Please Leave Your Constitutional Protections at the Door: A Challenge to Louisiana's Mandatory Drug Testing Statutes

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I. INTRODUCTION

The Louisiana Legislature has declared that a "state of emergency" exists as a result of the increase in the use of illegal drugs among Louisiana’s citizens. In response, it enacted two statutes which potentially require anyone who receives anything of economic value from the state to produce a urine sample to be tested for the presence of illegal drugs, or risk losing eligibility to receive those things of economic value from the state. Subject to the testing requirements are, among others, government employees, students who receive financial aid from the state and welfare recipients.

In the wake of recent United States Supreme Court decisions, it is difficult to perceive how these testing programs can survive constitutional challenges based upon the Fourth Amendment’s protection against unreasonable searches. One such challenge has already resulted in an injunction, stopping the drug testing of elected officials. The Supreme Court has decided that absent either some individualized suspicion or a significant safety risk, the government may not subject individuals to urinalysis drug testing. To do so would be an invasion of the Fourth Amendment protections of those tested. Louisiana’s statutes require no probable cause or reasonable suspicion of drug use, and only a fraction of those who will be subjected to the testing requirements are in safety-sensitive positions.

This comment will evaluate the provisions of Louisiana's drug testing statutes, discuss the cases in which the Supreme Court has examined similar drug testing statutes under the Fourth Amendment, and analyze the constitutionality of Louisiana's program in light of those Supreme Court decisions.

II. THE LOUISIANA STATUTES

In 1997, the Louisiana Legislature voted to enact a series of statutes which would allow the state to require persons to be tested for illegal drugs. One statute is broad, covering virtually all persons in the state, while the other applies specifically to those who receive welfare benefits from the state.

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Louisiana Revised Statutes 49:1021 provides that any person who

La. R.S. 49:1021 (Supp. 1997) provides:

A. (1) The legislature does hereby declare that a state of emergency exists in Louisiana as a result of the spiraling increases of abuse of illegal substances by its citizens. The legislature further declares that such illegal drug abuse presents a clear and present danger to the health, welfare, and security of the state, its citizens, and government. The legislature acknowledges that the terrible cost of drug abuse is ultimately paid by all of the state’s citizens in the form of public monies expended to eradicate, interdict, and destroy such illegal substances, operate a costly and massive criminal justice system for violators and acknowledges that all its citizens eventually pay the high price of illegal substance abuse by way of decreased productivity in the work place, and higher costs for goods and services throughout the state’s economic apparatus. Children, especially from lower income families, suffer unnecessarily from the drug abuse when they go unfed, ill clothed, and without proper medical treatment because drug abusing adults in the household spend badly needed money for illegal substances. Many times, the drug abusers deny themselves proper medical treatment to obtain illegal drugs, often becoming not only ill, but indigent as well. The legislature therefore believes that government has a compelling interest to insure, protect, and safeguard its citizens from the scourge of illegal drug abuse, whether in the classroom or the halls of government.

(2) Those persons entering into contracts with the state to provide goods and services, including such items as food services, construction of roads, and other public improvements, and goods and services provided could place in jeopardy the lives or livelihood of persons operating motor vehicles, eating at public state facilities or receiving other goods and services from such vendors. This would certainly involve a safety sensitive issue. Those persons receiving loans apply for the privilege of such award of taxpayer funds based upon claiming a special need for such assistance. It is in the state’s best interest and a duty of the state to protect the taxpayers from waste, fraud, and corruption by determining if such persons receiving such funding are using the funds as stated in their applications. The state, therefore, has a higher duty to be sure its funds are not used to further the addiction of someone who has the responsibility over children, elderly, or others dependent on their care.

B. The commissioner of administration shall establish and administer a program for random drug testing for all persons who receive anything of economic value or receive funding from the state or an entity thereof, including but not limited to all persons awarded state contracts to provide goods or services or loans from the state or an entity thereof.

C. The commissioner of administration shall promulgate rules and regulations for conducting a random drug testing program. When an agency, department or other government entity has an operational drug testing program, that agency, department, or government entity shall randomly test all of those persons seeking contracts or loans.

E. If the sample of a person tested subject to the provisions of this Section should indicate the presence of an illegal substance and it is the first such indication of such an illegal substance, that person shall be subject to compliance with the terms of a rehabilitative treatment program approved by the commissioner of administration as a prerequisite to continuation of the contract or loan from the state or an entity thereof. The costs of such a rehabilitative treatment program will be paid by the person’s health care insurer if that person has such coverage through said health care insurer. Otherwise, the costs of the treatment shall be borne by the person at his own expense. If the person is indigent, the program costs shall be borne by the agency requiring the drug testing and rehabilitative treatment.

