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Reemphasizing Impracticability in the Special Needs Analysis in Response to Suspicionless Drug Testing of Welfare Recipients

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Reemphasizing Impracticability in the Special Needs Analysis in Response to Suspicionless Drug Testing of Welfare Recipients*

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹

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1. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

INTRODUCTION

By the end of the 2013 legislative session, nearly thirty states proposed legislation that imposed or would have imposed some sort of drug testing of individuals receiving government benefits.² These proposals would have established a wide variety of requirements and procedures for implementing a system of drug testing. At their core, a large number of the proposals planned to test a randomly selected group of participants—or in some cases, all individuals receiving benefits—for drugs, without any indication that these individuals used or had contact with illegal drugs.³

These legislative proposals represent a sentiment among state legislators that welfare recipients are fair game for suspicionless drug testing. The legislators who proposed these laws identified drug use among those receiving government benefits as a serious problem, purportedly creating reliance on the welfare system, wasting government money, increasing crime rates, and endangering children within the state.⁴ Based on these beliefs, state legislators concluded

2. See *Drug Testing and Public Assistance*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/drug-testing-and-public-assistance.aspx> (last updated Jan. 2, 2014). Those states include: Alabama, Alaska, Arkansas, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Washington, and West Virginia. *Id.* In addition to these states, a number of other states proposed similar legislation in 2012, including Arizona, California, Colorado, Georgia, Louisiana, Minnesota, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. *Id.*

3. See OFFICE OF ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., ASPE ISSUE BRIEF: DRUG TESTING WELFARE RECIPIENTS: RECENT PROPOSALS AND CONTINUING CONTROVERSIES 5–6 (2011), *available at* <http://aspe.hhs.gov/hsp/11/DrugTesting/ib.shtml> (outlining and comparing all proposed legislation involving suspicionless drug testing).

4. Similarly, the U.S. House of Representatives recently voted to allow states to determine the best method for administering drug tests to all recipients of Supplemental Nutrition Assistance Program benefits (formerly known as food stamps). See Lauren Fox, *House Amendment: Drug Tests for Food Stamps*, U.S. NEWS (June 20, 2013), <http://www.usnews.com/news/articles/2013/06/20/house-passes-amendment-to-give-drug-tests-to-food-stamp-users>. Representative Richard Hudson of North Carolina, sponsor of the amendment to the Farm Bill that would have sanctioned testing for food stamps, said, "This is a clear and obvious problem in our communities as nearly 30 states have introduced legislation to drug test for welfare programs. We have a moral obligation to equip the states with the tools they need to discourage the use of illegal drugs." *Id.* This prompted one writer to argue that, as recipients of federal money, members of Congress should also be subjected to suspicionless drug tests—especially after the arrest of Representative Trey Radel for purchasing cocaine. See Petula Dvorak, *Drug Testing Is a*

that stopping such drug use was a “special need” that excused the state from complying with the Fourth Amendment’s warrant and individualized suspicion requirements and empowered the state to test welfare recipients for drugs even when there is no individualized suspicion of drug use.⁵

When states have enacted suspicionless drug testing of welfare recipients, federal courts have eventually enjoined these programs due to their lack of individualized suspicion, but the courts that have invalidated the laws have not spoken with a definitive or unified voice. Despite the federal injunctions imposed on similar laws, state legislatures continue to take up the issue and cite cases where the Supreme Court has approved suspicionless drug testing in other contexts. Although some states have turned against the idea of suspicionless drug testing due to the cost of the programs,⁶ other state legislatures continue to insist that it is constitutional to drug test welfare recipients without suspicion.⁷ In response to these arguments, lower courts have had trouble determining when the public interest in combatting drug use outweighs the privacy interest of welfare recipients. This balancing approach is at the heart of the special needs exception, and the approach sends an ambiguous and uncertain message on how the special needs doctrine will be applied in other cases and in front of other courts.

To reduce this uncertainty and bring the special needs exception more in line with its original purpose, this Comment argues that the Supreme Court should enforce the Fourth Amendment presumption requiring individualized suspicion and allow suspicionless drug testing under the special needs exception only when relying on individualized suspicion would be “impracticable.” The Court should focus on whether the government’s objective can be accomplished without individualized suspicion before it delves into the uncertain and heated debate over whether there is a special need important enough to outweigh an individual’s interest in privacy.

Great Idea. Thanks Rep. Radel, WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/local/rep-trey-radels-arrest-inspires-a-brilliant-idea-lets-drug-test-members-of-congress/2013/11/21/8f19c51e-52e6-11e3-9e2c-e1d01116fd98_story.html.

5. See *infra* notes 144–46 and accompanying text.

6. See Steven Yaccino, *A Faltering Approach to Denying Public Aid*, N.Y. TIMES (Oct. 25, 2013), http://www.nytimes.com/2013/10/26/us/state-drug-tests-for-public-aid-recipients-have-limited-effect.html?_r=0.

7. See *Drug Testing and Public Assistance*, *supra* note 2 (recognizing that drug testing of welfare recipients has been proposed steadily since federal welfare reform in 1996).

Part I of this Comment begins by explaining the development of the special needs exception to the Fourth Amendment, its initial focus on whether complying with Fourth Amendment requirements would be impracticable before excusing those requirements, how the special needs exception has grown “increasingly unsound, incoherent, and over-expansive,”⁸ and how the Court has sought to minimize the special needs exception in its recent opinions. Part II then moves from a descriptive to a normative analysis to show how—even with the recent trend in limiting the special needs doctrine—the current test’s focus on balancing the public and private interests leads to uncertain outcomes when it is applied to a new situation. This inconsistency means that lower courts and legislatures will continue to operate with uncertainty as they create and review systems that test for drugs without suspicion. A recent experience in Florida showcases the dangers of this inconsistency.

To combat this inconsistency, Part III suggests that courts should place greater importance on the threshold question of impracticability before balancing the public and private interests as a way to apply the special needs doctrine with greater predictability. Looking at impracticability first will create a more efficient and consistent analysis for courts to apply as they consider drug testing of welfare recipients and other new forms of suspicionless searches, a definitive answer that welfare recipients should not be subject to suspicionless searches, clearer guidelines for legislators as they determine when they can abandon individualized suspicion, and a special needs doctrine more in line with the requirements of the Fourth Amendment.

I. THE SPECIAL NEEDS EXCEPTION⁹

The Fourth Amendment usually requires “some quantum of individualized suspicion” before the government can conduct a constitutional search.¹⁰ Nonetheless, the Supreme Court has recognized that “the Fourth Amendment imposes no irreducible

8. Marc M. Harrold, *Computer Searches of Probationers—Diminished Privacies, “Special Needs” & “‘Whilst’ Quiet Pedophiles”—Plugging the Fourth Amendment into the “Virtual Home Visit,”* 75 MISS. L.J. 273, 339 (2005) (comparing the special needs doctrine to other exceptions within Fourth Amendment jurisprudence, such as the “pat-and-frisk” doctrine set forth under *Terry v. Ohio*, 392 U.S. 1 (1968), and the application of the “secondary effects” doctrine).

9. Throughout this Comment, the phrases “special needs exception” and “special needs doctrine” will be used interchangeably.

10. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

requirement of such suspicion,"¹¹ and a number of "specifically established and well-delineated exceptions" have sprung up that excuse the government from complying with the individualized suspicion requirement.¹² One of those exceptions is the special needs doctrine.¹³

When the government successfully invokes the special needs doctrine, it can conduct suspicionless searches because the court finds that the government's objective and the circumstances make it impracticable to base searches on individualized suspicion.¹⁴ Using the Supreme Court's precedents and the objectives that justified those searches, advocates for suspicionless drug tests claim that this exception to the Fourth Amendment justifies drug testing without individualized suspicion of the person being tested.¹⁵ The following subsections explore how the special needs exception developed, how it expanded, and how the Court has recently sought to restrict this exception to the Fourth Amendment.

A. *Development and Expansion of the Special Needs Exception*

First set out in Justice Blackmun's concurrence in *New Jersey v. T.L.O.*,¹⁶ the special needs exception to the Fourth Amendment provides that under certain defined circumstances, the government can search a person without individualized suspicion.¹⁷ First, the government must not be acting in a law enforcement capacity.¹⁸ Second, relying on individualized suspicion must be impracticable.¹⁹ Third, the government interests in conducting the suspicionless search must outweigh the individual's interest in privacy.²⁰

Before *T.L.O.*, the Court had ruled that it was appropriate to conduct an administrative search in the absence of individualized

11. *Id.* at 561.

12. See *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

13. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989).

14. See *id.*

15. See *id.* at 619-21 (advancing the government's interest in preventing railway accidents as justifying drug tests of railway employees).

16. 469 U.S. 325 (1985). In *T.L.O.*, the Court validated the search of a student's purse after that student violated a rule against smoking. *Id.* at 343-48.

17. See *id.* at 351 (Blackmun, J., concurring).

18. See *id.* ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

19. See *id.*

20. See *id.*

suspicion.²¹ But in his *T.L.O.* concurrence, Justice Blackmun outlined how the Court would analyze suspicionless searches moving forward.²²

To determine if the search was reasonable in *T.L.O.*, the majority employed a balancing test, questioning whether the government's interests outweighed the individual's interest in privacy.²³ Yet, Justice Blackmun laid out two additional factors that must be present before the Court could justify the suspicionless search through balancing. First, there must be a "special need," meaning that the government officials conducting the search must not have a law-enforcement motive for conducting the search.²⁴ Second, the circumstances must make it impracticable to require a warrant or individualized suspicion because these requirements would frustrate the non-criminal government interest.²⁵

Applying Justice Blackmun's special needs analysis, courts have used the special needs exception to justify suspicionless searches in a number of settings, ranging from drug tests of high school athletes and railroad employees after a train accident, to government searches of public employees' desks and welfare recipients' homes.²⁶ In 1987, a majority of the Supreme Court applied Justice Blackmun's special needs doctrine in *Griffin v. Wisconsin*²⁷ to justify searches of the

21. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (allowing for visual searches of vehicles crossing the United States-Mexico border).

22. See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (adopting for the first time the language from Justice Blackmun's concurring opinion in *T.L.O.*); see also *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989) (continuing to use the language from Justice Blackmun's concurring opinion in *T.L.O.*).

23. See *T.L.O.*, 469 U.S. at 337–42 (balancing schoolchildren's privacy interests against the school's interest in maintaining discipline, and ruling that the search in question was reasonable).

24. See *id.* at 351 (Blackmun, J., concurring); Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1228 (2004).

25. See *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

26. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 825 (2002) (upholding suspicionless drug testing of students in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995) (upholding suspicionless drug testing of student-athletes); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 678–79 (1989) (upholding suspicionless drug testing of customs officials); *Skinner*, 489 U.S. at 633–34 (upholding drug testing railroad employees after major accidents); *O'Connor v. Ortega*, 480 U.S. 709, 719–26 (1987) (permitting searches of government employees' desks and offices without probable cause); *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 931 (9th Cir. 2006) (holding that suspicionless searches of welfare recipients' homes before receiving welfare benefits is permitted); see also *United States v. Midgette*, 478 F.3d 616, 624 (4th Cir. 2006) (upholding warrantless searches by probation officers of a probationer's person, vehicle, and premises in the probationer's presence).

