No. 14-10322-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LUIS LEBRON, INDIVIDUALLY AND AS CLASS REPRESENTATIVE,
PLAINTIFF-APPELLEE,

V.

MICHAEL CARROLL, IN HIS OFFICIAL CAPACITY AS INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,
DEFENDANT-APPELLANT.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF THE STATES OF ALABAMA AND GEORGIA AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellant, David Wilkins:

The State of Alabama did not participate in the district court below, but will participate as Amicus Curiae for Appellant before this Court.

The State of Georgia did not participate in the district court below, but will participate as Amicus Curiae for Appellant before this Court.

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Whether the Fourth Amendment prevents a State from requiring an applicant to pass a drug test to be eligible for cash assistance through Temporary Assistance for Needy Families?

INTEREST OF AMICI CURIAE

The amici States have a vested interest in the issues raised by this litigation. The amici administer federal block grants for Temporary Assistance for Needy Families ("TANF"), as well as other State-specific child-welfare and job-readiness programs. Given Congress's express authorization to the States to test TANF beneficiaries for the use of controlled substances, 21 U.S.C. § 862b, many States have implemented (or are considering) drug-testing programs similar to the program at issue in this appeal. These drug-testing programs are substantiated by special needs that are uniquely compelling because of the purposes and structure of the TANF block grant. And they are especially reasonable in light of the prevalence of drug testing in society and the reduced privacy expectations of applicants for cash assistance.

Under this Circuit's law, the States have flexibility to craft drug-testing programs that balance their legitimate governmental interests with the limited Fourth Amendment privacy interests of applicants for cash assistance. But the lower court's decision, if allowed to stand, could upset these innovative welfare programs to the detriment of the citizens of this Circuit and the country as a whole. As Justice Brandeis famously warned, the States serve an important role as "laborator[ies]" for "novel social and economic experiments," and "[d]enial of [their] right to experiment may be fraught with serious consequences to the

nation." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 386-87 (1932) (Brandeis, J., dissenting). The amici request that the Court respect Florida's right to experiment and reverse the lower court.

The amici States have authority to file this amicus brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

I. How States Spend TANF Funds.

The TANF program was created by Congress as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) ("Welfare Reform Act"). Through the Welfare Reform Act, cash assistance was, "for the first time, converted to a work program." H.R. REP. No. 104-651 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2183, 2186. That "work program" is jointly financed by the Federal and State governments and administered by States. Federal funding is conditioned in part on the States' success in placing beneficiaries in work activities. *See* 42 U.S.C. § 607. And the program's structure was designed to give "States the freedom to innovate in developing" State-specific programs to "encourage personal responsibility and move welfare recipients into the work force." H.R. REP. No. 104-651, 1996 U.S.C.C.A.N. at 2186.

The TANF federal block grant has two purposes that are central to this case. The first goal of the grant is to provide for the welfare of children. In the words of the statute, the program is "designed to . . . provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives," and to ensure that those homes are healthy and functioning. 42 U.S.C. § 601(a); 45 C.F.R. § 260.20. For that reason, only families who have (or are expecting)

children are eligible to apply for benefits under TANF. *See* 42 U.S.C. § 602(a)(1)(A)(i). The second purpose of the TANF block grant is to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." 42 U.S.C. § 601(a)(2); 45 C.F.R. § 260.20. Consistent with that purpose, the statute provides that participating States must "[r]equire a parent or caretaker receiving assistance under the program to engage in work (as defined by the State)." 42 U.S.C. § 602(a) (1)(A)(ii); *see also id*. § 607 (describing mandatory work requirements). Other statutory purposes of the TANF program are to "prevent and reduce the incidence of out-of-wedlock pregnancies" and to "encourage the formation and maintenance of two-parent families." 42 U.S.C. § 601(a).

Each State must prepare a plan for how it will spend the TANF block grant, submit that plan to the federal Department of Health and Human Services, and make it available to the public. *See* 42 U.S.C. § 602(a) & (c). DHHS encourages these plans to use TANF funds to "[p]rovide job search, job placement, transportation, and child care services to TANF applicants from the beginning of the TANF application period." U.S. Dept. of Health & Human Servs., Admin. for Children & Families, FUNDING GUIDE, Support for Work Activities.[1] DHHS also encourages States to use TANF funds to hire TANF beneficiaries or subsidize their

[1] At http://www.acf.hhs.gov/sites/default/files/ofa/funding_guide.pdf (last visited May 9, 2014).

wages through a private employer, so that beneficiaries with little or no work history can gain marketable skills while receiving cash assistance. *Id.*

