MANDATORY DRUG SCREENING FOR WELFARE RECIPIENTS: FISCALLY RESPONSIBLE LIMITATION ON GOVERNMENT HANDOUTS OR CONSTITUTIONAL VIOLATION?

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I. INTRODUCTION

There is a long history of political maneuvering that surrounds social welfare legislation and government entitlement programs at both the national and state level. One aspect that has received increased attention during the recent economic downturn is mandatory drug screening, which has been a tool for politicians seeking to conserve taxpayer resources and limit the State's complicity in drug addiction.[2] Especially in times of economic crisis, welfare recipients have become a scapegoat for politicians in conservative, cash-strapped states.[3] This note will

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[1] I would like to express my gratitude to the entire JLPP editorial staff for their dedication and impeccable attention to detail. I also want to thank Ryan Goldberg, without whom I would not have pursued research in such an intriguing area of the law.

[2] *See* Arthur Delaney, *Georgia Welfare Drug Testing Law Supported by Bad Research*, HUFFINGTON POST (Apr. 13, 2012, 2:53PM), http://www.huffingtonpost.com/2012/04/23/welfare-drug-testing-georgia_n_1440167.html; Vanita Gupta, *Mandatory Drug Testing Demonizes and Demoralizes*, US NEWS & WORLD REPORT (Dec. 15, 2011), http://www.usnews.com/debate-club/should-welfare-recipients-be-tested-for-drugs/mandatory-drug-testing-demonizes-and-demoralizes; Kenric Ward, *Florida Welfare Drug-Test Savings Go up in Smoke*, SUNSHINE STATE NEWS (June 11, 2011 3:55AM), http://www.sunshinestatenews.com/story/florida-welfare-drug-test-savings-go-smoke.

[3] In recent months, there has been much debate over the intentions regarding implementation. *See* Arthur Delaney, *Rick Scott's Welfare Drug Test Saves No Money: Judge*, HUFFINGTON POST (Dec. 25, 2011, 5:12 AM),

not seek to establish a political position, but will examine the current Fourth Amendment paradigm for challenging such legislation and ultimately propose alternatives to withholding welfare, suggesting a new means for challenging legal barriers to the receipt of social welfare under the Equal Protection Clause of the Fourteenth Amendment.

Over the last decade, several states have proposed legislation requiring that the recipients of Temporary Assistance for Needy Families ("TANF") submit to mandatory drug screening as a condition for receiving such assistance.[4] In 2000, Michigan was the first state to make such an attempt with M.C.L § 400.57.[5] However, the Sixth Circuit affirmed the district court's ruling, which originally enjoined Michigan's program on Fourth Amendment grounds because the law was not sufficiently "grounded in public safety" to qualify for the "special needs" exception to the Fourth Amendment's reasonableness requirement.[6] Virginia also unsuccessfully attempted to pass

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http://www.huffingtonpost.com/2011/10/25/rick-scott-drug-test-welfare_n_1031024.html.

[4] *See infra* note 8 and accompanying text; *see also* HHS.gov/Recovery, *Temporary Assistance to Needy Families (TANF)*, http://www.hhs.gov/recovery/programs/tanf/index.html. (last visited Nov. 11, 2012) ("TANF is a block grant program to help move recipients into work and turn welfare into a program of temporary assistance . . . . The law ended Federal entitlement to assistance and instead created TANF as a block grant that provides States, Territories, and Tribes Federal funds each year. These funds cover benefits and services targeted to needy families.").

[5] Mich. Comp. Laws § 400.57a-u (1999) (amended on October 1, 2011).

[6] Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1143 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted*, *judgment vacated*, 319 F.3d 258 (6th Cir. 2003), *aff'd on reh'g*, 60 F. App'x 601 (6th Cir. 2003). In this case, the plaintiff Tanya Marchwinski challenged a Michigan law that conditioned welfare benefits upon her willingness to submit to drug testing. *Id.* The district court recognized that in order to mandate drug testing, the State required "some quantum of individualized suspicion" under the Fourth Amendment. *Id.* at 1138. The Sixth Circuit initially overturned the injunction, reasoning that, "the public has a strong interest in ensuring that the money it gives to recipients is used for its intended purposes." Marchwinski v. Howard, 309 F.3d 330, 338 (6th Cir. 2002) *reh'g en banc granted*, *judgment vacated*, 319 F.3d 258 (6th Cir. 2003) *aff'd on reh'g*, 60 F. App'x 601 (6th Cir. 2003). However, the Sixth Circuit vacated this opinion, granted a rehearing, and affirmed the district court by an evenly divided *en banc* panel. The court did not

such a law in 2008, but the bill never made it through the state legislature.[7] In the last several years, twenty-eight states, including Missouri, Alabama, Utah, Pennsylvania, and Florida have introduced related legislation, seeking to mandate drug screening for TANF recipients.[8] Of these recent examples, none have been more controversial than that the program enacted by the Florida legislature in early 2011,[9] which is now the subject of a civil suit in federal court.[10]

The current dispute over the Florida law that mandates drug testing for TANF recipients began in early 2011, when Governor Rick Scott pushed for Florida to become the first state in the U.S. to successfully mandate that TANF recipients undergo drug screening as a condition for cash assistance.[11]

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issue an opinion, leaving uncertain its justification for upholding the district court's injunction.

[7] *See, e.g.*, H.B. No. 955, 2012 Reg. Sess. (Va. 2012) (requiring departments of social services to screen entitlement program participants to determine whether probable cause exists to believe the participant is engaged in the use of illegal drugs); H.B. No. 365, 2008 Reg. Sess. (Va. 2008) (requiring, as a condition of participation in a government-run employment program, that the local director screen each participant to determine whether probable cause exists to believe such participant is engaged in the use of illegal drugs).

[8] S.B. No. 169, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011) (mandating drug screening for all TANF applicants); H.B. 197, 2012 1st Sess. (Al. 2012); H.B. 155, 2012 Gen. Sess. (Utah 2012) (requiring individuals applying for cash assistance to complete a written questionnaire screening for illegal drug use); 62 PA. CONS. STAT. § 432.24 (holding that people convicted of drug-related felonies and applying for public assistance are required to be tested and shall be tested at the time the application for public assistance is made).

[9] H.B. 353, 2011 Reg. Sess. (Fl. 2011).

[10] *See* Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1275 (M.D. Fla. Oct. 24, 2011). The United States District Court for the District of Florida granted a preliminary injunction in favor of Louis Lebron. *Id.* The court's reasoning draws heavily upon the *Marchwinski* case and halted the Florida drug screening measure. *Id.* at 1289.

[11] *See* www.RickScottForFlorida.com, *Rick Scott's Plan to Turn Florida Around: 7 Steps. 700,000 New Jobs. 7 Years*, https://docs.google.com/viewer ?a=v&pid=explorer&chrome=true&srcid=0B4fjL1-0K8piZDIyZDViMTE tZWFjNi00NTdlLWFkYjgtZTBhNTc0MThmNzc1&hl=en_US&pli=1 (last visited Nov. 22, 2012). During his campaign, Scott outlined his "7-7-7" plan, in which he proposed 7 steps to created 700,000 jobs over 7 years. Part of this plan was premised upon saving $77 million through the mandatory drug

Governor Scott promised to create a drug-screening requirement for TANF recipients as part of a gubernatorial campaign premised upon boosting Florida's depressed economic status. Seeking to pursue the goals of a failed federal law proposed by Senator Orrin Hatch (R-UT) in 2010, Governor Scott immediately approved the drug screening for TANF measure after it was passed by the Florida legislature.[12]

The purpose of this note is to examine the current political climate as motivation behind this recent phenomenon. Empirical data regarding the success of the law will be examined and litigation that has occurred under Fourth Amendment grounds will be analyzed. This note will suggest a new, alternative remedy that might force courts to examine the inherent inequities of such a law, outside of the traditional Fourth Amendment paradigm.[13] In other contexts, for example, such as drug testing high school athletes, there has been an array of successful equal protection challenges. These types of equal protection challenges are applicable to the passage of Florida's law and provide a foundation for future litigants to bring equal protection claims under the Fourteenth Amendment.

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screening of TANF recipients. Florida state Senator Steve Oelrich, one of the architects of Florida House Bill 353, summarized Scott's message, stating publicly, "This bill is about breaking the cycle of drug dependency and stopping the use of taxpayer dollars to buy illegal drugs." Sascha Cordner, *Drug Testing for Welfare Bill Goes to Governor*, WFSU/The Florida State University (May 5, 2011, 7:40 PM), http://www.publicbroadcasting.net/wfsu/news.newsmain/article/0/4046/1799065/State.News/Drug.Testing.for.welfare.bill.goes.to.governor.

[12] *See* Steve Benen, *Romney Backs Welfare Drug-Testing*, THE MADDOW BLOG (Feb. 9, 2012, 4:36 PM), http://maddowblog.msnbc.com/_news/2012/02/09/10365798-romney-backs-welfare-drug-testing?lite ("Florida Gov. Rick Scott (R) pushed through an ambitious drug-testing program, only to see it fail miserably. It's not just the states, either. Sen. Orrin Hatch (R-Utah) pushed for mandatory drug tests for those seeking unemployment benefit [during the 2010 congressional session].")

