No. 13-

IN THE

Supreme Court of the United States

RICK SCOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE 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

PETITION FOR A WRIT OF CERTIORARI

JESSE PANUCCIO
107 East Madison Street
Caldwell Building
Tallahassee, FL 32399

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
BRETT A. SHUMATE
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
SUPREME COURT CLINIC
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
wconsovoy@wileyrein.com

Attorneys for Petitioner

January 13, 2014

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Drug abuse remains one of the most serious issues confronting our society. To address the epidemic's deleterious impact on the workplace, public and private employers throughout the nation have instituted drug-testing policies for both job applicants and current employees. Today, consent to drug testing is a routine part of applying for and keeping a job. In Florida, the Governor issued an Executive Order making consent to suspicionless drug testing a condition of employment with the State agencies under his purview. The Eleventh Circuit, deepening an already entrenched circuit split, held that the Executive Order violated the Fourth Amendment. The questions presented are:

1. Whether a State may, consistent with the Fourth Amendment, condition government employment on an employee or job applicant's consent to suspicionless drug testing.

2. Whether suspicionless drug testing of all government employees and job applicants is reasonable under the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements.

PARTIES TO THE PROCEEDING

Petitioner in this case is Rick Scott, in his official capacity as Governor of the State of Florida.

Respondent is the American Federation of State, County, and Municipal Employees Council 79.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Page

Page

FEDERAL STATUTES

STATE STATUTES

Page

CONSTITUTIONAL PROVISIONS

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rick Scott, in his official capacity as the Governor of the State of Florida ("Petitioner" or "the Governor"), respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 717 F.3d 851 and reprinted in the Appendix ("App.") at 3a-60a. The opinion of the United States District Court for the Southern District of Florida is reported at 857 F. Supp. 2d 1322 and reprinted at App. 61a-101a.

JURISDICTION

The Eleventh Circuit issued its decision on May 29, 2013, App. 3a, and denied a timely petition for rehearing *en banc* on August 15, 2013, App. 1a. On October 28, 2013, Justice Thomas extended Petitioner's deadline for filing a petition for certiorari to and including Sunday, January 12, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV.

STATEMENT

A. The Serious Problem of Illegal Drug Use in the Workplace

"[D]rug abuse is one of the most serious problems confronting our society today." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674 (1989); *Chandler v. Miller*, 520 U.S. 305, 324 (1997) ("Few would doubt that the use of illegal drugs and abuse of legal drugs is one of the major problems of our society."); *Harmelin v. Michigan*, 501 U.S. 957, 1022 (1991) ("Drugs are without doubt a serious societal problem."). "The problem remains serious today." *Morse v. Frederick*, 551 U.S. 393, 407 (2007). In 2010, for example, approximately 22.6 million Americans—8.9% of the country's population—had used at least one illicit drug. App. 108a. "[T]here are 1,000,000 current users of illegal narcotics in Florida," and "as much as 80 percent of all crime reported in Florida is attributable to illicit drug activity." App. 110a.

"There is little reason to believe that American workplaces are immune from this pervasive social problem." *Von Raab*, 489 U.S. at 674. Over 8% of the nation's full-time workers and 11% of part-time workers are illegal drug users. App. 50a, 108a. Worse still, "an

estimated 3.1 percent of employed adults actually used illicit drugs before reporting to work or during working hour at least once in the past year." App. 108a-109a.

Nor is there "reason to believe that public employees are immune from the problem of drug abuse which is prevalent throughout all segments of our society." *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1562 (6th Cir. 1988) (Guy, J., dissenting), *vacated and remanded sub. nom. Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (en banc). Florida officials, for example, have documented a problem of illegal drug use by State employees. App. 109a-111a. Drug testing conducted at three agencies—including the Florida Department of Corrections ("DOC")—revealed that illegal drug use by both job applicants and current employees had increased between 2008 and 2011. App. 9a, 84a. In 2011, for example, Florida found through a limited testing sample that "2.5 percent of DOC employees tested positive" for illegal drugs. App. 50a; App. 84a. If that ratio held for the entire workforce, DOC would have had approximately *644 positive drug tests* over three months in 2011.

Illegal drug use in the workplace increases financial costs, creates safety hazards, and impairs productivity. App. 82a-83a, 111a-117a. The Florida Legislature found that "[d]rug use has serious adverse effects upon a significant portion of the workforce, resulting in billions of dollars of lost productivity each year and posing a threat to the workplace and to public safety and security." Fla. Stat. § 112.0455(3)(a). The federal government concurs. According to the U.S. Department of Labor, "numerous studies, reports and surveys suggest that substance abuse is having a profoundly negative effect on the workplace in terms of decreased productivity and increased accidents,

absenteeism, turnover, and medical costs." App. 112a. All levels of government thus have "a public interest in a drug-free workforce, which is manifestly more productive and less of a health and safety risk than the drug-impaired alternative." App. 85a; *Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 759-60 (2011) (study showing "illicit drug use [is] negatively correlated with workplace productivity").

Private employers in Florida and across the country have responded to the pervasive problem of illegal drug use by implementing widespread drug testing programs for both prospective and current employees. App. 118a-121a. The ACLU reported that "tens of millions of American workers are drug tested, either before they are hired or as a condition of continued employment." App. 118a. The ACLU further found that, "in some industries, taking a drug test is as routine as filling out a job application" and that "workplace drug testing is up 277 percent since 1987." App. 118a; App. 120a (U.S. Department of Labor reporting "workplace drug testing has increased by more than 1,200 percent since 1987" and that "[m]ore than 81 percent of businesses surveyed in 1996 were conducting some form of applicant or employee drug testing."). The U.S. Department of Health and Human Services likewise has reported that "most workplaces include drug testing in their programs for drug-free workplaces." App. 119a. It found 42.9% of full-time workers (47 million people) were subjected to job-applicant drug or alcohol screening between 2002 and 2004. App. 119a. Half of Florida's fifty largest employers (ranked by number of employees) state on job applications that some form of drug testing is a condition of employment. App. 121a. In short, workplace drug testing in the private sector is an "increasingly widespread practice." App. 118a.

Most States have similarly responded by adopting some version of the federal Drug-Free Workplace Act. 5 Emp. Coord. Employment Practices § 30:204; 1 Zeese, Drug Testing Legal Manual § 4:3. Laws authorizing public and private employers to impose suspicionless drug testing on prospective and current employees have become common. For example, Arizona permits employers to test "for the presence of drugs" by requiring "samples from its employees and prospective employees," Ariz. Rev. Stat. Ann. § 23-493.01.A, "for any job-related purposes consistent with business necessity," *id.* § 23-493.04. In Arizona, employers may penalize any employee or job applicant who refuses to take a drug test. *Id.* § 23-493.05; *see also* Neb. Rev. Stat. § 48-1901 to 1910; N.C. Gen. Stat. § 95-230 to 95-235.

B. Florida's Drug Testing of Government Employees

Florida has authorized drug testing for some government job applicants and employees since enactment of the Florida Drug-Free Workplace Act ("DFWA") in 1990. Fla. Stat. § 112.0455; App. 62a. The Governor issued Executive Order 11-58 (the "EO") on March 22, 2011, App. 102a, directing "all agencies within the purview of the Governor to amend their drug-testing policies to provide for pre-employment drug testing for all prospective new hires and for random drug testing of all employees within each agency," App. 103a-104a.[1] "Approximately 85,000 people, or 77 percent of the State's workforce, are covered by the EO." App. 7a.

---

1. In 2012, the Florida Legislature amended the DFWA. "In essence, the current version of the DFWA authorizes what the EO mandates." App. 9a.

The Governor made ten findings in support of his decision to issue the EO:

(1) "the taxpayers of Florida are entitled to a public workforce that is fit for duty and, as such, is free from the harmful and dangerous influence of illegal drugs;"

(2) "the State, as an employer, has an obligation to maintain discipline, health, and safety in the workplace, and to ensure State employees are not engaged in illegal drug use while at work;"

(3) "illegal drug use has an adverse [e]ffect on job performance, including increased injury on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services;"

(4) "lost productivity due to illegal drug use harms the financial interests of every taxpayer;"

(5) "the public interacts daily with state employees and, therefore, the risk to public safety is real and substantial if state employees use drugs;"

(6) "the Legislature has found that illegal drug use has serious adverse effects upon a significant portion of the workforce in Florida;"

(7) "the State, therefore, has a special responsibility to the public to ensure prospective employees are drug free before they are allowed to enter the state workforce and that existing employees remain drug free as long as they are employed by the State;"

(8) "the State can best fulfill these obligations by requiring pre-employment drug testing and periodic, random drug testing of existing state employees;"

(9) "the taxpayers of Florida are entitled to expect that Florida's public-sector employers be provided the same tools that are available to private-sector employers to ensure their workforce is drug free;" and

(10) "pre-employment and random drug testing are available to private-sector employers and are the best available methods to ensure drug abusers do not enter or remain in the state workforce."

App. 102a-103a.