States spend their TANF money to fund a variety of work-readiness programs, in addition to direct cash assistance, and Alabama's TANF plan provides a good example of these strategies in action. Under a recent Alabama plan, caseworkers refer everyone who qualifies for cash assistance to "the JOBS Unit for assessment in regard to their skills, prior work experience and employability." Ala. State Dept. of Human Res., ALABAMA TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) STATE PLAN RENEWAL FOR OCTOBER 1, 2011 TO SEPTEMBER 30, 2013, at 8.[2] Caseworkers then develop an "Individual JOBS Participation and Family Responsibility Plan (FRP)" for each beneficiary. *Id.* After that assessment, "[i]ndividuals determined to be ready to engage in work [are] immediately placed in work or work-related activities for up to 40 hours per week." *Id*. Alabama has the option under its plan to attempt to place a beneficiary in unsubsidized employment or to use TANF funding to pay for subsidized employment, in which an applicant works for an employer who is reimbursed for paying the beneficiary's wages. *See id.* at 7-11. Time spent searching for unsubsidized employment and time spent in continuing education can also count

[2] Available at http://www.dhr.state.al.us/services/Family_Assistance/Documents/AmendedStatePlanmaster.pdf (last visited May 9, 2014).

toward the work requirement, and may be included in an individual's JOBS plan. *Id.*

II. State Programs to Test for Drugs in TANF.

Congress recognized at the time it created the TANF block grant that drug use by the beneficiaries of cash assistance would undermine the program's objectives. Congress believed, however, that its reforms would "combat[] substance abuse by allowing States to sanction welfare recipients who test positive for illicit drug use." H.R. REP. No. 104-651 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2183, 2187. Section 115 of the Welfare Reform Act permanently disqualifies individuals convicted of certain drug-related felonies from receiving cash assistance under the TANF program, if such benefits are paid for by federal dollars. *See* 21 U.S.C. § 862a. And Section 902 of the Act expressly provides that "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." 21 U.S.C. § 862b.

The States have similarly recognized that drug use is incompatible with TANF's objectives and have adopted a variety of strategies to test and screen applicants for the use of illegal drugs. In some States, such as Maryland, an applicant's eligibility for cash assistance is determined based on an interview or home visit, after which a caseworker can require treatment and testing as a

condition of continued eligibility. *See* Welfare Reform in Maryland: Flexibility in Action, SITE VISIT REPORT 2 (Nat'l Health Policy Forum Feb. 2002).[3] In other States, such as Kansas, a caseworker can require drug testing of a TANF applicant or beneficiary "at any time when reasonable suspicion exists that such applicant for or recipient of cash assistance is unlawfully using a controlled substance or controlled substance analog." KAN. STAT. ANN. § 39-709(l)(1). In yet other States, such as Wisconsin, a drug test is required for an applicant who has been previously convicted of a drug offense. *See* WIS. STAT. ANN. §§ 49.148(4) & 49.79(5) (food stamps). Finally, Michigan adopted a pilot program in 1998 to test all applicants for cash assistance, which was permanently discontinued by the equally-divided en banc court in *Marchwinksi v. Howard*, 2003 WL 1870916 (6th Cir. 2003) (en banc). *See also Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000).

Recently, there has been movement among the States toward the greater use of drug tests within TANF. *See* Doc. 19-8. Alabama now requires drug screening for TANF recipients "upon reasonable suspicion that the adult uses or is under the influence of a drug." 2014 ALA. LAWS ACT 2014-438 (S.B. 63). Georgia also recently passed legislation requiring a drug screening of "an applicant or recipient

[3] Available at http://www.nhpf.org/library/site-visits/SV_MD02.pdf (last visited May 9, 2014).

at any time a reasonable suspicion exists that such applicant or recipient is using an illegal drug." 2014 GA. LAWS ACT 664 (H.B. 772). *See also* TENN. CODE ANN. § 71-3-1202 (implementing "suspicion-based drug testing"). On July 1, 2011, Pennsylvania began to require random drug testing of beneficiaries who have previously been convicted of a drug felony. *See* 62 PA. STAT. § 432.24(b)(1). Similarly, in 2011, Missouri and Arizona mandated drug testing for all applicants whose caseworkers believe may use controlled substances. *See* MO. REV. STAT. § 208.027; 2011 ARIZ. LEGIS. SERV. CH. 32 § 3 (S.B. 1620). Oklahoma has passed legislation like Florida's, requiring the screening of all TANF applicants for drug use. OK. STAT. TIT. 56, § 230.52(A)(14). Finally, the legislatures of many States are actively considering legislation similar to Florida's that would implement a threshold drug-testing program for most or all TANF applicants. *See* H.B. 952, 2014 Leg., Reg. Sess. (La. 2014); *see also Drug Testing for Welfare Recipients and Public Assistance*, National Conference of State Legislatures (Mar. 27, 2014) (noting that at least 18 state legislatures had proposals or carryover bills requiring drug screening or testing for TANF applicants or recipients).[4]

[4] Available at http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx (last visited May 9, 2014).