[13] *See generally* Michael D. Socha, *An Analysis of Michigan's Plan for Suspicionless Drug Testing of Welfare Recipients Under the Fourth Amendment "Special Needs" Exception*, 47 WAYNE L. REV. 1099 (2001). Challengers of such laws have brought these claims under the Fourth Amendment paradigm of "special needs" searches conducted by non-law enforcement personnel. *Id.*

II. A CASE STUDY FROM FLORIDA – *LEBRON V. WILKINS*

In early 2011, Florida Governor Rick Scott signed Fla. H.B. 353 into law, codified as Section 414.0652, Florida Statutes, requiring all applicants for TANF welfare benefits to submit to suspicionless drug testing.[14] The TANF block grant program was created by the U.S. Congress on August 22, 1996, as part of the Personal Responsibility and Work Opportunity Act, 42 U.S.C. §§ 601 et seq.[15] To become eligible to receive TANF funds, a state must submit a plan that outlines how it intends to administer its program and set eligibility requirements for families that apply for assistance.[16] States may generally use federal funds "in any manner that is reasonably calculated to accomplish" the purposes of TANF.[17] As a complement to this provision, 21 U.S.C. § 862b provides that "[n]otwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances."[18] Although this provision authorizes states to test welfare recipients for controlled substances, it does not provide guidance on the manner in which states are permitted to do so consistent with

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[14] FLA. STAT. ANN. § 414.0652 (West 2012).

[15] 42 U.S.C. § 601(a) (2012); Bill Clinton, *How We Ended Welfare, Together*, N.Y. TIMES (Aug. 22, 2006), http://www.nytimes.com/2006/08/22/opinion/22clinton.html?_r=0. The Act was intended to provide states with resources and flexibility to operate programs designed to meet the following goals: (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. *Id.*

[16] 42 U.S.C. § 602(a) (2012).

[17] 42 U.S.C. § 604(a)(1) (2012).

[18] 21 U.S.C. § 862b (2012).

constitutional mandates, leaving state lawmakers to create their own procedures.[19]

Although the federal government has not provided guidelines for states to administer drug screening as a condition for TANF benefits, several states have attempted to enact a variety of methods. Maryland has mandated that TANF benefits will be paid to a third-party if a recipient fails a drug test, but most states have simply rescinded cash assistance for individuals that test positive for drugs.[20] From the outset, Florida, lead by newly elected Governor Scott, sought to preclude drug users and their families from receiving TANF benefits at all.[21]

The Florida law only impacts TANF cash benefits, not other programs such as food stamps.[22] Although the law requires

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[19] HHS.gov/Recovery, *Temporary Assistance to Needy Families (TANF) Overview*, http://www.hhs.gov/recovery/programs/tanf/tanf-overview.html (last visited Mar. 4, 2013) ("TANF provides assistance and work opportunities to needy families by granting States the Federal funds and wide flexibility to develop and implement their own welfare programs."). Although Florida only recently attempted to test recipients for controlled substances, the state began disbursing TANF funds in 1996. Florida Department of Children and Families, *Temporary Assistance for Needy Families (TANF): An Overview of Program* Requirements, www.dcf.state.fl.us/programs/access/docs/TANF%20101%20final.pdf (last visited Mar 4, 2013); FLA. STAT. ANN. § 414.0652 (2011).

[20] See, *e.g.*, MD CODE ANN., HUM. SERVS., § 5-314 (West 2007) (where the recipient does not pass a substance abuse screening, "the remainder of the cash benefits for . . . children . . . will be paid to a third party payee or a compliant adult recipient").

[21] *See* CNN Wire Staff, *Florida Governor Defends Measure Requiring Drug Tests for Welfare*, CNN POLITICS (June 5, 2011, 5:58 PM), http://www.cnn.com/2011/POLITICS/06/05/florida.welfare.drug.testing/. Governor Scott's Democratic counterparts did not agree. State Senator Chris Smith of West Palm Beach said that "[i]f the mindset is let's test those that are getting state dollars because we don't want them to use state dollars to go out and buy drugs or we want to find out so we can get them treatment . . . we should have adopted [an] amendment that tested everybody . . . because we only create a certain class of people to be drug tested, I think we should vote this bill down." Sascha Cordner, *Drug Testing for Welfare Bill Goes to Governor*, WFSU/The Florida State University (May 5, 2011, 7:40 PM), http://www.publicbroadcasting.net/wfsu/news.newsmain/article/0/4046/1799065/State.News/Drug.Testing.for.welfare.bill.goes.to.governor.

[22] FLA. STAT. ANN. § 414.0652(j) (2012); *Their Tea-cup Runneth Over: Rick Scott's Zeal for Drug Testing Runs into Stiff Opposition*, ECONOMIST (Jun. 9, 2011), http://www.economist.com/node/18805970.

welfare recipients, of whom there are roughly 113,000 in Florida, to pay for the test, it raises their initial welfare payment to cover the cost of the test, provided they are clean.[23] TANF recipients who fail the test become ineligible for welfare for a year, though this is dropped to six months if they prove that they have successfully completed drug treatment.[24] The suggested treatment programs are not covered by increased TANF benefits, but taken directly out of the individuals' pockets.[25] If the individual fails a second time, he or she becomes ineligible for welfare for three years.[26] Lane Wright, a spokesman for Governor Scott, has touted that the plan will "[save] tax dollars," indicating to critics that the drug testing measure may remove large numbers of recipients from the benefit rolls.[27] Wright also noted that "a cost benefit is of secondary importance to ensuring the cash assistance is going to the children. That's what the money is intended for. It's also important to make sure we're not funding someone's drug habit with taxpayer dollars."[28] Preliminary estimates held that "the money saved on all rejected applicants would add up to $40,800-$98,400 for the cash assistance program that state analysts have predicted will cost $178 million this fiscal year."[29] Other estimates have been as low at $9 million.[30]

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[23] *Their Tea-cup Runneth Over: Rick Scott's Zeal for Drug Testing Runs into Stiff Opposition*, ECONOMIST (Jun. 9, 2011), http://www.economist.com/node/18805970.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Arthur Delaney, *Rick Scott Backs Drug Tests For Welfare Beneficiaries, Public Workers And Himself*, HUFFINGTON POST (Nov. 27, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/09/27/drug-testing-welfare-_n_983235.html [hereinafter "Scott Backs Drug Tests"].

[29] *Id.* Several news outlets have pointed out that the cost of administering the drug-screening program and the expense of defending the law in court might negate any money saved by taxpayers. *See, e.g.*, Rachel Bloom, *Just as We Suspected: Florida Saved Nothing by Drug Testing Welfare Applicants*, ACLU BLOG OF RIGHTS (Apr. 18, 2012, 1:52 PM), http://www.aclu.org/blog /criminal-

Nearly 92,000 Floridians currently receive TANF benefits.[31] The average household gets $240 a month, but only 20 percent of the applicants are accepted to receive these benefits.[32] Since the passage of the bill, there has been a test failure rate of 2.5 percent, which is not expected to change much if the law is upheld in the long run.[33] Furthermore, research has yielded a finding that welfare recipients who screened and tested positive for the use of illicit substances were found to be just as likely to work, and just as likely to use social service benefits, as those who screened and tested negative.[34]

A. LUIS LEBRON FILES SUIT

In July 2011, Luis Lebron applied to the Florida Department of Children and Families ("DCF") for benefits under the federal TANF program, seeking financial support for himself and his child.[35] Lebron is a military veteran and undergraduate student at the University of Central Florida who maintains sole custody of his four-year-old son.[36] Although Lebron claims he has never used illegal drugs, he is required to submit to drug testing under § 414.0652 of the new Florida law.[37] However, Lebron refused,

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law-reform-racial-justice/just-we-suspected-florida-saved-nothing-drug-testing-welfare.

[30] The Foundation for Government Accountability has published several statistical analyses. *See* Tarren Bragdon, *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.

[31] Delaney, *supra* note 28.

[32] *Id.*

[33] *Id.*

[34] *See* Robert E. Crew Jr. PhD & Belinda Creel Davis P.h.D., *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits*, 17(1) J. HEALTH & SOC. POL'Y 39, 47-48 (2003).

[35] Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1275 (M.D. Fla. 2011).

[36] *Id.*

[37] *Id.* at 1275-76.

protesting that requiring him to pay for and submit to a suspicionless drug test is unreasonable under the Fourth Amendment.[38] Except for his refusal to submit to drug screening, Lebron would otherwise be eligible for TANF benefits.[39]

Lebron sought a preliminary injunction on behalf of himself and a class of similarly situated TANF applicants, seeking a determination that § 414.0652 violates the Fourth Amendment right to be free from unreasonable warrantless searches.[40] More specifically, Lebron argued that because Florida's drug testing law authorizes suspicionless searches, the defendant must prove that his interests meet the "special needs" exception to the Fourth Amendment.[41]The Fourth Amendment does not prohibit all searches, but protects citizens from those that are unreasonable.[42] As the district court recognized, "[t]o be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing."[43] However, the Supreme Court noted one exception to this rule: if the government can demonstrate "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[44] The challenge facing the court right now is whether Florida's TANF regime fits within this exception.

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[38] *Id.* at 1276.

[39] *Id.*

[40] *Id.* at 1276.

[41] Plaintiff's Reply in Support of Motion for Summary Judgment at 1 Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 11CV01473), 2012 WL 5511866 (arguing that it is the state's "burden to demonstrate a special need sufficient to dispense with the customary individualized suspicion requirement of the Fourth Amendment").

[42] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989).

[43] Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1284 (M.D. Fla. 2011) (quoting Chandler v. Miller, 520 U.S. 305, 313 (1997)).