The DOC was the first and only State department covered by the EO to implement drug testing for current employees. App. 107a.[2] Under the policy initiated by DOC, its employees would be randomly selected for urinalysis testing on a quarterly basis and in compliance with the DFWA. Fla. Admin. Code § 33-208.403(1)(e); App. 62a, 106a-107a. If selected, the DOC employee was presented "with a written notice and consent for testing form that advises the employee that he or she has been randomly selected for testing and that he or she has 24 hours to complete the test." Fla. Admin. Code § 33-208.403(4)(c). The consent form, which the employee signed and returned

2. Although Florida law authorized random drug testing of DOC employees prior to the EO, App. 8a, it did not implement a policy for testing all current employees until the EO required it to do so. That policy was later suspended in response to the injunction granted by the district court.

before being tested, explained that the employee "do[es] hereby voluntarily consent to the sampling and subsequent testing of my body fluids, including urine and blood (if applicable)." App. 123a-124a. Once the form and other paperwork were completed, the employee had 24 hours to complete the test at a designated collection site. Fla. Admin. Code § 33-208.403(5). If the employee refused to sign the consent form or failed to report to the collection site within 24 hours, he or she would be deemed to have failed the drug test and could be disciplined or terminated. *Id.* § 33-208.403(8)-(9).

The DOC's drug testing policy is "relatively noninvasive." App. 53a & n.5; App. 63a. The employee receives 24-hour advance notice of the test, Fla. Admin. Code § 33-208.403(4)(c), and employers must provide all employees with a written policy statement about the drug testing program, Fla. Stat. § 112.0455(6). The urinalysis is conducted in a medical environment by an outside contractor, not a DOC employee. Fla. Admin. Code § 33-208.403(1)(d). "No employee selected for random urinalysis testing shall be required to provide the specimen in the direct visual or audial presence of the tester unless there is a documented reason to suspect that the employee has or will adulterate the specimen, such as a prior finding of adulteration." *Id.* § 33-208.403(20). And, the employee is not required to disclose his or her medications before the test; rather, if the employee tests positive, he or she has five days to present evidence "of lawful intake of the identified controlled substance from the positive test results." *Id.* § 33-208.403(12).

"[T]he results of the drug tests cannot be used as evidence, obtained in discovery, or otherwise disclosed

in any public or private proceeding." App. 7a; Fla. Stat. § 112.0455(11)(a). DOC's policy further provides that "[a]ll information, interviews, statements, memoranda, and drug test results, written or otherwise, received or produced as a result of the drug testing program shall be confidential." Fla. Admin. Code § 33-208.403(21). Last, "[i]nformation on drug test results shall not be released or used in any criminal proceeding against the employee or job applicant." Fla. Stat. § 112.0455(11)(c).

C. Proceedings Below

On May 31, 2011, before any Florida agency had implemented the EO, the American Federation of State, County, and Municipal Employees Council 79 (the "Union") filed suit in the United States District Court for the Southern District of Florida. The Union, on behalf of current employees of the state agencies subject to the EO, sought a declaratory judgment and permanent injunction on the ground that the EO was unconstitutional under the Fourth Amendment.

On April 25, 2012, the district court granted summary judgment to the Union and denied summary judgment to Petitioner. The district court held that the EO violated the Fourth Amendment and enjoined the Governor from implementing it as to all 85,000 current State employees. App. 99a-101a. The district court did not address the application of the EO to prospective employees of State agencies because it found that the Union did not have standing to represent them. App. 100a-101a. But the district court found that the Union could still challenge the EO's drug testing of job applicants because when "a current member applies for a promotion or transfer … the

member will be treated as a new hire and thus required to undergo mandatory pre-employment testing." App. 73a.

Petitioner timely appealed. 28 U.S.C. § 1291. On May 29, 2013, the Eleventh Circuit vacated the district court's declaratory judgment and permanent injunction and remanded the case for further proceedings. The court limited the dispute to random drug testing of all current employees and the mandatory testing for those seeking transfer or promotion, because "the Union made no claims as to the constitutionality of the EO as it relates to pre-employment testing of non-current employees." App. 21a.[3] And it rejected the Union's facial challenge because "there are some (how many is unclear) current state employees as to whom suspicionless drug testing is constitutionally permissible." App. 24a. The court found the EO reasonable under the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements as to "certain safety-sensitive categories of employees" by balancing "the individual's privacy expectations against the Government's interests." App. 24a-25a (quoting *Von Raab*, 489 U.S. at 665).

The court rejected Petitioner's summary judgment motion, however, because it found the EO violated the Fourth Amendment except as to those functions for which "the government has demonstrated heightened interests, such as a serious threat to public safety, that apply narrowly to specific job categories of employees." App. 6a. First, the Eleventh Circuit rejected the argument that the

3. The Eleventh Circuit further explained that the Union had not challenged "random testing of those hired after the issuance of the EO." App. 21a.

EO is constitutional because current employees consent to drug testing. App. 40a-45a. In its view, a current government employee can *never* freely consent to drug testing because "the State is offering its employees [a] Hobson's choice." App. 40a. "Employees who must submit to a drug test or be fired are hardly acting voluntarily, free of either express or implied duress or coercion." App. 41a. Moreover, the court held that consent, standing alone, could never justify suspicionless drug testing of government employees because "consent has already been adequately incorporated into the special-needs balancing test" under *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *Von Raab*, App. 41a.

Second, the Eleventh Circuit ruled that the EO is unconstitutional as to all employees under the "special needs" balancing test. App. 45a-54a. While the court described the "character of the intrusion [a]s relatively noninvasive," App. 53a, it determined that Petitioner had failed to "justify testing every category of employee covered by the EO" because the State did "not advance specific concerns relating to particular job categories and instead assert[ed] only a broad concern for safety that applies to all employees," App. 46a-47a. Nor was the court convinced that "a serious drug problem" exists among Florida's public employees. App. 50a.

The Eleventh Circuit remanded the case for the district court to sort the testable positions from the non-testable positions, "job-category-by-category," for all 85,000 current employees covered by the EO and to "conduct the 'balancing test' laid out in *Skinner* and its progeny" as to each job category. App. 37a, 59a. The court further ordered the parties to provide

"more extensive, job-category-specific facts than the record currently contains," which likely would require "additional discovery." App. 38a. The Eleventh Circuit understood that "providing job-category-specific reasons and evidence—which the district court must have in order to conduct the proper analysis—is a substantial, even onerous, task." App. 60a.

On June 18, 2013, Petitioner timely filed a petition for rehearing *en banc*, which the Eleventh Circuit denied on August 15, 2013. App. 1a-2a. After the mandate issued, Petitioner sought a stay from the district court pending the filing and disposition of a petition for a writ of certiorari in this Court. Even though the Union consented, the district court denied the motion on October 11, 2013. Since then, Petitioner and the Union have been engaged in the arduous process of dividing State employees into job categories so that they can later, absent this Court's intervention, litigate over each job category.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons. First, "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). The courts of appeals are divided 4-2 over whether a State may, consistent with the Fourth Amendment, condition government employment on an employee or job applicant's consent to suspicionless drug testing. In the Seventh, Eighth, Eleventh, and D.C. Circuits, the answer is categorically no—such consent is involuntary as a matter of law. But the Third and Fifth Circuits have held that a State may condition government employment

on consent to suspicionless drug testing and look to the totality of the circumstances to determine whether such consent was in fact voluntary. These approaches are irreconcilable, the split is entrenched, and resolution of the issue is decisive here.

Second, "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This Court has never decided whether a government employee's consent to drug testing renders an otherwise unconstitutional search permissible under the Fourth Amendment. Given the serious problem of illegal drug abuse and prevalence of drug testing in private and public workplaces, now is the time for the Court to settle this important question. Indeed, given the significant human and financial costs associated with illegal drug use in the workplace, this case raises important issues under the "special needs" framework as well.

Third, the decision below is unsustainable under this Court's precedent. Sup. Ct. R. 10(c). Requiring government employees and job applicants to consent to drug testing is not an unconstitutional condition because there is a rational connection between the requirement and the important State interest in a drug-free workplace. Florida's drug testing regime also is constitutional under the "special needs" framework given the prevalence of workplace drug testing in the private sector and because Florida's important interests outweigh public employees' limited expectation of privacy in this setting.

I. The Courts of Appeals Are Deeply Divided As To Whether Consent Can Overcome A Fourth Amendment Objection To Drug Testing of Government Employees.

"[O]ne of the specifically established exceptions to the [Fourth Amendment's] requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The consent must be "freely and voluntarily given" for it to be valid under the Fourth Amendment. *Florida v. Royer*, 460 U.S. 491, 497 (1983). "Voluntariness is a question of fact to be determined from all the circumstances[.]" *Schneckloth*, 412 U.S. at 248-49. The question presented here, upon which the courts of appeals are divided, is whether a government employee may voluntarily consent to drug testing as a condition of employment.

In the decision below, the Eleventh Circuit rejected Petitioner's argument "that employees' submission to drug testing, on pain of termination, constitutes consent under governing Supreme Court case law." App. 40a. In the court's view, "[e]mployees who must submit to a drug test or be fired are hardly acting voluntarily, free of either express or implied duress and coercion." App. 41a. The court broadly held that "[s]urrendering 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." App. 43a.