SUMMARY OF THE ARGUMENT

Legitimate governmental interests justify a drug test's limited intrusion on an applicant's privacy. Therefore, even if an applicant's consent to a drug test is not dispositive, Florida's policy of testing applicants for TANF is constitutional.

Drug testing serves at least two legitimate State interests. First, it allows the States to deter drug use within the TANF population. This interest is compelling: substance abuse is one of the most pressing problems among TANF beneficiaries, addiction and substance abuse are significant causal factors in child maltreatment, and drug use undermines an individual's employability, educational attainment, and self-sufficiency. Second, drug testing allows the States to eliminate drug users from participation in the TANF program. Federal funding is conditioned in part on States' success in moving applicants from welfare to work, and the States have programs to place beneficiaries in employment. The States thus have a special need to apply the same criteria to applicants for TANF that private employers will apply to applicants for jobs. These interests are uniquely compelling in this case because of the goals and structure of cash assistance under the TANF block grant.

Drug testing is a reasonable way to substantiate these State interests in light of Fourth Amendment values. Drug testing is one of the more socially-acceptable methods of screening for drug use. It is private and minimally invasive. And it is already commonplace in public employment, the military, and prestigious positions

within the federal government. Moreover, applicants' reasonable expectation of privacy is limited. Applicants for cash assistance voluntarily invite the State into their private lives and disclose large amounts of personal information. In light of the nature of the TANF program and its application process, the burden of a drug test is negligible.

Finally, nothing in the Constitution prevents Florida from making a policy choice simply because other States have gone a different route. Florida's policy of "suspicionless" drug testing, although different, is just as solicitous of Fourth Amendment values as the alternatives used by other States. Suspicion-based drug testing imposes a greater administrative burden on the State. Likewise, State legislators could reasonably prefer drug testing by a private laboratory to home inspections by State workers. The Constitution gives States the power to weigh these concerns and reach different conclusions; it does not require every State to adopt the same drug-testing policy.

ARGUMENT

Florida's drug-testing program is constitutional because it is supported by legitimate State interests that make the Fourth Amendment's warrant and probable cause requirement impracticable.[5] Whether a particular "search" is reasonable under the Fourth Amendment "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 1414 (1989) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S. Ct. 1391, 1396 (1979)). A search unsupported by probable cause is constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168 (1987) (internal quotation marks omitted). The States and Congress have both recognized that drug-testing has an important role in TANF, and the Supreme Court has held that "[t]he privacy interests compromised by the process of obtaining the urine sample are . . . negligible." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658, 115 S. Ct. 2386, 2393 (1995). Because the governmental interests in screening TANF

[5] Amici also agree with Appellant that an applicant's consent to the drug test is dispositive. *See* Appellant's Br. 36-45. As in any other Fourth Amendment case, this case can be resolved on the ground of consent alone.

applicants for illicit drug use outweigh the drug test's limited intrusion on an applicant's privacy, the District Court's injunction should be reversed.

I. The States Have Special Needs That Justify Drug Testing in TANF.

The States have special needs that support administrative drug testing in TANF. Specifically, the States have a legitimate interest in using drug testing to (1) deter and treat drug use among TANF applicants and (2) exclude drug users from participation in the TANF program. These needs are uniquely compelling to the TANF program, in which the States provide cash assistance and access to welfare and work programs in order for adults to provide a healthy home for their children and to attain private employment.

A. The States have a special need to deter drug use among TANF applicants.

Pre-announced drug testing of TANF applicants means less drug use by those eligible for TANF, which, in turn, protects children and prepares adults to enter the workforce. Florida's policy deters drug use in two ways. On the front end, testing deters drug use by encouraging TANF applicants, before they even apply for benefits, to refrain from drug use so that they can qualify. *Cf. Turner v. Glickman*, 207 F.3d 419, 425 (7th Cir. 2000) (explaining that "[r]endering those convicted of drug-related felony crimes ineligible to receive food stamps or aid under TANF is a potentially serious sanction, and individuals who are currently

eligible for such assistance would undoubtedly consider potential disqualification from federal benefits before engaging in crimes involving illegal drugs"); H.R. REP. NO. 104-651 at 6 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2183, 2187 (recognizing that one way to "combat[] substance abuse" is "to sanction welfare recipients who test positive for illicit drug use"). On the back end, Florida's drug testing policy encourages persons who apply for cash assistance, but fail the drug test, to seek treatment so that they can reapply.[6] *Cf. Selective Service Sys. v. Minn. Public Interest Research Grou*p, 468 U.S. 841, 854, 104 S. Ct. 3348, 3356 (1984) (denying financial aid to students who do not register for draft "is plainly a rational means to improve compliance with the registration requirement," not a punishment for the failure to register).