[44] N.J. v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

III. LEGAL ARGUMENTS IN LEBRON

In response to the passage of H.B. 353, Lebron filed suit, seeking class certification and a preliminary injunction, both of which were granted.[45]

A. PLAINTIFF'S ARGUMENT

The bulk of Lebron's initial complaint took issue with the law on Fourth Amendment grounds. Ignoring his arguments for class certification, which are extrinsic to this article, Lebron noted that under existing Supreme Court precedent, Florida's drug-testing regime does not meet the "special needs" exception required to conduct a warrantless search.[46] He alleged that the:

> Supreme Court of the United States has held that suspicionless drug testing by the government is an unreasonable search that violates the Fourth Amendment, except for a closely guarded category of cases limited to two situations. The first are those implicating substantial public safety concerns. The second are those cases affecting certain students in the public school system. Neither exception to the rule against suspicionless drug screening applies here.[47]

While Lebron's complaint itself was sparse in terms of authority, there is a great deal of support for this position. The Supreme Court has only permitted drug testing under the

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[45] *See* Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (granting preliminary injunction); Lebron v. Wilkins, 277 F.R.D. 664 (M.D. Fla. 2011) (certifying the desired class because the "commonality of the constitutional challenge was of such a nature that it was capable of class wide resolution").

[46] Verified Compl.: Class Action at ¶ 33 Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 11CV01473), 2011 WL 3909757.

[47] *Id.* at ¶ 37. As such, Lebron contends, "HB 353 violates the Fourth Amendment rights of Plaintiff and the Plaintiff Class because it commands Defendant to conduct unreasonable and suspicionless searches of them, and all applicants for TANF benefits, without articulating any governmental interest that would constitute a special need." *Id.* at 38.

"special needs" exception in a narrow set of circumstances.[48] For instance, the Court has favored drug-testing regimes meant to regulate public employees, especially those employees with a duty or obligation to safeguard the public.[49] However, many lower courts have also been hesitant to approve drug testing of public employees where no "special need" exists.[50] In other contexts, such as drug testing public school students, Supreme Court precedent is much more varied and seemingly unpredictable.[51] While it remains unclear why the Sixth Circuit upheld the injunction, these precise analyses originally led the

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[48] *See* EDC ANAFED, *Justifying Substance Abuse Testing on Basis of "Special Need"*, 1 EMP. DISCRIM. COORD. ANALYSIS OF FEDERAL LAW § 20:149.

[49] The Supreme Court has ruled that the government's interest in regulating the behavior of railroad employees constitutes a "special need." Therefore, it upheld a drug and alcohol testing program because the "special need" of public safety obviated the necessity of a warrant based on probable cause. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989). However, critics have recognized that drug-testing regimes may be a pretext designed "as a conduit for funneling evidence regarding criminal violations to law enforcement authorities." EDC ANAFED, *supra* note 48. In such a case, drug testing for TANF schemes may be susceptible to challenge. *Id.* The Court has also upheld warrantless and suspicionless drug-testing of public employees that carry firearms. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989). In that case, the Court held that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 671.

[50] Courts have found that no special need was demonstrated and ordered injunctive relief to stop many drug testing policies. *See, e.g.,* Connelly v. Horner, No. C88-5085-DLJ, 1989 U.S. Dist. LEXIS 12285 (N.D. Cal. June 15, 1989) (random testing of Office of Personnel Management investigators); Taylor v. O'Grady, 888 F.2d 1189, 1201 (7th Cir. 1989) (random testing of all correctional officers); AFL-CIO v. Sullivan, 787 F. Supp. 255, 257 (D.D.C. 1992) (drug screening of a library page applicant for drug use); Baron v. City of Hollywood, 93 F. Supp. 2d 1337, 1341 (S.D. Fla. 2000) (drug screening as a condition for employment in the city's accounting department).

[51] The Supreme Court has upheld suspicionless drug testing of public high school athletes. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). However, more recently, the Supreme Court found that a Georgia law requiring suspicionless drug testing of candidates for public office was not "substantial—important enough to override the individual's acknowledged privacy interest [and] sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." Chandler v. Miller, 520 U.S. 305, 318 (1997).

district court to enjoin execution of the Michigan drug testing for TANF law in *Marchwinski v. Howard*.[52]

Lebron's complaint made another important argument. Specifically, "HB 353 includes no provisions restricting the use of the test results to TANF eligibility or protecting their confidentiality from third parties."[53] In the absence of any determination by the legislature, the Florida "DCF requires that applicants acknowledge that any positive drug test results collected for TANF eligibility will be reported to the Florida Abuse Hotline 'for review . . . .'"[54] In previous litigation, this has been a crucial, albeit not dispositive, factor in determining the appropriateness of defining a warrantless search as a "special need."[55]

Regardless, Lebron argued that "[t]he potential for using the drug test results to generate evidence for use by law enforcement" makes the mandated drug test a warrantless search under Fourth Amendment standards.[56] On at least one occasion, the Supreme Court has ruled that the "threat of law enforcement . . . always serves some broader social purpose or objective" and should not "be immunized under the special needs doctrine by defining the search solely in terms of its ultimate . . . purpose" because "[s]uch an approach is

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[52] Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1144 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted*, *judgment vacated*, 319 F.3d 258 (6th Cir. 2003), *aff'd on reh'g*, 60 F. App'x 601 (6th Cir. 2003).

[53] Verified Compl.: Class Action, note 46 at ¶ 33.

[54] *Id*. Plaintiff further notes that "[h]ow the reporting occurs; who maintains the records of positive results; and what measures are in place to ensure confidentiality are unclear, particularly since DCF has not issued a formal rule." Plaintiff's Reply in Support of Motion for Preliminary Injunction at 3 Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 11CV01473), 2011 WL 4947390.

[55] *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989). There, the Supreme Court gauged the legality of drug testing U.S. Customs employees. It held that the fact that the results were not allowed to be released to law enforcement indicated that the testing served other needs beyond those of routine law enforcement. *Id*.

[56] Plaintiff's Reply in Support of Motion for Preliminary Injunction, *supra* note 54.

inconsistent with the Fourth Amendment."[57] Lebron seized upon this language to argue that, in the absence of any commentary by the DCF regarding law enforcement usage of the drug test results, Florida's program cannot be upheld as reasonable on the basis of a "special need."[58]

Lebron also advances another argument, pursuant to the "unconstitutional conditions" doctrine.[59] In *Bourgeois v. Peters*, for instance, the Eleventh Circuit overturned a city policy requiring participants in a protest to submit to screening by a mandatory metal detection device.[60] Similar to Florida's argument in the instant case, the defendant in *Peters* (the City of Columbus) tried distinguishing its policy from a search by arguing that the search was voluntary, because "[n]o protesters [were] compelled to submit to searches; they . . . [did] so only if they [chose] to participate in the protest . . . ."[61] However, the court rejected this rationale, finding that the purpose of the metal detector was to force citizens engaging in a protest to surrender their rights and consent to a search.[62] The court finished its inquiry by asking whether the city had authority to conduct the search, as opposed to examining the government's power to condition the use of its property upon submission to a search.[63] Lebron sought to frame his issue in a similar manner.

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[57] Ferguson v. City of Charleston, 532 U.S. 67, 83-84 (2001) (invalidating a law that subjected pregnant mothers to suspicionless drug-testing, in part, because the threat of altering law enforcement of a positive test, without consent, violated the Fourth Amendment).

[58] Plaintiff's Reply in Support of Motion for Preliminary Injunction, *supra* note 54.

[59] *See* Adams v. James, 784 F.2d 1077, 1080 (11th Cir. 1986) ("The doctrine of unconstitutional conditions prohibits terminating benefits, though not classified as entitlements, if the termination is based on motivations that other constitutional provisions proscribe.").

[60] Bourgeois v. Peters, 387 F.3d 1303, 1325 (11th Cir. 2004).

[61] *Id.* at 1324.

[62] *See id.* at 1325.

[63] *Id.* at 1316 ("[T]he searches here are invalid for two reasons: they do not fall within any recognized exception to the warrant requirement, and they were not supported by probable cause, which is a requirement for most warrantless searches.").

He argued that the "consent" required by the Florida DCF was both an unconstitutional condition for the receipt of TANF benefits and a means of forcing individuals to surrender their right to TANF benefits.[64]

Lebron also relied upon precedent, which indisputably holds that the government's symbolic interest in fiscal integrity is insufficient to override an individual's privacy interest under the Fourth Amendment.[65] In attempting to place its drug-testing regime into effect, the Florida legislature therefore subjected Lebron and his class of plaintiffs to "irreparable injury," giving him standing under the Fourth Amendment.[66] Case law from around the country supports this finding and for those like Lebron who depend so dearly upon government benefits, a withheld TANF check means less money for life's necessities, like food and clothing for Lebron and his son.[67] In his reply brief for preliminary injunction, Lebron simply stated, "[t]he denial of TANF benefits . . . will have consequences beyond the loss of temporary cash assistance, which alone

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[64] Plaintiff's Reply in Support of Motion for Preliminary Injunction, *supra* note 54, at 3-4.

[65] *Id.* at 12 (citing Chandler v. Miller, 520 U.S. 305, 622 (1997)); Baron v. City of Hollywood, 93 F. Supp. 2d 1337, 1340-41 (S.D. Fla. 2000)).

[66] Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1143 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted*, *judgment vacated*, 319 F.3d 258 (6th Cir. 2003), *aff'd on reh'g*, 60 F. App'x 601 (6th Cir. 2003) (citing *Easyriders Freedom F.I.G.HT. v. Hannigan,* 92 F.3d 1486, 1500-1501 (9th Cir. 1996)).