F. If a person subject to the provisions of the Section refuses to comply with a test request or if the sample of a person tested subject to the provisions of this Section indicates the
receives "anything of economic value" from the state or a state entity shall be subject to the possibility of a random drug test. Included in this group of persons to be tested are employees of the state, any state agency, or any entity of the state, recipients of welfare benefits and students who receive grants, loans or scholarships from the state to attend institutions of higher learning. The statute provides that chemical tests will be conducted to determine the presence of illegal substances in the body. Although each entity to which the statute applies is responsible for implementing its own testing program, the most prevalent method of conducting such a test is by urinalysis. The statute further provides that any person who fits within the scope of the statute "shall be deemed to have given consent" to a drug test. A person who tests positive for the presence of illegal drugs must comply with the requirements of a rehabilitative treatment program, provided that this is the first occurrence of a positive drug test result. If the person subsequently tests positive for the presence of drugs in his body, his contract or loan with the state or state entity will be terminated.

B. Louisiana Revised Statutes 46:460.10

The legislature adopted a similar random drug testing provision that applies exclusively to adult recipients of public assistance. By enacting Louisiana

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8. The statute, by its very broad terms, would apply to many more categories of people than those listed. However, the Governor intends to focus the drug testing on state employees, welfare recipients, and students who receive loans, grants, or scholarships from the state. Joe Gyan, Jr., Judge Rules Drug-testing Law Illegal, The Advocate (Baton Rouge, La.), Nov. 21, 1998, at 1A.
10. The challenged program in the ACLU petition uses urinalysis. It is expected that other testing will be done in much the same way.
12. La. R.S. 46:460.10 (Supp. 1997) provides:
   A. The legislature hereby reaffirms the legitimate government function of promoting the safety and welfare of children and adults. The legislature declares that the best interests of a significant portion of the state's population are served by ensuring that they are free of the physical and mental impairments associated with drug dependence. The legislature further reaffirms its compelling interest in providing safeguards to eliminate the misappropriation of entitlement benefits. The legislature hereby directs the secretary of the Department of Social Services in consultation with the secretary of the Department of Health and Hospitals and the commissioner of administration to establish a mandatory drug testing program for certain adults in the Temporary Assistance for Needy Families Block Grant Program.
   B. The secretary of the Department of Social Services shall cause to be instituted a mandatory drug testing program for certain adult participants, to be determined by the secretary of the Department of Health and Hospitals and the commissioner of administra-
Revised Statutes 46:460.10, the Louisiana Legislature amended the Welfare Reform Act of 1995 to include a mandatory random drug testing provision. The statute provides that a mandatory drug testing program shall be instituted for “certain adult participants . . . in the Temporary Assistance for Needy Families Block Grant Program.” Upon the first positive drug test, the participant must complete an “education and rehabilitation program” as a prerequisite for continued benefits. The welfare recipient will not suffer suspension of his benefits while he is taking part in such a program; however, in the event of subsequent positive drug tests, the recipient will be subject to suspension of his entitlement to such benefits.

III. SUPREME COURT DECISIONS

The Supreme Court of the United States has examined drug testing programs, which, although similar to the ones enacted in Louisiana, applied to a much narrower segment of the population. The Court addressed the constitutionality of these programs under the Fourth Amendment. The Fourth Amendment protects “[t]he right of people to be secure . . . against unreasonable searches and
Seizures..."\(^{20}\) Searches have traditionally been held to be *per se* unreasonable when they are conducted without a warrant.\(^{21}\) However, there are situations in which it is not feasible to require a warrant, such as when there is a possibility that a suspect will flee or when evidence might be destroyed. In such cases, courts have required that individualized suspicion be present before a warrantless search can be conducted.\(^{22}\) Still other situations dictate that even individualized suspicion may be unattainable. In some employment settings, the circumstances surrounding the employment may preclude the type of scrutiny needed to develop suspicion of drug use. For example, some jobs require that the employee work out of the office or travel for an extended period of time. In such a situation, there is no opportunity for individualized suspicion to be formed.

Such problems, along with various other obstacles, have prompted courts to carve out a "special needs" exception to the warrant requirement of the Fourth Amendment. This exception applies when "special needs" beyond the normal need for law enforcement make the warrant and probable cause requirements impracticable.\(^{23}\) The Supreme Court has recognized that a mandatory random drug testing scheme fits within a "special need" of the government. Although some of the programs examined by the Court passed constitutional muster, the Louisiana statutes do not contain the stipulations required by the Court to be deemed "reasonable."

A. *Skinner v. Railway Labor Executives Association*

The Federal Railroad Administration (FRA) mandated urinalysis tests to detect drug use among employees involved in certain train accidents. The testing program was enacted in response to evidence gathered by the FRA which showed that from 1972 to 1983, 21 train accidents occurred in which drug or alcohol use was a contributing factor. As a result of those accidents, there were 25 fatalities, 61 injuries, and $19 million in damages. The Railway Labor Executives' Association and members of its labor organizations brought suit in *Skinner v. Railway Labor Executives Association*\(^ {24}\) seeking to enjoin the testing program and challenging the scheme as a violation of Fourth Amendment protections. The Supreme Court of the United States held that the regulations were constitutional.

