No. 13-841

IN THE

Supreme Court of the United States

RICK SCOTT, GOVERNOR OF FLORIDA,
Petitioner,

—v.—

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 79,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

Shalini Goel Agarwal
Counsel of Record
Maria Kayanan
Nancy G. Abudu
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
(786) 363-2700
sagarwal@aclufl.org

Steven R. Shapiro
Jason D. Williamson
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that an executive order requiring random drug testing for *all* persons employed by Florida's executive branch agencies (approximately 77% of the State's total workforce), violated the Fourth Amendment and this Court's decisions in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

2. Whether the court of appeals correctly held that the broad class of workers covered by the executive order did not implicitly consent to suspicionless drug testing merely by accepting employment with the State.

3. Whether review by this Court is premature in any event since there are ongoing proceedings in the district court to determine whether any positions covered by the executive order are safety-sensitive, pursuant to the remand order by the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & CONSTITUTION

OTHER AUTHORITIES

COUNTER-STATEMENT OF THE CASE

1. On March 22, 2011, Florida Governor Rick Scott issued Executive Order 11-58 ("the EO"), directing all agencies under his purview "to provide for pre-employment drug testing for all prospective new hires and for random drug testing of all employees." App. 104a.[1] The employees at those agencies comprise approximately 77% of the State's total workforce. App. 7a. The EO is a policy of "unprecedented scope" for random drug testing of government employees and, if enforced as written, would have been the broadest such policy in the country. App. 39a.

Before issuing the EO, the Governor made no inquiry into whether drug abuse was a problem at Florida's state agencies, or whether existing drug testing provisions under the Drug Free Workplace Act, Fla. Stat. § 122.0455 (1990) ("DWFA"), were adequate to address any existing problems.[2] In fact, contrary to the Governor's generalized assertion of rampant drug use by employees at agencies covered by the EO (hereinafter "state agency employees"), the random testing of select state employees at three agencies revealed much lower rates of drug use than among those in the general population. In the

---

[1] Although Respondent raised a facial challenge to the pre-employment testing provision, the district court ruled that the Union did not have standing to assert claims on behalf of prospective employees. It agreed, however, that Respondent could challenge the mandatory pre-employment testing on behalf of current employees applying for new positions. App. 72a-76a.

[2] *See* Def.'s Resp. to Pl.'s First Set of Interrogatories No. 6 (Docket Entry 34-2), cited in Pl.'s Statement of Material Facts in Supp. of Mot. for Summ. J. ¶6 (Docket Entry 34).

district court, the State disclosed that "random testing at DOT [Dept. of Transportation] and DJJ [Dept. of Juvenile Justice] yielded positive results in less than one percent of cases between 2008 and 2011; random testing at DOC [Dept. of Corrections] produced positive results in less than one percent of cases in 2008 and 2009, then increased to 2.4 and 2.5 percent in 2010 and 2011." App. 9a. By contrast, in 2010, the rate of illicit drug use among Americans was estimated to be 8.9%. App. 108a.

When the American Federation of State, County and Municipal Employees Council 79 ("the Union") filed this suit on May 31, 2011, it represented approximately 40,000 employees at agencies subject to the EO, many of whom do not work in safety-sensitive positions. App. 63a. In its complaint, the Union alleged that the EO violated its members' Fourth Amendment rights to be free from unreasonable searches. App. 9a. Ten days after the Union filed suit, the State suspended drug testing under the EO at all agencies except DOC. App. 107a. Following three months of discovery, the parties filed cross-motions for summary judgment.

2. In April 2012, the district court granted the Union's motion for summary judgment and denied the State's motion. The court held that the EO violated the Fourth Amendment and permanently enjoined its enforcement as to all current state agency employees. App. 99a-101a. Specifically, the court found the State had made no effort to identify specific, safety-sensitive jobs and had not met its burden of showing a special need for suspicionless drug testing of *all* state agency employees. App. 95a-96a.

The court also rejected the State's argument that a government employee's willingness to submit to a mandatory, suspicionless drug test constituted valid consent and, therefore, cured any potential Fourth Amendment violation. In rebuffing the State's argument, the district court relied on *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Chandler v. Miller*, 520 U.S. 305 (1997), noting that: "Even assuming that submission [to a drug test] could somehow be equated with consent, the dispositive question in the cases decided by the Supreme Court is not whether an individual has submitted to a drug test, but rather whether he or she has chosen an occupation that entails a standard or diminished expectation of privacy." App. 93a.