Because drug *testing* deters drug *use*, the Supreme Court has approved of drug testing when there is a "special need" to deter drug use within the tested population. *See Bd. of Educ. of Independent Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 834, 122 S. Ct. 2559, 2567 (2002) (drug testing allowed to "prevent[] drug

[6] The statute requires the department to "[p]rovide any individual who tests positive with a list of licensed substance abuse treatment providers available in the area in which he or she resides that meet the requirements of s. 397.401 and are licensed by the department." FLA. STAT. § 414.0652(2)(j). The statute also incentivizes parents to seek treatment by reducing the wait-time to reapply from one year to six months if the adult completes a treatment program. *See id.* § 414.0652(2)(j)&(h). After two positive drug tests, the incentives to seek treatment are even greater—the wait time for reapplication remains six months with treatment but increases to three years without treatment. *See id.*

use by schoolchildren"); *Vernonia*, 515 U.S. at 661, 115 S. Ct. at 2395 (drug testing of student athletes allowed to "[d]eter[] drug use"). The States have a special need to deter drug use among applicants for TANF cash assistance for at least three reasons.

1. Persons eligible for TANF are at a greater risk for drug abuse than the general population.

The population of persons eligible for cash assistance is particularly susceptible to drug use. The unemployed are more likely to use illicit drugs than the employed by a margin of two to one—17 percent and 8 percent of the two groups respectively. *See* U.S. Dep't. of Health & Human Servs., Substance Abuse & Mental Health Servs. Admin., *Results from the 2009 National Survey on Drug Use and Health: Volume I. Summary of National Findings*, 25 (2010).[7] Nationwide studies also find that recipients of welfare are, in general, more likely than the general public to use illegal drugs. *See, e.g.*, *Substance Abuse and Welfare Reform*, POLICY BRIEF #2 (National Poverty Center, Apr. 2004).[8] Although studies arrive at different figures based on methodology, "[b]est estimates suggest that up to 20 percent of women on TANF have a substance use

[7] Available at http://oas.samhsa.gov/nsduh/2k9nsduh/2k9resultsp.pdf (last visited May 9, 2014).

[8] Available at http://www.npc.umich.edu/publications/policy_briefs/brief02/brief2.pdf (last visited May 9, 2014).

problem that probably interferes with their functioning." *CASASARD: Intensive Case Management for Substance-Dependent Women Receiving Temporary Assistance for Needy Families*, CASA WHITE PAPER (National Center on Addiction and Substance Abuse, Jan. 2009) at 2.[9]

2. Adult drug use endangers the children that TANF is intended to help.

There is also a special need to deter drug use within TANF because all of the applicants for TANF are, necessarily, the guardians of children. "Supreme Court opinions make it plain that the state has a compelling interest in the welfare of minor children." *Blair v. Supreme Court of State of Wyo.*, 671 F.2d 389, 390 (10th Cir. 1982). Accordingly, courts have held that the governmental interest in preventing child exposure to drug use is sufficient to support the "suspicionless" drug testing of a child's parents in a custody dispute between them. *See Luminella v. Marcocci*, 814 A.2d 711, 724-25 (Pa. Super. Ct. 2002) (rejecting the mother's argument "that the compelled drug testing was unreasonable because no evidence was presented that she used drugs").

Adult drug use also actively endangers the very children that the TANF program is intended to support. "In a study that controlled for income, family size, degree of social support, parental depression and anti-social personality, children

[9] Available at http://www.casacolumbia.org/sites/default/files/files/CASASARD-intensive-case-management-for-substance-dependant-women-receiving-temporary-assistance-for-needy-families.pdf (last visited May 9, 2014).

whose parents were abusing substances [including alcohol] were almost three times (2.7) likelier to be abused and more than four times (4.2) likelier to be neglected than children whose parents were not substance abusers." Nat'l Ctr. on Addiction & Substance Abuse, NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS 14 (Jan. 1999).[10] Children of *illicit* drug-using parents, in particular, are likely to lead markedly more challenging lives than other children:

> **Children of Illicit Drug Users**. Children of illicit drug abusers are likelier than children of non-drug abusers to demonstrate immature, impulsive or irresponsible behavior, to have lower IQ scores, more absences from school and to have behavioral problems, depression and anxiety — all signs of risk for substance abuse. Children of drug-abusing parents, particularly drug-abusing mothers, are more likely to be disobedient, aggressive, withdrawn and detached. These children also tend to have fewer friends, lower confidence in their ability to make friends and a greater likelihood of being avoided by their peers.