27. 483 U.S. 868 (1987).

homes of probationers.²⁸ In this and other cases, the Court cited Justice Blackmun's opinion in *T.L.O.* and first determined whether it would be impracticable to rely on individualized suspicion for these searches.²⁹

Throughout the late 1980s and 1990s, the Supreme Court expanded the special needs exception, placing greater significance on the balancing test between the government's special need and the individual's interest in privacy.³⁰ The Court used the balancing test as it considered whether special needs justified suspicionless drug tests in two companion cases handed down on the same day, *Skinner v. Railway Labor Executives' Ass'n*³¹ and *National Treasury Employees Union v. Von Raab*.³² Both cases involved suspicionless drug testing of government employees, and in both cases, the Court relied on the special needs exception to justify the use of suspicionless drug tests.³³

In *Skinner*, the Court approved a system of suspicionless drug testing that would automatically take place after a train accident.³⁴ The Court applied the special needs doctrine, drawing upon Justice Blackmun's concurrence in *T.L.O.* and a recent opinion where the majority of the Court adopted Justice Blackmun's approach.³⁵ The Court explained that the government had an interest in protecting the safety of its workers and the safety of the public at large from train wrecks.³⁶ Having recognized that protecting employee and overall

28. *Id.* at 873-80.

29. *See, e.g., id.* at 876 (finding that "the special needs of Wisconsin's probation system make the warrant requirement impracticable" because it would frustrate the purposes of the probation system and place a magistrate between the probation officer and the probationer); *O'Connor*, 480 U.S. at 722 ("In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome.").

30. *See, e.g.,* Kenneth Nuge, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 129-31 (1992) (noting the flexibility with which courts can justify abandoning individual suspicion); Jennifer Y. Buffaloe, Note, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 551-52 (1997) (arguing that the rationale of the special needs exception means that this exception is unbounded).

31. 489 U.S. 602 (1989).

32. 489 U.S. 656 (1989).

33. *See Von Raab*, 489 U.S. at 678-79; *Skinner*, 489 U.S. at 633-34.

34. *See Skinner*, 489 U.S. at 606, 633-34.

35. *See id.* at 619 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring))).

36. *See id.* at 620 (comparing the monitoring of the railroad with the government's supervision of "probationers or regulated industries, or its operation of a government office, school, or prison").

public safety was a special need, the Court framed the question as “whether the Government’s need to monitor compliance with these restrictions justifies the privacy intrusions at issue absent a warrant or individualized suspicion.”³⁷

The Court observed that it would be “impracticable in the aftermath of a serious accident” to obtain evidence that would lead to individualized suspicion of a particular employee using drugs.³⁸ The Court also recognized that the railroad workers had a diminished expectation of privacy because they worked in a heavily regulated field.³⁹ In order to protect the public, the Court found that the employer must rely on suspicionless drug tests, and as a result, it upheld the practice.⁴⁰

In *Von Raab*, the Court considered whether the federal government could conduct suspicionless searches of U.S. Customs officers.⁴¹ The Court reworded Justice Blackmun’s formulation of the special needs doctrine, explaining:

[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.⁴²

This explanation moves impracticability out of its position as a threshold question, and instead suggests that impracticability is the conclusion one can come to if the public interest in the drug test outweighs the individual’s privacy interests. Later in the opinion, the Court recited the special needs test without any mention of impracticability at all, referencing only the non-law enforcement requirement and the balancing test.⁴³

Despite the fact that the *Von Raab* Court did not mention impracticability as a requirement in the special needs analysis, it proceeded to review the circumstances to assess whether

37. *Id.* at 621.

38. *Id.* at 631. The Court continued: “It would be unrealistic, and inimical to the Government’s goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances.” *Id.*

39. *See id.* at 627.

40. *See id.* at 633–34.

41. *See Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 660–61 (1989).

42. *See id.* at 665–66 (citing *Skinner*, 489 U.S. at 619–20).

43. *See id.* at 678–79.

individualized suspicion would be impracticable.⁴⁴ The Court established that it would not be possible for the Customs Service to comply with the warrant requirements or to rely on individualized suspicion every time it had to make a work-related search or drug test, citing the need for swift execution of employment decisions.⁴⁵ Additionally, after explaining other cases where individualized suspicion had proven impractical, the Court found that the privacy interests of the employees were outweighed by the need for physically fit "front-line interdiction personnel" with "unimpeachable integrity and judgment."⁴⁶

Six years later, the Court handed down its decision in *Vernonia School District 47J v. Acton*,⁴⁷ allowing for the suspicionless drug testing of high school student-athletes.⁴⁸ Finding that there was a decreased expectation of privacy among the students, the search was relatively unobtrusive, and the need for drug tests was severe, the Court ruled that it was reasonable for the school district to conduct suspicionless searches of all student-athletes.⁴⁹ To reach this conclusion, the Court readily accepted two premises: (1) drug use was a major and immediate problem,⁵⁰ and (2) student-athletes had a diminished expectation of privacy due to the supervisory role that the school plays and the lack of privacy one must assume when becoming involved in school sports.⁵¹

Notably, *Acton* may have also limited the scope of the impracticability required before invoking a special need. The Court

44. See *id.* at 666–67.

45. See *id.*

46. See *id.* at 670. Both decisions drew a harsh rebuke from the dissenting Justices. In *Skinner*, Justice Marshall criticized the balancing test employed. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 639 (1989) (Marshall, J., dissenting) ("Tellingly, each time the Court has found that 'special needs' counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided 'reasonableness' balancing inquiry, it has concluded that the search in question satisfied that test."). In *Von Raab*, Justice Scalia broke ranks with his fellow majority members in *Skinner* because the Customs Service presented no evidence of a real problem of illicit drug use among its agents. See *Von Raab*, 489 U.S. at 680–81 (Scalia, J., dissenting). Over the objections of these Justices, however, the Court moved from only allowing bodily searches absent individualized suspicion in the context of dangerous probationers, see *Griffin v. Wisconsin*, 483 U.S. 868, 873–75 (1987), to approving two separate instances where the government could order its employees to be tested for drugs without suspicion, see *Von Raab*, 489 U.S. at 680.

47. 515 U.S. 646 (1995).

48. See *id.* at 665.

49. See *id.* at 664–65.

50. See *id.* at 661–62.

51. See *id.* at 656–57.

decided that the presence of less intrusive means of accomplishing the government's objective did not render the chosen means unreasonable.⁵² The student-plaintiff claimed that the school could have based the tests on individualized suspicion.⁵³ But, the majority refused to accept this argument, noting that the Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."⁵⁴ The Court in *Skinner*, too, reasoned that requiring the least restrictive means would lead to countless second-guessing.⁵⁵ After making this statement, the *Acton* Court went on to hold that individualized suspicion would be impracticable due to the adversarial relationship it would create between teacher and student and the possibility that it might unfairly target students who do not use drugs.⁵⁶

Acton's conclusion that identifying a less intrusive means does not indicate that the search is unreasonable has led some to argue that *Acton* did away with the impracticability component of the special needs test.⁵⁷ This reading may be overstated, however, since the Court did consider whether individualized suspicion would have been impractical.⁵⁸ Nonetheless, *Acton* seemed to set the stage for the Court to legitimize more instances of suspicionless drug testing.⁵⁹ As long as the government's interest was important enough to overcome the invasion of privacy created by the form of drug testing utilized under the circumstances, the special needs exception appeared to justify the drug tests.⁶⁰

52. See *id.* at 663 (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 629 n.9 (1989)).

53. See *id.*

54. See *id.* (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 629 n.9 (1989)).

55. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 629 n.9 (1989).

56. See *Acton*, 515 U.S. at 663.

57. See Christian Edward Samay, Comment, *Judicial Activism Works the Constitution Out of Shape—Acton and Its Atrophic Effect on the Fourth Amendment Rights of Student Athletes*, 7 SETON HALL J. SPORT L. 291, 305–06 (1997) ("Without any logical or legal support, Justice Scalia made short shrift of the well established requirement that the impracticability of a suspicion based governmental policy must be demonstrated before an alternative, suspicionless search policy may be considered."); see also *Acton*, 515 U.S. at 678 (O'Connor, J., dissenting) (pointing out that the majority "never seriously engage[d] the practicality" of a suspicion-based program, and as a result approved a program that was overly broad and intrusive).

58. See *Acton*, 515 U.S. at 663.

59. See JOHN L. MILLS, *PRIVACY: THE LOST RIGHT* 259–60 (2008).

60. See *id.*

B. *Recent Efforts to Limit the Scope of the Special Needs Exception*

A number of scholars have criticized the direction taken by the Court in the special needs cases explained above. Some have expressed disapproval of the inconsistency with which judges determine when special needs exist.⁶¹ Others have contended that the balancing test used in special needs cases overemphasizes the public concern to the point where the individual's interest in privacy can never outweigh the government's interests.⁶² Whether in response to this criticism or not, the 1998 decision in *Chandler v. Miller*⁶³ appeared to signal a shift towards limiting the Court's special needs jurisprudence.⁶⁴ Including *Chandler*, three of the four most recent special needs cases taken up by the Court have imposed some sort of limitation on the doctrine.⁶⁵

61. See, e.g., Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 584-85 (1995) ("The factors in the balancing test have become mere shells, manipulated to justify unguided conclusions as to what the majority in any given case concludes is reasonable.").

62. See Nuger, *supra* note 30, at 100 ("When the Supreme Court defines the governmental function as so exceptionally important that special needs ... justify inspection schemes normally vulnerable to the Fourth Amendment, it reduces the resulting balancing test to one in name only.").

63. 520 U.S. 305 (1997).

64. As with all trends in the Court's history, changes in membership could play a key role. Two justices will be important if the Court is to continue in this trajectory. First, Justice Samuel Alito is important because he replaced Justice Sandra Day O'Connor on the bench. Justice O'Connor was skeptical of the special needs doctrine and advocated for a narrower exception to the Fourth Amendment. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting). Assuming Justice Alito would join his fellow conservative colleagues in allowing a broader special needs doctrine, the change in the make-up of the Court makes the second justice—Justice Stephen Breyer—all the more important. Justice Breyer has voted with the majority in all four of the most recent special needs cases, voting to strike down the suspicionless searches in *Ferguson v. City of Charleston*, *City of Indianapolis v. Edmond*, and *Chandler*, but upholding the suspicionless search in *Earls*. See *Ferguson v. City of Charleston* 532 U.S. 67, 69 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 33 (2000); *Chandler*, 520 U.S. at 307; *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 824 (2002). Although the retirement of Justice O'Connor may darken the possibilities of limiting the special needs doctrine, it does not foreclose the possibility of further reform. *Chandler* was an 8-1 decision striking down the Georgia suspicionless drug testing program. *Chandler*, 520 U.S. at 307. Thus, a majority could vote to limit the special needs doctrine, so long as Justice Breyer and one of the more conservative justices that voted with the majority in *Chandler* (Justices Scalia, Kennedy, and Thomas) are on board. See *id.* at 307-09.

65. See *Ferguson*, 532 U.S. at 84 (refusing to find a special need where the primary purpose of the drug test involved law enforcement objectives); *Edmond*, 531 U.S. at 48 (refusing to find a special need where the primary purpose of the highway checkpoints involved law enforcement objectives); *Chandler*, 520 U.S. at 321-22 (requiring that the government prove the existence of an actual threat to safety and not merely a symbolic threat).

