 U.S.C. § 862b expressly allows states to administer mandatory drug testing programs and sanction beneficiaries who test positive for controlled substances<sup>38</sup>

In accordance with the Personal Responsibility and Work Opportunity Reconciliation Act, Florida commenced TANF disbursement in 1996.<sup>39</sup> In 1998, Florida solicited a “Demonstration Project” in order to study the costs and benefits of implementing mandatory drug testing among TANF recipients.<sup>40</sup> The results contradicted the researchers’ expectations, demonstrating lower rates of drug use among TANF beneficiaries than among the general Florida population.<sup>41</sup> Although researchers speculated that after news spread of the drug testing requirements applicants would abstain from using illegal substances prior to applying, results after actual implementation of the Florida statute demonstrated an even lower percentage of drug use than the initial study.<sup>42</sup> The Demonstration Project also found little difference between the employment and income levels of TANF beneficiaries who tested positive for drug use from those who tested

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<sup>37</sup> *About TANF*, *supra* note 28. *See also* 42 U.S.C. §601(a) (2006).

<sup>38</sup> 21 U.S.C. § 862b (2006) (“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 the use of controlled substances.”).

<sup>39</sup> *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011).

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* (discussing structure of research and results).

<sup>42</sup> *See Stereotyping the Welfare Recipient*, *supra* note 18 (“Since drug testing began in Florida in July, only about 2 percent of welfare recipients have tested positive. This compares to the 8.7 percent of the U.S. population over the age of 12 (6.3 percent for those ages 26 and up), according to a 2009 survey by the U.S. Substance Abuse and Mental Health Services.”).

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negative.<sup>43</sup> Despite the fact that the Demonstration Project's Evaluation Report did not recommend that welfare testing be expanded statewide, due to the high costs associated and the minimal benefits derived therefrom,<sup>44</sup> Florida enacted legislation implementing mandatory drug testing for TANF applicants, which became effective July 1, 2011.<sup>45</sup>

### III. Policy Issues Regarding Mandatory Drug Testing for Welfare Beneficiaries

#### A. Cost and Actual Efficacy

Florida is not the only state that has recently shown interest in implementing mandatory drug testing for welfare recipients. In 2011, the state of Idaho solicited a study to determine how to test welfare recipients for illegal drugs in order to save money.<sup>46</sup> The study estimated total government savings to be below \$100,000 annually.<sup>47</sup> The study also pointed to one of the risks of drug testing: The risk of parents not applying for aid if drug screens are involved, effectively denying their children the benefits from TANF assistance.<sup>48</sup>

Many critics argue against implementing drug testing requirements for welfare benefits.<sup>49</sup> First, drug

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<sup>43</sup> Lebron, 820 F. Supp. 2d 1273.

<sup>44</sup> *Id.*

<sup>45</sup> FLA. STAT. § 414.0652 (2011).

<sup>46</sup> Dustin Hurst, *DHW Study Says Welfare Recipient Drug Testing Would Cost State More Money Than It's Worth*, IDAHO REPORTER (Feb. 9, 2011), [www.idahoreporter.com/2011/dhw-study-says-welfare-recipient-drug-testing-would-cost-state-more-money-than-its-worth](http://www.idahoreporter.com/2011/dhw-study-says-welfare-recipient-drug-testing-would-cost-state-more-money-than-its-worth) (discussing study of various drug testing schemes for welfare applicants and the prospective savings of each).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

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testing is expensive.<sup>50</sup> Furthermore, denying drug users financial assistance may actually help to perpetuate the drug use cycle instead of cure it, and this impoverishment may actually increase drug-related activity in an effort to generate income.<sup>51</sup> Furthermore, drug testing is not an entirely accurate means of identifying drug abuse.<sup>52</sup> The Center for Addiction and Mental Health suggests that funds would be better spent educating government workers to identify substance abuse problems more accurately and offering treatment to those who need the assistance in an attempt to help people better their position and leave the welfare system.<sup>53</sup>