3. The court of appeals agreed with the district court that the EO could not be affirmed as written, characterizing it as "a drug testing policy of far greater scope than any ever sanctioned by the Supreme Court or by any of the courts of appeals." App. 6a. The special-needs test requires more, the court held, than the State's "generic justifications" regarding the safety and efficiency of the workplace, which "could apply to all government employees in any context." App. 49a. Otherwise, "there would be nothing left of the individualized-suspicion requirement in any type of government employment, and no interests left to balance." *Id.*

Like the district court, the court of appeals refused to uphold the State's suspicionless drug testing program based on the purported consent of its employees.

> In effect, the State is offering its employees this Hobson's choice: either they relinquish their Fourth Amendment rights and produce a urine sample which carries the potential for termination, or they accept termination immediately. . . . [W]e do not agree that employees' submission to drug testing, on pain of termination, constitutes consent under governing Supreme Court case law. . . . Moreover, consent has already been adequately incorporated into the special-needs balancing test, which obliges us to evaluate whether an employee's choice of profession necessarily diminishes her expectation of privacy. . . . [T]here seems to be no way to square *Skinner* and its progeny with the argument that consent justifies the Executive Order's drug testing requirement. . . . Surrendering to drug testing in order to remain eligible for a government benefit such as employment or welfare, whatever else it is, is not the type of consent that automatically renders a search reasonable as a matter of law. . . . In short, the State's consent argument cannot, standing alone, render the EO constitutional.

App 40a-45a.

The court of appeals nonetheless vacated the declaratory judgment and injunction because it found that the relief the district court granted – striking down any application of the EO to any state agency

employee – was overly broad. The court remanded the case to the district court for the parties to continue discovery in order to determine which positions were indeed "safety-sensitive," and therefore potentially subject to a narrower application of the drug testing policy. App. 38a-39a. The court emphasized that, in identifying this narrower category of jobs, the State has the burden of showing a special need for each category it seeks to test and that, once that burden has been met, the district court must craft a new injunction covering only those employees as to whom the EO is unconstitutional. App. 59a-60a.

4. The State sought rehearing en banc, which the court of appeals denied on August 15, 2013. On September 16, 2013, the State moved to stay proceedings in the district court because of its plan to file a petition for a writ of certiorari in this Court. The district court denied the motion for a stay on October 11, 2013, and the State filed its petition for a writ of certiorari on January 13, 2014.

While the State's petition to this Court is pending, the State and the Union have been actively engaged in discovery to determine which of the thousands of state employees in hundreds of job categories should be subject to the EO. The parties are likely to be engaged in this process for months to come.

REASONS FOR DENYING THE WRIT

There are at least four reasons the Court should deny this petition. First, the Eleventh Circuit's ruling on the unconstitutionality of the State's warrantless and suspicionless drug testing of all state agency employees was a straightforward application of this Court's longstanding, fact-specific Fourth Amendment special-needs framework, which recognizes only "a closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (quoting *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989)).

Second, the State's claim of a circuit split on the issue of consent in the context of suspicionless drug testing is overblown and misleading. Indeed, consent has never been the primary lens through which this Court has evaluated the constitutionality of suspicionless drug testing schemes—whether in a secondary school or employment setting. Moreover, those circuits that have specifically addressed suspicionless drug testing of government employees agree that consent alone does not determine the constitutionality of a state's policy to randomly examine its employees' bodily fluids but, rather, has been treated by this Court as a component of the special-needs inquiry.

Third, this case is a poor vehicle to address the issues presented. Measuring a government employee's expectation of privacy requires the government, when challenged, to defend its policy by first building an evidentiary record that will allow a district court to apply this Court's special-needs analysis to the particular facts of each employee's job

functions. As noted, the parties are now engaged in that process. When it is completed and the district court has ruled, the State will be free to seek further appellate review, if it so chooses. This Court should not, and need not, grant review based on the present incomplete record. Finally, contrary to the State's suggestion, this case does not present an issue of national importance, particularly in light of the unusual and extreme breadth of the challenged policy.

I. THE ELEVENTH CIRCUIT'S RULING, INCLUDING ITS TREATMENT OF CONSENT, IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS.