In *Chandler*, the Court considered a Georgia law that required all candidates for state office to pass a drug test.⁶⁶ The Court explained that the category of constitutionally permissible suspicionless searches was “closely guarded.”⁶⁷ The Georgia law did not fit into the special needs exception because the government objective behind the law addressed a hypothetical problem.⁶⁸ As such, the government objective was not substantial enough to outweigh the office seekers’ interest in privacy.⁶⁹ For the first time since it set out the exception in *New Jersey v. T.L.O.*,⁷⁰ the Court found a set of suspicionless drug tests unconstitutional under the special needs doctrine.⁷¹

The Court held that the Georgia program of suspicionless drug tests was unconstitutional after it found that no special need existed to justify the drug tests.⁷² *Chandler* is different from the preceding special needs cases because the Court gave substantial consideration to the threshold question of whether a special need existed.⁷³ In previous cases, by contrast, the Court gave only a brief look at the question before spending the majority of its time focusing on the balancing of public and private interests.⁷⁴ *Chandler* marked the possibility of a major change in the special needs analysis, but it was unclear whether this would have any lasting effect on how the Court analyzed suspicionless drug testing cases.⁷⁵

Exploring other areas of the special needs analysis, the Court’s decisions in *Ferguson v. City of Charleston*⁷⁶ and *City of Indianapolis*

66. See *Chandler*, 520 U.S. at 309.

67. See *id.*

68. See *id.* at 319.

69. See *id.* at 318.

70. See *supra* notes 16–25 and accompanying text (describing *T.L.O.* and the origin of the exception).

71. The Eleventh Circuit used the same argument to find that the district court had not abused its discretion when it issued a preliminary injunction against the Florida system of suspicionless drug tests. See *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, 710 F.3d 1202, 1214 (11th Cir. 2013) (“Because we agree with the district court that the State failed to meet its burden in establishing a special need for its mandatory, suspicionless drug testing of [Temporary Assistance for Needy Families (“TANF”)] applicants, that ends our inquiry into the testing regime’s validity for Fourth Amendment purposes, and thus, we need not weigh any competing individual and governmental interests.”). For the procedural history of the *Lebron* litigation, see *infra* notes 136–38 and accompanying text.

72. See *Chandler*, 520 U.S. at 317–22.

73. See *id.* at 318.

74. See Zachary A. Bulthuis, Note, *Suspicionless Drug Testing by Public Actors: How Chandler v. Miller Should Change the Standard*, 74 S. CAL. L. REV. 1549, 1563 (2001).

75. See *id.*

76. 532 U.S. 67 (2001).

*v. Edmond*⁷⁷ also invalidated sets of suspicionless searches by strictly enforcing the threshold distinction between law enforcement and non-law enforcement purposes.⁷⁸ *Ferguson* involved drug tests that were administered to a group of expectant mothers by the Medical University of South Carolina hospital.⁷⁹ The hospital staff tested those expectant mothers who met certain criteria suggesting drug abuse.⁸⁰ The hospital shared any subsequent positive test results with local law enforcement in order to ensure that the mothers remained drug-free during their pregnancies.⁸¹

The Court clarified that the special needs doctrine was meant to operate outside of the law enforcement context.⁸² By sharing the results of the drug tests with law enforcement and advocating for the State to prosecute expectant mothers who tested positive, the hospital was participating in the law enforcement process.⁸³ As a result, the hospital could not claim that the special needs doctrine justified suspicionless drug tests of the expectant mothers.⁸⁴ To some, the decision in *Ferguson* confirmed their hopes that the Court was setting

77. 531 U.S. 32 (2000). For purposes of this Comment, the *Edmond* decision appears to have been sufficiently in line with *Ferguson* in advancing the “primary purpose” rule, see Harrold, *supra* note 8, at 317–18, that its facts will not be revisited in this Comment. For more in-depth analysis of how *Edmond* set forth a “primary purpose” test, see 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.7(b) (5th ed. 2012).

78. See *Ferguson*, 532 U.S. at 85–86 (finding drug tests of expectant mothers for cocaine unconstitutional because the doctors were working in conjunction with local law enforcement); *Edmond*, 531 U.S. at 32 (excluding evidence obtained at a drug checkpoint because the police at the drug checkpoint had a law enforcement purpose); see also Christopher Mebane, Note, *Rediscovering the Foundation of the Special Needs Exception to the Fourth Amendment in Ferguson v. City of Charleston*, 40 HOUS. L. REV. 177, 195 (2003) (recognizing that *Ferguson* sought to limit the special needs exception to instances where there is a clear non-law enforcement purpose).

79. See *Ferguson*, 532 U.S. at 71–72.

80. *Id.* at 71 n.4. The hospital first implemented a protocol where mothers who tested positive for cocaine were referred to a local treatment center, but the incidence of cocaine use among the hospital’s patients did not appear to change. *Id.* at 70.

81. See *id.* at 72.

82. See *id.* at 84.

83. See *id.* The hospital’s policies prescribed the offenses that an expectant mother who tested positive for drugs would receive, based on the stage of her pregnancy:

If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. If it was 28 weeks or more, she was to be charged with possession and distribution to a person under the age of 18—in this case, the fetus. If she delivered ‘while testing positive for illegal drugs,’ she was also to be charged with unlawful neglect of a child.

Id. at 72–73.

84. See *id.* at 84.

out to transform and constrain the scope of the special needs doctrine.⁸⁵

Conspicuous in this trend toward a more restricted special needs doctrine is the case of *Board of Education of Independent School District No. 92 v. Earls*.⁸⁶ Once again, the Court took up the issue of suspicionless drug testing in schools.⁸⁷ However, in this case, the Court considered whether it should expand upon its holding in *Acton* and find that a school could test all participants in extracurricular activities, not just student-athletes.⁸⁸ The Court held that the school's suspicionless testing in *Earls* was constitutional.⁸⁹ But instead of focusing on the suspected drug use among extracurricular participants in the particular school district, the Court looked to national statistics on drug use among all high school students.⁹⁰ Some scholars pointed out that this focus on national statistics and the recognition that drugs are a danger to all students could lead the Court to justify random drug testing of all students.⁹¹ *Earls* certainly does not fit with the preceding decisions that sought to limit the special needs exception, but it does fit with the previous school cases that treated the *in loco parentis*⁹² relationship as justifying a severely diminished expectation

85. See Joseph S. Dowdy, Recent Development, *Well Isn't That Special? The Supreme Court's Immediate Purpose of Restricting the Doctrine of Special Needs in Ferguson v. City of Charleston*, 80 N.C. L. REV. 1050, 1068 (2002) ("Hence, *Ferguson* should not be taken lightly by those who study or practice Fourth Amendment law. While the Court did not expressly announce that it was weakening the doctrine of special needs, it did so in a very meaningful way by creating the immediate purpose inquiry. Moreover, the subtle changes in tone and the votes in *Ferguson* confirm an ongoing erosion in the support for the doctrine among the members of the Court. Policymakers who devise search policies predicated on the doctrine of special needs would be wise to scrutinize the immediate purpose of their policies and eliminate any clear links to law enforcement because the Court is searching for ways to quietly eliminate the doctrine of special needs.").

86. 536 U.S. 822 (2002).

87. See *id.* at 825.

88. See *id.*; see also *supra* notes 47–51 and accompanying text (discussing the Court's holding in *Acton*).

89. See *Earls*, 536 U.S. at 825.

90. See *id.* at 834 ("The drug abuse problem among our Nation's youth has hardly abated since [*Acton*] was decided in 1995. In fact, evidence suggests that it has only grown worse."); *id.* at 838 (Breyer, J., concurring) ("The school's drug testing program addresses a serious national problem by focusing upon demand, avoiding the use of criminal or disciplinary sanctions, and relying upon professional counseling and treatment.").

91. See *MILLS*, *supra* note 59, at 259–60. But see *Teannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 930 (N.D. Tex. 2001) (invalidating a school district plan that would subject all students to random drug testing after finding that the entire student body has an "increased expectation of privacy over that of student athletes" and recognizing the "near dearth of evidence demonstrating a need to be met by the search").

92. Meaning "in place of the parent," the *in loco parentis* doctrine is a common law principle that has been codified in many states and provides that an individual who is not a

of privacy among students.⁹³ As a result, the Court found a reason to apply a broad special needs exception in the school context. Yet, due to the school-specific nature of its rationale, *Earls* should not be read to mean that the Court is abandoning its push for a more constrained special needs exception.

The opinion in *Earls* notwithstanding, three of the four most recent special needs cases indicate a possible trend towards limiting the special needs exception. The decision in *Earls* continues to show that the Court can be persuaded that a special need exists, especially when there is an ongoing special relationship between the government and the population that is tested. Nonetheless, in *Ferguson* and *Chandler*, the Court clarified that two types of drug tests—those that directly involve law enforcement and those that do not serve a concrete need—cannot be justified through the special needs doctrine.⁹⁴ These opinions could suggest that the Court is ready to move even further in clarifying and limiting the special needs doctrine.⁹⁵

C. Current Framework of the Court's Special Needs Test

The framework that the Supreme Court currently uses in special needs cases is relatively clear. Courts must look for an actual government interest that is important enough to constitute a special need.⁹⁶ Usually, this special need involves public safety,⁹⁷ but it must

parent can assume all of the obligations that are incident to the parental relationship. See 28 AM. JUR. 2D *Proof of Facts* § 545 (1981). Additionally, those standing *in loco parentis* can also exercise all rights incident to the parental relationship. *Id.* Under and apart from statute, teachers and other educational employees may stand *in loco parentis*. See 78 C.J.S. *Schools and School Districts* § 503 (2008).

93. See Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 769–70 (2011) (arguing that safety and the *in loco parentis* role are the two justifications under which the Court has imposed the special needs doctrine); Walker Newell, *Tax Dollars Earmarked for Drugs? The Policy and Constitutionality of Drug Testing Welfare Recipients*, 43 COLUM. HUM. RTS. L. REV. 215, 226–27 (2011) (recognizing that *Earls* did not add much to the doctrine already established by *Acton*).

94. See *Ferguson v. City of Charleston*, 532 U.S. 67, 82–84 (2001); *Chandler v. Miller*, 520 U.S. 305, 318–19 (1997).

95. See Harrold, *supra* note 8, at 317–18 (arguing that *Chandler* “slowed the ‘special needs’ train” and “the Court, in *City of Indianapolis v. Edmond* and *Ferguson v. City of Charleston*, seemed to want to return the ‘special needs’ doctrine to its roots”).

96. See *Chandler*, 520 U.S. at 323 (“[W]here, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”).

97. See Newell, *supra* note 93, at 226–27 (arguing that *Chandler* requires public safety concerns to constitute a public safety need). But see *Marchwinski v. Howard* (*Marchwinski II*), 309 F.3d 330, 335 (6th Cir. 2002) (identifying public safety concerns as one of several

not be related to law enforcement.⁹⁸ Having found a special need, the court must then balance the government objective with the individual's interest in privacy.⁹⁹ When balancing, the court considers the government's need,¹⁰⁰ the intrusiveness of the search,¹⁰¹ and the individual's expectation of privacy.¹⁰² If the court considers the impracticability of individualized suspicion, it is usually mixed in as part of the balancing calculus.¹⁰³ A special relationship between the government and the person being tested could indicate that there is a diminished expectation of privacy, which would factor into the balancing.¹⁰⁴ For instance, courts have found a diminished expectation of privacy among public school students,¹⁰⁵ individuals on probation,¹⁰⁶ government workers,¹⁰⁷ and workers employed in a highly regulated field.¹⁰⁸

Although balancing has been the focal point in the special needs analysis, the recent attempts to recalibrate the special needs

special needs that the government had), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir.), *rev'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003). For further explanation of the procedural history of the *Marchwinski* litigation, see *infra* note 133.

98. See *Ferguson*, 532 U.S. at 84.

99. See, e.g., *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989); *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 616–18 (1989).

100. See, e.g., *Chandler*, 520 U.S. at 323.

101. Drug tests are relatively intrusive. See *Skinner*, 489 U.S. at 617 (“There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.”). However, the public interest can outweigh the individual's interest in privacy so long as there is no observation of the drug testing and the information from the test is not released. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995).