[67] *See, e.g., Chu Drua Cha v. Noot,* 696 F.2d 594, 599 (8th Cir. 1982) (ruling that there is "no doubt that irreparable harm is occurring to the plaintiff . . . [f]or people at the economic margin of existence, the loss of $172 a month and perhaps some medical care cannot be made up by the later entry of a money judgment"); *Banks v. Trainor,* 525 F.2d 837, 842 (7th Cir. 1975) (holding that the plaintiff class would be irrevocably harmed by reducing food stamp benefits because such harm outweighs the goal of the statute); *Nelson v. Likins,* 389 F. Supp. 1234, 1237, 1242 (D. Minn. 1974) (holding that a loss of $100 a month in benefits is irreparable injury to justify a preliminary injunction and a denial of a stay of preliminary injunction pending appeal) *aff'd per curiam,* 510 F.2d 414 (8th Cir. 1975); *Moore v. Miller,* 579 F. Supp. 1188, 1192 (N.D. Ill. 1983) ("For those in the 'grip of poverty,' living on the financial edge, even a small decrease in payments can cause irreparable harm."); *Badri v. Mobile Hous. Bd.,* No. 11-0328-WS-M, 2011 WL 3665340, at *3 (S.D. Ala. Aug. 22, 2011) (ruling that a potential loss of $625 in housing vouchers constituted an irreparable injury).

constitutes irreparable injury as a matter of law."[68] Lastly, the final portion of Lebron's argument for overturning H.B. 353 focused on tearing down the faulty empirical analyses implicitly relied upon by the state as a basis for its supposed money-saving program.[69]

B. STATE'S ARGUMENT

Contrary to the plaintiff's argument, the State asserted, "the Supreme Court has routinely upheld drug testing where the State can show a special need, and especially when it has taken on the responsibility to ensure the welfare of children."[70] In essence, Florida's argument stresses that the minor intrusion of drug screening is not a search, obviating an analysis under the "reasonableness" paradigm developed to analyze warrantless searches through decades of Fourth Amendment jurisprudence.[71]

The State's argument began with an analysis of the relationship between Supreme Court decisions *Wyman v. James*, upon which the State relied, and *Chandler v. Miller*,

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[68] Plaintiff's Reply in Support of Motion for Preliminary Injunction at 16 Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 11CV01473), 2011 WL 4947390 at *1.

[69] Lebron argued that while "credible objective evidence may assist the Court in determining whether a special need justifies a suspicionless search, and 'help to clarify - and to substantiate - the precise hazards posed by such use,' the State has presented no such objective evidence" in its legal argument. *Id.* at 16–17 (citing *Chandler*, 520 U.S. at 319). The only study of drug use among Florida TANF recipients conducted prior to the passage of HB 353 was a study conducted in northern Florida between 1999 and 2001. *Id.* at 18. The report was mentioned by both the state House and Senate, and was accompanied by the following comment: "Overall research and findings concluded that there is very little difference in employment and earnings between those who test positive versus those who test negative. Researchers concluded that the cost of the pilot program was not warranted." *Id.* *See also* Robert E. Crew Jr. PhD & Belinda Creel Davis PhD, *supra* note 34, at 39–53 (2003); Final House Staff Analysis, June 28, 2011.

[70] Defendant's Response to Plaintiff's Motion for Preliminary Injunction at 2 Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 11CV01473), 2011 WL 4947381, at *1.

[71] *Id.* at 9.

upon which the plaintiff's argument rested.[72] In *Wyman*, the Supreme Court held that consent to an "inquiry," in the context of cash assistance, precludes Fourth Amendment issues because, in that case, the government did not compel the disclosure – it was consensual.[73] The Court upheld a New York law that required a recipient of welfare monies (under the precursor to TANF) to submit to in-home visits by a state agent.[74] The purpose of the home visit was to determine if the recipient was still eligible to receive welfare funds.[75] The *Wyman* court reasoned that, "if consent to the visitation is withheld, no visitation takes place. The aid never begins or merely ceases, as the case may be. There is no entry of the home and there is no search."[76] In its brief, Florida argued that this principle governs *Lebron*. When applied, *Wyman* meant that, "consent to an eligibility requirement in the public assistance context obviates any potential Fourth Amendment problem that would otherwise exist."[77] In essence, Plaintiff's sought-after relief would be unavailable if the State's argument prevailed.

Florida's argument was strategic – the plaintiff actually argued that *Chandler overrules Wyman*. However, *Chandler* involved a statute "requir[ing] candidates for designated state offices to certify that they have taken a drug test and that the test result was negative" before qualifying for nomination.[78] That drug-testing requirement thus involved the right to run for office, implicating the right of voters to select candidates of their choice. As the State noted, this was a guaranteed right that

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[72] *Id.* at 9–14.

[73] Wyman v. James, 400 U.S. 309 (1971).

[74] *Id.*

[75] *See* James v. Goldberg, 303 F. Supp. 935, 939 (S.D.N.Y. 1969) ("the home visit is . . . designed to verify information as to eligibility for public assistance"). *Wyman* discussed this case and used it as precedential support. *See Wyman,* 400 U.S. at 312–16.

[76] *Wyman,* 400 U.S. at 317–18.

[77] Defendant's Response, *supra* note 70, at 11.

[78] Chandler v. Miller, 520 U.S. 305, 308 (1997).

maintains First Amendment protection.[79] In the context of TANF benefits, however, there was no particular constitutional right of access because such benefits were merely subject to the government's discretion.[80]

The State of Florida stressed that Fourth Amendment analysis required a "context-specific" inquiry.[81] The factual discrepancies between *Chandler* and *Wyman* "necessarily leave *Wyman* intact and controlling in a case involving the facts in this case."[82] Moreover, the State contested, *Wyman* controls because it involved a challenge to "an inquiry into a criterion for eligibility for receipt of funds from a cash assistance program – the precise issue in this case."[83] If *Wyman* did indeed control in *Lebron*, it would mean that the drug screening procedure that TANF recipients must undergo as a condition for receipt of benefits was not a search, exempt from a traditional Fourth Amendment analysis.

The second major argument that the State of Florida advanced was an alternative to its claims under *Wyman*. If the court were to determine that *Chandler* controlled and deemed the drug screening protocol a search, the State argued, then the court should have applied the "special needs" paradigm and upheld the law.[84] Under this exception to the typical Fourth Amendment requirements, the government may suspend the requirement of probable cause and a warrant, allowing it to

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[79] Defendant's Response, *supra* note 70, at 12 (quoting Anderson v. Celebrezze, 460 U.S. 780, 786-87 (1983) ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights" of voters to choose their preferred candidate.")).

[80] *See* 42 U.S.C. § 601(b) ("This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."); FLA. STAT. ANN. § 414.025(2) ("This chapter does not entitle any individual or family to assistance . . . ."); Weinberger v. Salfi, 422 U.S. 749, 751 (1975) ("[a] noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status").

[81] Defendant's Response, *supra* note 70, at 12 (citing *Chandler*, 530 U.S. at 314).

[82] Defendant's Response, *supra* note 70, at 13.

[83] *Id.*

[84] *See* Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002).

search individuals when there are needs beyond those of law enforcement.[85]

As support for this claim, the State of Florida framed the test as a balancing act – "the court's balancing task is merely to determine whether governmental interests . . . are of sufficient gravity to outweigh the privacy interest at issue."[86] The court cited its interest in curtailing what it referred to as the "drug use epidemic."[87] As a "fiduciary of public funds," the State claimed that it has a duty to prevent taxpayer funds from contributing to this ongoing substance abuse problem.[88] Further, that the primary purpose of TANF is to help and protect children and to promote a stable and healthy family life.[89] By providing "needy children with cash assistance, the government has stepped into one of the roles usually played by parents and family: economic provider."[90] As such, Florida argued that it had a duty to prevent parental drug use and that its drug screening requirement helped satisfy this obligation.[91] Florida also made a structural argument about TANF in general, noting that the welfare regime was actually a creation of Congress.[92] As such, Florida argued,

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[85] *Id.* at 829 (internal quotation marks omitted) (citing N.J. v. T.L.O., 469 U.S. 325, 351 (1985) (ruling that "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.")).

[86] Defendant's Response, *supra* note 70, at 17.

[87] *Id.* at 18 n. 12 (citing National Poverty Center, "Substance Abuse and Welfare Reform" (April 2004)).

[88] Defendant's Response, *supra* note 70, at 18.

[89] *See* 42 U.S.C. §§ 601(a), 608(a).

[90] Defendant's Response, *supra* note 70, at 19.

[91] *Id.*; *see also* Wyman v. James, 400 U.S. 309, 318–19 (1971) ("The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses.").

[92] Defendant's Response, *supra* note 70, at 17-18.

Congressional interest was also at play – invalidating H.B. 353 would "essentially invalidate an act of Congress as well."[93]

The second prong of the State's balancing test sought to examine the minimal nature and degree of intrusion on Lebron's privacy interests. Specifically, the State argued that, "in areas subject to extensive regulation, like public welfare, an individual's reasonable expectations of privacy are limited."[94] Essentially, the State of Florida argued that, because Lebron "part[ed] the veil" of his personal privacy, the move to drug testing was not a far stretch.[95] Above all, the State's interest overrides Lebron's, which was already partially diminished in light of the fact he revealed private information to receive TANF benefits.[96] Lastly, Florida relied upon the overturned *Marchwinski* panel's decision in support of its argument that Lebron would not suffer irreparable harm as a result of the State's drug screening protocol.[97]

However, Judge Scriven of the Middle District of Florida disagreed, issuing two opinions establishing the likelihood that Florida's defense of the measure would fail.[98]

C. COURT'S RESPONSE AND CLASS CERTIFICATION

Since the initiation of this suit, Judge Scriven has issued two opinions: the first granted a preliminary injunction to enjoin the enforcement of the statute[99] and the second granted the plaintiff's motion for class certification.[100]

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[93] *Id.* at 18.