Family Matters: Substance Abuse and the American Family, A CASA WHITE PAPER (National Ctr. on Addiction & Substance Abuse, March 2005), at 12 (footnotes omitted).[11]

[10] Available at http://www.casacolumbia.org/articlefiles/379-No%20Safe%20Haven.pdf (last visited May 9, 2014).

[11] Available at http://www.casacolumbia.org/articlefiles/380-Family%20Matters.pdf (last visited May 9, 2014).

3. Drug use undermines work readiness among TANF beneficiaries.

Finally, illicit drug use makes a TANF beneficiary much less employable. In fact, "[s]ubstance abuse is recognized as one of the most common barriers to employment among the hard-to-employ Temporary Assistance for Needy Families (TANF) recipients." Substance Abuse & Mental Health Servs. Admin., U.S. Dep't. of Health & Human Servs., A LOOK AT STATE WELFARE REFORM EFFORTS TO ADDRESS SUBSTANCE ABUSE 1 (July 2000).[12] "Substance dependent women receiving TANF have lower rates of any type of employment than those who are not substance dependent." *CASASARD: Intensive Case Management for Substance-Dependent Women Receiving Temporary Assistance for Needy Families*, *supra* at n.9. To fulfill their obligations to move TANF beneficiaries from welfare to work, the States have a special need to deter drug use among TANF beneficiaries.

B. The States have a special need to exclude drug users from the TANF program.

The States also have a special need to exclude persons who use drugs from participating in the TANF program. The Supreme Court has approved of drug testing for the purpose of identifying and eliminating drug users from participation

[12] Available at http://www.peerta.acf.hhs.gov/uploadedFiles/8_case_studies_final.pdf (last visited May 9, 2014).

in a government program in which drug use poses a special problem. *See Vernonia* 515 U.S. at 662, 115 S. Ct. at 2396 (removal from athletics "where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high"); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670, 109 S. Ct. 1384, 1393 (1989) (testing ensures the hiring of customs service personnel with "unimpeachable integrity and judgment"). This reasoning applies equally to drug testing within the context of TANF. *See, e.g.*, MO. REV. STAT. § 208.027 (excluding persons who test positive for illicit drug use from TANF for three years). The use of drug testing to identify and exclude drug users from TANF ensures that the program's limited resources are available for persons who are likely to succeed in the program and move from "welfare to work."

1. Passing a drug test is required to be eligible for private employment.

Because TANF is a work-readiness program as well as a child-welfare program, the States have a special interest in limiting participation in TANF to persons who are eligible, or likely to become eligible, for subsidized or unsubsidized private-sector employment. Many, if not most, of the jobs in the private sector require drug testing as a condition of employment.[13] As Appellant

[13] Surveys consistently place the number at roughly one half or above. *See*, *e.g.*, 2004 Workplace Testing Survey: Medical Testing (American Management Association, 2004), at 3, *available at* http://www.amanet.org/training/articles/2004-Medical-Testing-Survey-17.aspx (last visited May 9, 2014) (between

explains, many large employers likely to hire TANF beneficiaries require drug testing. *See* Appellant's Br. at 25-26. This long list of employers includes, for example, the major automobile manufacturers in Alabama and Georgia. *See, e.g.*, *Kia begins taking job applications for West Point production positions*, THE VALLEY-TIMES NEWS.[14] By testing applicants for TANF, the States can ensure that beneficiaries are likely to be eligible for subsidized or unsubsidized employment with private employers, and the State can communicate that fact to private employers who may otherwise be reluctant to hire a person receiving cash assistance.