102. See, e.g., *Acton*, 515 U.S. at 658 n.2 (finding student-athletes had a diminished expectation of privacy); *Von Raab*, 489 U.S. at 672 (“We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a *diminished expectation of privacy* in respect to the intrusions occasioned by a urine test.” (emphasis added)).

103. See, e.g., *Acton*, 515 U.S. at 660.

104. See Newell, *supra* note 93, at 226–27 (arguing that *Chandler* requires public safety concerns to constitute a public safety need).

105. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 825 (2002); *Acton*, 515 U.S. at 664–65.

106. See *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

107. See *Von Raab*, 489 U.S. at 679 (upholding drug tests of custom officials); *O'Connor v. Ortega*, 480 U.S. 709, 725–26 (1987) (ruling that a search of a doctor's office at a state hospital was reasonable, citing the efficiency interests of the governmental employer as sufficient to dispense with the warrant and probable cause requirements).

108. See *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 633 (1989) (approving drug testing of railroad employees).

exception recognize that change is necessary for lower courts to apply the balancing test in a consistent manner.¹⁰⁹ The outline of the Court's analysis may be clear, but the implementation of that balancing test continues to be a problem, as the following Section demonstrates.

II. INCONSISTENT DECISIONS ON SUSPICIONLESS DRUG TESTING OF WELFARE RECIPIENTS

Although the Supreme Court has issued several opinions that appear to limit the special needs analysis, the inconsistency within this area of the law continues to cause problems as government actors try to determine when individualized suspicion is required and when it is excused. The suspicionless drug testing of welfare recipients is one area where the balancing test used within the Court's special needs precedents has not led to clear outcomes on the constitutionality of the government's testing schemes. This inconsistency means that lower courts and legislatures will continue to operate with uncertainty as they create and review systems that provide for suspicionless drug tests. This Part begins by detailing laws enacted in Florida, Georgia, and North Carolina that implemented drug testing of welfare recipients, and then considers the inconsistent judicial responses to such programs. Finally, this Part attempts to pinpoint the main areas of disagreement between proponents and opponents of suspicionless drug testing.

A. *Recent Laws Implementing Suspicionless Drug Testing of Welfare Recipients*

In recent years, Florida and Georgia enacted legislation that would require that all applicants for welfare benefits initially pay for and pass a drug test before receiving benefits.¹¹⁰ These laws state that the tests are to be minimally invasive and that the applicant must be given adequate notice that testing is a requirement for receiving Temporary Assistance for Needy Families ("TANF") benefits.¹¹¹ Nonetheless, both laws condition receipt of TANF benefits on the

109. See Bulhuis, *supra* note 74, at 1570; Harrold, *supra* note 8, at 317–18.

110. See FLA. STAT. ANN. § 414.0652(2) (West 2013); GA. CODE ANN. § 49-4-193(e) (2013). After enacting a regime of suspicionless drug testing similar to the one implemented by Florida, Georgia decided to delay the implementation of its program as it awaits the outcome of the legal challenges to the Florida system. See Rachel La Corte, *Bill Would Add Potential Drug Test for Welfare*, SEATTLE TIMES (Feb. 13, 2013), http://seattletimes.com/html/localnews/2020352594_apwawelfaredrugtesting2ndldwritethru.html.

111. See FLA. STAT. ANN. § 414.0652(2); GA. CODE ANN. § 49-4-193(e).

results of the drug test and require the individual to bear the cost of testing.¹¹² Thus, all applicants must comply with the requirement regardless of whether there is reason to suspect a participant of drug use or not.¹¹³

In 2013, the North Carolina General Assembly passed its own scheme for drug testing welfare recipients.¹¹⁴ The bill was different from the Florida and Georgia legislation, requiring “a drug test to screen each applicant for or recipient of Work First Program assistance whom the Department [of Health and Human Services] reasonably suspects is engaged in the illegal use of controlled substances.”¹¹⁵ For the purposes of the bill, reasonable suspicion could stem from a conviction or arrest related to illegal drugs or a determination by a qualified medical professional that the applicant is addicted to illegal drugs.¹¹⁶ However, all applicants are subject to “screening tools” used by the Department of Health and Human Services.¹¹⁷ There is no guidance in the legislation about the nature of these screening tools or how they will operate.¹¹⁸

Despite the mention of reasonable suspicion, Governor Pat McCrory subsequently vetoed the legislation.¹¹⁹ Governor McCrory

112. See FLA. STAT. ANN. § 414.0652(2); GA. CODE ANN. § 49-4-193(e); OFFICE OF ASSISTANT SEC’Y FOR PLANNING AND EVALUATION, *supra* note 3, at 5–6.

113. See FLA. STAT. ANN. § 414.0652(2); GA. CODE ANN. § 49-4-193(e).

114. H.B. 392, 2013–2014 Gen. Assemb., Reg. Sess. (N.C. 2013), *available at* <http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H392v6.pdf>.

115. *Id.* § 4.

116. Before this most recent enactment, North Carolina would only subject participants in its Work First Program to random and suspicionless drug testing if a qualified medical professional first determined that the person was addicted to drugs or alcohol. See N.C. GEN. STAT. § 108A-29.1(a) (2011), *amended by* 2013 N.C. Sess. Laws 417. The only individuals allowed to make such a determination were doctors or those with a specific certification from the North Carolina Department of Health and Human Services. *Id.*

117. See N.C. H.B. 392.

118. See *id.*

119. See *House Bill 392 Information/History (2013–2014 Session)*, N.C. GEN. ASSEMB., <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=hb+392&submitButton=Go> (last visited Feb. 16, 2014); see also Memorandum from Governor Pat McCrory to N.C. Gen. Assembly, Governor’s Objections and Veto Message (Aug. 15, 2013) [hereinafter *McCrory Veto Message*], *available at* <http://www.ncleg.net/Sessions/2013/h392Veto/letter.pdf> (expressing Governor McCrory’s desire to prevent drug use among welfare recipients but disagreeing with the North Carolina General Assembly on the appropriate means of preventing such drug use); Arthur Delaney, *Pat McCrory Vetoes Welfare Drug Test Bill*, HUFFINGTON POST (Aug. 16, 2013, 12:29 AM), http://www.huffingtonpost.com/2013/08/15/pat-mccrory-pat-mccrory-welfare-drug-test_n_3677667.html (reporting on Governor McCrory’s veto and his executive order to enforce the bill’s requirement that the North Carolina Department of

explained his veto, in part, by expressing skepticism that “reasonable suspicion” under the bill does not match the requirements of the Fourth Amendment.¹²⁰ Additionally, McCrory emphasized the difficulty of ensuring consistent application of the law in each of the state’s 100 counties.¹²¹ Over Governor McCrory’s objections, the North Carolina General Assembly overrode the veto.¹²² The system of drug tests is set to begin on August 1, 2014.¹²³

These legislative actions reflect a larger groundswell of bills that call for suspicionless searches in other states. Writing in 2011, Professor Jordan C. Budd collected empirical data on the scope of this legislative trend toward suspicionless drug testing of welfare recipients.¹²⁴ His research reported that twenty-seven legislatures had proposed a total of forty-nine bills that would have conditioned government benefits on a suspicionless drug test, with ten legislatures—those of Arkansas, California, Illinois, Indiana, Kentucky, Minnesota, Mississippi, Oklahoma, Pennsylvania, and Tennessee—producing multiple bills that required suspicionless testing.¹²⁵ Out of the forty-nine bills allowing suspicionless drug testing, only thirteen bills proposed during this period would have screened for individualized suspicion of drug use before forcing applicants to submit to a drug test.¹²⁶

This trend has its roots in the congressional authorization of such testing schemes during the 1996 welfare reform debate.¹²⁷ Congress declared, “Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled

Health and Human Services check welfare and food stamp applicants’ criminal histories and explore the possibility of sharing that information with law enforcement).

120. McCrory Veto Message, *supra* note 119; *see also* U.S. CONST. amend. IV (protecting the people “against unreasonable searches” and requiring warrants to be supported by probable cause).

121. *See* McCrory Veto Message, *supra* note 119.

122. *See* 2013 N.C. Sess. Laws 417 (codified at N.C. GEN. STAT. §§ 108A-26.1, 108A-26.2, 108A-29.1, 114-19.34 (2013)); *House Bill 392 Information/History (2013–2014 Session)*, N.C. GEN. ASSEMB., <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=hb+392&submitButton=Go> (last visited Feb. 16, 2014).

123. 2013 N.C. Sess. Laws 417, § 8.

124. *See* Budd, *supra* note 93, at 784–85.

125. *See id.*

126. *See id.*

127. For broader coverage of the 1996 welfare reform debate and its effects, *see* Isabel V. Sawhill, R. Kent Weaver & Ron Haskins, *Welfare Reform Reauthorization: An Overview of Problems and Issues*, BROOKINGS INST. (Jan. 2001), available at <http://www.brookings.edu/research/papers/2001/01/01poverty-haskins02>.

substances.”¹²⁸ Although Congress believed states could test welfare recipients, it is not clear whether states can constitutionally test without suspicion. Some courts have struggled when asked to rule on this issue,¹²⁹ and as this Comment argues below, legislators will continue introducing these bills as long as the special needs exception focuses on weighing the importance of the government interest against the individual interest in privacy rather than testing as a threshold matter whether individualized suspicion is impracticable.¹³⁰

B. Inconsistent Responses by Courts to Suspicionless Drug Tests

The inconsistency with which lower courts have applied the special needs analysis was on display in one of only two decisions from a federal appeals court on the constitutionality of suspicionless drug tests of welfare recipients. In *Marchwinski v. Howard*, the Eastern District of Michigan (“*Marchwinski I*”)¹³¹ and a panel of the Sixth Circuit (“*Marchwinski II*”)¹³² disagreed on whether a Michigan law that would test all welfare recipients for illegal drugs was constitutional under the Fourth Amendment. The Sixth Circuit, sitting en banc, issued an evenly-divided,¹³³ four-sentence opinion that reversed the Sixth Circuit panel and reinstated the district court’s injunction.¹³⁴ Instead of slamming the door on suspicionless drug tests of welfare recipients, the conflicting opinions in *Marchwinski* seemed to imply that the issue was a close one and that a constitutional regime of suspicionless drug tests was possible.¹³⁵

128. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, Title IX, § 902 (codified at 21 U.S.C. § 862b (2012)).

129. See *infra* Part II.B (discussing the convoluted path of *Marchwinski v. Howard*, where the Sixth Circuit reversed an injunction placed on a system of suspicionless drug testing in Michigan only to have that decision vacated by an evenly-divided Sixth Circuit sitting en banc).

130. See *infra* Part III.

131. *Marchwinski v. Howard* (*Marchwinski I*), 113 F. Supp. 2d 1134 (E.D. Mich. 2000) (finding that the suspicionless drug tests violated the Fourth Amendment), *rev’d*, *Marchwinski II*, 309 F.3d 330 (6th Cir. 2002), *reh’g en banc granted, judgment vacated*, *Marchwinski III*, 319 F.3d 258 (6th Cir.) (en banc), *aff’d by an equally divided court*, *Marchwinski IV*, 60 F. App’x 601 (6th Cir. 2003) (en banc).

132. *Marchwinski II*, 309 F.3d 330 (6th Cir. 2002), *reh’g en banc granted, judgment vacated*, *Marchwinski III*, 319 F.3d 258 (6th Cir.) (en banc), *rev’d by an equally divided court*, *Marchwinski IV*, 60 F. App’x 601 (6th Cir. 2003) (en banc).