The Eleventh Circuit instead held that "consent has already been adequately incorporated into the special-

needs balancing test, which obligates [a court] to evaluate whether an employee's choice of profession necessarily diminishes her expectation of privacy." App. 41a. After reviewing the Supreme Court's "special needs" decisions, the court concluded that "there seems to be no way to square *Skinner* and its progeny with the argument that consent justifies the Executive Order's drug testing requirement." App. 42a.

At least three other circuits have reached the same conclusion. In *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987), the D.C. Circuit faced a Fourth Amendment challenge to the Department of Defense's mandatory drug testing policy for certain civilian employees. Those subject to the testing were required to sign a consent form, and employees who refused to consent to testing would "be voluntarily or involuntarily reassigned or demoted to a noncritical job or separated from Federal employment." *Id.* at 938-39. Reversing the district court's dismissal of the Fourth Amendment claim, the D.C. Circuit held "that a search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment." *Id.* at 943. As in the Eleventh Circuit, consent only "may be taken into account as one of the factors relevant to the extent of the employees' legitimate expectations of privacy." *Id.*

The Eighth Circuit reached the same conclusion in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), a case the Eleventh and D.C. Circuits relied upon in rejecting consent as an independent defense to an employee's Fourth Amendment claim. There, the Iowa Department of Corrections had a policy that subjected "the correctional

institution employees to searches of their vehicles and of their persons, including urine, blood, or breath testing, upon the request of Department officials." *Id.* at 1304. Correctional employees selected for drug testing through urinalysis were asked to sign a "consent to search form" and at least one such employee who refused to do so was ultimately docked "ten days' pay and was transferred to another institution." *Id.* at 1304-05.

After holding that the policy violated the Fourth Amendment, *id.* at 1307-09, the Eighth Circuit rejected the Department's consent defense, *id.* at 1310 ("If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment."). The court found that a "legal search conducted pursuant to voluntary consent is not unreasonable and does not violate the fourth amendment" and "[c]onsent must be given voluntarily and without coercion determined from the totality of the circumstances." *Id.* But because the search violated the Fourth Amendment, the consent was involuntary. *Id.* ("Advance consent to future *unreasonable* searches is not a reasonable condition of employment."). The Eighth Circuit required the Department to "use a consent form which delineates the rights of employees consistent with the views of this opinion and which [did] not require the waiver of any of those rights." *Id.*; *True v. Nebraska*, 612 F.3d 676, 679-80 (8th Cir. 2010) (same).

Finally, the Seventh Circuit reached the same result in a case involving "random, suspicionless drug testing of [high school] students involved in extracurricular activities and of students driving to school." *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1054 (7th Cir.

2000). Students participating in extracurricular activities were required to "sign and return a consent form that allow[ed] the School to conduct the drug testing. The consent form [was to] be signed by the student and by a parent or guardian and … returned to the School prior to the student's participation in the extracurricular activity." *Id*. at 1055. "Student drivers" also were required to "sign the consent form before receiving a parking permit … and [] a student who [did] not return the consent form [would] not receive a parking permit." *Id*. "The test check[ed] for the presence of alcohol, nicotine, and any drug listed as a controlled substance." *Id*. at 1057. The district court upheld the extracurricular policy under binding Seventh Circuit precedent and held "that students sign a consent form in exchange for the privilege of parking on school premises and that the safety issues evolving from students driving to and from school while under the influence of illegal substances justifies the testing." *Id*.

The Seventh Circuit affirmed in part and reversed in part. The court agreed with the district court that the legality of the extracurricular drug-testing policy was controlled by circuit precedent. *Id.* at 1065-67. But despite noting the students' consent, the court resolved the challenge to the policy for student drivers under ordinary Fourth Amendment principles and struck down an aspect of it as unreasonable. In particular, the Seventh Circuit held that random nicotine testing was unconstitutional because the school had "not documented any serious risks associated with a student driving while using a tobacco product." *Id*. at 1064. Like the Eighth, Eleventh, and D.C. Circuits, the Seventh Circuit declined to resolve the case on consent grounds. App. 45a (describing *Joy* as applying "the special-needs balancing test, rather than

treating consent as the sole determinant of a policy's constitutionality").[4]

The Third and Fifth Circuits reached the opposite conclusion. In *Bolden v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, 953 F.2d 807 (3d Cir. 1991) (en banc), the Third Circuit upheld a government-employee drug testing policy based on consent. Bolden had been suspended from work for disciplinary reasons and, under a unilateral SEPTA policy, was required to submit to drug testing as a condition of his reinstatement. The union filed a grievance on Bolden's behalf and, while that process was ongoing, SEPTA's drug-testing policy was struck down as violating the Fourth Amendment. *Id.* at 810-11. Nevertheless, the union and SEPTA settled the grievance by requiring "Bolden to submit to a drug test before returning to work and to remain subject to testing for a period thereafter." *Id.* at 811. Bolden ultimately filed suit and a jury found that his Fourth Amendment rights had been violated and awarded him $285,000 in damages. *Id.* at 811-12. The Third Circuit vacated the judgment.

---

4. *See also United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006) ("Government employees … do not waive their Fourth Amendment rights simply by accepting a government job; searches of government employees must still be reasonable."); *Sec. & Law Enforcement Emps. v. Carey*, 737 F.2d 187, 202 n.23 (2d Cir. 1984) ("We do not construe defendants' argument as asserting that the correction officers consented to being searched merely by accepting employment and by receiving the rule book. However, if that is the claim, we reject it."); *Univ. of Colo. Through Regents of Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 947-48 (Colo. 1993) ("It is quite clear that no consent can be voluntary where the failure to consent results in a denial of the governmental benefit.").

In an *en banc* opinion authored by then-Judge Alito, the Third Circuit ruled that the drug test could not be justified under the Fourth Amendment based on the "special needs" doctrine. *Id.* at 821-24. The court also rejected the argument "that Bolden consented to the drug test because he knowingly submitted to the test without voicing any objection and later testified that he had 'no qualms' about taking the test." *Id*. at 824. "Bolden's silent submission to an otherwise unconstitutional search on pain of dismissal from employment" was not "consent as a matter of law." *Id*.

The *en banc* court, however, found "greater merit in SEPTA's reliance on the settlement it reached with Local 234 following Bolden's discharge for drug use." *Id*. After determining that the union was authorized to consent to this workplace condition on Bolden's behalf, *id.* at 826-28, the court held that consent rendered the search valid. Then-Judge Alito explained that the "settlement had the same effect under labor law *and under the Fourth Amendment as if Bolden himself had consented to such future drug testing*." *Id*. at 829 (emphasis added).

The Third Circuit has made clear that this holding is not limited to the collective bargaining setting. In *Kerns v. Chalfont-New Britain Township Joint Sewage Authority*, 263 F.3d 61 (3d Cir. 2001), an employee challenged an "unwritten policy of a state regulated Sewage Authority to subject its superintendent to urinalysis drug testing," *id*. at 62-63. After being informed of the condition, Kerns submitted to multiple drug tests, failed two of them, and was terminated. *Id.* at 63. He sued for reinstatement on the ground "that the Authority violated his Fourth Amendment right to be free from unreasonable searches

when it required him to submit to and pass a drug test as a condition of employment." *Id.* The district court granted the Authority summary judgment based on Kerns' consent. The Third Circuit affirmed.

As the court explained, although "[i]t is settled law that the collection and analysis of a urine sample to test for drug use constitutes a search that is subject to the constraints of the Constitution's Fourth Amendment," *id.* at 65 (citing *Skinner*, 489 U.S. at 617), "it is also settled law that a search conducted with the free and voluntary consent of the person searched is constitutional," *id.* (citing *Schneckloth*, 412 U.S. at 219). The court found that the record below established that Kerns had freely consented to drug testing. *Id.* at 65-66. Again, "'silent submission' to a drug test 'on pain of dismissal from employment' [did] not constitute consent." *Id.* at 66 (quoting *Bolden*, 953 F.2d at 824). But "Kerns did more than silently submit. He had signed a document in which he agreed to 'successfully complete' a pre-employment drug test as a condition of his employment." *Id.* As a consequence, there was no Fourth Amendment violation.

The Fifth Circuit took the same approach in *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977). There, a prison posted a large sign at its entrance warning that employees were "subject to routine searches of their person, property or packages." *Id.* at 350. "Sihler passed through this door almost every day as he reported for work." *Id.* at 350-51. Sihler also "had been advised upon his hiring that he was not to bring any contraband into the prison," and the record showed that he "had earned 87 college credits and spoke fluent English." *Id.* at 351.

After being searched by the prison in accordance with this policy, Sihler argued that his resulting conviction for marijuana possession "was based upon the fruits of a warrantless search by prison officials." *Id.* at 350. The Fifth Circuit disagreed because "a search conducted with one's consent need not meet the probable cause and warrant requirements of the Fourth Amendment, and … the search here was conducted with Sihler's consent. *Id.* "Under these circumstances in which Sihler voluntarily accepted and continued an employment which subjected him to search on a routine basis, … the search in question was made with his consent. Although the consent was required, it was nonetheless freely and voluntarily given and not the product of coercion." *Id.*

The division that exists among the courts of appeals to have addressed this issue is undeniable. In the Seventh, Eighth, Eleventh, and D.C. Circuits, public employees can *never* consent to any search that implicates the Fourth Amendment (and to urinalysis drug testing in particular) as a condition of employment. The question has been categorically resolved as a matter of law. The Third and Fifth Circuits, by contrast, hold that public employees can consent and look to the "totality of the circumstances" to determine if it was in fact freely and voluntarily given. These competing approaches are irreconcilable.