For these reasons, the States started experimenting with drug-testing within their TANF work-readiness programs as soon as the Welfare Reform Act was passed. "For example, in Kansas [during the 1990s], one of their TANF initiatives [was] a two to four month employment training program, which upon completion, the TANF recipients are guaranteed jobs with Boeing Airlines. To be considered for this program, the TANF recipient [had to] submit to a drug test." A LOOK AT

1995 and 2004, 62 to 81 percent of U.S. firms surveyed engaged in some kind of drug testing); Substance Abuse & Mental Health Servs. Admin., Dep't of Health & Human Servs., WORKER SUBSTANCE USE AND WORKPLACE POLICIES AND PROGRAMS (2007), *available at* http://www.samhsa.gov/data/work2k7/work.htm (last visited May 9, 2014) (between 2002 and 2004, 42.9 percent of full-time workers reported that their company tested for drugs in the pre-hire process).

[14] Available at https://www.kiajobsingeorgia.com/news/ValleyTimes-News-NowHiring.pdf. (last visited May 9, 2014).

STATE WELFARE REFORM EFFORTS TO ADDRESS SUBSTANCE ABUSE, *supra* at 18. This Kansas program made eminent sense: given that Boeing would require its own drug test at the completion of the program, Kansas limited participation in the program to those persons who it knew could pass. The same principle applies to TANF in general: it is wasteful to expend resources preparing persons for private employment who would be ineligible for half of all job openings in the private sector.

2. Drug users are likely to misdirect TANF benefits away from the children that they are intended to help.

The States intend for recipients of direct cash assistance to spend it on providing a safe and healthy home environment for the benefit of their children. But, because money is fungible, the States must take steps to make sure that their money is being spent the way the program intends. Drug-testing eliminates persons from the program who are likely to misdirect State resources away from children and toward other, perhaps even illegal, uses. Under Florida's statute, these persons can then be replaced by recipients who will pass the drug test and receive cash assistance on behalf of the same children. *See* FLA. STAT. § 414.0652(3) (providing for a protective payee so that child is unaffected).

C. These State interests are uniquely compelling in the context of the TANF program.

Congress and a number of States have expressly recognized that drug use by TANF beneficiaries undermines the objectives of the TANF program and that drug testing is one legitimate way to combat those ill effects. Although these legitimate interests may exist in some tenuous form in other programs, they are especially compelling in the unique context of TANF for at least two reasons.

First, the States need to ensure that *cash* assistance is spent on children, not diverted to other uses. In most programs, including the programs mentioned by the District Court, the States provide benefits directly to the individual they intend to benefit. Many times, the States do so simply by reimbursing for services, not by providing cash. *See, e.g.*, 42 C.F.R. § 430.0 (under Medicaid, "[p]ayments for services are made directly by the State to the individuals or entities that furnish the services"). Cash assistance under TANF is different. Under TANF, the States provide cash assistance directly to a parent or other adult. But, unlike other programs, the State is providing cash assistance, not because the State intends to help that adult, but because the State intends to help a child under that adult's supervision. A program like TANF cannot work effectively unless the State can make efforts to ensure that the recipient of the State's money is likely to spend it as intended.

Second, the States' goal of preparing persons for employment is uniquely frustrated if the States cannot apply the same criteria to an applicant for the program that a private employer would apply to an applicant for a job. One goal of the TANF program is to place persons in work-related activities, and federal funding is contingent on how well the States meet that goal. That the employers who hire beneficiaries for subsidized and unsubsidized work are likely to require a drug test (or at least to desire that welfare-to-work employees have passed a drug test) distinguishes this program from the programs mentioned by the District Court. A student who receives federal loans, for example, can enroll in college without passing a drug test. But an entry-level job seeker is unlikely to find a job if he or she cannot. The States thus have a special interest in using drug-tests to establish eligibility for the TANF program.

II. The States' Special Needs Outweigh the Fourth Amendment Privacy Interests.

Florida's drug-testing program does not stigmatize applicants; nor does it substantially invade an applicant's privacy. By applying for cash assistance, applicants invite the government into the most private aspects of their lives. They voluntarily put at issue their familial relationships, their health, their ability to secure present and future employment, their housing arrangements, and their plans for the future. In light of an applicant's consent to enter this highly regulated area,

an administrative drug test has little impact on applicants' Fourth Amendment privacy interests.

A. Applicants for TANF have only a limited privacy interest in their health and welfare information.

Applicants for direct cash assistance cede much of their privacy during the application process. An applicant generally must provide his or her fingerprints and other physical-identification information, which may also constitute a "search" under the Fourth Amendment. *See, e.g.*, U.S. Dep't of Health & Human Servs., THE APPLICATION PROCESS FOR TANF, FOOD STAMPS, MEDICAID AND SCHIP 3-10 (Jan. 2003) (application requirements for New York and Texas);[15] *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S. Ct. 1394, 1397-98 (1969) (under certain circumstances fingerprinting may violate Fourth Amendment). Applicants must provide life, health, and disability insurance information, detailed information about all their current and potential future sources of income, and an itemized accounting for their current expenses such as child care costs, medical costs and housing costs. Doc. 19-3. The applicant must identify in detail every person that lives with him or her and their relationship. Doc. 19-3. Applicants usually answer screening questions about any drug use or abuse among the members of their household, either in writing or in an in-person interview as part of their work plan.