The Supreme Court first recognized that because the collection and testing of urine samples intrudes upon expectations of privacy, the intrusions are searches and therefore invoke the protections of the Fourth Amendment.\(^ {25}\) Because drug tests are searches within the meaning of the Fourth Amendment, they must be reasonable. The Court held that the determination of what is reasonable under the

\(^{20}\) U.S. Const. art. IV.


\(^{25}\) *Id.* at 617, 109 S. Ct. at 1413.
Fourth Amendment depends upon all of the circumstances surrounding the search and upon the nature of the search itself.

The tests in *Skinner* were conducted without a warrant or individualized suspicion of those tested. Instead, the tests were randomly conducted after the occurrence of certain accidents. They were designed to meet the "special needs" of the FRA to promote safety in the industry and to help determine the causes of railway accidents. When faced with such a "special needs" situation, the Court held that it must balance the governmental interests in conducting the search against the privacy interests of the individual. It also noted that when the "special needs" balancing is triggered, the application must be a context-specific inquiry into each individual case.

The Court ruled that the invasion of privacy suffered by those employees tested under the FRA program was minimal. The tests were conducted in a medical environment under the supervision of a testing administrator who did not view the individual while the sample was collected, but only listened for sounds of urination. The Court also held that individuals who participate in an industry that is heavily regulated by the government have a diminished expectation of privacy. Furthermore, requiring particularized suspicion in this case would impede the purpose of the regulation. "[C]ompelling government interests [served by the FRA's regulations] would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a particular employee."  

The Court also focused on the fact that not every person employed in the railroad industry would be tested under the random drug testing provisions. The testing was triggered by the occurrence of an accident. A key factor in upholding the program was that those tested occupied safety-sensitive positions in the industry. In a highly regulated industry, where the governmental interest in safety outweighed the diminished privacy interests of individuals, the government can constitutionally conduct drug tests without a warrant or individualized suspicion.

**B. National Treasury Employees Union v. Von Raab**

In a companion case decided on the same day as *Skinner*, the Supreme Court upheld a program for random drug testing of certain employees of the United States Customs Service. In a 5-4 decision, the Court held that the governmental interest in testing certain Customs Service employees outweighed the privacy interests of those individuals protected by the Fourth Amendment.

The United States Customs Service had in place a urinalysis drug testing program that made the test a requirement for promotion to or employment in positions that met one or more of three criteria: 1) direct involvement in drug interdiction or enforcement of related laws; 2) a requirement that the employee

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26. *Id.* at 633, 109 S. Ct. at 1421-22.
27. *Id.* at 619, 109 S. Ct. at 1414.
carry firearms; or 3) a requirement that the employee handle classified material. The urine was to be collected in a bathroom stall while an administrator of the same sex listened for sounds of urination, but the employee was not visually monitored.

As in *Skinner*, the Court observed the "special needs" of the government in this situation. Pursuant to the application of the "special needs" exception to the warrant requirement, the Court balanced the interests of the government against the privacy interests of the tested employee to determine whether the search was reasonable under the Fourth Amendment.

As applied to drug interdiction personnel, the Court held that the governmental interests outweighed the privacy interests of the employees. The government has a strong interest in ensuring that drug users are not promoted to positions directly involving the interdiction of illegal drugs. These persons may be subject to bribery or their physical safety may be threatened by people entering the country with illegal drugs, and they are often exposed to illegal substances. Therefore, the Court noted, it is important that those occupying these positions have "unimpeachable integrity and judgment," unimpaired by the use of illegal drugs. The Court likewise ruled that public interest demands that drug users not be promoted to positions that require the employee to carry a firearm. "[The] public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."

As in *Skinner*, the Court pointed out that employees of the Customs Service have a diminished expectation of privacy. "Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness." Again, emphasis was placed on the fact that there was a triggering event that placed the employee on notice that he could be tested. In this case, that event was the employee's application for promotion to one of the covered positions. The Court also recognized that it would not be feasible to require individualized suspicion in this case. The employees who would be tested under the urinalysis program are not subject to the kind of day-to-day scrutiny under which most office employees work.

Thus in *Von Raab*, the Supreme Court held that the government demonstrated that its compelling interests in public safety outweigh the privacy interests of employees who apply to be promoted to positions that involve the interdiction of illegal drugs or that require the employee to carry a firearm. The Court did not hold, however, that employees who have access to sensitive information could be drug tested without a violation of their Fourth Amendment protections. It stated that the reasonableness of requiring testing of these individuals would depend upon

29. *Id.* at 660-61, 109 S. Ct. at 1388.
30. *Id.* at 670, 109 S. Ct. at 1393.
31. *Id.*
32. *Id.* at 671, 109 S. Ct. 1393.
33. *Id.* at 672, 109 S. Ct. 1394.
34. *Id.* at 677, 109 S. Ct. 1396-97.
the employees' expectations of privacy and the type of materials that would be
handled by those employees. This gives rise to the belief that as long as these
employees do not handle any information that, if released, would compromise
public safety or subject them to the possibility of bribery, they could not be
consitutionally required to undergo drug testing without implicating their Fourth
Amendment right to be free from unreasonable searches.