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<sup>50</sup> See *id.* (“According to estimates, testing is pricy”); Rebecca Catalanello, *Florida Judge Blocks Drug Testing of Welfare Applicants*, TAMPA BAY TIMES (Oct. 25, 2011), [www.tampabay.com/news/florida-judge-blocks-drug-testing-of-welfare-applicants/1198389](http://www.tampabay.com/news/florida-judge-blocks-drug-testing-of-welfare-applicants/1198389) (“Applicants must pay \$25 to \$45 for the test...”); *Stereotyping the Welfare Recipient*, *supra* note 18 (“[S]avings could evaporate, considering the cost of staff hours and other resources the state has had to spend on implementing the program”); *Our Take on: Welfare Drug Tests*, ORLANDO SENTINEL (Oct. 30, 2010), [http://articles.orlandosentinel.com/2010-10-30/news/os-ed-mandatory-drug-testing-103010-20101029\\_1\\_welfare-recipients-drug-screening-cash-assistance](http://articles.orlandosentinel.com/2010-10-30/news/os-ed-mandatory-drug-testing-103010-20101029_1_welfare-recipients-drug-screening-cash-assistance) (“In the pilot program it cost almost \$90 per test, which resulted in a \$2.7 million expense.”); Newell, *supra* note 29, at 250 (“A study by the Center for Law and Social Policy reached similar conclusions, noting that the real cost of identifying a single drug user could range from \$ 29,000 to \$ 77,000, since tests do not accurately identify drug users.”).

<sup>51</sup> Carey, *supra* note 23, at 330-31 (“Guthrie argues that denying welfare to drug users will only eliminate that class of substance abusers from welfare rolls; it will not eliminate drug use and crime among the destitute. It seems senseless to make poor drug addicts suddenly poorer and, therefore, more desperate to commit income-generating crimes.”).

<sup>52</sup> *Drug Testing of Public Assistance Recipients as a Condition of Eligibility*, ACLU (Apr. 8, 2008), [www.aclu.org/drug-law-reform/drug-testing-public-assistance-recipients-condition-eligibility](http://www.aclu.org/drug-law-reform/drug-testing-public-assistance-recipients-condition-eligibility).

<sup>53</sup> *Mandatory Drug Testing and Treatment of Welfare Recipients Position Statement*, *supra* note 21.

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Despite these issues with mandatory drug testing, states have continued to consider varying drug testing programs. At least ten states have introduced legislation to enforce drug testing on welfare recipients.<sup>54</sup> Kentucky is even considering implementing random drug testing on Kentucky residents who receive food stamps, Medicaid, and other assistance, denying further assistance to any recipients who test positive.<sup>55</sup>

### B. Constitutionality

The greatest challenge to these efforts to implement mandatory drug testing on welfare recipients is the fact that drug testing in such a context may be unconstitutional. Although the issue has not yet made its way to the Supreme Court, a similar law in Michigan was granted a preliminary injunction by the United States District Court for the Eastern District of Michigan,<sup>56</sup> the court ruling that the testing program was unconstitutional<sup>57</sup> because suspicionless testing was an infringement upon the individual's Fourth Amendment right.<sup>58</sup>

Those that have challenged the mandatory drug testing laws look to the Fourth Amendment for grounds of unconstitutionality.<sup>59</sup> Historically, the Supreme Court has always considered the collecting and testing of urinary

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<sup>54</sup> *Stereotyping the Welfare Recipient*, *supra* note 18.

<sup>55</sup> Jack Brammer, *Kentucky Lawmaker Wants Random Drug Testing For Welfare Recipients*, KENTUCKY.COM (Feb. 17, 2011, 4:30 PM), [www.kentucky.com/2011/01/17/1600950/kentucky-lawmaker-wants-random.html](http://www.kentucky.com/2011/01/17/1600950/kentucky-lawmaker-wants-random.html).