[94] *Id.* at 24; Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602,627 (1989).

[95] Defendant's Response, *supra* note 70, at 24.

[96] *Id.* at 24–25.

[97] *Id.* at 25 (citing Marchwinski v. Howard, 309 F.3d 330, 337 (E.D. Mich. 2000)).

[98] *See* Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011); Lebron v. Wilkins, 227 F.R.D. 664 (M.D. Fla. 2011).

[99] *See Lebron*, 820 F. Supp. 2d at 1275.

[100] *See Lebron*, 277 F.R.D. at 666.

In its October 2011 opinion granting the plaintiff's temporary relief, the district court reasoned as a threshold matter that "a drug test is considered a search under the Fourth Amendment"[101] and that the plaintiff's "initial consent does not bar the invocation of his rights under the Fourth Amendment to be free from suspicionless drug testing."[102] Examining the parties' arguments, the court also held that the "State has not demonstrated a substantial special need to justify the wholesale, suspicionless drug testing of all applicants for TANF benefits."[103] Therefore, the court concluded that an injunction was proper because it would "serve the public interest by protecting TANF applicants from the harm caused by infringement of their constitutional right, a right here that once infringed cannot be restored."[104] The court did, however, deny the plaintiff's motion for class certification without prejudice, opting to reexamine the issue once it had been fully briefed.[105]

First, the district court squarely addressed the Fourth Amendment issues at play, relying more heavily upon *Skinner* and post-*Wyman* cases involving drug-testing, finding that the State's argument should not extend "outside the context of home visit[s]."[106] The court summarized the State's rejected argument as follows: "According to the State, the drug test is not forced or compelled, and, if there is no consent to the testing, there is no drug test and, thus, no search."[107] Not surprisingly, the court

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[101] *Lebron*, 820 F. Supp at 1281-82.

[102] *Id.* at 1284.

[103] *Id.* at 1286.

[104] *Id.* at 1292-93.

[105] *Id.* at 1293. In November 2011, the plaintiff renewed his motion for class certification, arguing that it was necessary because the preliminary injunction "might be subject to dissolution on mootness grounds in the event that Plaintiff finds employment." Lebron v. Wilkins, 277 F.R.D. 466, 466 (M.D. Fla. 2011). The district court gave the defendant a week to file an expedited response motion. *Id.* at 468. In December 2011, the court considered the parties' motions and granted the plaintiff's motion, ruling that the "risk of mootness creates a sufficient need for class certification." Lebron v. Wilkins, 277 F.R.D. 664, 666 (M.D. Fla. 2011).

[106] Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1283 (M.D. Fla. 2011).

[107] *Id.* at 1282.

held that this argument fell flat. Relying on *Wyman*, the court distinguished the urine tests at issue in *Lebron* from the "rehabilitative" home visits at issue in *Wyman*.[108] According to the court, the home visits were less intrusive because they typically involved only a conversation and did not permit snooping or an investigation by the caseworker.[109] Since *Lebron* did not involve home visits, which the court actually hinted are less intrusive than urine tests, Judge Scriven focused the analysis on more factually apt decisions involving drug-screening measures, all of which deemed such testing to be a search under the Fourth Amendment.[110] Because of the "inherently investigative" nature of drug screening, and the plethora of recent precedential authority on the topic, the court reiterated that drug-screening is a search within the context of the Fourth Amendment.[111]

Second, the court briefly addressed consensual submission to testing. While recognizing that Florida was right to argue that, "a search conducted with consent does not give rise to a constitutional violation,"[112] the court held that consent does not bar *Lebron* from bringing the instant suit.[113] It is clear that Lebron did sign a "Drug Testing Information and Consent Form," which is evidence of his consent to submit to drug

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[108] *Id.*

[109] *Id.* at 1283.

[110] *Id.*; *See also* Ferguson v. City of Charleston, 532 U.S. 67, 77 n.9 (2001) (ruling that the Supreme Court "routinely treat[s] urine screens taken by state agents as searches within the meaning of the *Fourth Amendment*," regardless of whether the person subjected to the test has the opportunity to refuse it); Chandler v. Miller, 520 U.S. 305, 313 (1997) (finding that drug testing of prospective political candidates is considered a search); Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (finding that a policy requiring high school students to sign a form consenting to testing in order to play sports is considered a search); Bd. of Educ. of Indep. School Dist. No. 92 v. Earls, 536 U.S. 822, 828 (2002) (holding that a policy requiring middle school and high school students to consent to drug testing as a condition for participation in extracurricular activities constitutes a search).

[111] Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1283 (M.D. Fla. 2011).

[112] *Id.* (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)).

[113] *Id.* at 1284.

screening.[114] However, the court ruled that Lebron's consent, which he later revoked, did not stop him from successfully challenging the Florida statute §414.0652.[115]

Third, after finding that the drug-testing measure constituted a search and that the plaintiff's consent did not preclude a Fourth Amendment challenge, the court addressed the Florida drug-testing requirement under the "special needs" exception.[116] The court recognized the high burden that the State must satisfy in order to justify its program under this exception: "[B]ecause Florida's drug testing program authorizes suspicionless searches, Florida must establish that the interests it advances to demand such searches without probable cause or reasonable suspicion meet the 'Special Needs' exception to the Fourth Amendment."[117] The court then compared several of the "exceptional circumstances"[118] under which this paradigm had been tested to the facts of this case.[119]

Initially, the court noted that the State's "goals are undeniably laudable objectives," but the "stated goals can be found nowhere in the legislation, and with good reason: the State's commissioned study undercuts each of these rationales as a likely feature of the proposed legislation."[120] Specifically,

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Lebron*, 802 F. Supp. 2d. at 1284.

[118] *Id.* (quoting N.J. v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

[119] *Id.* at 1286.

[120] *Id.*; *see also* Robert E. Crew Jr. PhD & Belinda Creel Davis PhD, *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits*: *The Outcome of a Demonstration Project in Florida,* 17(1) J. HEALTH & SOC. POL'Y 39, 39–53 (2003) (finding that TANF applicants can be expected to test positive between 2 and 5.1 percent of the time, a figure well below current estimates of the rate of drug use among the general population of Florida). The Court recognized that the states are often viewed as laboratories of experimentation. Chandler v. Miller, 520 U.S. 305, 324 (1997) (Rehnquist, J., dissenting) (quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932)). However, it ruled that "Florida has already conducted its experiment" by commissioning a study to gather evidence on the scope of this problem and the efficacy of the

preliminary research has already revealed a lower rate of drug usage among TANF applicants than among the population of Florida as a whole, suggesting that "TANF funds are no more likely to be diverted to drug use . . . in a manner that would expose children to drugs or fund the 'drug epidemic' than funds provided to any other recipient of government benefits."[121] The court also found that the studies cited by the State lacked any probative value and thus utilized only the data presented by the plaintiff in support of its decision.[122] As a likely result of these unfavorable statistics, the State invoked a concern for the wellbeing of Florida's children as a special need.[123] However, the court was not so ready to accept this rationale, absent convincing empirical data supporting Florida's position.[124]

However, the court recognized that the Supreme Court had upheld various drug-testing laws in the absence of evidence that the target demographic has a drug abuse problem.[125] Specifically, *Von Raab* permitted drug testing of customs agents.[126] However, later decisions, such as *Chandler*, clarify that *Von Raab* is not "a decision opening broad vistas for suspicionless searches" but one that "must be read in its unique context."[127] The *Chandler* court also reasoned that the preventative drug testing in *Von Raab* was warranted because the customs employees serve as the "first line of defense" against

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proposed solution. *Lebron*, 820 F. Supp. 2d at 1291. The results debunked the assumptions of the State. *Id.* at 1291–92.

[121] *Lebron*, 820 F. Supp.2d at 1286-87.

[122] *Id.*; *see Bridget* F. Grant & Deborah A. Dawson, *Alcohol and Drug Use, Abuse, and Dependency among Welfare Recipients,* 86 AM. J. PUB. HEALTH 1450, 1453 (1996); HAROLD POLLACK ET AL., DRUG TESTING WELFARE RECIPIENTS—FALSE POSITIVES, FALSE NEGATIVES, UNANTICIPATED OPPORTUNITIES (2001).

[123] *Lebron*, 820 F. Supp. 2d at 1287.

[124] *Id.* at 1288.

[125] *Id.* at 1287-88.

[126] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 687 (1989).

[127] Chandler v. Miller, 520 U.S. 305, 307 (1997).

the smuggling of illicit narcotics into America.[128] In the context of political candidates, the same rationale did not apply, preventing the justification of a search under the "special needs" exception.[129]

The court also analogized to *Earls* to a similar end, holding that the "school district's custodial . . . responsibility towards those students" subject to testing "justified early, preventative intervention through drug testing."[130] In that case, the Supreme Court pointed out that "the number of 12th graders using any illicit drug increased from 48.4 percent in 1995 to 53.9 percent in 2001. The number of 12th graders reporting they had used marijuana jumped from 41.7 percent to 49.0 percent during that same period."[131] This evidence on the "nationwide drug epidemic made the war against drugs a pressing concern in every school."[132] The school district in *Earls* also provided evidence that several students had recently been caught with marijuana on campus.[133] The Supreme Court concluded that the school board had "provided sufficient evidence to shore up the need for its drug testing program."[134] Unlike the students subject to drug-screening in that case, there was no evidence that the children of TANF applicants in Florida are more at risk of drug abuse.[135] The district court also rejected the State's argument that it was effectively stepping into the role of a parent, as the school district had in *Earls*.[136]

The court continued its analysis of the Fourth Amendment issues by discussing the most factually applicable case:

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[128] *Id.* at 316 (quoting *Von Raab*, 489 U.S. at 668).