Implicitly recognizing that the broad scope of the State's drug testing policy cannot be justified absent consent, Petitioner asks this Court to decide whether public employees can be deemed to have constructively consented to random drug testing simply by accepting employment with the State. As the Eleventh Circuit correctly recognized, the State's position cannot be reconciled with *Skinner* and *Von Raab*.[3]

---

[3] In its petition, the State argues for the first time that a current AFSCME employee who seeks transfer or promotion "can decline the test and remain in his or her own post. All that is lost is a promotion or transfer to which the employee has no vested right or expectation." Pet. at 34. The State did not take this position in the district court or the court of appeals. Moreover, its parting words, that this "aspect of the Eleventh Circuit's decision, which the court failed to even address, *is in obvious need of correction*," *id*. (emphasis added) raise no basis for this Court to grant review, and certainly not at this interlocutory stage of the proceedings. *See* Point III, *infra*.

Had the Court in those cases agreed with the State's position in this case, there would have been no need to engage in a special-needs analysis. Instead, in both *Skinner* and *Von Raab*, the Court undertook a fact-specific inquiry that balanced the employee's expectation of privacy against the government interest in drug testing. In some circumstances, the Court has held, an employee may have a diminished expectation of privacy because of the nature of her job duties, *Von Raab*, or her participation in a highly regulated industry, *Skinner*. But the Court has never held, as Petitioner argues here, that the mere fact of public employment represents consent by every public employee to random drug testing.[4]

The Court's decision in *Von Raab* is particularly instructive on this point. The Customs Service in that case had adopted a drug testing program for employees that satisfied one of three criteria: they were involved in drug interdiction, they carried firearms, or they had access to classified information. While recognizing the government's interest in ensuring a drug-free workplace in all three categories, the Court remanded for further proceedings to determine whether those job categories subject to drug testing ostensibly based on

---

[4] In both *Skinner* and *Von Raab*, moreover, the consent issue had been expressly addressed in the lower courts. *Von Raab*, 816 F.2d 170, 178 (5th Cir. 1987) ("The Customs Service test is, to some extent, consensual); 649 F. Supp. 380, 388 (E.D. La. 1986) ("The Court refuses to find voluntary 'consent' to an unreasonable search where the price of not consenting is loss of government employment or some other government benefit."); *Skinner*, 839 F.2d 575, 579 (9th Cir. 1988) ("[W]hen a search has been determined to be constitutionally unreasonable, the consent feature cannot save it.").

access to classified information had been defined too broadly. As the Court explained, "it is not evident that those occupying these positions are likely to gain access to sensitive information, and this apparent discrepancy raises in our minds the question whether the Service has defined this category of employees more broadly than is necessary to meet the purposes of the Commissioner's directive." 489 U.S. at 678. If Petitioner is correct that consent is always implicit in public employment, then the remand in *Von Raab* would have been inexplicable and unnecessary.[5]

Nor can Petitioner avoid the holding in *Von Raab* by arguing that there is a fit between means and ends in this case because the State's asserted interest in the safety and efficiency of all government offices cannot be achieved without a comprehensive drug testing program that covers all state agency employees. This Court has properly recognized that allowing the state to define its interests at such a high level of generality would create an exception that swallows the rule.

---

[5] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), does not inform the consent inquiry here. That case arose in an entirely different factual context, involving pregnant women who were surreptitiously drug tested by a state hospital and then criminally prosecuted if they tested positive for cocaine and refused to enroll in drug treatment. In *Ferguson*, the Court "did not reach the question of the sufficiency of the evidence with respect to consent" and concluded that the law enforcement purpose of the program disqualified it as a special need. 532 U.S. at 75. On remand to the Fourth Circuit, the Court of Appeals held that "a rational jury could not find voluntariness." *Ferguson v. City of Charleston*, 308 F.3d 380, 404 (4th Cir. 2002).

Thus, in *Chandler v. Miller*, 520 U.S. 305 (1997), the Court struck down a Georgia law that required political candidates seeking designated state offices to submit to mandatory drug testing. Like Petitioner here, Georgia argued that "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions . . . ; and undermines public confidence and trust in [its] officials." *Id.* at 318. Also like this case, the record in *Chandler* was devoid of facts indicating that the state's concerns were real rather than hypothetical. Applying the special-needs test, the Court had little difficulty concluding that "[however] well meant, the candidate drug test Georgia has devised diminishes privacy for a symbol's sake. The Fourth Amendment shields society against that state action." *Id.* at 322.