C. Vernonia School District 47J v. Acton

In Vernonia,35 the Supreme Court applied the "special needs" balancing test
to the random drug testing of student athletes in public schools. The school district
implemented a mandatory random drug testing program to test students who
participate in interscholastic athletics in response to an observed increase in drug
use among these students.

Again, the Supreme Court utilized the balancing test to determine whether the
search was reasonable, given the "special needs" of the school district. The Court
began by examining the privacy interests implicated by the testing program. It first
noted that school-aged children lack some fundamental rights, including liberty, as
they are subject to the control of their parents. It further explained that a parent,
when he sends his child to school, delegates some of his parental authority to the
schoolmaster.36 Although it recognized that children do not "shed their
constitutional protections at the schoolhouse gate,"37 the Court nevertheless
concluded that within the school environment, students have a lesser expectation
of privacy than do free adults, illustrated by the fact that students are required to
undergo hearing and visual screening, dermatological examinations, and
vaccinations.

The Court further stated that privacy expectations of student-athletes are even
lower. These students, it reasoned, are exposed to situations in which their privacy
is diminished on a regular basis, such as changing and showering before and after
competitions and practices in a less-than-private locker room. The Court also noted
that by choosing to participate in interscholastic athletics, the students voluntarily
subject themselves to the drug testing policy implemented by the school district.

As for the nature of the search, the Court observed that the testing environment
was not significantly different to that in a public restroom. Female student-athletes
were allowed to produce a urine sample in a bathroom stall behind a closed door,
while a monitor stood outside only to listen for sounds of tampering. Male students
were allowed to stand, fully clothed, with their backs facing a monitor, who
observed from behind. The Court viewed the privacy interests of the students
implicated by this process as "negligible."38

36. Id. at 654, 115 S. Ct. at 2391.
37. Id. at 655-56, 115 S. Ct. at 2392 (quoting Tinker v. Des Moines Indep. Community Sch.
Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969)).
The major governmental interest to be advanced by the drug tests was to deter drug use among schoolchildren. The Court stated that this interest a fortiori applies to student-athletes who are exposed to the risk of immediate physical harm every time they step on the field, and who, therefore, need to be free from the effects of illegal drugs. Also key in the Court’s analysis was the fact that student-athletes serve as role models for the rest of the student body. The Court, therefore, held that the school district’s interests in implementing the drug testing program clearly outweighed the “negligible” privacy interests of the student-athletes.

The Court further noted that a drug testing program based on suspicion of drug use would be worse than a suspicionless, random drug test in this case. It reasoned that a testing program based on individualized suspicion would place a “badge of shame” on tested students, would put teachers in an awkward position of singling out students to be tested, and would likely result in the most troublesome students being tested. The Court was careful, however, to “caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.” Although the Court declared this suspicionless drug testing program constitutional, it was careful to point out that a key factor in this case was that the school was acting as guardian and tutor of the students, and therefore was allowed to minimally invade the privacy of the students.

D. Chandler v. Miller

In its most recent examination of a random mandatory drug testing scheme, the Supreme Court in Chandler v. Miller struck down a program which required candidates for certain elected public offices to undergo urinalysis testing before the election, stating that those testing programs did not fit within the “closely guarded category of constitutionally permissible suspicionless searches.”

The Georgia statute in this case required the candidate to produce a urine sample in an environment that was even less intrusive than those involved in Skinner, Von Raab, and Vernonia. The candidate was allowed to use his personal physician to fulfill the testing requirements. Furthermore, the results of the test were submitted directly to the candidate and were not released to the public or state officials unless the candidate decided to disclose the information.

In an 8-1 decision, the Supreme Court reversed the decision of the court of appeals and held the search to be unreasonable under a Fourth Amendment “special needs” analysis. Although the Court here acknowledged that the invasiveness of the testing procedure was effectively limited, it stated that the special need offered by the government must still be “important enough to override the individual’s acknowledged privacy interest, [and] sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”

39. Id. at 663, 115 S. Ct. at 2395-96.
40. Id. at 665, 115 S. Ct. at 2396.
42. Id. at 309, 117 S. Ct. 1298.
43. Id. at 318, 117 S. Ct. at 1303.
The Court specifically pointed out that the government's argument for upholding the statute was lacking "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." It noted that there was no evidence presented of a drug problem among Georgia's elected officials. Key in the Court's analysis of the testing program was that the officials who would be subjected to the urinalysis requirement did not perform any high-risk or safety-sensitive tasks. The Court further recognized that state officials are scrutinized every day and therefore, it would not be impractical to require individualized suspicion before testing could be conducted. It held that the need urged by the government in this case is merely symbolic, not special.