[129] *Id.* at 318.

[130] *Lebron*, 820 F. Supp.2d at 1288 (citing *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls,* 36 U.S. 822, 830 (2002)).

[131] *Earls*, 536 U.S. at 855 n. 5.

[132] *Lebron*, 820 F. Supp. 2d at 1288 (citing *Earls,* 536 U.S. at 834).

[133] *Earls*, 536 U.S. at 834–35.

[134] *Id.* at 835.

[135] *Lebron*, 820 F. Supp. 2d at 1288-89.

[136] *Id.* at 1288–89.

Marchwinski.[137] The court echoed the Sixth Circuit's concern for the "unquestioned deference" that politicians often give child-protection measures.[138] This concern—that in the absence of a showing that Florida's drug-testing requirement was promulgated in response to any concrete danger to the children of Florida's TANF recipients—forced the court to decline an application of the special need exception.[139] The special needs exception, the court reasoned, "rests on the assumption that the drug testing will actually redress the problem that gives rise to the special need[.]"[140] However, this "justification for the special needs exception loses force when the drug testing and its attendant consequences would prove ineffective."[141]

Lastly, the court concluded by reiterating its attack upon the State's proffered empirical data. In the absence of the law's other stated goals, the court noted, the only justification for drug-testing TANF recipients is the State's "interest in preserving public funds by ensuring that money . . . is not used instead to purchase illegal drugs."[142] The defendant did proffer some evidence of savings yielded by its drug screening law, but the district court refused to identify the information as an "expert opinion."[143] It reasoned that even a "cursory review of

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[137] *Id.* at 1289.

[138] *Id.* (quoting Marchwinski v Howard, 113 F. Supp. 2d 1134, 1142 (E.D. Mich. 2000) *aff'd*, 60 Fed. Appx. 601 (6th Cir. 2003) ("If the State is allowed to drug test [TANF] recipients in order to ameliorate child abuse and neglect by virtue of its financial assistance on behalf of minor children, that excuse could be used for testing the parents of all children who receive Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from the State. In all cases in which the State offers a benefit on behalf of minor children, the State could claim that it has a broad interest in the care of those children which overcomes the privacy rights of the parents.")).

[139] *Lebron*, 820 F. Supp. 2d at 1289.

[140] *Id.* (citing *Earls,* 536 U.S. 822, 829 (2002)).

[141] *Lebron*, 820 F. Supp. 2d at.1290; *see also* Chandler v. Miller, 520 U.S. 305, 317 (1997).

[142] *Lebron*, 820 F. Supp. 2d at 1290.

[143] *Id.* at 1290 – 1291 (citing Tarren Bragdon, *The Impact of Florida's New Drug Test Requirement for Welfare Cash Assistance,* FOUND. FOR GOV'T ACCOUNTABILITY (Sept. 2011), http://www.floridafga.org/2011/09/the-impact-

certain assumptions in the pamphlet undermines its conclusions."[144] As a back-up argument, the court notes, the State invoked the government's interest in fighting the "war on drugs" and curtailing drug abuse, contending that TANF benefits must not be used to bolster this illegal trade.[145] While the court voiced its agreement, it held that this is not the "only requirement to establish a special need," and therefore "the State could impose drug testing as an eligibility requirement for every beneficiary of every government program."[146] The *Marchwinski* court made a very similar argument in its rejection of Michigan's drug testing measure.[147] In turn, the *Lebron* court concurred with this reasoning, concluding that that, "such blanket intrusions cannot be countenanced under the Fourth Amendment."[148]

It is precisely this point made by the *Lebron* court upon which I will capitalize for making a potential equal protection claim. While the court never specifically references the Fourteenth Amendment, it is clear that this is an allusion to both the need for either (1) an individualized suspicion, in the absence of

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of-florida-new-drug-test-requirement-for-welfare-cash-assistance) ("Even a cursory review of certain assumptions in the [Bragdon] pamphlet undermines its conclusions . . . the pamphlet suggests that the State will save millions in the first year; but it arrives at this number by extrapolating from the 9.6 percent of TANF applications that are denied." However, the State "extends these hypothetical savings for the full year that a TANF applicant who tested positive for drugs would be subject to losing benefits. . . the results show that 7.6 percent of this 9.6 percent figure is comprised of applicants who have declined to be tested" and "cannot be reasonably counted as providing twelve months of 'annualized savings'").

[144] *Lebron*, 820 F. Supp. 2d at 1290.

[145] *Id.* at 1291.

[146] *Id.*

[147] Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1140 (E.D. Mich. 2000)("The State's desire to address substance abuse as a barrier to employment is laudable and understandable in view of the Federal mandate to move welfare recipients to work. Yet, it does not constitute a special need sufficient to warrant a departure from the Fourth Amendment's main rule.").

[148] *Lebron*, 820 F. Supp. 2d at 1291.

widespread drug screening or (2) an application of equal protection jurisprudence.

The court concluded, without a traditional balancing analysis, that the plaintiff would suffer irreparable harm if the Florida drug-testing program were carried out.[149] Specifically, the court reasoned that, "[t]he right to be free from unreasonable searches and seizures under the Fourth Amendment is a fundamental constitutional right, the violation of which is enough to demonstrate irreparable harm."[150] Ultimately, the court held that the state did not prove a "special need" existed, holding that "the constitutional rights of a class of citizens are at stake, and the Constitution dictates that the needs asserted to justify subverting those rights must be special . . . in order for this exception to the Fourth Amendment to apply."[151] As such, it granted the plaintiff's motion for a preliminary injunction.[152]

IV. ALTERNATIVES AND RECOMMENDATIONS

Although it appears that the Fourth Amendment provides a viable remedy to prevent the state from drug-testing welfare candidates, there may be other possible avenues of redress for TANF recipients. This portion of the note will address the Equal Protection clause of the Fourteenth Amendment as a possible theory for blocking drug-screening-for-TANF measures promulgated by state governments.

The Fourteenth Amendment clearly indicates that states have a duty to protect their citizens equally.[153] Such a duty

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[149] *Id.* at 1292.

[150] *Id.*

[151] *Lebron*, 820 F. Supp. 2d at 1292 (citing Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001)).

[152] *Lebron*, 820 F. Supp. 2d at 1292 ("As the State has failed to demonstrate a special need for its suspicionless drug testing statute, the Court finds no need to engage in the balancing analysis—evaluating the State's interest in conducting the drug tests and the privacy interests of TANF applicants.").

[153] U.S. CONST. amend XIV, § 1 ("No state shall make or enforce . . . nor deny to any person within its jurisdiction the equal protection of the laws.").

includes the "obligation to assist the poor if the state has 'done' something to cause the undue poverty" by treating the poor differently from everyone else.[154] While drug-testing requirements for TANF benefits do not exactly represent a "state's complicity in placing people in . . . severe economic jeopardy," the requirements do draw a fine line between those who are poor and those who are not.[155] While drawing such a line itself is not an equal protection violation,[156] treating people on either side of the line differently, on the basis of their socio-economic constitution, does raise equal protection concerns.[157]

When examining equal protection cases, the Supreme Court will ascribe a level of scrutiny towards a given law based upon the socioeconomic, racial, sexual, or religious classification drawn by the challenged state action.[158] With respect to wealth classifications, the Supreme Court has been somewhat equivocal. The decisions of the Warren Court suggest that

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[154] Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 43 (1987).

[155] *Id.*

[156] *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) ("[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)). *See also* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[T]he 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation.").

[157] Zablocki v. Redhail, 434 U.S. 374, 382 (1978) (invalidating on equal protection grounds, a prohibition on marriage by people with child support obligations); *but see* Burka v. New York City Transit Auth., 680 F. Supp. 590, 602 (S.D.N.Y. 1988) ("The current policies in issue—prohibiting drug use, requiring drug testing, and disciplining or refusing to hire those who test positive—apply to all TA employees or applicants, not just to plaintiffs or some other discrete class. Consistent with *Beazer,* we see no equal protection violation[.]").

[158] *See* U.S. v. Carolene Products Co., 304 U.S. 144, 153 (1938) (describing in footnote four levels of judicial review that vary based upon the challenged governmental action and the interest asserted by government in its defense of the that action).

classifications discriminatory to the poor would be suspect,[159] but later Burger Court opinions distinguished those cases on factual grounds, refusing to apply exacting scrutiny towards classifications made on the basis of wealth.[160] The Roberts Court has continued this hostility toward the poor, as also reflected in the rulings of the Rehnquist Court.[161] The Court's overall opposition towards litigating challenges to legislation that impacts the poor has lead to nationwide judicial refusal to apply a heightened level of scrutiny to these laws.[162] As such, it appears on the surface that the judicial climate in this country does not support the use of Equal Protection litigation to challenge laws like the one recently enacted in Florida. Such attempts will be met with deference to state legislatures and met with a mere rational basis test.[163] In light of an increasing number of states that have passed drug-testing for TANF legislation, however, it is important to craft additional remedies for future litigation.

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[159] *See e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20–22 (1973); James v. Valtierra, 402 U.S. 137, 145 (1971) (Marshall J., dissenting).; Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall J., dissenting).

[160] *See* Quinn v. Millsap, 491 U.S. 95, 106-07 (1989); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966).

[161] *See generally* Andrew M. Siegel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851 (2008) (arguing that the Roberts Court is hostile to poverty-related litigation and is likely to overrule protections for the poor).

[162] *See e.g.,* Dotson v. Shalala, 1 F.3d 571, 580 (7th Cir. 1993) (subjecting to rational basis review a challenge of welfare laws that had differential impact on poor persons rather than wealthy persons).