[15] Available at http://www.urban.org/UploadedPDF/410640.pdf (last visited May 9, 2014).

See, e.g., Commonwealth of Pa., Dep't of Public Welfare, Application for Benefits, at 5 ("Is anyone in treatment for drug or alcohol abuse?").[16] Finally, in some jurisdictions, an applicant must allow a home visit within 7 to 10 days of the application in order to verify his or her application information, after which point drug-testing may be required. *See, e.g.*, *id*. at 16; THE APPLICATION PROCESS FOR TANF, FOOD STAMPS, MEDICAID AND SCHIP, *supra* n.15, at 3-11 (describing application process for New York City).

The individuals Florida intends to drug test will have voluntarily decided to go through this intrusive process. By divulging information about his or her own drug use and consenting to the State's investigation into his or her health and relationships, "an applicant relinquishes whatever privacy he might otherwise retain with respect to such information, even when the information is derived from chemical analysis." *Willner v. Thornburgh*, 928 F.2d 1185, 1189-90 (D.C. Cir. 1991).

B. Administrative drug testing does not stigmatize TANF applicants or unreasonably invade their privacy.

Drug testing applicants for TANF does not unreasonably invade whatever limited privacy interest they have in their health and welfare information. *See Skinner*, 489 U.S. at 616, 109 S. Ct. at 1412 (constitutional interests protect "an

[16] Available at http://www.dpw.state.pa.us/cs/groups/webcontent/documents/form/s_002634.pdf (last visited May 9, 2014).

expectation of privacy that society is prepared to recognize as reasonable"). The ability to pass a drug test is a common eligibility criterion; it is required to buy life insurance, play sports, and get a job. It is unsurprising, therefore, that American society generally does not consider drug-testing to be an unjustified invasion of privacy. Roughly 91 percent of workers, for example, would either be more likely (39.8 percent) or equally as likely (51.4 percent) to work for an employer with a policy of random drug testing as an employer without such a policy. *See* WORKER SUBSTANCE USE AND WORKPLACE POLICIES AND PROGRAMS, *supra* n.13.

The absence of any *stigma* associated with "suspicionless" drug testing is borne out by federal drug-testing programs. Those programs almost universally require drug testing of *important* positions in the government and the private-sector. Civilian positions in the Defense Department are eligible for random drug-testing. *See* U.S. Dep't of Defense Directive No. 1010.9 (Aug. 23, 1998).[17] The Department of Transportation requires private businesses to adopt policies for administrative drug testing for commercial drivers and airline pilots. *See, e.g.*, 49 C.F.R. Part 40. The Nuclear Regulatory Commission requires drug testing for persons with clearance to work in nuclear plants. *See* 10 C.F.R. § 26.31. And the United States Army requires administrative drug testing of all military personnel.

[17] Available at http://acsap.army.mil/Pdf/DoDD_1010-09_DoD_Civilian_Employee_Drug_Abuse_Testing_Program.pdf (last visited May 9, 2014).

See Dep't of the Army, The Army Substance Abuse Program, Reg. 600-85 (Feb. 2, 2009).[18] There is obviously no stigma attached to any of these groups.

III. Florida Should Have Discretion To Prefer "Suspicionless" Drug-Testing Over the Alternatives Used in Other States.

At the preliminary injunction stage, the District Court erroneously concluded that Florida's reasons for drug-testing were "belied by the fact that other states competently administer TANF funds without drug tests or with suspicion-based drug testing and no other state employs blanket suspicionless drug testing." Doc. 33 at 33. The District Court's premise is not entirely accurate: Oklahoma has adopted a program similar to Florida's, and other States employ "blanket suspicionless drug testing" of subpopulations of TANF applicants (*e.g.*, those with prior convictions). *Drug Testing for Welfare Recipients and Public Assistance*, supra n.4.

Regardless, the main problem with the District Court's reasoning is its failure to identify anything in federal law that would prevent a State from making a policy choice simply because other States have gone a different route. And there is no reason the Fourth Amendment should be interpreted to require uniform State drug-testing policies. Instead, a State could reasonably conclude that a policy of

[18] Available at http://www.apd.army.mil/pdffiles/r600_85.pdf (last visited May 9, 2014).