The Court stressed that Von Raab must be read in its unique context. It urged that a "need of the 'set a good example' genre" is insufficient to overcome a Fourth Amendment objection. The Court concluded that "where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes suspicionless searches, no matter how conveniently arranged."

IV. Analysis—Applying Fourth Amendment Standards to the Louisiana Statutes

The urinalysis testing to be implemented by Louisiana Revised Statutes 49:1021 and 46:460.10 is to be conducted randomly without a warrant. The drug testing program is intended to be justified as a "special needs" type program of the sort that was considered in the Supreme Court cases discussed above. The legislature has not articulated any process whereby individualized suspicion will be used to determine which persons will be tested, nor has it given any indication that it would not be feasible to require individualized suspicion. Instead, it has simply stated that such testing programs are to be imposed upon any person who receives anything of economic value from the state or an entity thereof based upon the effects that illegal drug use has upon the government, as well as the citizens of Louisiana. Therefore, consistent with the Supreme Court cases, a court considering a constitutional challenge to the Louisiana statutes would be required to balance the government's interests in conducting the testing program against the privacy interests of the individual implicated by being subjected to a urinalysis examination.

A. The First Challenge—O'Neill v. State of Louisiana

The first challenge to Louisiana's drug testing statutes was brought by the American Civil Liberties Union on behalf of a justice of the peace and a Louisiana State Representative, asking the court to enjoin the testing of elected officials pursuant to Louisiana Revised Statutes 42:1116.1. Like the testing provisions

44. Id. at 318-19, 117 S. Ct. at 1303.
45. Id. at 322, 117 S. Ct. at 1305.
46. Id. at 323, 117 S. Ct. at 1305.
47. La. R.S. 49:1021(B) (Supp. 1997).
discussed, the statute challenged in *O'Neill v. State of Louisiana*, 48 allowed the testing to be conducted "without the necessity of showing any measure of individualized suspicion." Citing *Skinner, Von Raab, Vernonia*, and *Chandler*, the court held that the drug testing statute violated the Fourth Amendment.

The court stated that deciding whether a suspicionless drug test is a reasonable search is a two step process. First, the court must determine whether any "special needs" of the government exist. If, and only if, the government can show "special needs" to conduct the test, then the court can proceed to the second step, balancing public versus private interests. 50 In this case, the court never got to the second step, because it held that the government had not met its burden of proving "special needs."

The court recognized that the state had not offered any real evidence to prove that drug abuse among Louisiana’s elected officials was anything more than hypothetical. Further, following the Supreme Court’s opinion in *Chandler*, the court held that elected officials do not occupy any safety-sensitive positions within society. The court also noted that although elected officials are often in the public eye, it does not automatically follow that they have a diminished expectation of privacy. Finally, it concluded that the purpose of the statute is only symbolic, and in the wake of *Chandler*, searches conducted pursuant to such a statute are clearly unconstitutional. Because no “special needs” existed for the testing of elected officials, the court issued an injunction against the drug testing of Louisiana’s elected officials. 51

The decision in *O'Neill* does not extend beyond its application to elected officials. Therefore, it is still necessary to examine the constitutionality of Louisiana’s drug testing statutes as applied to other persons covered under their provisions. *O'Neill*, however, can provide persuasive support for successful challenges to Louisiana Revised Statutes 49:1021 and 46:460.10. Following United States Supreme Court precedent and the well-reasoned decision in *O'Neill*, courts should invalidate other provisions of Louisiana’s broad drug testing scheme, as well.

**B. Constitutional Infirmities of Louisiana’s Drug Testing Statutes**

1. **Overbreadth and Vagueness**

The first defect in Louisiana’s drug testing plan is that it is far too broad and overreaching in its application to those persons who may be tested. *Skinner*
expressly stated that each time a “special needs” evaluation is done, a context-specific inquiry is required. In enacting these statutes, the legislature has given no indication that such an inquiry was conducted. The statute simply states that a “state of emergency exists in the State of Louisiana” which justifies drug testing of Louisiana citizens. It subjects to testing anyone who receives anything of economic value from the state or any state entity.

Because the statute applies to any person who receives “anything of economic value or receive[s] funding from the state or an entity thereof,” conceivably, this urinalysis program could be imposed upon any person living in the State of Louisiana and perhaps even some persons who may merely be present within the state, but who do not reside in Louisiana. In some sense, nearly every person living in or visiting Louisiana receives something of economic value from the state or a state entity. All persons who drive cars in the state benefit from the use of Louisiana’s roads and highways. Anyone who lives inside of the State of Louisiana, or anyone who visits the state, is protected by the police and fire departments, which are sub-divisions of state entities. Every child who attends public school receives an education that is funded by the state. Therefore, under the provisions of the statutes currently in effect in Louisiana, any person who steps foot inside Louisiana’s borders could potentially be forced to undergo a urinalysis test. Is this the result that the legislature was trying to reach by enacting such a broad statute? If so, it is impossible for such a sweeping provision to be upheld against a constitutional challenge.