The Eleventh Circuit sought to distinguish *Sihler* as having "preceded *Skinner* and its progeny." App. 44a n.4. But that reasoning is flawed because neither *Skinner* nor any other Supreme Court decision has resolved this issue. *See infra* pp. 22-23. And the Eleventh Circuit claimed that *Kerns* was distinguishable because the decision "turned on a factual finding of consent in an individual case, which

the Third Circuit reviewed for clear error." App. 44a n.4. But that only highlights the division among the courts. The Eleventh Circuit and the others on its side of the split have rejected even the possibility of valid consent as a matter of law, whereas the Third Circuit (as *Kerns* shows) and Fifth Circuit treat consent as a fact question to be resolved under the totality of the circumstances.

This is an appropriate case for resolving the split. The Eleventh Circuit correctly denied summary judgment to Petitioner on this ground only if a government employee can never freely consent to drug testing. If the Third and Fifth Circuit's approach is instead correct, the Union's Fourth Amendment claim must fail because consent could not be found to be invalid as a matter of law in a pre-enforcement challenge such as this. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722 (2010) (holding that plaintiffs could not "prevail in their pre-enforcement challenge" based on "sheer speculation"). Moreover, the undisputed summary judgment record shows that the State agencies will obtain (and the DOC has obtained) written consent in a manner that raises no red flags under the Fourth Amendment. *See, e.g.*, *Bolden*, 953 F.2d at 811-12.

II. The Petition Raises Important and Unsettled Federal Questions Concerning Drug Testing of Government Employees.

Even if there were no circuit split, the Court should grant the Petition to settle whether the government may, consistent with the Fourth Amendment, condition employment on consent to drug testing. Contrary to the Eleventh Circuit's conclusion, the issue was not resolved

in *Skinner* or in any other decision. In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), a case concerning whether a state hospital could test pregnant women for drugs, the Court limited its review to "the appellate court's holding on the 'special needs' issue" and "assume[d] for purposes of [its] decision—as did the Court of Appeals—that the searches were conducted without the informed consent of the patients," *id.* at 76. The Court then "reversed and … remanded for a decision on the consent issue." *Id.*

That *Ferguson* reserved judgment on the consent issue by itself proves that *Skinner* and *Von Raab* (which were decided more than a decade earlier) did not resolve the issue. The Supreme Court briefing in those cases provides confirmation. In *Skinner*, the United States referenced consent only as part of its argument as to the privacy interests at stake under the "special needs" test, not as a stand-alone defense to the Fourth Amendment claim. Br. for Pet'rs, *Skinner*, 489 U.S. 602 (No. 87-1555), 1988 WL 1023122; Pet. for Writ of Cert., *Skinner*, 489 U.S. 602 (No. 87-1555), 1988 WL 1094056. In *Von Raab*, the United States likewise pressed only a "special needs" argument, explaining in a footnote that the government was "content to rest [its] defense … on the essential reasonableness of the program itself." Br. for United States, *Von Raab*, 489 U.S. 656 (No. 86-1879), 1987 WL 880093. Consent also was not raised in the other drug testing cases in which the issue could have been pressed. In short, the Court did not decide the issue *sub silentio* in *Skinner* and *Von Raab* only to remand the question for resolution in *Ferguson*.

The constitutionality of Florida's drug testing policy is not only unsettled—it is an important issue the Court

should decide now. The Eleventh Circuit has intruded upon Florida's sovereign right to ensure the general welfare of its citizens and regulate its workforce. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting) ("[T]he autonomy of a State is an essential component of federalism."); *FERC v. Mississippi*, 456 U.S. 742, 777 (1982) ("[E]ach State is sovereign within its own domain, governing its citizens and providing for their general welfare."). The Court has thus granted certiorari in cases where, as here, federal courts have invalidated state drug-testing policies, even in the absence of a circuit split. *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *cf. Chandler*, 520 U.S. 305; *Ferguson*, 532 U.S. 67.

The considerations that persuaded the Court to grant certiorari in those cases also warrant granting this Petition. Florida's elected representatives have reached the judgment that "[m]aintaining a healthy and productive workforce, safe working conditions free from the effects of drugs, and quality products and services is important to employers, employees, and the general public in this state." Fla. Stat. § 112.0455(3)(b). The State thus has "special responsibility to the public to ensure … that existing employees remain drug free" and that taxpayers are served by "a public workforce that is fit for duty and … free from the harmful and dangerous influence of illegal drugs." App. 102a; Fla. Stat. § 112.0455; App. 85a (district court recognizing that Florida has "a public interest in a drug-free workplace"). Floridians overwhelmingly support the Governor's decision to drug test government workers. App. 121a. Florida therefore "is fulfilling a public trust" and advancing an "appropriate and paramount interest" by assuring that those individuals whose salaries

are funded by the taxpayers are unimpaired and able to discharge their duties properly. *Wyman v. James*, 400 U.S. 309, 318-19 (1971).

A judicial ruling that prevents Florida from relying on the "best available method[]" of addressing drug abuse by government employment warrants this Court's review. App. 103a. This Court has long recognized that illegal drug abuse is a "serious" and "pervasive social problem," *Von Raab*, 489 U.S. at 674, one that remains prevalent in the workplace, *supra* pp. 2-4. "Drug use has serious adverse effects upon a significant portion of the workforce, resulting in billions of dollars of lost productivity each year and posing a threat to the workplace and to public safety and security." Fla. Stat. § 112.0455(3)(a); App. 112a (U.S. Department of Labor finding that "numerous studies, reports and surveys suggest that substance abuse is having a profoundly negative effect on the workplace in terms of decreased productivity and increased accidents, absenteeism, turnover, and medical costs"); App. 85a (district court finding that "a drug-free workplace … is manifestly more productive and less of a health and safety risk than the drug-impaired alternative").

That is why testing has become so common in private and public employment throughout the country. *Bolden*, 953 F.2d at 827; *Willner v. Thornburgh*, 928 F.2d 1185, 1187-94 (D.C. Cir. 1991). Yet the Eleventh Circuit has forbidden Florida from using "the same tools that are available to private-sector employers to ensure their workforce is drug free." App. 103a; *Lovvorn*, 846 F.2d at 1560 (Guy, J., dissenting) (finding it "anomalous" that a private company could drug test its employees but the City could not). That is precisely the kind of important question that meets this Court's criteria for review.

Finally, it is especially important to review the decision below given its reliance on this same reasoning to invalidate Florida's policy of requiring consent to drug testing as a condition of receiving welfare benefits. App. 42a (relying on *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202 (11th Cir. 2013)). Indeed, the Eleventh Circuit's broad ruling that public employees and benefit recipients can *never* consent to searches interferes with important State policy initiatives across a spectrum of issues and paradoxically affords them far greater protection than the Fourth Amendment affords in criminal cases. *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 372 (4th Cir. 1993). That kind of sweeping constitutional ruling merits this Court's attention.

III. The Eleventh Circuit Incorrectly Decided The Important Federal Questions Presented By This Petition.

The Eleventh Circuit's decision striking down the EO under the Fourth Amendment is unsustainable under this Court's precedent for several independent reasons.

A. This Court has long recognized that consent to a search cures any constitutional violation that might otherwise exist. *See supra* p. 19; *United States v. Drayton*, 536 U.S. 194, 207 (2002). This rule applies regardless of whether the search arises in a criminal or regulatory context. In *Wyman*, therefore, the Court rejected a Fourth Amendment challenge to a requirement that a welfare recipient submit to a home inspection by a state official because the beneficiary was free to deny consent to the search. 400 U.S. at 316-25. "If consent to the visitation is withheld, no visitation takes place. The aid then never

begins or merely ceases, as the case may be. There is no entry of the home and there is no search." *Id*. at 317-18. So too here. If an employee objects to drug testing, he or she is free to deny consent and no search will be conducted. But when the employee consents to drug testing, there is no Fourth Amendment violation. *Lovvorn*, 846 F.2d at 1553-61 (Guy, J., dissenting).

The fact that denial of consent has consequences for the individual's employment status does not render the choice involuntary. The Court has made clear that the government cannot restrict access to a public program or employment as a means of suppressing or coercing core speech, or as a means of punishing an individual's decision to exercise another constitutionally-protected right outside the workplace. *See, e.g.*, *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563 (1968); *Agency for Int'l Devel. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013); *Connick v. Myers*, 461 U.S. 138, 144-45 (1983) (explaining that the Court's unconstitutional conditions cases dealt with government attempts to "suppress the rights of public employees to participate in public affairs").