<sup>56</sup> *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1144 (E.D. Mich. 2000).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> 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.”).

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samples to be a “search” under the meaning of the Fourth Amendment. In *Skinner v. Railway Labor Executives’ Ass’n*, the Supreme Court discussed the fact that chemical analysis of urine can reveal a wealth of information about a person and that the act of collecting urine itself invades on privacy interests.<sup>60</sup>

However, the Fourth Amendment does not protect against all searches, just “unreasonable” searches.<sup>61</sup> In deciding what is “reasonable,” the circumstances surrounding the search and the nature of the search is considered,<sup>62</sup> judging the permissibility of a search by “balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.”<sup>63</sup> Typically, there is a presumption of reasonableness in favor of the procedures described in the Warrant Clause of the Fourth Amendment,<sup>64</sup> but an exception to this presumption is recognized when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>65</sup>

*Skinner* applied this balancing test to the drug testing of railroad employees after major train accidents and found that the “governmental interest in ensuring the

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<sup>60</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 617 (1989) (“Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.”).

<sup>61</sup> U.S. CONST. amend. IV; *United States v. Sharpe*, 470 U.S. 675, 682 (1985).

<sup>62</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

<sup>63</sup> *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

<sup>64</sup> U.S. CONST. amend. IV (“[N]o 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.”).

<sup>65</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

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safety of the traveling public and of the employees”<sup>66</sup> justified implementing policies to deter drug use, and that suspicionless testing was necessary in order to best protect the public’s safety.<sup>67</sup> The Court in *Skinner* further qualified suspicionless drug testing by stating that the railway’s employees have a diminished expectation of privacy because they are involved in an industry highly regulated to ensure the safety of the public.<sup>68</sup>

Similarly, the Supreme Court in *National Treasury Employees Union v. Von Raab* held that the government’s interest in safety outweighed the individual employee’s privacy interests; thus, the Court held that suspicionless drug testing of federal employees applying for positions involving illegal drugs or positions that require the carrying of a firearm is reasonable.<sup>69</sup> *Von Raab* also addressed and dismissed the warrant issue by claiming that the applicant knows that he or she must take a drug test in order to apply for the position<sup>70</sup> and thus the process is not discriminatory because it is required of all applicants.<sup>71</sup> Consequently, a warrant would provide little protection of personal privacy.<sup>72</sup>

In a similar vein, *Veronia School District 47J v. Acton* held that suspicionless drug testing of school athletes

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<sup>66</sup> *Skinner*, 489 U.S. at 621.

<sup>67</sup> *See id.* at 628-33 (“We conclude that 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.”).

<sup>68</sup> *Skinner*, 489 U.S. at 627.

<sup>69</sup> *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 679 (1989) (“We hold that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable.”).

<sup>70</sup> *Id.* at 667.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

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and extra-curricular program participants is reasonable<sup>73</sup> after the school demonstrated that there was a problem with illegal drug use among the student population.<sup>74</sup> The Court also alleged that students have a decreased expectation of privacy due to the fact that they are under the control of their parents and guardians<sup>75</sup> and because student athletes “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”<sup>76</sup> Because the government has a significant interest in maintaining order and protecting students in a school environment, the drug tests were held to be reasonable.<sup>77</sup>

IV. Analysis of the Constitutionality and Efficacy of  
Mandatory Drug Testing of Welfare Recipients.

Despite the line of Supreme Court cases that seem to favor suspicionless drug testing within “reasonable” circumstances, *Chandler v. Miller* held that suspicionless drug testing of candidates for state office in Georgia was not reasonable and thus unconstitutional.<sup>78</sup> One reason the Court cited for ruling the law unconstitutional was the fact that the state of Georgia did not provide any evidence that there was a current or past drug problem with candidates for state office,<sup>79</sup> unlike in *Veronia*.<sup>80</sup> The Court also held that the drug testing was implemented purely to protect the

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<sup>73</sup> *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

<sup>74</sup> *Id.* at 648-50.