133. Under Sixth Circuit rules, granting an en banc petition vacates the previous decision by the Sixth Circuit. See 6th Cir. R. 35(b). Since the en banc decision was then evenly divided, the Sixth Circuit affirmed the district court.

134. See *Marchwinski IV*, 60 F. App’x 601 (6th Cir. 2003).

135. See Newell, *supra* note 93, at 233 (arguing that *Marchwinski* should have been but was not a “death knell” in the efforts to submit welfare recipients to suspicionless drug tests).

The Eleventh Circuit is the only other federal appeals court to consider whether suspicionless drug testing of welfare recipients is constitutional. In *Lebron v. Secretary, Florida Department of Children and Families* ("Lebron II"),¹³⁶ the Eleventh Circuit found that the district court in *Lebron v. Wilkins* ("Lebron I")¹³⁷ did not abuse its discretion by enjoining Florida's suspicionless testing of welfare recipients.¹³⁸ It is possible that the Eleventh Circuit's recent opinion may have cleared up the issue.¹³⁹ However, the case's procedural posture means that the Eleventh Circuit has not ruled on its ultimate merits.¹⁴⁰ Instead, the court only considered whether the trial court "abused its discretion in concluding that Lebron is substantially likely to succeed in establishing that Florida's drug testing regime for TANF applicants violates his Fourth Amendment rights."¹⁴¹ Although the holding suggests that the Eleventh Circuit would likely find that the drug testing at the heart of the Florida program is unconstitutional, this attenuated analysis does not deliver the definitive answer on this issue that lower courts need.

After the federal courts enjoined the program of suspicionless drug testing in Florida, there was a tremendous outcry from advocates of the program.¹⁴² The fervor seen in Florida after the injunction demonstrates that there are widely divergent opinions on

136. 710 F.3d 1202 (11th Cir. 2013).

137. 820 F. Supp. 2d 1273 (M.D. Fla. 2011), *aff'd*, *Lebron II*, 710 F.3d 1202 (11th Cir. 2013).

138. *See Lebron II*, 710 F.3d at 1211.

139. *Cf.* Steven Yaccino, *A Faltering Approach to Denying Public Aid*, N.Y. TIMES, Oct. 25, 2013, at A10 (recognizing that some states are beginning to search for nuanced ways to drug test welfare recipients without relying on suspicionless drug testing).

140. *See Lebron II*, 710 F.3d at 1218 (Jordan, J., concurring) ("We are not making any definitive legal pronouncements about the ultimate constitutionality of Fla. Stat. § 414.0652. We are reviewing the grant of a preliminary injunction on an undeveloped record, and therefore are considering only the district court's determination that Mr. Lebron is likely to succeed on the merits of his Fourth Amendment claim." (citations omitted)).

141. *See id.* at 1206 (majority opinion).

142. *See* Press Release, Governor Rick Scott of Fla., Governor Scott: We Will Appeal Welfare Drug Testing to Supreme Court (Feb. 26, 2013) [hereinafter Scott Press Release], available at <http://www.flgov.com/2013/02/26/governor-scott-we-will-appeal-welfare-drug-testing-to-supreme-court/> ("The court's ruling today is disturbing. Welfare is 100 percent about helping children. Welfare is taxpayer money to help people looking for jobs who have children. Drug use by anyone with children looking for a job is totally destructive. This is fundamentally about protecting the wellbeing of Florida families. We will protect children and families in our state, and this decision will be appealed to the Supreme Court."); *cf.* Robert Rector, *Welfare Program Should Promote Self-Sufficiency*, U.S. NEWS (Dec. 15, 2011), <http://www.usnews.com/debate-club/should-welfare-recipients-be-tested-for-drugs/welfare-programs-should-promote-self-sufficiency> (extolling the virtues of programs such as the Florida drug testing requirement).

whether a special need justifies suspicionless drug testing.¹⁴³ Comparing the opinions from the district and appellate courts in the Michigan litigation and the arguments from either side in the Florida litigation indicates where the uncertainty lies within the current special needs analysis. The following subsections lay out where these parties have disagreed. The first subsection exposes the discord over what constitutes a special need, and the second subsection exposes the discord over when and why a group of people has a diminished expectation of privacy.

1. Do the Goals of the Government's Program Constitute a Special Need?

One major area of confusion in special needs jurisprudence involves how the government proves the existence of a special need in order to justify a suspicionless search. The arguments in favor of suspicionless drug testing of welfare recipients can be grouped into several themes, such as ensuring the fiscal health of the state;¹⁴⁴ protecting the health of those on welfare, particularly, the health of those individuals' children;¹⁴⁵ and moving individuals out of dependency.¹⁴⁶ The Sixth Circuit in *Marchwinski II* accepted all of these arguments,¹⁴⁷ but the federal courts in the *Lebron* litigation

143. Compare 2011 Fla. Laws 81, § 1 (codified at FLA. STAT. ANN. § 414.0652 (West 2013)) (enacting suspicionless drug testing of welfare recipients), with *Lebron I*, 820 F. Supp. 2d 1273, 1292–93 (M.D. Fla. 2011) (enjoining the law as a preliminary matter after finding that Florida had not demonstrated a special need that would justify suspicionless drug testing), *aff'd*, *Lebron II*, 710 F.3d 1202 (11th Cir. 2013).

144. See Kimberly Yee, Opinion, *Opposing View: No Drug Test, No Welfare*, USA TODAY (Mar. 18, 2012, 7:23 PM), <http://usatoday30.usatoday.com/news/opinion/story/2012-03-18/drug-tests-welfare-Yee/53620412/1> (presenting an argument by Arizona legislator Kimberly Yee that drug testing makes fiscal sense).

145. See Horace Cooper, *Drug Testing of Welfare Recipients Is Sound, Sensible and Constitutional*, NAT'L POL'Y ANALYSIS (Nov. 2011), <http://www.nationalcenter.org/NPA627.html> (arguing that drug testing is in the best interests of Florida's children).

146. See Budd, *supra* note 93, at 775–76 (presenting short excerpts from the Congressional Record where members of Congress spoke about the problem of drug use among those receiving government benefits); Robert Wilonsky, *Perry, Dewhurst Want to Drug Test Texans Collecting Welfare and Unemployment Benefits*, DALL. MORNING NEWS (Nov. 13, 2012, 1:16 PM), <http://trailblazersblog.dallasnews.com/2012/11/perry-dewhurst-want-to-drug-test-texans-collecting-welfare-and-unemployment-benefits.html/> (reporting Texas Lieutenant Governor Dewhurst's belief that it is "beneficial to welfare recipients for us to reform and strengthen our job training requirements and require them to be drug-free so that we can help them get back on their feet and back to work").

147. See *Marchwinski II*, 309 F.3d 330, 333–37 (6th Cir. 2002), *reh'g en banc granted*, *judgment vacated*, *Marchwinski III*, 319 F.3d 258 (6th Cir.) (en banc), *rev'd by an equally divided court*, *Marchwinski IV*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

flatly rejected them.¹⁴⁸ These divergent results indicate that lower courts have little guidance to determine if the government's objectives are "special needs" within the Supreme Court's definition, and legislators will continue to believe that they have the authority to conduct suspicionless drug testing of welfare recipients.

First, courts are divided on whether the government must put forth a real public safety concern in order for its objective to constitute a special need. After *Chandler*, there has been considerable disagreement on whether a safety concern is necessary or is just one factor in calculating whether a special need exists.¹⁴⁹ In *Marchwinski II*, the Sixth Circuit held that safety was not required; it was just one of several factors that the court could consider.¹⁵⁰ In contrast, the courts in *Lebron I* and *Marchwinski I* ruled that the special need must concern public safety, even over the objections of the States that they did not have to establish a public safety need.¹⁵¹ If safety is the only reason for using the special needs exception, legislators' arguments that they can conduct suspicionless searches of welfare recipients would be tenuous because there are no pressing safety concerns in that context.¹⁵² But if safety is only one of several factors that can justify suspicionless drug tests, supporters of suspicionless searches of welfare recipients feel they have compelling justifications to support such forms of testing.¹⁵³

Moreover, the evidentiary standard employed by the courts in *Marchwinski II* and in the *Lebron* litigation appears to be different. In *Lebron I* and *Marchwinski II*, the States put forward nearly identical justifications for drug testing: overcoming dependence, protecting children, ensuring that public money is not used to

148. See *Lebron I*, 820 F. Supp. 2d 1273, 1292 (M.D. Fla. 2011), *aff'd*, *Lebron II*, 710 F.3d 1202 (11th Cir. 2013); *Lebron II*, 710 F.3d at 1211–14.

149. See Bulthuis, *supra* note 74, at 1556. Different panels of the Fifth Circuit also considered this question within the same term. See *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 856–57 (5th Cir. 1998) (finding that preventing injuries at work among school teachers did not justify suspicionless drug testing because there was not a sufficient nexus between workplace injuries and impairment); *Aubrey v. Sch. Bd. of Lafayette Parish*, 148 F.3d 559, 564–65 (5th Cir. 1998) (implicitly distinguishing *United Teachers of New Orleans* and finding that a suspicionless drug test of a custodian was justified because of the dangerous chemicals and machinery that the custodian used and the threat to students it posed).

150. See *Marchwinski II*, 309 F.3d at 334–35.

151. See *Lebron I*, 820 F. Supp. 2d at 1287–88; *Marchwinski I*, 113 F. Supp. 2d 1134, 1139–41 (E.D. Mich. 2000), *rev'd*, *Marchwinski II*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted*, *judgment vacated*, *Marchwinski III*, 319 F.3d 258 (6th Cir.) (en banc), *aff'd by an equally divided court*, *Marchwinski IV*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

152. See *Lebron I*, 820 F. Supp. 2d at 1287–90; *Marchwinski I*, 113 F. Supp. 2d at 1143.

153. See *Marchwinski II*, 309 F.3d at 335–36.

purchase drugs, and limiting the public health risk posed by crimes associated with the illicit drug use and trafficking.¹⁵⁴ The court in *Marchwinski II* readily accepted these goals as special needs “beyond the normal need for law enforcement.”¹⁵⁵ In doing so, the court accepted the government’s objective without much scrutiny as long as the government’s interest qualified as a special non-law enforcement need.¹⁵⁶ Evaluating the same objectives, the *Lebron I* court required that the government present evidence that the testing responded to a “concrete danger” and would “actually redress the problem that gave rise to the special need.”¹⁵⁷ This evidentiary standard appears to be a much higher burden than that required in *Marchwinski II*, and the government was unable to meet that high burden in *Lebron I*.¹⁵⁸

Following along with the question of the correct standard of review, courts have struggled to define the appropriate amount and source of data that can prove there is a drug use problem substantial enough to justify suspicionless drug testing. The *Lebron I* court’s skepticism of the government’s claims stemmed from the fact that Florida conducted a demonstration project in 2001 and did not find many drug users among those who receive government benefits.¹⁵⁹ However, the *Lebron I* court went further, dismissing other studies the State put forth that suggested a nationwide drug problem.¹⁶⁰ The *Lebron I* court found that all of this data was irrelevant, pointing out the age of the data along with the differences in demography and

154. *Lebron I*, 820 F. Supp. 2d at 1286; *Marchwinski II*, 309 F.3d at 335–36.

155. *Marchwinski II*, 309 F.3d at 335–36 (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829 (2002)) (internal quotation marks omitted).

156. Cf. *The Supreme Court, 1996 Term — Leading Cases: Suspicionless Drug Testing*, 111 HARV. L. REV. 197, 298–99 (1997) (arguing that the balancing test provides little resistance to the government’s alleged special need).