[163] *Dandridge*, 397 U.S. at 487 (1970) (sustaining a maximum welfare grant to families despite their need and family size); *Valtierra*, 402 U.S. at 145 (upholding a requirement of approval in a local referendum as a prerequisite to low-cost housing construction); *Rodriguez*, 411 U.S. at 132 (invalidating tax-based funding of education whereby expenditures are a function of school district wealth).

A. POVERTY AS A SUSPECT OR SEMI-SUSPECT CLASSIFICATION

Despite cases like *Dandridge v. Williams*, which reject strict scrutiny in welfare cases, the opportunity for poverty-stricken litigants to successfully challenge equal protection laws under the Equal Protection clause has not been completely foreclosed. At least one commentator has argued that intermediate scrutiny might be achievable, even in the face of the most deferential of courts.[164] Such a test asks whether the law or policy being challenged furthers an important governmental interest in a way that is substantially related to that interest.[165] Rational basis review merely asks whether or not a law is reasonably related to its stated ends, which must be a legitimate governmental interest.[166]

The hope for a more rigorous level of scrutiny comes from *Plyler v. Doe*, a case where the Supreme Court applied intermediate equal protection scrutiny to strike down a Texas law that denied free public education to children of illegal aliens.[167] The Court suggested two potential rationales to achieve this result, reasoning that, either illegal aliens are a sensitive class or that education,[168] while not fundamental,[169] is a type of important right that triggers intermediate scrutiny.[170] Therefore, intermediate scrutiny should be applied in circumstances "where the denial of subsistence (an important interest with a close nexus to constitutional rights) would result in the discriminatory infringement of the constitutional rights of

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[164] *See Intermediate Equal Protection Scrutiny of Welfare Laws That Deny Subsistence*, 132 U. PA. L. REV. 1547, 1550 (1984).

[165] Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980).

[166] U.S. v. Carolene Products Co., 304 U.S. 144, 152 (1938).

[167] Plyler v. Doe, 457 U.S. 202, 230 (1982).

[168] The theoretical underpinnings of this argument are sound, but illegal immigration has taken on such a political life of its own that the Court would be unlikely to view the reasoning of *Plyler* in the same light today.

[169] "Fundamental" classifications automatically trigger strict scrutiny. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

[170] *See* Plyer v. Dole, 457 U.S. 202, 223-24 (1982).

a disfavored group and where the…classification is likely to reflect prejudice[.]"[171] When a state enacts a particularly harsh welfare law that denies subsistence "to a group with sensitive characteristics, the intermediate tier of review can be an important tool for the judiciary in scrutinizing those laws."[172] Although the Supreme Court has only done so in limited circumstances, it has not completely foreclosed such a possibility.

With respect to the ongoing Lebron litigation, it does not appear that the plaintiff class has pled a cause of action under the Equal Protection clause. In light of the judicial reluctance to apply heightened scrutiny to classifications on the basis of wealth, this may have been a wise decision. However, litigants can combat drug-testing laws effectively by arguing that poverty-stricken individuals are a semi-suspect or sensitive class. Such individuals are not the only ones in America receiving government entitlements, but have continually been the subject of state drug testing legislation that targets their receipt of benefits.[173]

On its face, Florida's law appears to draw this line, and boldly at that – it makes no attempt to conceal its discriminatory classifications. Especially in light of the data published since the law has been in effect,[174] it is implausible for the State to argue that the drug testing law, which is allegedly preserving state funds, supersedes concerns relating to the suspect classification it makes. Although the State may argue that the drug-screening measure could survive intermediate scrutiny because it relieves Florida of its complicity in drug abuse, such an argument is specious in light of uncontroverted

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[171] *Intermediate Equal Protection Scrutiny of Welfare Laws That Deny Subsistence*, 132 U. PA. L. REV. 1547, 1575 (1984).

[172] *Id.* at 1576.

[173] *See, e.g.*, H.B. No. 955, 2012 Reg. Sess. (Va. 2012) (requiring departments of social services to screen entitlement program participants to determine whether probable cause exists to believe the participant is engaged in the use of illegal drugs); H.B. No. 365, 2008 Reg. Sess. (Va. 2008) (requiring, as a condition of participation in a government-run employment program, that the local director screen each participant to determine whether probable cause exists to believe such participant is engaged in the use of illegal drugs).

[174] *See* Bragdon, *supra* note 30.

statistics to the contrary.[175] Absent the empirical data supporting the law's ineffectiveness, Florida may be able to successfully argue that the law is substantially related to curbing the state funding of drug abuse. However, the ultimate question here is whether wealth is a suspect or semi-suspect classification. Until such a question is litigated in this context, one can only speculate as to how a court would rule. Yet, rulings in other contexts may provide some clues.

B. PUBLIC HIGH SCHOOL ATHLETES – PROGRAMMATIC AND OPERATIONAL VIOLATIONS OF EQUAL PROTECTION

Brushing aside arguments about levels of scrutiny for a moment, there is a line of cases in equal-protection jurisprudence that examines factual situations similar to the ones present in Florida. At both the state and federal level, suits alleging that drug-screening measures in public high schools violate the equal-protection clause have found little success.[176] However, the Supreme Court has provided guidance that may be of use to overturn laws similar to that challenged by Louis Lebron in Florida.

In *Schaill by Kross v. Tippecanoe Cnty. Sch. Corp.*, the Seventh Circuit heard an equal protection challenge to a school's drug-screening measure targeting only at athletes who voluntarily chose to participate in their respective varsity sports.[177] Applying a rational basis review, the Court ruled that the "consequences flowing from the voluntary choice of participation in interscholastic sports" did not violate the Equal

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[175] Robert E. Crew Jr. & Belinda Creel Davis, *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits*: *The Outcome of a Demonstration Project in Florida,* 17(1) J. HEALTH & SOC. POL'Y 39 (2003).

[176] *See* Schaill by Kross v. Tippecanoe Cnty. Sch. Corp., 679 F. Supp. 833, 854 (N.D. Ind. 1988) *aff'd*, 864 F.2d 1309 (7th Cir. 1988) (ruling that the public school district's requirement that varsity athletes consent to submit to random urinalysis drug testing to be eligible for participation in interscholastic sports did not violate equal protection clause). *But see* Theodore v. Del. Valley Sch. Dist., 836 A.2d 76, 92-93 (Pa. 2003) (ruling that a school's policy of drug and alcohol testing as a condition of participation in extracurricular activities and obtaining parking permits failed to show a special need).

[177] *Schaill by Kross*, 679 F. Supp. at 854-55.

Protection Clause because the school did not impose the participation in sports, not did it provide sanctions for failure to take or pass a test, other than the inability to partake in a voluntary activity.[178] However, the court left open the possibility that such a rule could be overturned on equal protection grounds if within "the program itself there exists a violation."[179]

For this proposition, the district court cited two parallel cases from the Supreme Court of Indiana, recognizing that although a school drug-screening regime may not violate the equal protection clause on its face, the program itself in which students participate may be violative.[180] First, the *Hass* court entertained an equal protection challenge to a rule that prohibited "mixed" participation in non-contact interscholastic athletics by barring women from playing on the same team as men. The court overturned the school policy, reasoning that any "rule or law appearing to be nondiscriminatory on its face may be struck down as a denial of equal protection if it is unreasonably discriminatory in its operation."[181]

Second, the Seventh Circuit examined *Sturrup,* a case similar to *Hass* involving an equal protection challenge to a school policy that made transfer students ineligible for one year to participate in varsity sports, unless the transfer resulted from a "change of residence" of student's parents or from "unavoidable circumstances" experienced by the student.[182] In that case, the Indiana Supreme Court refused to hold that the policy denied equal protection because it "impinged upon the fundamental right to travel interstate."[183] The Court granted relief because the law was unreasonably broad in excluding from eligibility many students who move for reasons unrelated to athletics.[184] A

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[178] *Id.*

[179] *Id.* at 854 (citing Haas v. S. Bend Comm. Sch. Corp., 289 N.E.2d 495, 522-23 (Ind. 1972); Sturrup v. Mahan, 305 N.E.2d 877, 881 (Ind.1974)).

[180] *Schaill by Kross.*, 679 F. Supp. at 854. (*citing Haas,* 289 N.E.2d at 522-23; *Sturrup,* 305 N.E.2d at 881).

[181] *Haas,* 289 N.E.2d at 522-23.

[182] *Sturrup*, 305 N.E.2d at 878-79.

[183] *Id.* at 880.

[184] *Id.* at 881.

few decades later, the Indiana Supreme Court overturned this case when it rejected the theory that over-breadth may violate the Equal Protection Clause.[185] However, this did not change the pertinent rule that a nondiscriminatory law may be struck down as a denial of equal protection if it is unreasonably discriminatory in its operation.[186]

This line of cases is dispositive of a potential avenue of relief under the Equal Protection Clause. Analogizing to *Schaill by Kross v. Tippecanoe*, it is fair to say that *Lebron* would not be successful if he simply alleged that the law was discriminatory on its face, unless a court were to apply intermediate scrutiny, as discussed, because levels of wealth are not a suspect classification and Florida would easily overcome rational basis review. However, *Schaill by Kross v. Tippecanoe* emphasized the voluntary nature of the student's participation in varsity sports. *Lebron* and the members of his class did not choose to become poor – while poverty may not be an immutable characteristic like race or sex, one does not choose to be in a position where TANF funds are a necessity. This not only weakens the rationale of that case, as applied to *Lebron*, but signals that divergent factual situations may allow a court to rule for the individual challenging drug-testing laws on equal protection grounds.