But the Court has never suggested that it is unconstitutional to impose a workplace condition merely because it requires the employee to consent to something that the government could not impose on the general public. *See, e.g.*, *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947); *Kelley v. Johnson*, 425 U.S. 238 (1976); *Snepp v. United States*, 444 U.S. 507 (1980); *Waters v. Churchill*, 511 U.S. 661 (1994). "Time and again [the Court's] cases have recognized that the Government has a

much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large. This distinction is grounded in the common-sense realization that if every employment decision became a constitutional matter, the Government could not function." *Nelson*, 131 S. Ct. at 757-58; *Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991) ("Individuals who are voluntarily employed for a [government-funded] project must perform their duties in accordance with the regulation's restrictions," which "do not in any way restrict the activities of those persons acting as private individuals."). Because of the "wide latitude accorded the government in the dispatch of its own internal affairs," such workplace rules will be upheld so long as there is a "rational connection" between the condition and the government's reasons for imposing it. *Kelley*, 425 U.S. at 247.

Here, there is clearly a rational connection between the EO and the problem that Florida seeks to remedy. Drug abuse by government workers is a serious concern, and the evidence is indisputable that drug use negatively affects productivity and safety. *See supra* pp. 3-4; *Lovvorn*, 846 F.2d at 1559-60 (Guy, J., dissenting) (explaining that "liability issues" that give government officials "a strong financial interest in taking affirmative measures designed to reduce the risks of accidents and related injuries" and that "[p]ublic employers must also consider the negative image created by public servants who buy and use drugs"). Suspicionless drug testing is "the best available method[] to ensure drug abusers do not enter or remain in the state workforce." App. 103a; *Lovvorn*, 846 F.2d at 1561 (Guy, J., dissenting) ("Under an individualized suspicion requirement, urinalysis essentially becomes a tool of confirmation, rather than discovery."). By identifying

drug abuse in the workplace, Florida can provide the taxpayers "a public workforce that is fit for duty and, as such, is free from the harmful and dangerous influence of illegal drugs," App. 102a; *Lovvorn*, 846 F.2d at 1560 (Guy, J., dissenting) ("[I]t is well established that there is a strong correlation between drug and alcohol abuse and absenteeism, tardiness and chronic medical problems.").

Moreover, the drug testing contemplated by the EO does not raise the potential for abuse often accompanied by workplace speech restrictions. The EO does not seek to suppress core speech or punish State employees from exercising a constitutionally-protected right. "There is no right, constitutional or otherwise, to be impaired for duty or to engage in illegal drug usage." *Lovvorn*, 846 F.2d at 1561 (Guy, J., dissenting). Nor does Florida drug test its employees for the purpose of ferreting out criminals and prosecuting unlawful activity. Florida law expressly prohibits the use of drug test results "in any criminal proceeding against the employee or job applicant." Fla. Stat. § 112.0455(11)(c); Fla. Admin. Code § 33-208.403(21).

B. The EO does not violate the Fourth Amendment under the "special needs" framework. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2627-29 (2010). It authorizes "'searches of the sort that are regarded as reasonable and normal in the private-employer context" and therefore "do not violate the Fourth Amendment.'" *Id*. at 2628 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 732 (1987) (Scalia, J., concurring in the judgment)). "In recent years, many employers in the private and public sectors have sought to implement drug testing programs." *Bolden*, 953 F.2d at 827 (Alito, J.). Indeed, consent to drug testing is a common part of applying for and keeping a job in the

private sector. *See supra* pp. 4-5; *Willner*, 95 F.2d at 1191 ("A recent study by the Bureau of Labor Statistics found that drug-testing programs have become fairly common in the nation's largest firms. The study showed that the larger the work force, the more likely the employer would have a drug-testing program.").

That is why millions of Americans each year are tested by their employers. Indeed, the ACLU has found that "tens of millions of American workers are drug tested, either before they are hired or as a condition of continued employment," "in some industries, taking a drug test is as routine as filling out a job application," that "workplace drug testing is up 277 percent since 1987," and is therefore considered an "increasingly widespread practice." App. 118a. And it is why numerous States have acted to ensure the workplaces in their States—public and private—remain drug free. *See supra* pp. 4-5. Florida "has the same need for supervision, control and the efficient operation of the work place as does any other employer, public or private." *Lovvorn*, 846 F.2d at 1559 (Guy, J., dissenting).

In addition, the searches authorized by the EO are reasonable when "the individual's privacy expectations" are balanced "against the Government's interests" in drug testing. *Von Raab*, 489 U.S. at 665; *Quon*, 130 S. Ct. at 2628; *O'Connor*, 480 U.S. at 719-20 (plurality opinion). "[W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624. That is precisely the case here.

Florida has an overriding interest in a drug-free workforce. "Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties." *Nelson*, 131 S. Ct. at 759-60; *Skinner*, 489 U.S. at 620; *O'Connor*, 490 U.S. at 720 (plurality opinion). Workplace drug abuse is widespread and has serious consequences. *See supra* pp. 2-5. Substance-abusing employees are "more likely to be involved in a workplace accident," to file "workers' compensation and disability claims," to change jobs frequently, to be late to or absent from work, and to be less productive. App. 113a. The bulk of these costs are not amassed solely by government employees whose daily responsibilities involve life-or-death scenarios; they come from the average worker, whose decisions and actions, while perhaps not as immediately dangerous as those of a train or crane operator, nonetheless implicate safety and productivity concerns.

Morover, assuming safety were the only concern, even a desk-bound clerk may become violent with other employees or the public, may present a danger when driving a car in a workplace parking lot, or may exercise impaired judgment when encountering any of the myriad hazards that exist in the workplace environment. It is "wrong[]" to conclude that "substance abuse is a problem only in industries that have … jobs requiring the operation of vehicles, machinery and tools …. [T]he general services industry pays a high price for substance abuse." App. 112a.

Florida's need for a safe, productive, and efficient workforce outweighs the limited expectation of privacy that attaches here for several reasons. First, that drug testing is common in the employment context, *see supra*

pp. 4-5, diminishes the employee's privacy interest, *Vernonia*, 515 U.S. at 665 (explaining that "when the government conducts a search in its capacity as employer … the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in"); *Quon*, 130 S. Ct. at 2628 (examining whether the "searches [were] of the sort that are regarded as reasonable and normal in the private-employer context"). Where an employment practice is ubiquitous and generally accepted outside government, as is true for workplace drug testing, the privacy claim of public workers is weak. *Cf. Florida v. Riley*, 488 U.S. 445, 450-51 (1989).

Second, the degree of regulation and lack of individual privacy that otherwise pervades government employment or a government program also is a significant factor in determining the reasonableness of an asserted expectation of privacy. *Skinner*, 489 U.S. at 627 (holding that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety"); *Vernonia*, 515 U.S. at 657 (noting that "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy"); *O'Connor*, 480 U.S. at 717-18 (plurality opinion). State of Florida employees voluntarily subject themselves to much closer scrutiny, regulation, and invasion of privacy than that encountered in the typical workplace. Florida has a long-established and celebrated tradition of open government. Fla. Const. art. I, § 24. Subject to limited exceptions, every document produced—including employees' personnel files and emails—is subject to inspection by any member of the public at any time. Fla. Stat. § 119.01(1), (2)(f); § 119.011(2), (12); § 119.07(1)(a).

Moreover, many Florida employees are required to make extensive public disclosures about their private activities outside of work. These financial and gift disclosures broadly reveal a great deal of personal information about public employees. *Id.* §§ 112.3145, 112.3148. By accepting a job working for the State, an employee is well aware that public service comes at the sacrifice of a significant amount of privacy.

Third, if the employer announces the policy in advance, and it is known to employees, any expectation of privacy guarding against the search is sharply reduced. *Von Raab*, 489 U.S. at 667, 672 n.2. Such an announcement "scotches [the] claim" of privacy. *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002). The EO clearly announces the policy governing agency workplaces going forward, the DOC has made its drug testing policy publicly accessible, and DOC employees are "notified in advance of the scheduled sample collection." *Von Raab*, 489 U.S. at 672 n.2.; *see supra* p. 8. The abundant notice given to employees here negates any expectation of privacy. *Ferguson*, 532 U.S. at 90-91 (Kennedy, J., concurring).

Fourth, the degree of intrusion urinalysis entails also "depends upon the manner in which production of the urine sample is monitored." *Earls*, 536 U.S. at 832; *Von Raab*, 489 U.S. at 672 n.4. Florida agencies have a long history of conducting drug testing in a discrete, private manner. *See supra* pp. 8-9. *Earls* upheld a testing program the Court characterized as "minimally intrusive" because the sample was produced in private, the results were confidential, and there were consequences associated only with the program for which it was taken. *Id.* at 833-34; *Skinner*, 489 U.S. at 626-27; *Von Raab*, 489 U.S. at 672 n.2; *Vernonia*, 515 U.S. at 658. The drug testing authorized

under the EO is consistent with the programs upheld in *Earls* and other cases.