<sup>75</sup> *Id.* at 654.

<sup>76</sup> *Id.* at 657 (discussing requirements of student athletes in *Veronia*’s public school system).

<sup>77</sup> *Id.* at 646-47.

<sup>78</sup> *Chandler v. Miller*, 520 U.S. 305 (1997).

<sup>79</sup> *Id.* at 321. *See id.* at 319.

<sup>80</sup> *See Acton*, 515 U.S. at 665.

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State's anti-drug image,<sup>81</sup> and that the Fourth Amendment protects society against policies that diminish "personal privacy for a symbol's sake."<sup>82</sup>

Likewise, an argument can be made that the Florida law implementing mandatory suspicionless drug testing on welfare applicants is purely symbolic, as Governor Rick Scott ran for office promising such a requirement.<sup>83</sup> So far, evidence is lacking to support any proposition that TANF beneficiaries use drugs more frequently than the general population.<sup>84</sup> According to the data from the first month requiring mandatory drug testing of TANF applicants, approximately only 2-5.1% of TANF applicants use drugs.<sup>85</sup> Despite these low numbers, Florida urges that all refusals to test should be considered "drug related denials."<sup>86</sup> However, the court in *Lebron* found it difficult to conclude that an applicant refusing to take a drug test does so for purely drug-related purposes and cited other reasons why an applicant may refuse, such as: "[I]nability

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<sup>81</sup> See *Chandler*, 520 U.S. at 321 ("By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse.").

<sup>82</sup> *Id.* at 322.

<sup>83</sup> *Rick Scott Says Welfare Recipients are More Likely to Use Illicit Drugs*, POLITIFACT (Jun. 5, 2011), [www.politifact.com/florida/statements/2011/jun/09/rick-scott/rick-scott-says-welfare-recipients-are-more-likely/](http://www.politifact.com/florida/statements/2011/jun/09/rick-scott/rick-scott-says-welfare-recipients-are-more-likely/).

<sup>84</sup> See *Stereotyping the Welfare Recipient*, *supra* note 18 ("Since drug testing began in Florida in July, only about 2 percent of welfare recipients have tested positive. This compares to the 8.7 percent of the U.S. population over the age of 12 (6.3 percent for those ages 26 and up), according to a 2009 survey by the U.S. Substance Abuse and Mental Health Services."); *News Release*, *supra* note 21 (finding that the prevalence of alcohol and drug use was comparable among welfare recipients and the general population); *Mandatory Drug Testing and Treatment of Welfare Recipients Position Statement*, *supra* note 21 (explaining that substance abuse is no more prevalent among welfare recipients than the working population).

<sup>85</sup> *Lebron*, 820 F. Supp. 2d 1273.

<sup>86</sup> *Id.*

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to pay for testing, a lack of laboratories near the residence of the applicant, inability to secure transportation to a laboratory or . . . a refusal to accede to what an applicant considers to be an unreasonable condition for receiving benefits.”<sup>87</sup>

Furthermore, *Skinner* and *Von Raab* focused on imminent safety concerns.<sup>88</sup> In *Skinner*, the FRA provided the Court with evidence that alcohol and drug use had significantly contributed to railroad accidents, resulting in multiple fatalities, injuries, and millions of dollars in property damage.<sup>89</sup> *Von Raab* likewise focused on the dangerous aspects of the job, and the fact that employees deal directly with dealers and seized contraband,<sup>90</sup> in rationalizing the government’s drug testing requirements to be “reasonable.”<sup>91</sup> Although Gov. Rick Scott claims that there is a prevalence of drug use among welfare beneficiaries,<sup>92</sup> the evidence simply does not hold up.<sup>93</sup> Unlike in *Veronia*, where the school district was able to provide evidence of a substantial contemporary drug problem in the school that mandated the implementation of

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<sup>87</sup> *Id.*

<sup>88</sup> See *Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656.