157. *Lebron I*, 820 F. Supp. 2d at 1289; see also *Chandler v. Miller*, 520 U.S. 305, 318–19 (1997) (recognizing the necessity of a concrete danger before removing individualized suspicion).

158. See *Lebron I*, 820 F. Supp. 2d at 1288–90.

159. See *id.* at 1286–88; see also *id.* at 1276–77 (explaining the results of the Florida Demonstration Project); 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 J. HEALTH & SOC. POL’Y, no. 1, 2003, at 39, 39–48 (same). During the demonstration project, 5.1% of the screened welfare recipients tested positive for drug use, which is less than the 8.13% of the general population that uses drugs. See *Lebron I*, 820 F. Supp. 2d at 1277; see also Budd, *supra* note 93, at 776 (recognizing that the correlation between poverty and drug addiction is “quite weak” but that the empirical data regarding drug abuse has not been a major factor in the debates on the issue). Whether it was based on this finding or not, the Florida legislature decided not to implement drug testing for all welfare recipients. See *Lebron I*, 820 F. Supp. 2d at 1278.

160. See *Lebron I*, 820 F. Supp. 2d at 1286–87.

geography between the study's population and the group subject to tests under the Florida law.¹⁶¹

While the *Lebron I* court criticized the data put forward by the State as irrelevant for identifying the drug problem in Florida, the Supreme Court in *Earls* accepted the government's use of nationwide data to prove that there was a drug problem among one school district's high school students.¹⁶² The Court found that this nationwide data, combined with a few anecdotes of possible drug use among the school district's students,¹⁶³ made it reasonable for the school district to enact a system of suspicionless drug tests.¹⁶⁴ With some cases requiring specific data to justify a system of drug tests and others finding nationwide data and local anecdotes sufficient, courts are left to struggle with a number of questions regarding what empirical data can be used to justify broad suspicionless searches, such as: (1) Should the court accept national data or must it be local? (2) How recent must data be to be relevant? (3) Can state officials extrapolate the severity of the drug problem in their area based on national statistics or dated research?

Complicating matters further, the Supreme Court in *Earls* went on to assert that evidence of a demonstrated drug problem was helpful but not necessary in all cases for establishing a special need.¹⁶⁵ The *Earls* Court noted that evidence of a demonstrated drug problem would merely "shore up" the government's asserted special need for stopping drug use.¹⁶⁶ Armed with evidence of a nationwide drug problem, the *Earls* Court allowed the school district to test all students involved in extracurricular activities without any proof that

161. *See id.*

162. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. *Earls*, 536 U.S. 822, 834 (2002) ("Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.").

163. *See id.* at 834-35 ("Additionally, the School District in this case has presented specific evidence of drug use at Tecumseh schools. Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the 'drug situation.' " (citations omitted)).

164. *See id.* at 834-36.

165. *See id.* at 835 ("We have recognized, however, that '[a] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime . . .'" (alterations in original) (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997))).

166. *See id.* (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

there was a drug problem among the specific group of students.¹⁶⁷ The Court cited *Chandler* for the proposition that evidence of a drug problem was helpful but not necessary.¹⁶⁸ Yet, in the sentences following the proposition cited by the *Earls* Court, the *Chandler* Court invalidated a set of suspicionless drug tests because the government did not establish a drug-use problem among those who were to be tested.¹⁶⁹ The *Chandler* Court found that there was no special need present to justify Georgia's suspicionless drug testing of elected officials because, in part, the State did not assert any evidence of a drug problem among the State's elected officials.¹⁷⁰ Based on the conflicting nature of these cases, lower courts are left to struggle with whether or not the State must provide evidence of an actual drug problem among those it aims to test.

In addition to arguments over appropriate sources of supportive data and whether such data is necessary, part of the disconnect between those who support and those who oppose suspicionless drug testing could stem from deeply engrained assumptions about poverty and drug use. Many legislators assume that preventing drug use among the poor is a critical government objective despite data showing very little correlation between drug use and receiving welfare benefits.¹⁷¹ Professor Jordan Budd lays out three premises that seem to undergird the desire to submit welfare recipients to suspicionless drug tests: (1) the poor are addicted to drugs, which prevents them from escaping poverty; (2) the State can—and some would say should—exert dominion over the lives of welfare recipients; and (3) the efficacy of drug testing programs in reducing drug use is irrelevant.¹⁷² These assumptions lead legislators and other advocates to believe a special need is present.¹⁷³ However, legislators

167. See *id.* ("The School District has provided sufficient evidence to shore up the need for its drug testing program.").

168. See *id.* (citing *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

169. See *Chandler v. Miller*, 520 U.S. 305, 320–22 (1997).

170. *Id.* at 321–22.

171. See Budd, *supra* note 93, at 775–78 (describing the weak links between drug abuse and poverty). For example, Professor Budd noted data from a National Alcohol Epidemiologic Survey that found that "the rate of drug abuse and/or dependence among welfare recipients ranged between 1.3 and 3.6 percent in comparison to a rate of 1.5 percent across the broader population." *Id.* at 776–77.

172. See *id.* at 775–81.

173. Cf. Michael S. Vaughn & Rolando V. del Carmen, "Special Needs" in *Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. C.R. L.J. 203, 220–23 (1993) ("[D]anger looms that the Court, serving an ideological agenda and using the convenience of a balancing test, may effectively negate decades of Fourth Amendment precedent and case law by carving out a few broad exceptions that can be misinterpreted and misapplied by lower courts.").

have been unable to prove that these assumptions are supported by empirical data.¹⁷⁴ The disconnect between what legislators believe and what they can prove leads to greater confusion as to why some courts accept the State's goal of limiting drug use as a special need and some do not.

2. How Do Courts Determine Whether a Group of Individuals Has a Diminished Expectation of Privacy?

Along with the question of what constitutes a special need, lower courts have also been split on the factors that prove that a group has a diminished expectation of privacy. An individual's interest in privacy is one of the factors that courts balance to determine whether the special needs exception excuses individualized suspicion.¹⁷⁵ With conflicting ideas of who has a diminished expectation of privacy, lower courts cannot consistently apply the special needs test. As explained above, the Supreme Court has identified several groups that have a diminished expectation of privacy, including government employees, probationers, and high school students.¹⁷⁶ As courts have considered whether welfare recipients have a diminished expectation of privacy, proponents of suspicionless drug testing of welfare recipients have attempted to analogize welfare recipients to these other groups.

For instance, the court in *Marchwinski II* analogized welfare recipients to the railroad employees in *Skinner* and found that, like the railroad industry, "welfare assistance is a very heavily regulated area of public life with a correspondingly diminished expectation of privacy."¹⁷⁷ Similarly, the State of Florida argued that, just like the parental role it plays when children are in school, the state

174. See, e.g., *Lebron I*, 820 F. Supp. 2d 1273, 1287–88 (M.D. Fla. 2011) (rejecting the Florida legislature's evidence in support of its alleged special needs), *aff'd*, *Lebron II*, 710 F.3d 1202 (11th Cir. 2013).

175. See *supra* Part I.C.

176. See *supra* notes 104–08 and accompanying text.

177. See *Marchwinski II*, 309 F.3d 330, 337 (6th Cir. 2002) (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 627–28 (1988); *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 379 (6th Cir. 1998)), *reh'g en banc granted, judgment vacated*, *Marchwinski III*, 319 F.3d 258 (6th Cir.) (en banc), *rev'd by an equally divided court*, *Marchwinski IV*, 60 F. App'x 601 (6th Cir. 2003) (en banc); see also *To Receive Welfare, Should Drug Test Be Required?*, PBS NEWSHOUR (Mar. 20, 2012), http://www.pbs.org/newshour/bb/law-jan-june12-drugtesting_03-20/ ("It's no different as far as an invasion of privacy as it is in the private sector or in government as a condition of employment. We have to do drug tests for that. I don't see any difference in having to do drug tests for a condition of your welfare or your TANF payments." (quoting Colorado Representative Jerry Sonnenberg)).

government steps into the parental role when it provides welfare benefits to children.¹⁷⁸ Florida argued that it should be allowed to subject welfare recipients to suspicionless drug testing based on this *in loco parentis* argument¹⁷⁹—the same reason the government used to justify testing students in *Acton* and *Earls*.¹⁸⁰ While the courts rejected this argument in the *Lebron* litigation,¹⁸¹ proponents of suspicionless drug testing believe there are obvious connections.¹⁸² The courts may keep rejecting these arguments, but the assumption that welfare recipients have a special relationship with the government, similar to public employees, permits proponents of suspicionless drug testing to argue that welfare recipients have a diminished expectation of privacy.

Although federal courts enjoined the Florida law and the Sixth Circuit eventually reinstated the injunction against the Michigan law,¹⁸³ uncertainty surrounding the special needs doctrine will remain unresolved until the Supreme Court steps in. The Court could provide a more certain basis for deciding special needs cases by clarifying the judicial role in allowing suspicionless drug testing of welfare recipients. The *Lebron* courts found it helpful to ask whether individualized suspicion was impracticable before diving into the

178. See *Lebron I*, 820 F. Supp. 2d at 1289.

179. See *id.*

180. See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. *Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–56 (1995).

181. See *Lebron II*, 710 F.3d 1202, 1213 n.9 (11th Cir. 2013) (“State officials are not in the same position vis a vis either the adult or child participants in the TANF program and thus, the child welfare-related special need identified in *Earls* and [*Acton*] is inapplicable here.”).

182. See, e.g., Scott Press Release, *supra* note 142 (“Welfare is 100 percent about helping children. Welfare is taxpayer money to help people looking for jobs who have children. Drug use by anyone with children looking for a job is totally destructive. [The Florida system of suspicionless drug tests] is fundamentally about protecting the wellbeing of Florida families. We will protect children and families in our state”); David Vitter, *Government Programs Should Not Encourage Lifelong Dependency*, U.S. NEWS (Dec. 15, 2011), <http://www.usnews.com/debate-club/should-welfare-recipients-be-tested-for-drugs/government-programs-should-not-encourage-lifelong-dependency> (setting out the views of David Vitter, a current U.S. Senator and Louisiana gubernatorial candidate). Throughout the Supreme Court’s own discussion of the special needs exception, similar paternalistic themes emerged. For instance, the Court analogized how a warrant requirement would interfere with a parent’s discipline of a child as it justified suspicionless searches of probationers’ homes. See *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987). Moreover, it reiterated that, like parents, probation officers have the probationer’s best interest in mind. *Id.* However, arguments that the government can simply step into a parental role should be treated with extreme wariness, as they could potentially justify a host of government intrusions into citizens’ everyday lives.

183. See *supra* notes 131–41 and accompanying text.

balancing of public and private interests.¹⁸⁴ The Supreme Court could take *Lebron*'s lead on the impracticability test to avoid arbitrary application of the special needs doctrine by lower courts. In doing so, the Court would prevent future controversies over the application of the special needs doctrine.

While not a complete fix to the problem, subjecting the impracticability component of the Court's existing test to more heightened scrutiny could lead to a more consistent and efficient special needs analysis. The following Section explores the arguments for and against a more robust impracticability standard and demonstrates how the impracticability standard may be used to more definitively respond to calls for suspicionless drug tests of welfare recipients.

III. CLARIFYING THE SPECIAL NEEDS EXCEPTION BY EMPHASIZING IMPRACTICABILITY

In response to the inconsistency with which the special needs doctrine has been applied, a number of scholars have called for reform. Some have argued for a complete overhaul or outright abandonment of the special needs exception.¹⁸⁵ Others have pushed for reinforcing or possibly reimagining various elements within the current test for the special needs exception.¹⁸⁶ In line with the latter group of scholars, this Comment argues that merely emphasizing the fundamental question of whether a search based on individualized suspicion would be impracticable under the circumstances could create a more constructive and predictable analysis that would remove some of the inconsistency in the debate over drug testing welfare recipients.