C. Finally, whether as a matter of voluntary consent or Fourth Amendment reasonableness under the "special needs" framework, invalidating the EO's mandatory drug testing of current employees seeking transfer or promotion was particularly egregious. Consent to such testing is not coercive even under the Eleventh Circuit's ill-conceived approach as the employee is not offered a "Hobson's choice" to "relinquish their Fourth Amendment rights" or "accept termination immediately." App. 40a. The employee can decline the test and remain in his or her post. All that is lost is a promotion or transfer to which the employee has no vested right or expectation. Under these circumstances, the search is likewise reasonable under the "special needs" framework. *See, e.g.*, *Willner*, 928 F.2d at 1187-94. This important aspect of the Eleventh Circuit's decision, which the court failed to even address, is in obvious need of correction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSE PANUCCIO
107 East Madison Street
Caldwell Building
Tallahassee, FL 32399

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
BRETT A. SHUMATE
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
SUPREME COURT CLINIC
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
wconsovoy@wileyrein.com

January 13, 2014

Attorneys for Petitioner

APPENDIX

APPENDIX A — DENIAL OF REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 15, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-12908-AA

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 79, RICHARD FLAMM,

Plaintiffs-Appellees,

versus

RICK SCOTT, in his official capacity as Governor of the State of Florida,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING *EN BANC*

BEFORE: MARCUS, BLACK and SILER[1], Circuit Judges.

---

1. Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Appendix A

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 29, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-12908

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 79, RICHARD FLAMM,

Plaintiffs-Appellees,

versus

RICK SCOTT, in his official capacity as Governor of the State of Florida,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

May 29, 2013, Decided

Before MARCUS, BLACK and SILER*, Circuit Judges.

MARCUS, Circuit Judge:

This appeal presents two closely related issues: first, the extent to which an executive order that mandates suspicionless drug testing of 85,000 state employees

* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

violates the Fourth Amendment; and, second, the propriety of the district court's decision to enjoin the Governor of Florida from testing all 85,000 covered employees. The district court, confronted with a suspicionless drug testing policy that almost certainly sweeps far too broadly and hence runs afoul of the Fourth Amendment in many of its applications, granted relief that also swept too broadly and captured both the policy's constitutional applications and its unconstitutional ones. We therefore vacate the district court's order and remand for further proceedings.

Confusion regarding the scope of the relief that the plaintiffs requested has plagued this lawsuit from its inception in 2011. In that year, Appellant Rick Scott, the Governor of Florida, issued Executive Order 11-58 ("EO"), which mandated two types of suspicionless drug testing: random testing of all employees at state agencies within his control, and pre-employment testing of all applicants to those agencies. Appellee American Federation of State, County, and Municipal Employees Council 79 ("Union"), which represents many employees covered by the EO, sued in the United States District Court for the Southern District of Florida to invalidate the EO, and to enjoin its implementation, as unconstitutional under the Fourth Amendment. Initially, as the Union itself has conceded, its challenge was exclusively facial in nature and sought to strike down the entire EO rather than to limit its applicability. By the summary-judgment stage, however, the Union urged the district court to construe its complaint as making both a facial and an as-applied challenge. The Union's as-applied challenge contended only that the EO was unconstitutional when applied to

employees not occupying safety-sensitive positions—a group that the Union estimated to be roughly 60 percent of the covered employees.

The district court granted summary judgment to the Union and denied summary judgment to the State. In its order, the district court concluded that the State's justifications for testing all of its employees, including those in non-safety-sensitive positions, were insufficient. The court then turned to the question of what relief it would grant. The district court granted relief that it described as "as-applied" but that remained essentially facial in nature: the court invalidated the EO, and enjoined its implementation, as to all 85,000 current state employees. This relief covered every single employee and disregarded any distinction between safety-sensitive and non-safety-sensitive positions.

Yet, as the Supreme Court has established, a party is entitled to facial invalidation of a law on Fourth Amendment grounds only if the party can demonstrate that there are no constitutional applications of that law. In this case, the district court declared the EO unconstitutional as to *all* current state employees. This relief swept too broadly, enjoined both constitutional and unconstitutional applications of the EO, and did so without examining the specific job categories to be tested. What the Supreme Court's case law requires, in contrast, is that the trial court balance the governmental interests in a suspicionless search against each particular job category's expectation of privacy. Among the covered state employees, for example, are law enforcement personnel

who carry firearms as well as employees tasked with operating heavy machinery or large vehicles—groups that the Supreme Court has held, in a line of precedent beginning with *Skinner v. Ry. Labor Execs.' Ass'n,* 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), may be drug tested without individualized suspicion. As to those safety-sensitive employees, the EO's application would most likely be constitutional, and, therefore, the district court's order cannot stand as written.

The State, however, asks us to do more than vacate and remand. It argues that the Governor is entitled to summary judgment, and that we should reverse the district court, because the EO is constitutional as applied to all 85,000 state employees. At bottom, the State wants us to approve of a drug testing policy of far greater scope than any ever sanctioned by the Supreme Court or by any of the courts of appeals. In order to meet its burden of justifying the EO, the State offers several reasons, stated only at the highest order of abstraction, for why it can drug test all of its employees without any individualized suspicion. However, the Supreme Court has approved of suspicionless drug testing only when the government has demonstrated heightened interests, such as a serious threat to public safety, that apply narrowly to specific job categories of employees. Yet during the summary judgment proceedings, the State refused to provide reasons that apply narrowly to specific job categories, which undoubtedly hindered the district court from conducting its balancing calculus at the proper level of specificity. On remand, the State must meet its burden of demonstrating important special needs on a job-category-

by-category basis. Its current arguments have failed to convince us to direct summary judgment in its favor.

I.

A.

On March 22, 2011, Governor Scott issued Executive Order 11-58. The EO directed all state agencies "within the purview of the Governor . . . to provide for pre-employment drug testing for all prospective new hires and for random drug testing of all employees within each agency." The EO further instructed the agencies to "provide for the potential for any employee . . . to be tested at least quarterly." Approximately 85,000 people, or 77 percent of the State's workforce, are covered by the EO.

Although the Executive Order does not specify a method of drug testing, the State indicated in the district court that urinalysis would be the method used to implement the testing program. The testing process would afford the person providing the sample "individual privacy" unless there is reason to believe that a particular individual intends to alter or substitute the sample. In addition, the results of the drug tests cannot be used as evidence, obtained in discovery, or otherwise disclosed in any public or private proceeding.

The EO represented a significant expansion of the State's employee drug testing regime. Prior to the EO's issuance, Florida's Drug-Free Workplace Act ("DFWA"), Fla. Stat. § 112.0455, *permitted* drug testing in more

limited instances. State agencies were authorized to test: job applicants to "safety-sensitive position[s]," meaning "any position, including a supervisory or management position, in which a drug impairment would constitute an immediate and direct threat to public health or safety," § 112.0455(5)(f) & (m); current employees, if the employer had reasonable suspicion; current employees, if the test was "conducted as part of a routinely scheduled employee fitness-for-duty medical examination"; and current employees who entered "an employee assistance program for drug-related problems." *See* § 112.0455(7)(a)–(d). This version of the statute notably did not provide for random suspicionless testing of any current employees, even those employed in safety-sensitive positions.

Other statutes or administrative regulations provided for suspicionless testing of current employees in specific departments. The Department of Corrections ("DOC"), for instance, provided for random suspicionless testing of its employees. *See* Fla. Stat. § 944.474. The Department of Juvenile Justice ("DJJ") also required random suspicionless drug testing of its employees. The Department of Transportation ("DOT") and the Department of Environmental Protection ("DEP"), meanwhile, required random suspicionless testing of their safety-sensitive employees, particularly those who held commercial driver's licenses.

In 2012, the Florida Legislature amended the Drug-Free Workplace Act and substantially broadened it. The current version of Fla. Stat. § 112.0455 permits random testing of all employees at three-month intervals, *see* § 112.0455(7)(c) (2012), and expands the definition of "job

applicant" to cover all job applicants, *see* § 112.0455(5)(f) (2012). In essence, the current version of the DFWA authorizes what the EO mandates.

The text of the Executive Order offers several justifications for this sweeping policy, including, among others, that: (1) "the State, as an employer, has an obligation to maintain discipline, health, and safety in the workplace"; (2) "illegal drug use has an adverse [e]ffect on job performance," including the risk of absenteeism, greater burden on state health benefit programs, and a decline in productivity; and (3) drug use poses a risk to the public, which "interacts daily with state employees."

Prior to the issuance of the EO, the State had collected data from random drug testing of job applicants and employees at three departments—the Department of Transportation, the Department of Juvenile Justice, and the Department of Corrections. Random testing at DOT and DJJ yielded positive results in less than one percent of cases between 2008 and 2011; random testing at DOC 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. The State presented this data as evidence that there was a preexisting drug problem among the state employee population.

B.

On May 31, 2011, before any agency implemented the EO, the Union filed suit, alleging that the EO violated the Fourth Amendment. Using the terminology of a facial challenge, the Union described its suit as "an action . . .

for a preliminary injunction and a permanent injunction against the Governor of the State of Florida, ordering him to cease, or not implement, all employee drug-testing mandated by his Executive Order Number 11-58," and also for "declaratory judgment declaring that the drug-testing regime mandated by Executive Order 11-58 violates the Fourth Amendment of the Constitution." Compl. ¶ 1. The gravamen of the complaint was that "[t]he Supreme Court of the United States has held that suspicionless drug-testing by the government is an unreasonable search violative of the Fourth Amendment, except under certain special circumstances," none of which applied to the EO. Compl. ¶ 11. More precisely, the EO "violate[d] the Fourth Amendment . . . because it command[ed] state agencies to conduct random, suspicionless searches of all employees, without limiting the searches in any way to employees in safety-sensitive positions where there is a concrete danger of real harm." Compl. ¶ 13.