The same conclusion applies with equal force to Florida's unconstitutional effort to subject all state agency employees to a random drug testing program that is not supported by actual need and cannot be justified based on the fig leaf of consent.

II. THERE IS NO CIRCUIT CONFLICT FOR THIS COURT TO RESOLVE.

Contrary to the State's assertion, there is no "entrenched" split among the circuit courts, Pet. at 13, as to whether government employers' exaction of their employees' consent to drug testing as a condition of employment can obviate the special-needs test. Rather, the courts of appeals uniformly agree that consent is but one factor in evaluating an employee's reasonable expectation of privacy, which must be balanced against the government's interests in conducting the testing.

Three circuits—the Eleventh, Eighth, and the D.C. Circuit—have held that consent, standing alone, is not the constitutional touchstone for suspicionless government employee drug testing. *AFSCME v. Scott*, App. 3a-60a; *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Nat'l Fed'n of Fed. Emps. v.Weinberger*, 818 F.2d 935 (D.C. Cir. 1987).[6] Only one circuit—the Third—has ruled that a public

---

[6] Two other circuits—the Second and the Seventh—also hold that consent is not dispositive, although in different contexts than employee drug testing. *Anobile v. Pelligrino*, 303 F.3d 107, 123-25 (2d Cir. 2001) (holding that horse trainers who, as a part of their annual license applications with the state racing board, signed a waiver of their right to object to searches conducted at the raceway, did not effectively consent to dormitory searches, as there was no evidence that they were aware of their right to refuse to sign the waiver or whether they could refuse and still be licensed) (citing *Security & Law Enforcement Emps. v. Carey*, 737 F.2d 187 (2d Cir. 1984) (rejecting argument that corrections officers consented to strip search by accepting employment and receiving the rule book)); *Schaill v. Tippecanoe Cnty. Sch. Corp.*, 864 F.2d 1309, 1319-20 (7th Cir. 1989) (concluding that forms requiring consent to drug testing as a prerequisite for students participating in interscholastic athletics did not resolve constitutional issue, although they did reduce the students' expectation of privacy; characterizing burden on students of refusing to consent—resulting in inability to participate in some athletic games—as "a light one compared with, for example, cases where drug testing is a condition of employment, promotion or similar job-related interest") (cited by *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000) (affirming constitutionality of suspicionless drug testing of high school students who participated in extracurricular activities or drove cars to school)). *See also Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1548 (6th Cir. 1988) (holding that "a search otherwise unreasonable does not become constitutionally palatable because it is attached as a condition of employment").

employee did, in fact, consent to urinalysis screening. *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61 (3d Cir. 2001). But that court's decision was based on a robust evidentiary record that supported its finding of consent in light of the totality of the circumstances. Indeed, as discussed below, the ruling in *Kerns* is consistent with *Skinner*, *Von Raab*, *Chandler*, and the rulings of the Eleventh, Eighth, and D.C. Circuits.

There is no disagreement among the circuits that this Court's special-needs framework subsumes the issue of consent by mandating a fact-based, category-by-category review of the employees' job functions and any diminished expectation of privacy a particular employee may have by virtue of the nature of her work, as compared with the ordinary government employee. Any variation between the Eleventh and other circuits is attributable to the varying factual determinations, based on a full evidentiary record, of whether particular jobs are safety-sensitive, and whether the employee who occupies those positions has a lower expectation of privacy than the ordinary government worker.

The Eleventh Circuit rejected the State's argument that conditioning employment upon consent eliminates the need for a special-needs analysis, explaining that "consent has already been adequately incorporated into the special-needs balancing test, which obliges us to evaluate whether an employee's choice of profession necessarily diminishes her expectation of privacy." App. 41a. It further held that "[s]urrendering to drug testing in order to remain eligible for a government benefit such as employment . . . is not the type of consent that automatically renders a search reasonable as a

matter of law." App. 43a. *See also McDonell*, 809 F.2d at 1308-10 (while upholding reasonableness of testing correctional employees who have regular contact with prisoners, opining that "advance consent to future *unreasonable* searches is not a reasonable condition of employment"); *Weinberger*, 818 F.2d at 943 (while remanding challenge to testing certain critical civilian jobs in the Department of Defense, offering, pre-*Skinner*, the following guidance: "We hold . . . that a search otherwise unreasonable cannot be redeemed by a public employer's exaction of 'consent' to the search as a condition of employment. Advance notice of the employer's condition, however, may be taken into account as one of the factors relevant to the extent of the employees' legitimate expectations of privacy.").[7]