The statute is not only overly broad in its scope, it is also impermissibly vague. Louisiana courts have held that “a law is fatally vague . . . if the law does not provide a standard to prevent arbitrary and discriminatory application.” The statute mandating drug testing does not articulate any standard by which those tested will be selected. There is nothing to prevent arbitrary selection of those to be tested. While the statutes require that each state department, agency, or entity devise its own program for drug testing, the statutes themselves give no guidelines as to how to select those who will be tested. In fact, in the case of welfare recipients, Louisiana Revised Statutes 46:460.10(B) simply states that “certain adult participants” will be tested, giving no indication which recipients will be considered “certain adult participants.”

55. Id.
57. La. R.S. 46:460.10(B) (Supp. 1997).
2. Lack of Consent to Search

Louisiana Revised Statutes 49:1021(G) specifically states that "[a]ny person subject to the provisions of this Section shall be deemed to have given consent" to being tested for the presence of illegal drugs in his body. Based on this language in the statute, the state may argue that by receiving anything of economic value from the state, persons implicitly consent to drug testing. However, this argument cannot pass constitutional scrutiny.

The Supreme Court has held that when consent is given to search without a warrant, that consent must be given freely and voluntarily. Additional, when the consent is relied on to establish the reasonableness of a search, the state must prove by clear and convincing evidence that the consent was given freely and voluntarily.

Persons from out of state who enter into contracts with the State of Louisiana, or visitors traveling on Louisiana's roads and highways, are probably not even aware of the drug testing statutes enacted in Louisiana. Therefore, it cannot be said that by simply doing these activities, and thus receiving things of economic value from the state, that they are voluntarily consenting to being tested for drugs. Although ignorance of the law is usually note a valid defense, a person's Fourth Amendment right to be free from unreasonable searches may only be waived if such waiver is voluntary. It can hardly be stated that the crossing of a border into Louisiana is a voluntary waiver of one's Fourth Amendment rights.

The same rationale applies to persons who receive welfare or unemployment benefits from the state. It cannot be assumed that people who receive these benefits voluntarily choose to be placed on the welfare or unemployment rolls. For many of these people, it is their only means of survival while they are unemployed or underpaid. Such circumstances cannot in any way be deemed as "freely" giving consent to a drug test. The state cannot condition the survival of these people upon their consenting to be tested for drugs.

Moreover, government employees may not be required, as a condition of employment, to waive a constitutional right. The state cannot, therefore, deem that a person, by receiving things of economic value from the state, has relinquished his constitutional right to be free from unreasonable searches and seizures. The argument that Louisiana's drug testing procedures are performed pursuant to the consent of state employees cannot survive constitutional scrutiny.

Regarding the application of the drug testing statutes to students who receive financial aid, it has previously been held that "[t]he state, in operating a public school system of higher education, cannot condition attendance at one of its schools on the student's renunciation of his constitutional rights." Most of the

students in Louisiana who receive financial aid could not attend college without that funding. The legislature is conditioning their ability to receive funding, and therefore to attend college, upon consent to conduct an unreasonable search. This cannot be done without infringing upon the constitutional rights of the student. The legislature cannot require a student to waive his constitutional protection against unreasonable searches so that he may further his education.

3. Lack of "Special Needs"

a. Individualized Suspicion

The Louisiana Legislature enacted the drug testing statutes at the insistence of the governor, who urged that Louisiana needed some sort of system to combat the problem of drug abuse in the state. Specifically, the governor wanted to target three groups of individuals—government employees, students who receive financial assistance from the state, and welfare recipients. As a justification for implementing the drug-testing programs, the legislature declared that a "state of emergency" exists in Louisiana as a result of increases in drug abuse among its citizens. However, the legislature has offered no evidence of the extent of illegal drug use among those covered by the statute.

The United States Fifth Circuit Court of Appeals recently examined a drug testing policy applied to government employees. In United Teachers of New Orleans v. Orleans Parish School Board, the court struck down a program which required teachers to submit a urine sample for a drug test after the occurrence of an accident on campus. It held in this case that no "special needs" were present because there was no evidence of drug abuse among the teachers in the parish. "[S]pecial needs must rest on demonstrated realities. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a 'kind of immolation of privacy and human dignity in symbolic opposition to drug use,' that troubled Justice Scalia in Von Raab." The court held that since no "special needs" were present, the test could only be conducted based upon adequate individualized suspicion of illegal drug use.