Regarding its standing, the Union averred that it represented more than 50,000 employees at the agencies covered by the EO. Its members were subject both to the random testing requirement for current employees as well as the pre-employment testing requirement for new hires because "employees represented by [the Union] who seek a promotion to another job are considered new employees." Compl. ¶ 15. Thus, the Union "sue[d] on its own behalf" as well as "in its organizational capacity on behalf of those state employees it represent[ed]." Compl. ¶ 16.

In the final section of the complaint, the Union reiterated its request for facial relief. The Union first

asked the district court to declare "that Defendant's Executive Order 11-58 is quashed because it violates the right of the people to be free from unreasonable searches, under the Fourth Amendment." The Union further urged the district court to issue a permanent injunction ordering "the Defendant [to] immediately direct all agencies and persons affected by Defendant's Executive Order 11-58 to cease all drug-testing implemented in compliance with the order." Compl. at 6-7.

C.

The parties filed cross motions for summary judgment. The Union argued that the Executive Order was unconstitutional because it failed to separate safety-sensitive from non-safety-sensitive positions and thus moved the district court to issue both a declaratory judgment declaring that the EO violated the Fourth Amendment and a permanent injunction barring the EO's implementation.

Notably, at this stage, the Union began recasting its complaint in the terminology of an as-applied challenge. The Union stressed that it "challenge[d] only the new drug-testing regime that tests the rest of the State's workers [not covered by the then-current version of Fla. Stat. § 112.0455]—those not suspected of drug abuse and those who don't hold safety-sensitive jobs." And, in its opposition to the State's cross-motion for summary judgment and its reply brief, the Union expressly insisted it had made an as-applied challenge. The Union argued that "the Complaint, fairly read, clearly put the Governor

on notice that [the Union] was bringing both a facial and as-applied challenge," and that its as-applied challenge contended that the statute was "unconstitutional as applied to [Union] bargaining unit members who are not reasonably suspected of drug abuse and who are not in safety-sensitive positions." The Union further clarified that, for purposes of its as-applied challenge, it was "not challenging drug-testing of those in safety-sensitive positions."

In support of its motion, the State argued: (1) that the Union lacked standing; (2) that the Union could not succeed on what the State maintained was a facial challenge to the Executive Order; (3) that, on the merits, the EO was constitutional because individuals consented to the test; or, alternatively, (4) that the EO was constitutional because the State had a special need justifying suspicionless drug testing. In its special-needs analysis, the State offered its interest in a safe, productive, and efficient workplace as the primary need justifying the EO. The State expressly declined to specify which groups of employees presented heightened safety concerns, instead arguing generally that "even if safety concerns were the only permissible justification, the notion that only intoxicated employees with certain duties present a danger to others . . . is untenable." Thus, according to the State, the proffered safety need applied across the board and to all employees:

> An employee need not drive a train, carry a gun, or interdict drugs to present a safety risk. Even a desk-bound clerk . . . may become violent with other employees or the public, may present

> a danger when driving a car in the workplace parking lot, or may exercise impaired judgment when encountering any of the myriad hazards that exist in the workplace environment . . . .

The State also asserted that the privacy interests of state employees were diminished for several reasons. First, drug testing among private employers had become common. Second, Florida had a tradition of open government. Finally, the policy was clearly announced, so employees could not have any expectation of privacy. As for the Union's as-applied challenge, the State declined to meet it head-on. Instead, it argued only that the district court should reject the Union's attempt to recast its pleadings because "prior to the about-face in its [o]pposition [to defendant's motion for summary judgment], Plaintiff repeatedly relied on the solely facial nature of its claim." According to the State, therefore, the district court should consider and reject only the Union's facial challenge.

D.

On April 25, 2012, the district court granted summary judgment to the Union and, in turn, denied the State's motion. After finding that the Union had standing to challenge the Executive Order,[1] the district court conducted the special-needs balancing test established in

1. Scott has not appealed the district court's determination that the Union had standing to challenge the EO, and we are satisfied that the Union has standing to mount this challenge.

Skinner and weighed the State's asserted public interests against the employees' privacy interests. The district court first determined that the public interests asserted were "notably broad and general compared to the interests that the Supreme Court . . . held justify suspicionless drug testing." The court then rejected the State's assertion that state employees possessed a diminished privacy interest. The district court therefore concluded that the EO was unconstitutional.

The district court turned to crafting the remedy. Although the State argued that the Union had mounted exclusively a facial challenge, the court pointed out that the Union had conceded that the Fourth Amendment permitted drug testing of state employees in safety-sensitive positions. However, the district court then characterized the Union's challenge "as consistent with an 'as-applied' challenge . . . . [that] asserts at most that the EO cannot be constitutionally applied to *any* current employee at a covered agency." (Emphasis added.) Accordingly, the district court granted far more sweeping relief than was consistent with the Union's concession. The Court granted a declaratory judgment holding the EO unconstitutional and issued an injunction coextensive with that declaration, which barred drug testing of "both Union and non-Union employees . . . . currently employed at covered agencies" as of the date of the district court's order. In short, the district court struck down the EO insofar as it covered all 85,000 current state employees. The only thing that the judgment and injunction did not address was the application of the EO to "pre-employment testing of non-current employees," a group the district

court labeled "prospective new hires," and "the random testing of those hired after the issuance of the EO."

The State timely appealed.

II.

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We review a district court's grant of summary judgment *de novo*, viewing the facts and drawing all reasonable inferences in the light most favorable to the non-moving party. *Moore ex rel. Moore v. Reese,* 637 F.3d 1220, 1231 (11th Cir. 2011). We review the decision to grant a permanent injunction for abuse of discretion but review the district court's underlying legal conclusions *de novo*. *See Alabama v. Ctrs. for Medicare & Medicaid Servs.,* 674 F.3d 1241, 1244 n.2 (11th Cir. 2012).

A.

The parties first dispute whether the relief the district court granted in this case was facial or as-applied in nature. Although the boundary between these two forms of relief is not always clearly or easily demarcated, the district court's decision to strike down the EO and enjoin its implementation as to all 85,000 current employees has the essential characteristics of facial relief.

From the outset, the Union mounted a facial challenge to the Executive Order. That much is apparent from the

face of the complaint. We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature. *See Doe v. Reed*, 130 S. Ct. 2811, 2817, 177 L. Ed. 2d 493 (2010). The heart of the Union's requested remedy was two-fold: first, that the district court broadly declare "that Defendant's Executive Order 11-58 is quashed because it violates the right of the people to be free from unreasonable searches, under the Fourth Amendment"; and, second, that the district court issue an injunction ordering "the Defendant [to] immediately direct *all* agencies and persons affected by Defendant's Executive Order 11-58 to cease all drug-testing implemented in compliance with the order." Compl. at 6-7 (emphasis added). There can be no doubt that this relief would be facial in nature. And, indeed, the Union expressly maintained that its challenge was facial prior to filing a motion for summary judgment.

However, the Union began requesting both facial and as-applied relief at the summary-judgment stage. In requesting as-applied relief, the Union explained that it "challenge[d] only the new drug-testing regime that tests . . . those not suspected of drug abuse and those who don't hold safety-sensitive jobs," and that it was "not challenging drug-testing of those in safety-sensitive positions." The Union identified the non-safety-sensitive category of employees to be roughly 60 percent of all employees covered by the EO.

Insofar as the Union mounted a facial challenge to the Executive Order—and it surely did that—it had to meet an especially demanding standard. "A facial challenge,

as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *United States v. Frandsen,* 212 F.3d 1231, 1235 (11th Cir. 2000). "[W]hen a plaintiff mounts a facial challenge to a statute or regulation, the plaintiff bears the burden of proving that the law could never be applied in a constitutional manner." *DA Mortg., Inc. v. City of Miami Beach,* 486 F.3d 1254, 1262 (11th Cir. 2007). Put another way, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The Supreme Court reaffirmed Salerno's validity as recently as 2010, *see United States v. Stevens,* 559 U.S. 460, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010) (citing *Salerno*, 481 U.S. at 745), and, just last year, a panel of this Court reiterated that the strict "no set of circumstances" test is the proper standard for evaluating a facial challenge. *GeorgiaCarry.Org, Inc. v. Georgia,* 687 F.3d 1244, 1255 & n.19 (11th Cir. 2012).