Moreover, *Schaill by Kross v. Tippecanoe* hints that if the law underlying the classification operates in a discriminatory fashion, it may be unconstitutional.[187] It is therefore plausible to reframe the issue and argue that although drawing a classification on the basis of TANF funding may not be unconstitutional, drug testing *only the recipients of this one particular government entitlement* is indeed unconstitutional. This argument has even more force when you consider Florida's stated goal of ensuring that TANF funds do not go towards drug usage.[188] If this was such a concern, why wouldn't the

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[185] *See* Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 239 (Ind. 1997).

[186] *See Schaill by Kross*, 679 F. Supp. at 854.

[187] *Id.*

[188] Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law at 25 Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 11CV01473), 2012 WL 4030663 (arguing that the drug testing

government drug test beneficiaries of unemployment benefits or other entitlements? When viewed in that light, Florida's law seems to pick on the poor and indigent by singling them out as classes of drug abusers, despite data that only two percent of those tested were positive for drug usage.[189]

Additionally, the Florida law requires TANF beneficiaries to pay the initial cost of the drug test.[190] Such a requirement should be viewed as a financial burden placed upon one discrete class, a group that has been proven vulnerable to political maneuvering and the rhetoric of public officials. Forcing prospective TANF recipients to pay up front not only represents the government's policy of failing to give a class the benefit of the doubt, but is also an egregious violation of the Equal Protection Clause. This is exactly what the Supreme Court mentioned as unconstitutional in *Schaill by Kross v. Tippecanoe*: an otherwise constitutional policy may be rendered unconstitutional if its operation violates notions of equal protection. By stigmatizing prospective TANF recipients and requiring them to pay for a drug test, the government forces the poorest of the poor to finance a test as a condition for crucial entitlement monies. Scratching the surface of the Florida law thus reveals the means by which an equal protection claim might be successful in challenging drug-screening for TANF measures promulgated by the states.

C. AN ANALOGY TO PUBLIC EMPLOYEE DRUG-SCREENING – USING RACE TO ACHIEVE INTERMEDIATE SCRUTINY

The constitutionality of drug testing by public sector employers has been challenged on a variety of constitutional theories. Many such challenges have been brought on Fourth Amendment grounds and have been met with limited success.[191]

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measure prevents the grant of "TANF funds to parents who might redirect those monies to a purpose that specifically and seriously undermines . . . family-stability and child-protection").

[189] Verified Compl.: Class Action at ¶27 n. 2 Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 11-CV-01473), 2011 WL 3909757.

[190] Fla. Stat. Ann. § 414.0652 (West 2012) ("The cost of drug testing is the responsibility of the individual tested.").

[191] L. CAMILLE HEBERT, 1 EMPLOYEE PRIVACY LAW § 3:24 (2012).

Specifically, one type of challenge to the constitutionality of drug testing has been a claim that such testing violates the equal protection rights of the employees or job applicants.[192] While largely unsuccessful, these types of claims provide a revealing analogy to drug-testing-for-TANF laws that provides the most likely avenue of success for equal protection challenges.[193]

Typically, the basis for these equal protection challenges is that certain employees are subject to drug testing, while other "similarly situated" employees are not subject to drug testing.[194] Equal protection challenges to drug testing requirements and discipline based on drug test results are judged by the rational basis test, because the courts have held that neither a suspect classification nor a fundamental right was involved.[195] However, "if an employee alleges that drug-testing requirements are imposed unequally upon protected classes who are granted a higher level of protection under equal protection analysis, those classifications would be subject to a greater level of scrutiny."[196] For instance, in *Harmon v. Bratton*, a New York City police officer brought an equal protection claim against the City for punishing African-American officers who tested positively for drugs more severely compared to white officers.[197] The Eastern District of New York declined to grant summary judgment for the defendant on this claim because, despite the fact that 11.5%

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[192] *See e.g.,* Copeland v. Phila. Police Dep't., 840 F.2d 1139, 1147 (3d Cir. 1988); Ry. Labor Execs Ass'n v. Burnley, 839 F.2d 575, 592 (9th Cir. 1988), *rev'd on other grounds*, Skinner v. Ry. Labor Execs' Ass'n, 489 U.S. 602 (1989).

[193] *See e.g.,* Burka v. N.Y.C. Transit Auth., 680 F. Supp. 590, 603 (S.D.N.Y. 1988) (ruling that New York Transit Authority's drug testing policy for applicants and present employees was rationally related to ensuring safe and dependable public transit systems).

[194] Hebert, *supra* note 191.

[195] *See, e.g.*, Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995).

[196] Hebert, *supra* note 191.

[197] Harmon v. Bratton, No. 94-CV-3070, 1995 WL 405015, at *3 (E.D.N.Y. June 29, 1995); *but see* Mack v. Port Auth. of N.Y. & N.J., 225 F. Supp. 2d 376, 380–84 (S.D. N.Y. 2002) (ruling for defendant because plaintiff did not provide evidence of a "custom or practice" of treating non-white employees differently from non-black employees when imposing sanctions for failure to pass a drug test).

of the total police force was African American and 72.2% were white, but 47% of officers dismissed were African American, while only 34.5% were white.[198] In the absence of discriminatory intent, the court was unable to determine that the defendant had not acted unconstitutionally.[199] However, in a later action, the district court granted the defendant's renewed motion for summary judgment, in part, because the plaintiff had failed to complete timely discovery.[200] On appeal, the Second Circuit affirmed the ruling, finding that the statistics were insufficient to prove an equal protection violation.[201] Had the plaintiff, who appeared *pro se* until the second district court proceeding, properly conducted discovery, he would likely have won his equal protection argument. Still, the case is significant because it represents the potential for heightened scrutiny on the basis of race in equal protection litigation focused on challenging governmental drug-testing measures.

The *Harmon* litigation gives rise to a potential remedy for claimants like Louis Lebron who may seek to challenge drug-testing-for-TANF legislation on equal protection grounds. By using race to raise the level of scrutiny, prospective TANF recipients can maneuver their legal arguments to achieve a more rigorous level of scrutiny from the courts. Doing so would remove judicial deference to state legislatures and would require that drug-testing measures further a compelling interest through a means substantially related to that interest. This essentially means that blanket statements about state complicity in drug addiction or unfounded claims about keeping money in state coffers would be put to a litmus test. It would also mean that politicians using such legislation as a future campaign point would not be given a *carte blanche* to make poverty-stricken individuals a public scapegoat.

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[198] *See* Harmon, No. 94-3070, at *8 (reasoning that, although the plaintiff did not properly lay a foundation for these statistics, it was enough to create a dispute of fact for the denial of summary judgment).

[199] *Id.* at *8.

[200] Harmon v. Bratton, No. 97-9070, 1998 WL 667788, at *1 (2d Cir. Sept. 16, 1998).

[201] *Id.* at *2.

According to a 2003 study conducted by Public Agenda, a public opinion research and civic engagement organization, 38% of all TANF recipients in the United States are African American, while 31.8% are white and 24.8% are Hispanic.[202] This striking statistic could form the basis of a successful equal protection challenge because African Americans are impacted more profoundly by drug-testing measures than other racial groups. Based upon this data alone, an equal protection claim can trigger heightened scrutiny and increase the likelihood of the claimant's success. Moreover, the Supreme Court has held that certain acts "disparately impacting" a discrete racial group may be actionable in certain situations, giving force to this argument.[203]

Borrowing law from a variety of contexts, it is highly plausible that litigants may eventually achieve success in challenging drug-testing-for-TANF measures under the Equal Protection Clause of the Fourteenth Amendment. While the current paradigm for challenging such laws under the Fourth Amendment appears to have been successful, it is important to provide the poor and indigent with a variety of methods for challenging litigation that stands in the way of welfare benefits. While poverty may not be a suspect classification and the application of employment law principles will be tenuous, it is very likely that courts will provide intermediate scrutiny to plaintiffs alleging that state laws contain inherent racial biases.

IV. CONCLUSION

While the *Lebron* litigation is still ongoing, it appears as if the district court is likely to grant relief for a class of poverty-stricken individuals negatively impacted by Florida's drug-testing-for-TANF law.[204] Although the parties have been

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[202] *Issue Guides: Poverty and Welfare – Race of TANF Recipients*, PUB. AGENDA, http://publicagenda.org/citizen/issueguides/poverty-and-welfare/getfacts (last visited Sep. 3, 2012).

[203] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).

[204] *See* Lebron v. Wilkens, 820 F. Supp. 2d 1273, 1293 (M.D. Fl. 2011) ("[T]he Court concludes that preliminarily enjoining what appears likely to be deemed to be an unconstitutional intrusion on the Fourth Amendment rights of TANF

successful thus far by challenging the law under the Fourth Amendment paradigm utilized in *Marchwinski*, it is important to constantly seek alternative remedies for combating laws that disparately impact America's poor. Several equal protection remedies exist, at least in theory, which may also be used to protect the ability of needy families to receive the benefits that our government has appropriated for their usage. These remedies may become necessary as state leaders increasingly find ways to save money for their constituents.

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applicants serves the public interest and outweighs whatever minimal harm a preliminary injunction might visit upon the State."). The parties have completed discovery, submitted expert reports and filed cross-motions for summary judgment. *See*, *e.g*. Lebron v. Wilkins, No. 6:11-cv-01473-MSS-DAB, 2012 WL 4030662 (M.D. Fla. Sept. 10, 2012) (Plaintiff's motion for summary judgment); Defendant's Response to Plaintiff's Motion for Summary Judgment Lebron v. Wilkins, No. 6:11-cv-01473-MSS-DAB, 2012 WL 4896716 (M.D. Fla. Oct. 15, 2012) (Defendant's motion for summary judgment).