"suspicionless" drug testing is, on the whole, *more* solicitous of Fourth Amendment values than the alternatives that the District Court implicitly approved.

A. Suspicion-based testing is not the only constitutional answer.

Several States require drug tests of applicants whom caseworkers *suspect* of using drugs, based on a questionnaire, personal interview, or home-visit. Other States, including Alabama, use a proxy for individualized suspicion, such as a previous drug-related conviction. Those policy choices are constitutional, and they are well within the States' discretion under the Welfare Reform Act. But they do not mean that Florida has no legitimate reason to take another direction.

Suspicion-based testing, in particular, has its own well-documented problems. Because a drug-impaired individual "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician,'" *Skinner*, 489 U.S. at 628, 109 S. Ct. at 1419 (quoting 50 Fed. Reg. 31526 (1985)), the efficacy of giving discretion to caseworkers to target persons for testing is debatable. And allowing that kind of discretion imposes special costs on both the applicants and the State. The applicants must bear "the risk that [administrators] will impose testing arbitrarily," and the State must bear "the expense of defending lawsuits that charge such arbitrary imposition" and the "greater process before accusatory drug testing." *Vernonia*, 515 U.S. at 663-64, 115 S. Ct. at 2396; *see, e.g.*, MO. REV. STAT. § 208.027 (creating an appeal and administrative-review

process for suspicion-based drug-testing). Applicants who a caseworker singles out for drug-testing will also bear the burden of a greater stigma than had the testing been class-wide. For these reasons, a State might reasonably conclude, like the Supreme Court, that "testing based on 'suspicion' of drug use would not be better, but worse." *See Vernonia*, 515 U.S. at 664, 115 S. Ct. at 2396.

Florida's program avoids the pitfalls of suspicion-based testing. But the point is not to quibble with the District Court's implicit conclusion that suspicion-based testing is "better." The point is that States should have the discretion to weigh these concerns and to develop eligibility and verification criteria that make sense for them. Indeed, Congress structured TANF as a block grant precisely so that States could innovate. That the States have used this flexibility differently in the area of drug-testing is not evidence that Florida's program fails to pass constitutional muster; it is merely "one of the happy incidents of the federal system." *New State Ice Co.*, 285 U.S. at 311, 52 S. Ct. at 386-87 (Brandeis, J., dissenting).

B. Home inspections are not necessarily the answer.

The other alternative for States that want to ensure that TANF beneficiaries are not using illegal drugs is to rigorously inspect applicants' homes for signs of drug use. *See Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 931 (9th Cir. 2006) (upholding the constitutionality of San Diego's in-home inspections). That

procedure is used by a number of States to verify an applicant's eligibility for TANF. *See supra* at 7-8, 25 (discussing Maryland and New York). And it can also be used by a caseworker to determine whether to require a suspicion-based drug test.

Florida's current policy of "suspicionless" drug testing, not mandatory home visits, strikes a perfectly reasonable balance between privacy and efficiency. Although the constitutionality of home visits is not reasonably subject to question, *see Wyman v. James*, 400 U.S. 309, 911 S. Ct. 381 (1971), it is not clear how a regime of home visits and interviews is necessarily less burdensome on an applicant's Fourth Amendment rights than class-wide suspicionless drug testing. A reasonable State legislator could well decide that it is less intrusive for a private laboratory to collect a urine sample than for a government worker to walk through an applicant's front door. *Compare Payton v. New York*, 445 U.S. 573, 601, 100 S. Ct. 1371, 1388 (1980) (an "overriding respect for the sanctity of the home" has "been embedded in our traditions since the origins of the Republic"), *with Vernonia*, 515 U.S. at 658, 115 S. Ct. at 2393 ("the privacy interests compromised by the process of obtaining the urine sample are . . . negligible"). And it is unlikely that the 90 percent of Americans who would work for an employer that requires random drug-tests would also be content with an employer that required random home-visits.

In short, there is no "best" way to substantiate the legitimate governmental interests that support Florida's drug-testing program. Florida's approach may not be perfect; nothing is. The important thing is that Florida's approach strikes a reasonable balance between the benefits and drawbacks of suspicionless drug testing. And it does so within a block grant that Congress structured for the express purpose of encouraging experimentation and State diversity. That Florida's approach is different from that taken by other States should have no effect on the constitutionality of the program.

CONCLUSION

The Court should reverse the District Court's injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,512 words, excluding the parts of the brief exempted by 11th Circuit Rule 32-4. I have relied upon Microsoft Word 2007 to determine the word count.

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Dated: May 12, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will serve electronic notice upon the following participants:

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