Impracticability should serve as a threshold question in the special needs analysis—that is, courts should first consider whether individualized suspicion is impracticable in a situation before balancing the government and private interests at stake. If the

184. See *Lebron I*, 820 F. Supp. 2d 1273, 1291–92 (M.D. Fla. 2011) (rejecting the Florida legislature's evidence in support of its alleged special needs), *aff'd*, *Lebron II*, 710 F.3d 1202 (11th Cir. 2013).

185. See, e.g., Robert S. Logan, Note, *The Reverse Equal Protection Analysis: A New Methodology for "Special Needs" Cases*, 68 GEO. WASH. L. REV. 447, 467–98 (2000) (arguing for a "reverse equal protection analysis" that would subject all searches to intermediate scrutiny unless the search was part of a class of searches that was subjected to only rational basis review due to the class's diminished expectation of privacy).

186. See, e.g., Harrold, *supra* note 8, at 339 ("If the 'special needs' doctrine is to continue to exist, the Court should continue the trend in [*Edmond*] and *Ferguson* and reign the doctrine back to its original 'root' application.").

government can accomplish its objective using individualized suspicion, a court should strike down any effort to search individuals without a warrant or individualized suspicion.¹⁸⁷ The following subsections explain why an analysis that begins with heightened scrutiny of whether suspicion-based searches are impracticable—before balancing individual and government interests—will lead to a more consistent application. This impracticability analysis can be applied efficiently in new situations and will be more in line with the development of the special needs exception.

A. How the Impracticability Test Would Work as a Threshold Question

In the Supreme Court's special needs cases, it identified instances when individualized suspicion is impracticable.¹⁸⁸ Thus, a court encountering a program of suspicionless searches would question if these circumstances—compiled by Justice O'Connor in her *Acton* dissent—exist:

- (1) The circumstances are too chaotic to obtain individualized suspicion,¹⁸⁹
- (2) The level of scrutiny that is required of this kind of person, either because of their safety-security job responsibilities, is not

187. The district court in *Lebron I* made a similar argument as it enjoined the Florida law. See *Lebron I*, 820 F. Supp. 2d at 1291. The court explained part of the rationale for its holding by noting,

The State has made no showing that it would be 'impracticable' to meet these prerequisites [a showing of reasonable suspicion or probable cause] in the context of TANF recipients. Any suggestion that it would be impracticable should be based on some evidentiary showing, and any such showing would likely be 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.

Id.; see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting) (criticizing the majority for abandoning an impracticability standard); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1214–15 (10th Cir. 2003) (finding that there was no inherent impracticability in complying with ordinary Fourth Amendment norms before conducting physical examination of Head Start students without parental consent or notice).

188. See *Acton*, 515 U.S. at 674–76 (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674 (1989); *Skinner v. Ry. Execs.' Labor Ass'n*, 489 U.S. 602, 631 (1989); *Bell v. Wolfish*, 441 U.S. 520, 559–60 n.40 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 537 (1967); *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974)).

189. See *Skinner v. Ry. Execs.' Labor Ass'n*, 489 U.S. 602, 631 (1989) (asserting that the scene following a serious train accident would make it impossible to test for drug use).

possible (i.e., it is impossible to monitor the person as closely as that person should be monitored);¹⁹⁰

(3) The violation has no observable characteristics;¹⁹¹

(4) The observation necessary to develop individualized suspicion would violate the confidentiality that is part of the government program;¹⁹²

(5) There is not enough time for the government to develop individualized suspicion;¹⁹³

(6) There is no way to develop individualized suspicion reliably;¹⁹⁴ or

(7) One undetected instance of wrongdoing could harm a great number of people.¹⁹⁵

If these criteria are present, the court can conclude that individualized suspicion is impracticable and move on to consider whether the government has a special need that outweighs the individual's interest in privacy.¹⁹⁶ However, if these or similar conditions are absent, the court would find that the government's searches cannot proceed without individualized suspicion.¹⁹⁷ The

190. See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674 (1989) (finding that customs officials could be searched without individualized suspicion due to the dangerous nature of drug interdiction).

191. See *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 537 (1967) (finding it impracticable to rely on individualized suspicion of housing code violations before authorizing inspections).

192. See *Bell v. Wolfish*, 441 U.S. 520, 559–60 n.40 (1979) (recognizing that the government must search visitors before a prison visit because observing prisoners during a prison visit would create an "obvious disruption of the confidentiality and intimacy that these visits are intended to afford").

193. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (recognizing that "the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.").

194. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002) (arguing that individualized suspicion would place too much of a burden on the educational professionals and put them in an adversarial relationship with the student).

195. See, e.g., *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 628 (1989) (recognizing the "disastrous consequences" of even one train wreck caused by a drug- or alcohol-impaired operator); *Camara*, 387 U.S. at 535 (identifying the threat of "fires and epidemics [that] ravage large urban areas").

196. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting) ("[T]he individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual."); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1214 (10th Cir. 2003) ("The premise of the 'special needs' doctrine is that these are cases in which compliance with ordinary Fourth Amendment requirements would be 'impracticable.'").

197. See, e.g., *Harrold*, *supra* note 8, at 339–40 (recognizing that impracticability is the sine qua non of the special needs analysis).

Supreme Court in *Chandler* recognized this distinction, as it sought to distinguish the constitutional drug testing of customs officials in *Von Raab* and Georgia's unconstitutional drug testing of candidates for designated state offices.¹⁹⁸ The *Chandler* Court noted that the customs officials in *Von Raab* were involved in a dangerous profession and were not subject to day-to-day scrutiny,¹⁹⁹ one of the circumstances justifying suspicionless searches listed in O'Connor's *Acton* dissent.²⁰⁰ In contrast, the relentless scrutiny given elected officials meant that individualized suspicion was possible, and as a result, the suspicionless drug testing of elected officials was unconstitutional.²⁰¹ Although the *Chandler* Court did not specify that impracticability was a threshold question that it considered, *Chandler* demonstrates how the impracticability question may help courts distinguish between cases where suspicionless drug testing is justified and schemes where it is not justified.

If a court were to apply this threshold question to the system of suspicionless drug testing of welfare recipients, the court would find that the factors listed in O'Connor's *Acton* dissent show that relying on individualized suspicions is not impracticable in these circumstances.²⁰² Specifically, the process of applying for welfare benefits does not happen in chaotic circumstances; drug use has observable characteristics; asking questions and pulling criminal records are similar to the requirements that welfare recipients already face; and one person's drug use would not create a major public safety problem. Therefore, a court could confidently conclude that individualized suspicion in these circumstances is not impracticable.²⁰³

In addition, the court could look at whether other jurisdictions found that individualized suspicion either is or is not impracticable. A number of jurisdictions already require individualized suspicion before subjecting an individual to drug tests.²⁰⁴ These jurisdictions

198. See *Chandler v. Miller*, 520 U.S. 305, 321 (1997).

199. *Id.*

200. See *supra* notes 188, 190 and accompanying text.

201. See *Chandler*, 520 U.S. at 321.

202. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 674–76 (1995) (O'Connor, J., dissenting) (collecting cases that identified when individualized suspicion was impracticable); *supra* notes 189–95 and accompanying text (listing the factors).

203. See *Lebron I*, 820 F. Supp. 2d 1273, 1291 (M.D. Fla. 2011), *aff'd*, *Lebron II*, 710 F.3d 1202 (11th Cir. 2013).

204. See ARIZ. REV. STAT. ANN. § 46-294(3) (2005 & Supp. 2011) (requiring that each adult recipient be screened and tested if “the department has reasonable cause to believe [the recipient] engages in the illegal use of controlled substances”); MO. ANN. STAT. § 208.027 (West 2010 & Supp. 2012); OKLA. STAT. ANN. tit. 56, § 230.52 (West 2004 &

establish reasonable suspicion using various mechanisms.²⁰⁵ For instance, Arizona relies on a screening questionnaire to develop reasonable suspicion of drug use before it subjects an individual to a drug test.²⁰⁶ Until recently, North Carolina subjected a participant in its Work First Program to random drug testing only if a doctor or an individual with a specific certification diagnosed the participant as an addict.²⁰⁷ These states found that they could accomplish the purposes of their welfare system without resorting to suspicionless drug testing. Of course, the federalist system means that the experiences and judgments of one state do not apply to other states. Still, states have found ways to accomplish their goals without abandoning individualized suspicion.²⁰⁸ If the government wants to enact suspicionless drug testing, it should bear the burden of proving that individualized suspicion is impracticable,²⁰⁹ and laws from other states that base drug tests of welfare recipients on individualized suspicion

Supp. 2013); TENN. CODE ANN. § 71-3-1202 (2012 & Supp. 2013); UTAH CODE ANN. § 35A-3-304.5 (LexisNexis 2011 & Supp. 2012).

205. For example, while not a jurisdiction, the Department of Commerce suggests a reasonable suspicion standard and gives several criteria that may raise individualized suspicion of drug use by an employee. Those criteria include (1) “observable phenomena, such as direct observation of drug [use] or possession and/or the physical symptoms of being under the influence of a drug”; (2) “a pattern of abnormal conduct or erratic behavior”; and (3) an “[a]rrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or [distribution].” See U.S. DEP’T OF COMMERCE, DRUG-FREE WORKPLACE PLAN 25 (2009), available at http://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/prod01_008040.pdf.

206. See ARIZ. REV. STAT. ANN. § 46-294(3). An Arizona newspaper reported,

All adult recipients must now fill out a new three-question statement on illegal-drug use to apply or reapply for DES benefits. If answers on that statement provide ‘reasonable cause’ of illegal-substance abuse, the department will notify the adult that they must complete a drug test within 10 days, at the state’s expense.

Amy B. Wang, *Welfare Recipients Face Drug Tests*, ARIZ. REPUBLIC (Nov. 25, 2009 12:00 AM), <http://www.azcentral.com/news/articles/2009/11/25/20091125urinetesting1125.html>.

207. See N.C. GEN. STAT. § 108A-29.1(a) (2011), amended by 2013 N.C. Sess. Laws 417, § 4.

208. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

209. See, e.g., *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668 (1989); *Skinner v. Ry. Excs.’ Labor Ass’n*, 489 U.S. 602, 633 (1989); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

militate against a finding that individualized suspicion is impracticable.²¹⁰

The factors laid out in Justice O'Connor's *Acton* dissent, along with the experience of using individualized suspicion in other states,²¹¹ indicate that it is not impracticable to require individualized suspicion in the context of drug testing welfare recipients. As such, the special needs inquiry would end there, and the court would not have to balance the public and private interests. Thus, states cannot test welfare recipients without individualized suspicion.²¹²

B. More Consistent and Efficient Application of the Special Needs Exception

Although balancing tests allow judges to weigh the interests of opposing parties, they can be inefficient when addressing new and complicated legal issues and can lead to inconsistent outcomes that

210. See *Lebron I*, 820 F. Supp. 2d 1273, 1291 (M.D. Fla. 2011) ("What the Fourth Amendment requires is that such incursions by the Government must be reserved for demonstrated special needs of government or be based on some showing of reasonable suspicion or probable cause. The State has made no showing that it would be 'impracticable' to meet these prerequisites in the context of TANF recipients. Any suggestion that it would be impracticable should be based on some evidentiary showing, and any such showing would likely be 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."), *aff'd*, *Lebron II*, 710 F.3d 1202 (11th Cir. 2013).