The Supreme Court has stated that a stronger argument for special needs can be made by the government if it can show some evidence of drug abuse among the individuals subject to testify. One of the bases for striking down the statute in Chandler was that no evidence was offered to show that drug abuse was a problem among candidates for state office. Evidence of drug use would have bolstered the special needs argument advanced by the government in that case. To support this

65. 142 F.3d 853 (5th Cir. 1998).
66. Id. at 857 (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681, 109 S. Ct. 1384, 1399 (1989) (Scalia, J., dissenting)).
argument in regard to the new drug testing statutes, the legislature should give some indication of how prevalent the use of drugs is among the population it seeks to test.

The government has offered no evidence of particularized drug use among any of the groups covered by the new statutes. In a nationwide survey of 1,450 college students and 1,420 individuals who had been out of high school for one to four years but were not in college, it was reported that 33.5% of the college students had used illegal drugs, while 34.0% of those non-students responding had used illegal drugs.68 This shows that nationwide, there is no more of a drug problem among college students than among non-students of the same age group. Therefore, the government can form no individualized suspicion of those persons enrolled in school versus those who are not.

Nor has the legislature given any indication of a problem with illegal drug abuse among recipients of welfare benefits. In fact, in a national survey conducted in December 1996, it was estimated that 5.0% of the general public used illegal drugs, while that number was only slightly higher for welfare recipients at 7.0%.69 Is this increase enough to expose the welfare population to searches that the general public would not be required to endure? Following the rationale of Chandler, if the government cannot point to any individualized suspicion of drug use among the population it seeks to test, then the government must offer some “special need” to justify subjecting those persons to a search.

b. Safety-Sensitive Positions

The legislature has also stated that drug abuse among its citizens poses a significant danger to the health, welfare and security of the citizens of the state. It further noted that the economic costs of illegal drug abuse are paid by all citizens of the state of Louisiana, through increased costs of law enforcement, higher prices of goods and services due to low productivity in the workplace, and attempts to rehabilitate drug abusers.70

Further, the legislature has stated that a safety sensitive issue is presented due to the state or state entities entering into government contracts with persons who use illegal drugs. Although it gives no specific examples of how the safety of the public is implicated, the legislature said that if goods and services were to be provided by illegal drug abusers, “the lives . . . of persons operating motor vehicles, eating at public state facilities or receiving other goods and services from such vendors” would be placed in jeopardy.71

In its most recent pronouncement on urinalysis drug testing, the Supreme Court has explicitly stated that “[w]hen public safety is not genuinely in jeopardy,
the Fourth Amendment precludes the suspicionless search, no matter how
conveniently arranged.\textsuperscript{72} Therefore, absent some individualized suspicion, only
those government employees who occupy safety-sensitive positions can be subject
to the scrutiny of a urinalysis drug test. Those employees may include security
officers,\textsuperscript{73} prison employees,\textsuperscript{74} or public school custodians who are often in contact
with dangerous chemicals and children.\textsuperscript{75} Von Raab explicitly left open the
question of the reasonableness of testing employees who handle confidential
information. It remanded this question to determine whether these employees
would be handling information that was safety-sensitive. This decision seems to
reinforce the argument that unless the government employee occupies a position
that involves the safety of the public, it is a violation of his Fourth Amendment
right to subject him to a urinalysis drug test.

In Aubrey v. School Board of Lafayette Parish,\textsuperscript{76} the court upheld a program
designed to test persons employed in positions which were listed in a school board
regulation as "safety-sensitive." The plaintiff, Aubrey, was a custodian in the
school system, a position which was listed in the regulation as "safety-sensitive."
The court upheld the program based on a "special needs" analysis. It stated that
while the intrusiveness of the search was minimal, the interests of the government
in ensuring that those employees in a public school who interact regularly with
students, operate potentially dangerous equipment, and handle hazardous
chemicals, are free from impairment by illegal drug use was strong.\textsuperscript{77} Furthermore,
the court held that when "safety-sensitive" positions are at issue, no evidence of
drug use in the district’s schools was required to validate the reasonableness of the
search.\textsuperscript{78}

Following Supreme Court precedent, as well as the analysis followed by the
Fifth Circuit Court of Appeals, it seems there are only two ways that Louisiana’s
statutes may be saved. First, they may be limited only to those persons who hold
a safety-sensitive position. Second, Louisiana’s statutes may be upheld if there is
evidence of a significant drug problem among the segment targeted for testing.

c. Lack of Triggering Mechanism

Present in Skinner and Von Raab, where drug testing programs were upheld,
was some sort of triggering mechanism which would put the employee on notice
that he could be required to undergo a drug test. In Skinner, that trigger was a
railroad accident, while in Von Raab, it was the application for promotion to a
safety-sensitive position. An additional flaw in the Louisiana statute is that there

\textsuperscript{73.} See New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 675 A.2d 1180 (N.J.
\textsuperscript{74.} See American Fed’n of Gov’t Employees v. Roberts, 9 F.3d 1464 (9th Cir. 1993).
\textsuperscript{75.} See Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559 (5th Cir. 1998).
\textsuperscript{76.} Id.
\textsuperscript{77.} Id. at 565.
\textsuperscript{78.} Id. at 564.
is no triggering mechanism that allows those persons who are covered to be put on notice that they may be required to undergo a urinalysis test.