<sup>89</sup> *Von Raab*, 489 U.S. at 669 (“The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 ‘the nation’s railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor.’”).

<sup>90</sup> *Skinner*, 489 U.S. at 607 (“Many of the Service’s employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country.”).

<sup>91</sup> *Von Raab*, 489 U.S. at 670 (“It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment.”).

<sup>92</sup> *Rick Scott Says Welfare Recipients are More Likely to Use Illicit Drugs*, *supra* note 74.

<sup>93</sup> *Our Take on: Welfare Drug Tests*, ORLANDO SENTINEL (Oct. 30, 2010), [http://articles.orlandosentinel.com/2010-10-30/news/os-ed-mandatory-drug-testing-103010-20101029\\_1\\_welfare-recipients-drug-screening-cash-assistance](http://articles.orlandosentinel.com/2010-10-30/news/os-ed-mandatory-drug-testing-103010-20101029_1_welfare-recipients-drug-screening-cash-assistance).

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suspicionless drug testing,<sup>94</sup> Florida has not been able to demonstrate any such prevalent drug problem in the TANF beneficiary population.<sup>95</sup> Thus, Florida is unlikely to prevail on a claim that a current drug problem in the welfare population exists that necessitates mandatory drug testing.

However, the case of *Wyman v. James* is noteworthy in examining the constitutionality of a mandatory drug testing provision for welfare recipients. In *Wyman*, the Court held that a New York statute that required home visits as a requirement of assistance did not violate the Fourth Amendment because, by applying for benefits, welfare applicants consented to the searches; and consensual searches are not a violation of the Fourth Amendment.<sup>96</sup> Florida relied on the holding in *Wyman* to bolster its case; but, the Judge who ordered the Preliminary Injunction in *Lebron*, Mary Scriven, differentiated *Wyman*'s holding by arguing that urinary drug testing was more invasive than house searches.<sup>97</sup> Scriven argues that, although TANF beneficiaries give consent to be tested, requiring drug tests to receive benefits violates the Fourth Amendment.<sup>98</sup> Scriven further remarked that the State did not demonstrate a strong enough special need to overcome the presumption that "a search ordinarily must be based on individualized suspicion of wrongdoing"<sup>99</sup> in order to be "reasonable" under the Fourth Amendment.<sup>100</sup> Because

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<sup>94</sup> Acton, 515 U.S. at 648-50 (discussing drug problem in Veronia schools).

<sup>95</sup> *Lebron*, 820 F. Supp. 2d 1273.

<sup>96</sup> See *Wyman v. James*, 400 U.S. 309, 326 (1971).

<sup>97</sup> *Lebron*, 820 F. Supp. 2d 1273 ("The principal and dispositive difference between this case and *Wyman* is the nature of the intrusion demanded.").

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (quoting *Chandler*, 520 U.S. at 313).

<sup>100</sup> *Lebron*, 820 F. Supp. 2d 1273 ("[T]he court finds the State has not demonstrated a substantial special need to justify the wholesale,

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*Wyman* has never been reaffirmed, and because drug testing has since been repeatedly deemed a search under the Fourth Amendment,<sup>101</sup> the Supreme Court hearing the *Lebron* case will most likely agree with Scriven’s reasoning regarding the applicability of the *Wyman* holding to the mandatory drug testing of welfare applicants.

Even if the Supreme Court did rule the Florida law constitutional, implementing mandatory drug testing of welfare applicants is simply bad policy. Although one can be sympathetic to the argument that drug testing is common place during the job application process in the private sector, and that TANF applicants should have to undergo a similar process as job applicants,<sup>102</sup> the fact is that most private sector employers do not require the applicant to pay for the drug test.<sup>103</sup> Conversely, the Florida law requires TANF applicants to pay for the test upfront, which is a substantial cost for a person who is already struggling to cover daily living expenses.