211. The Tennessee legislation is an interesting case study of a state recognizing the constitutional limitations of suspicionless drug testing of all welfare recipients. An initial version of the bill included suspicionless searches similar to laws in Georgia and Florida: "The department must require that the results of a recent urine drug test be submitted by each individual who applies for TANF." *Bill Summary of 2012 Tenn. S.B. 2580*, TENN. GEN. ASSEMB., <http://wapp.capitol.tn.gov/apps/billinfo/BillSummaryArchive.aspx?BillNumber=SB2580&ga=107> (last visited Feb. 19, 2014). However, the Tennessee Attorney General warned that the bill would be unconstitutional if the testing it authorized did not require individualized suspicion. See *Limitations on Drug Testing as a Condition of Receiving Public Assistance*, Tenn. Att'y Gen. Op. No. 12-41 (Mar. 20, 2012), available at <http://www.tn.gov/attorneygeneral/op/2012/op12.41.pdf>. Thus, the approved version of the bill required an initial screening and some form of reasonable suspicion before the applicant can be tested for drugs. See 2012 Tenn. Pub. Acts 1079, §§ 2(9), 3.

212. As an aside, states would be better served by adopting the two-step process rather than suspicionless drug testing. The two-step process is based on individualized suspicion gained in a nonintrusive manner, thus leaving fewer grounds for constitutional challenge for these programs. The process is also more cost-effective and will continue to deter drug dependency because those who are dependent will be more likely to be caught. More importantly, dependency is more likely than occasional drug use to keep individuals from returning to work.

bewilder those outside of the judiciary.²¹³ The current focus on balancing requires that the court consider whether there is a safety interest at stake in each drug-testing scheme and determine whether the group subject to testing has a diminished expectation of privacy.²¹⁴ If a person subject to suspicionless drug testing wants to challenge the testing, the court must engage in a highly factual determination of the group's expectation of privacy and a policy-driven debate on whether the government interest is sufficiently important.²¹⁵

This analysis is inefficient and leads to inconsistent results. As shown in the cases above, parties have disagreed over whether the threat of illegal drugs is considered a special need.²¹⁶ Opposing parties offer statistics, anecdotes, and societal trends to justify their conclusions on how substantial the drug problem is in the United States and whether the drug problem justifies suspicionless drug tests.²¹⁷ Similarly, when courts look at the data on drug use, judges have come to different conclusions on both the magnitude of the drug problem among welfare recipients and how much must be done to combat this problem. Those who support suspicionless drug testing may claim that opponents of these programs are not fully aware of the drug problem in the United States, particularly among those who receive government benefits. At the same time, those who would require individualized suspicion harbor varying assumptions about welfare recipients or about the amount of drug use among recipients of government benefits. Whatever the reasons for this disconnect between the parties, the courts are not in the position to resolve this policy debate.

The current focus on balancing the public and private interests in the special needs analysis gives each group hope that it will be able to prove that the problem they see—whether the problem is drug use among welfare recipients or the invaded privacy of those same individuals—is substantial enough to require judicial action. With those on either side of the debate focusing on opposing issues, it is not surprising that these systems of drug testing have led to protracted litigation with ambiguous judicial responses and a clear disconnect between the parties who oppose and parties who support suspicionless drug testing.

213. See Cooper, *supra* note 145 (arguing that the judiciary is not “[keeping] pace with the times” and drug testing is not unreasonable for welfare recipients in Florida).

214. See *supra* Part I.C.

215. See Samay, *supra* note 57, at 305–06.

216. See *supra* Part II.

217. See *supra* Part II.B.1.

Setting impracticability as a threshold question allows the court to avoid revisiting this policy debate with each new claim. Instead of weighing the public and private interests or weighing in on controversial social issues, the court would first question whether individualized suspicion is impracticable under the circumstances.²¹⁸ This initial consideration would in many cases prevent the court from considering the special needs of each situation and entering a contentious policy debate if it is clear that the government could accomplish its purpose using individualized suspicion.

Those skeptical of a more robust impracticability test might argue that it adds another step to an already complicated analysis, creating a more inefficient process rather than making it more efficient. However, it will be easier for courts to lay down guidelines as to when individualized suspicion is impracticable²¹⁹ than it has been to establish guidelines concerning when the special need outweighs the individual interest in privacy.²²⁰ As seen above, the Supreme Court can easily spell out criteria that a lower court can identify,²²¹ rather than leaving a lower court to attempt to analogize the Court's divergent opinions on suspicionless drug testing.

Additionally, courts perform a similar "gatekeeping" function in other areas of the law. In administrative law, courts first determine whether due process applies before moving into a balancing of the public and private interests at stake in the administrative determination.²²² The question of whether due process exists—much

218. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting).

219. See *supra* notes 189–95 and accompanying text (listing the examples given in Justice O'Connor's *Acton* dissent of when the Court has found it impracticable to rely on individualized suspicion).

220. Scholars have recognized that the formulation of whether the special need is substantial has been highly indeterminable. See, e.g., Budd, *supra* note 93, at 793; Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 170 (2006) (labeling the Supreme Court's reasoning as "not logically consistent" and "ad hoc" and the lower court rulings as "contradictory"); W. J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) ("[L]ittle or no effort has been made to explain what these 'special needs' are; the term turns out to be no more than a label that indicates when a lax standard will apply.").

221. See *supra* notes 189–95 and accompanying text.

222. See *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) ("The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law.'" (citations omitted)).

like the question of whether individualized suspicion is impracticable—is a constitutional question, not a policy question.²²³ Courts are better suited for answering these constitutional questions than they are at answering questions of policy.

Those who support the current special needs analysis argue that impracticability cannot be considered in a vacuum because weighing the public and private interests at stake necessarily requires consideration of impracticability.²²⁴ Based on this argument, opponents may claim that the push for efficiency sacrifices a more complex and fact-specific application of the special needs doctrine for an arbitrary bright line. However, the desire for balancing public and private interests mistakes the real question at the heart of the special needs analysis: whether the government is justified in dispensing with the warrant and probable cause requirements of the Fourth Amendment.²²⁵ Thus, the line drawn by the Court is not arbitrary—it is a critical element of the Fourth Amendment.

Finally, some may claim that the determination of whether individualized suspicion is impracticable will be as controversial and highly fact-based as the decision over whether drug tests serve a special need where public interest outweighs private interests. Just as in the debate over whether the public interest outweighs the private, courts will have to consider all of the circumstances surrounding implementation of the plan. Nonetheless, the impracticability analysis does not question a need's importance; it questions whether relying on individualized suspicion is possible under the circumstances. This question is a much different inquiry and one that does not require the court to weigh in on whether drug use is an imperative national crisis.

To realign the special needs doctrine with this fundamental question, a threshold test must be “substantial enough that only those cases that truly justify departure from the individualized suspicion requirement would advance to the balancing stage.”²²⁶ Questioning

223. See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”); U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

224. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995); see also *Lebron II*, 710 F.3d 1202, 1211 (11th Cir. 2013) (“The question is *not* whether drug use is detrimental to the goals of the TANF program, which it might be. Instead, the only pertinent inquiry is whether there is a substantial special need for mandatory, suspicionless drug testing of TANF recipients . . .”).

225. See *The Supreme Court, 1996 Term — Leading Cases: Suspicionless Drug Testing*, *supra* note 156, at 298–99.

226. See *id.*

whether individualized suspicion is impracticable is a substantial test that will focus the special needs analysis. Even if this threshold question sacrifices some of the fact-specific analysis of the balancing test, looking for impracticability before balancing will ensure that the test is applied more efficiently because courts will only move to balancing once this more substantial threshold has been met.²²⁷

C. *Protecting Legislators' Evaluations of Government Objectives from Judicial Second-Guessing*

As well as being inconsistent and inefficient, the current focus on balancing second-guesses legislative determinations on the necessity of a government objective. Under the current special needs analysis, courts are left in the precarious position of telling legislators that the problem they see—drug use among welfare recipients—is not actually a problem. By second-guessing the extent of this problem, the current special needs test is inconsistent with the judicial role.²²⁸ This judicial second-guessing has led some legislators and commentators to believe that the judge either made the wrong decision or that more information would convince the judge that suspicionless searching is correct.²²⁹ This belief may explain why legislators continue to push for such legislation in spite of judicial action halting these programs.

In contrast, setting impracticability as a threshold constitutional question more clearly communicates that the judiciary, when it declares a set of suspicionless searches unreasonable, chose to do so because of the constitutional requirements of the Fourth Amendment, not because the judge is enforcing his or her own social beliefs over the beliefs of elected legislators. The threshold impracticability standard does not question the importance of the government objective. Instead, it focuses on whether the search can be conducted with individualized suspicion or whether that would be impracticable. This new analysis may not have changed some of the

227. See *id.* at 299 (“[C]learly articulating the threshold test’s requirements . . . would help lower courts understand that the initial inquiry is a substantial hurdle meant to weed out the vast majority of cases.”).

228. See, e.g., *Butler v. McKellar*, 494 U.S. 407, 432 (1990) (Brennan, J., dissenting) (“[T]he majority, whose Members often pride themselves on their reluctance to play an ‘activist’ judicial role by infringing upon legislative prerogatives, does not hesitate today to dismantle Congress’ extension of federal habeas to state prisoners.”)

229. See Cooper, *supra* note 145 (“As a precedent, Judge Scriven’s ruling [in *Lebron I*] is off the mark and epitomizes judicial micromanagement of American domestic social policy. It is a temporary win for the ACLU and a setback for Florida taxpayers. Drug testing of welfare recipients is sound and sensible public policy—and far from being an unreasonable or unconstitutional invasion of privacy.”).

special needs decisions handed down by the Supreme Court,²³⁰ but it would help state legislatures and other civic groups understand why a court supported or invalidated the state's program of suspicionless drug testing. Understanding where the lines are drawn may prevent legislators from continuing to push for unreasonable invasions of privacy.

That said, others may claim that making the determination of impracticability is just another form of the judiciary second-guessing the legislature. No matter the rationale, the legislature will not be pleased when a court enjoins its program. However, the decision on impracticability does not involve a judicial determination on what is an important social problem. Instead, it merely calls on the legislature to consider whether the constitutional requirements have been met. A threshold impracticability test protects the individualized suspicion requirement of the Fourth Amendment, and it sets clear boundaries that the legislature cannot cross instead of telling legislators that the social problem it fears is not important enough.

CONCLUSION

The recent calls for drug testing of welfare recipients demonstrate that some legislators believe that the problem of drug use among those who receive government benefits is a special need and that the special need doctrine justifies subjecting recipients to suspicionless drug testing. Courts applying the special needs exception have had trouble convincing state legislators that this is incorrect. The current special needs test, with its focus on balancing, indicates that individualized suspicion can be avoided in any circumstance as long as the government can show it has a strong interest. This litigation inappropriately devolves into a policy debate on the need for drug testing. As such, the special needs analysis leaves only problems of inefficiency and inconsistency and very few definitive answers.

More heightened scrutiny on the question of impracticability would create an analysis that ensures that individualized suspicion is only set aside when it is impracticable. Tying success in the special needs exception to a determination of whether individualized suspicion is impracticable aligns more closely with what the Supreme Court envisioned when it created this exception to the Fourth

230. See *Bulthuis*, *supra* note 74, at 1575-76 (recognizing that the drug test in *Von Raab* may be upheld if the government proved that the imminence of danger in the field when one is under the influence of drugs could justify suspicionless testing).

Amendment. More importantly, this revamped special needs analysis will ensure that legislators will know when they must require individualized suspicion and when it is excused, and courts will be better able to dispose of government programs that too eagerly do away with the protections of the Fourth Amendment.

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