---

[7] While *McDonell* and *Weinberger* pre-date *Skinner*, more recent precedents in the Eighth and D.C. Circuits confirm their view that consent is not the dispositive factor in determining the constitutionality of suspicionless drug testing. *See Barrett v. Claycomb*, 705 F.3d 315 (8th Cir. 2013) (in evaluating constitutionality of technical college's policy requiring drug testing as a condition of admission, balancing students' interests against those of the college; vacating injunction as overbroad "based on the current record" and remanding to district court, --- F.Supp.2d ---, 2013 WL 5567194 (W.D. Mo. Sept. 13, 2013), which enjoined testing of students not engaged in safety sensitive training); *Nat'l Fed'n of Fed. Emps. v. Cheney*, 884 F.2d 603, 614-15 (D.C. Cir. 1989) (on second appeal after *Weinberger*, based on evidentiary record with job descriptions, reviewing each job category as to employees' expectations of privacy); *Nat'l Fed'n of Fed. Emps. v. Vilsack*, 681 F.3d 483, 495 (D.C. Cir. 2012) (striking down drug testing of all Forest Service Job Corps employees, even though their expectations of privacy were "somewhat diminished" by background checks and agency's use of federal guidelines for workplace testing).

The State mistakenly asserts that the Eleventh Circuit's ruling is at odds with the Fifth Circuit's ruling in *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977). Even if true, this would at best represent an intra-circuit conflict that is not a basis for certiorari.[8] Stephen M. Shapiro, et al., Supreme Court Practice § 4.6 at 254 (10th ed. 2013) ("Ordinarily, a conflict between decisions rendered by different panels of the same court is not a sufficient basis for granting a writ of certiorari.")Regardless, as the Eleventh Circuit noted, *Sihler* is easily distinguishable on its facts: the case involved a less intrusive search (of a lunch bag), based on reasonable suspicion that a correctional officer was dealing drugs in a correctional facility, which was adorned with signs warning entrants that they were subject to search. 562 F.3d at 350. As the court of appeals reasoned, "*Sihler* cannot and does not stand for the far-reaching proposition that all 85,000 state employees have consented to drug testing simply by coming to work." App. 43a.

The State's effort to manufacture a circuit split argument by relying on the Third Circuit's decision in *Kerns*, 263 F.3d 61, is equally misplaced. *Kerns* likewise arose under very different factual circumstances and offered the reviewing court a fully-developed factual record. Kerns was a new job applicant for the position of superintendent of a wastewater treatment plant. *Id.* That job was a highly-regulated position in which Kerns could have caused "disaster to the local waterways and,

[8] Decisions rendered by the former Fifth Circuit prior to October 1, 1981, are binding on the Eleventh Circuit, *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

consequently, to the health and safety of the local people and others downstream." *Id.* at 63. When told during the interview of the drug test, he replied "I'm just fine. I have no problem." *id.* at 65. Kerns subsequently signed a contract making clear that the employment offer was "contingent" on his ability to pass the drug test, *id.* at 66, and made all the testing arrangements himself, *id.* at 65. When Kerns failed the drug test, he requested another test and passed. *Id.* at 64. The Third Circuit concluded that, under these circumstances, the district court had committed no clear error in finding that Kerns had consented to the first two searches. Sixty days after Kerns was hired, his employer asked him to take a third drug test. He expressed no objection, and upon testing positive was discharged. *Id.* at 66. As to this third drug screening, the court of appeals again determined that the district court had committed no clear error in finding that Kerns had consented, since this test served as a resolution of the conflicting results he had previously received. *Id.*

Contrary to the State's contention, *Kerns* does not support Petitioner's claim that any employee can consent to drug testing as a condition of employment. Instead, as the same court had earlier ruled in *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991), then confirmed in *Kerns*, "silent submission to a drug test on pain of dismissal from employment does not constitute consent." *Kerns*, 263 F.3d at 66 (quoting *Bolden*, 953 F.2d at 824). *Bolden* was a Fourth Amendment challenge by a maintenance custodian for the regional transit authority who was suspended for a disciplinary violation, drug tested as part of his return-to-work medical exam, and tested positive for marijuana

metabolites. 953 F.2d at 810-11. He was discharged based on his test results. *Id.* at 811. Bolden's union filed a grievance on his behalf and reached a settlement with his employer, which required him to be drug tested before returning to work and periodically thereafter. Bolden did not resume work but instead sued the union for violating his Fourth Amendment rights. *Id.*