Another popular argument is that “it is unfair for Florida’s taxpayers to subsidize addiction.”<sup>104</sup> However, as previously discussed, the rate of drug use among the employed population is comparable to the rate of drug use among the unemployed.<sup>105</sup> Furthermore, drug testing

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suspicionless drug testing of all applicants for TANF benefits.”). *See id.* (discussing rationale behind holding that State has not demonstrated a substantial need).

<sup>101</sup> Carey, *supra* note 23, at 316.

<sup>102</sup> Aaron Sharockman, *Bill Filed Would Require Only Recently Convicted Drug Felons Be Tested*, POLITIFACT (Feb. 22, 2011), [www.politifact.com/florida/promises/scott-o-meter/promise/600/require-drug-screening-for-welfare-recipients](http://www.politifact.com/florida/promises/scott-o-meter/promise/600/require-drug-screening-for-welfare-recipients).

<sup>103</sup> Department of Health and Human Services, *Drug Testing*, COMP DRUG, INC. (last visited May 1, 2012, 11:51 AM), <http://www.compdrug.org/tipsheet9.htm>.

<sup>104</sup> Brammer, *supra* note 46 (“Most employers require it for their workers. . .”). *See Stereotyping the Welfare Recipient*, *supra* note 18.

<sup>105</sup> *Mandatory Drug Testing and Treatment of Welfare Recipients Position Statement*, *supra* note 21 (explaining that substance abuse is

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regimes are expensive to implement, administer, and maintain, and ultimately do not save the State any significant expense.<sup>106</sup> And despite the good intentions of the legislature, sanctioning welfare recipients who test positive for drug use may actually help to perpetuate the drug cycle in Florida instead of helping to give the applicant the resources they need to defeat any drug reliance they have and to ultimately leave the welfare system.<sup>107</sup>

### V. Conclusion

Ultimately, the *Lebron* case may make its way before the Supreme Court of the United States; and there, the Florida law requiring suspicionless mandatory drug testing of welfare recipients will likely be struck down as unconstitutional. However, whether other legislative attempts to institute drug testing programs will succeed as constitutional is uncertain. Kentucky State Representative Lonnie Napier claims that by making drug testing random, his bill, which proposes a drug testing scheme similar to the Florida law, would be constitutional.<sup>108</sup> However, this is likely an unfounded claim, as random testing is not the same as suspicionless testing and the law would likely have to pass through the same rigorous analysis of

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no more prevalent among welfare recipients than the working population).

<sup>106</sup> *Stereotyping the Welfare Recipient*, *supra* note 18 (“[S]avings could evaporate, considering the cost of staff hours and other resources the state has had to spend on implementing the program.”).

<sup>107</sup> Carey, *supra* note 23, at 330-31 (“Guthrie argues that denying welfare to drug users will only eliminate that class of substance abusers from welfare rolls; it will not eliminate drug use and crime among the destitute. It seems senseless to make poor drug addicts suddenly poorer and, therefore, more desperate to commit income-generating crimes.”).

<sup>108</sup> Brammer, *supra* note 46 (“Making the testing random would ensure the bill constitutional, Napier said.”).

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“reasonableness” established throughout *Wyman*, *Chandler*, *Veronia*, *Von Raab*, and *Skinner*.

Regardless of the constitutionality of various drug testing schemes, states are most likely better off not implementing any wide scale mandatory suspicionless drug testing schemes for welfare beneficiaries, due to the costs and questionable efficacy of such schemes. Instead, states would better accomplish the goal of eliminating drug use in the welfare population by offering better access to drug rehabilitation programs, education, and resources in an effort to improve marketable job skills. Doing so will help individuals increase financial stability so that they can support themselves and their family without needing to rely on the welfare system for assistance, which is better off for everyone in the long run.

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