It may be argued that receiving things of economic value from the state "triggers" the possibility that the recipient may be required to undergo a drug test. However, as discussed above, some persons who may be subjected to the drug testing procedures do not even know of the existence of the statutes, or do not know that the statutes may apply to them. This differentiates the Louisiana statutes from those upheld in *Skinner* and *Von Raab*.

d. "Set a Good Example"

Louisiana's governor has specifically stated that government employees, especially those holding state office, should "set an example" for the rest of the state. Chandler explicitly struck down a drug testing program that was based on "symbolic" needs rather than "special" needs. A need "of the 'set a good example' genre" is not sufficient to overcome a Fourth Amendment objection. The Louisiana statute provides for the type of drug testing program that was specifically struck down in Chandler as a violation of the candidates' Fourth Amendment rights.

As justification for testing welfare recipients, the governor, an avid supporter of the drug testing programs, stated that the drug testing of welfare recipients is to prepare the recipients for the workforce, where they will likely be subject to the same type of testing; therefore, aiding in the accomplishment of his overall goal of getting people to work and off of welfare. It has already been stated that a "symbolic" need will not be sufficient to support the reasonableness of a suspicionless drug test. Therefore, Louisiana Revised Statutes 46:460.10, which mandates drug testing of welfare recipients, likewise cannot survive constitutional scrutiny.

4. *Diminished Expectation of Privacy*

The "special needs" analyses conducted in *Skinner* and *Von Raab* resulted in the conclusion that government employees who occupy safety-sensitive positions in industries heavily regulated by the government have a diminished expectation of privacy; and therefore, the privacy interests implicated by the minimal intrusion of a urinalysis test are far outweighed by the need for public safety. However, Chandler specifically limited those cases to their unique contexts. It seems, then,
that employees in government departments that are not heavily regulated have the same expectation of privacy as anyone else, not diminished in any way.

_Vernonia_ recognized that students who participated in interscholastic athletics had a diminished expectation of privacy. It also held that a school is delegated the authority to act _in loco parentis_ when it is entrusted with the care of students. However, this rationale cannot be relied upon to support the reasonableness of a suspicionless drug test of students who receive financial aid, most of which are college-aged and enrolled in institutions of higher education. The legislature cannot use the _in loco parentis_ reasoning to support an otherwise unreasonable search in the context of college students, many of whom live away from home and are presumed to be independent and responsible. It has long been held that students do not shed their constitutional rights at the schoolhouse door. Students enrolled in colleges, even those who live in on-campus dormitories, enjoy the usual privacy rights enjoyed by adults.

C. Summary

All of the interests that the government hopes to advance cannot sufficiently outweigh the privacy interests of the persons who will be subjected to the drug testing scheme. Those people should not be subjected to an indignity such as a urine test simply because they receive things of economic value from the state or a state entity. They should not be treated any differently from the rest of the general public.

V. Conclusion

The filing of a suit challenging Louisiana’s mandatory drug testing statutes was inevitable given the constitutional inadequacies of the statutes enacted by the legislature. Other challenges brought against Louisiana’s drug testing provisions will succeed as well, as courts will undoubtedly follow the lead of the Eastern District in _O’Neill v. State of Louisiana_. As a result of those challenges, the legislature will be required to refine the application of the statutes to apply only to those individuals who are involved in safety-sensitive activities or where some indication of drug abuse among the population to be tested is recognized.

Louisiana’s drug testing statutes are unconstitutional as a violation of the Fourth Amendment’s guarantee of protection against unreasonable searches. Searches under those provisions must be based on probable cause. In cases where it would be impractical to require probable cause, the search must nevertheless be based on some individualized suspicion of wrongdoing unless there are special circumstances. The government has given no indication that such circumstances

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are present in Louisiana. Nevertheless, a suspicionless search may still be reasonable when the government's interests in conducting the search outweigh the privacy interests of the individual that are implicated by such a search. In promulgating these statutes, the Louisiana Legislature has not given any safety reasons that would justify the search in question. Nor has it shown any evidence of a drug problem among the population to be tested. Furthermore, the statutes are overbroad in that almost every person in the State of Louisiana may be required to submit a urine sample for testing. Such broad statutes surely cannot survive a constitutional challenge. Although a drug crisis may exist in the State of Louisiana, "society's fundamental right to be protected against unreasonable searches and seizures should not be sacrificed in the name of our country's war against drugs."

Louisiana's governor believes that state employees should "set a good example" for the rest of the state by submitting to drug tests. The judicial system of Louisiana should do the same by striking down these drug testing provisions, and thereby protecting the right guaranteed to citizens of the United States to be free from unreasonable searches and seizures.

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