The court explained, consistent with *Skinner* and *Von Raab*, that Bolden himself "submitted to drug testing without voicing any objection, not because he was truly willing to undergo the test, but because he understood that the test was compulsory and that the alternative to submission was loss of his job," *id.* at 825, and that this was not consent as a matter of law. Nonetheless, the Court held that the union had consented to testing on Bolden's behalf in the settlement of his grievance. *Id.* at 828 ("Through collective bargaining, a public employer and union can reach agreement on detailed factual questions (such as whether particular jobs are safety-sensitive) that may have important implications under the Fourth Amendment."). Thus, *Bolden* rests exclusively on the scope and binding nature of collective bargaining agreements, not on consent, thereby rendering it inapposite to this case.

In sum, every circuit to address random drug testing of government workers has applied the fact-intensive special-needs analysis, which must be grounded in an evidentiary record made in the district court.

III. PLENARY REVIEW IS PREMATURE IN ANY EVENT BECAUSE THE PARTIES ARE STILL ENGAGED IN DISCOVERY REGARDING WHICH JOB CATEGORIES WOULD JUSTIFY SUSPICIONLESS AND WARRANTLESS DRUG TESTING.

On May 29, 2013, the court of appeals vacated the declaratory judgment and permanent injunction issued by the district court on the grounds that they were overly broad, and remanded for further proceedings. App. 60a. In its remand order, the court of appeals directed the State to provide the Union and the district court with "job-category-specific reasons and evidence" to allow that court to "conduct the proper analysis," namely "how those employees present a serious safety risk comparable to those recognized in *Skinner* and its progeny." App. 59a. Consistent with that directive, the parties have been enmeshed, since December 2013, in a category-by-category analysis of job classifications to determine which are safety-sensitive, and whether the employees in those positions maintain a diminished expectation of privacy compared to other government workers. As the court's docket reflects, that undertaking is far from complete; to the contrary, the parties are still considering each other's positions on whether employees in those particular job categories are sufficiently safety-sensitive to fall within this Court's narrow spectrum of individuals who may, consistent with the Fourth Amendment, be subject to random, suspicionless urinalyses.

The Eleventh Circuit's ruling is entirely in line with, and in fact mandated by, this Court's special-needs framework. The circuit court properly acknowledged that the Union's constitutional claims

against the State could not be finally adjudicated on the merits until the State met its "burden of production under the special-needs balancing test." App. 60a. Hence, by prematurely seeking review from this Court, the State is attempting to avoid satisfying its legal burden below.

Furthermore, both parties have acknowledged the possibility of seeking further review in the circuit court, or this Court, once they complete the process of identifying which job categories are safety-sensitive and the district court enters a final judgment based on a fully developed record.

This Court's prudential considerations counsel against piecemeal review of disputes. *See, e.g.*, *Nike v. Kasky*, 539 U.S. 654, 665-60 (2003) (dismissing writ of certiorari as improvidently granted, where further evidentiary proceedings were necessary to determine outcome of case in state court, making likely piecemeal review of merits issues); *Virginia Military Inst. v. U.S*, 508 U.S. 946, 946 (1993) (denying petition for writ of certiorari, as Court "generally await[s] final judgment in the lower courts before exercising our certiorari jurisdiction."); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (denying petition for certiorari because "the Court of Appeals [had] remanded the case" and thus it was "not yet ripe for review by this Court"). For this reason as well, the petition should be denied.

IV. BECAUSE OF THE "UNPRECEDENTED SCOPE" OF FLORIDA'S DRUG TESTING PROGRAM, THIS CASE DOES NOT PRESENT AN ISSUE OF NATIONAL IMPORTANCE.

In holding that Florida's drug testing program could not be upheld as written, the court of appeals appropriately referred to its "unprecedented scope." App. 39a. That both explains the ruling below and significantly reduces the significance of the State's petition.

The statutes and regulations cited as comparable by the State, Pet. at 5, and its *amici*, Brief of Texas, *et al.*, at 3, are more modest than the challenged EO. Some states require testing of only certain jobs, rather than across-the-board-testing.[9] Others do not require any testing.[10] Kansas' drug screening program is a hybrid, permitting but not mandating testing for certain employees and applicants.[11] Before the EO, Florida had a similarly

---

[9] *See* Ga. Code § 45-20-110–111 (requiring analysis of which positions warrant testing of applicants); 20 Ill. Comp. Stat. 2610/12.5 (any person employed by Dept. of State Police); Md. Code Regs. 17.04.09.01–.15 (state employees in "sensitive classifications"); N.M. Stat. § 9-7–18 (health care providers who provide direct care to patients in state facilities); Ohio Admin. Code 123:1-76-01–14 (applicants to designated positions and employees reasonably suspected of drug use); S.D. Admin. R. 55:05:01:01–:09:05 (law enforcement, correctional, direct health care, and wildfire suppression personnel).

[10] *See* Ariz. Rev. Stat. § 23-493–493.12; Neb. Rev. Stat § 48-1901–1910; La. Rev. Stat. § 49:1001–1002.

[11] *See* Kan. Stat. § 75-4362 (giving director of division of personnel services authority to establish and implement drug screening for governor and other elected state officials, and

limited policy that permitted, but did not require, testing of applicants to safety sensitive positions. *See* Drug Free Workplace Act of 1990, Fla. Stat. § 122.0455 (1990). The remaining provisions cited by Petitioner's *amici* do not address random, suspicionless drug testing of public employees,[12] and do not support the State's request for review.

The State attempts to elevate the court of appeals' ruling to one of national importance by relying on an entirely different case from the Eleventh Circuit. Pet. at 26 (addressing *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202 (11th Cir. 2013) (affirming entry of a preliminary injunction barring the State from implementing Fla. Stat. § 414.0652 (2011), which required all applicants for Temporary Assistance for Needy Families ("TANF") to provide a urine sample for drug testing)). The court of appeals did not rule, as the State submits, that "public . . . benefits recipients can *never* consent to searches." Pet. at 26. The court instead ruled that the district court did not abuse its discretion at the preliminary injunction stage "in determining that the State failed to establish a substantial special need for mandatory drug testing of TANF applicants," 710 F.3d at 1211,

---

applicants for safety sensitive positions who receive a conditional offer of employment).

[12] *See* Ga. Code §§ 45-23-1-9 (making individuals convicted of drug crimes ineligible for public employment); Ga. Code §§ 34-9-410-421 (setting standards for drug-free workplace policy that would afford private employers a discount on workers' compensation insurance policies); Ky. Rev. Stat. § 161.175 (requiring random testing of teachers disciplined for engaging in misconduct involving illegal drug use).

and that exacted compliance is not valid consent under *Skinner* and *Von Raab*:

> [T]he Supreme Court has never held that such drug testing regimes were constitutionally reasonable because of consent. Instead, every time that the Supreme Court has been asked to address the validity of a government mandated drug testing policy, it has applied the same special-needs analysis and reasonableness balancing, whether upholding or rejecting those policies. Simply put, we have no reason to conclude that the constitutional validity of a mandated drug testing regime is satisfied by the fact that a state requires the affected population to "consent" to the testing in order to gain access or retain a desired benefit.

Id. at 1215.

On remand, following extensive discovery—including proffered expert testimony—the district court in *Lebron* granted Plaintiffs' motion for summary judgment, denied the State's cross-motion for summary judgment, entered a declaratory judgment finding Fla. Stat. § 414.0652 unconstitutional, and made the preliminary injunction permanent. *Lebron v. Sec'y, Fla. Dep't of Children & Families*, -- F.Supp.2d --, 2013 WL 6875563 (M.D. Fla. Dec. 31, 2013). The State has once again appealed to the Eleventh Circuit, Case No. 14-10322. Thus, as in this case, the parties continue to litigate *Lebron*, and it is not relevant to this Court's consideration of the State's petition.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

Shalini Goel Agarwal
Counsel of Record
Maria Kayanan
Nancy G. Abudu
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
(786) 363-2700
sagarwal@aclufl.org

Steven R. Shapiro
Jason D. Williamson
American Civil Liberties Union Foundation
125 Broad Street
New York, N.Y. 10004

Dated: March 14, 2014