Salerno also applies when a court grants relief that is quasi-facial in nature—that is, relief that reaches beyond the plaintiffs in a case. In *Doe v. Reed*, for instance, the Supreme Court considered a challenge that a state law violated the First Amendment when applied to referendum petitions. 130 S. Ct. at 2817. The Court noted that characterizing the challenge as either facial or as-applied was problematic because the challenge "obviously ha[d] characteristics of both: The claim [wa]s 'as applied' in the sense that it d[id] not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim [wa]s 'facial' in that it [wa]s not limited

to plaintiffs' particular case . . . ." *Id.* When a plaintiff brings this sort of quasi-facial challenge, "[t]he label is not what matters." *Id.* Where "an injunction . . . reach[es] beyond the particular circumstances of these plaintiffs," it "must therefore satisfy [the Supreme Court's] standards for a facial challenge to the extent of that reach." *Id.*

Prior to considering the propriety of the Union's facial challenge, the district court correctly attempted to construe the Union's complaint as making a more limited, as-applied challenge to the EO. The State objects that the district court could not have construed the Union's suit as an as-applied challenge at all because the Union's complaint requested only facial relief and the Union insisted during discovery that it was mounting a facial challenge. This objection is unconvincing. Ordinarily, it is true that, "[a]t the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment" or one advocating summary judgment. *Gilmour v. Gates, McDonald & Co.,* 382 F.3d 1312, 1315 (11th Cir. 2004). In this case, however, the Union was not stating a new claim, only clarifying the scope of its desired remedy. As the Supreme Court has explained, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed.*

Election Comm'n, 558 U.S. 310, 331, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); *see Jacobs v. Fla. Bar,* 50 F.3d 901, 905 n.17 (11th Cir. 1995) (we are not bound by a party's characterization of the complaint as facial, but rather look to whether "the complaint sets forth a cause of action for an as-applied challenge").

As a general matter, courts strongly disfavor facial challenges, and for good reason:

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (citations and internal quotation marks omitted). Thus, courts construe a plaintiff's challenge, if possible, to be as-applied. *See Jacobs,* 50 F.3d at 905 n.17; *see also Stupak-Thrall v. United States,* 89 F.3d 1269, 1288 (6th

Cir. 1996) (Boggs, J., dissenting) ("[U]nless a plaintiff expressly disavows an 'as-applied' challenge, the complaint that a regulation is invalid should be construed, if possible, as an as-applied challenge.").

However, despite explicitly saying that it was granting only as-applied relief, the district court in this case granted what effectively amounted to facial relief by declaring the Executive Order unconstitutional and enjoining its application to all 85,000 current employees. As the district court itself acknowledged, the concession that transformed the lawsuit into an as-applied challenge was the Union's admission that the Fourth Amendment permitted drug tests of state employees in safety-sensitive positions. Yet the district court did not follow that reasoning to its necessary conclusion, which was that the proper scope of the as-applied challenge—and the scope of the relief that it could have granted based on the Union's motion for summary judgment—was limited to those employees not occupying safety-sensitive positions. Instead, the district court characterized the Union's concession "as consistent with an 'as-applied' challenge . . . . [that] asserts at most that the EO cannot be constitutionally applied to *any* current employee at a covered agency." (Emphasis added.) In doing so, the district court attached an as-applied label to what essentially amounted to a facial challenge concerning all 85,000 current state employees.

This led the district court to grant both a declaratory judgment and a corresponding injunction that were too broad. In determining the scope of its relief, the court began by dividing the individuals subject to the EO into

three groups: (1) employees at the covered agencies prior to the issuance of district court's order; (2) "prospective new hires," which meant "individuals who are not currently employed at covered agencies"; and (3) employees at the covered agencies hired after the district court's order. The district court then granted the Union declaratory judgment declaring the EO unconstitutional, and an injunction that mirrored the scope of that declaration, as to the first group. The court stated that its order left "unresolved" the question of the EO's constitutionality with regard to the latter two groups, since "[t]he Union ma[de] no claims as to the constitutionality of the EO as it relates to pre-employment testing of non-current employees, or the random testing of those hired after the issuance of the EO." This limitation, however, did not transform the district court's relief from facial to as-applied.

As we've said, the line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation. The Supreme Court itself has weighed challenges with both facial and as-applied characteristics, *see, e.g.*, *Doe,* 130 S. Ct. at 2817, and perhaps the best understanding of constitutional challenges is that "[t]here is no single distinctive category of facial, as opposed to as-applied, litigation." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321 (2000). As both parties acknowledged at oral argument, the district court's order has characteristics of both facial and as-applied relief. On the one hand, it

reaches far beyond the scope of the Union's as-applied challenge and encompasses all current state employees. On the other hand, the district court did not invalidate the EO in its entirety.

Nonetheless, we conclude that the district court granted what effectively amounted to facial relief—or, at the very least, relief that had enough characteristics of facial relief to demand satisfaction of *Salerno*'s rigorous standard. The essential point is that the district court invalidated the EO across the board covering *all* 85,000 state employees, the overwhelming majority of those subject to the EO. The scope of the district court's judgment is extremely broad and, notably, its relief was not limited in any way by the concession the Union itself made: "[O]n March 22, 2011 (the date of promulgation) there was at least one employee . . . who held a high-risk, safety-sensitive job, and was subject to EO 11-58. And we admit that the Fourth Amendment does not bar the random drug testing of government employees in high-risk, safety-sensitive jobs." Notwithstanding that concession, the district court's judgment and injunction bar the State from testing that employee and, indeed, any other current employee who, for example, occupies a law enforcement position that requires carrying a firearm.

Nor does the district court's cutoff of the scope of its judgment and the accompanying injunction transform that relief into as-applied relief. The district court invalidated the Executive Order and enjoined its implementation as to the vast majority of individuals covered by the EO. To be sure, the district court did not declare unconstitutional or

enjoin the implementation of the entirety of the EO. But the district court's decision not to cover pre-employment testing of prospective new hires does not alter our view that the relief it did grant was facial as to all 85,000 current employees. If a statute has two distinct provisions, and a court strikes down one as unconstitutional (and indeed, one that covers so many employees), we would not say that the relief was as-applied simply because a part of the statute remains. Rather, we would say that, as to the provision the court struck down, the plaintiff obtained facial relief. *See Doe,* 130 S. Ct. at 2817.[2] Here, that is precisely what the Union received. Rather than conducting any kind of job-category-by-category inquiry, and narrowly tailoring its decision to the precise contours of the constitutional violation, the district court facially invalidated the provision of the Executive Order that provides "for random drug testing of all employees within each agency."

B.

Having established that the district court granted facial relief, the essential question becomes whether that relief could meet *Salerno*'s demanding standard. To uphold the scope of the relief, we would have to be convinced that the State could never constitutionally require any of the 85,000 current state employees protected by the injunction

2. The alternative is untenable. If a challenge to a statute only became facial in nature when it attacked every provision within a statute, then any moderately clever drafter could insulate an unconstitutional statute from a facial challenge simply by adding a provision to the statute that was clearly constitutional.

to submit to a suspicionless drug test. But the answer, plainly, is that there are some (how many is unclear) current state employees as to whom suspicionless drug testing is constitutionally permissible. This conclusion ineluctably follows from the line of Supreme Court precedent beginning with *Skinner*, which held that the Fourth Amendment permits suspicionless drug testing of certain safety-sensitive categories of employees—for instance, employees who operate or pilot large vehicles, or law enforcement officers who carry firearms in the course of duty.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. amend. IV, and applies to the states through the Due Process Clause of the Fourteenth Amendment. *See City of Ontario v. Quon,* 560 U.S. 746, 130 S. Ct. 2619, 2624, 177 L. Ed. 2d 216 (2010). Testing a urine sample, which "can reveal a host of private medical facts about an employee," and which entails a process that "itself implicates privacy interests," is a search. *Skinner,* 489 U.S. at 617; *see also Chandler v. Miller,* 520 U.S. 305, 313, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). The basic question we are required to answer when confronted with a drug-testing policy is whether this search is reasonable. *Chandler,* 520 U.S. at 313. While "[i]n the criminal context, reasonableness usually requires a showing of probable cause" to obtain a search warrant, that standard is "unsuited to determining the reasonableness of administrative searches where the 'Government seeks to *prevent* the development of hazardous conditions.'" *Bd. of Educ. v. Earls,* 536 U.S.

822, 828, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002) (quoting *Nat'l Treasury Emps. Union v. Von Raab,* 489 U.S. 656, 667-68, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989)).

The default rule in this context, therefore, is that "[t]o be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler,* 520 U.S. at 313. While individualized suspicion is the normal requirement, "particularized exceptions to the main rule are sometimes warranted based on 'special needs, beyond the normal need for law enforcement.'" *Id.* (quoting *Skinner,* 489 U.S. at 619). When the government alleges that special needs justify this Fourth Amendment intrusion, "courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner,* 489 U.S. at 624.

Therefore, the test we apply is a job-category-by-category balancing of "the individual's privacy expectations against the Government's interests," *Von Raab,* 489 U.S. at 665, with other relevant factors being "the character of the intrusion"—particularly whether the collection method affords a modicum of privacy, *see Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 658, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)—and the efficacy of the

testing regime, *see Chandler,* 520 U.S. at 319-20. At times, the Supreme Court has described the interests justifying suspicionless drug testing as "compelling." *See Von Raab,* 489 U.S. at 670; *Skinner,* 489 U.S. at 628. In *Vernonia*, the Court clarified that "[i]t is a mistake, however, to think that the phrase 'compelling state interest,' in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern," and therefore we cannot "dispose of a case by answering in isolation the question: Is there a compelling state interest here?" 515 U.S. at 661. Rather, a compelling interest is one "*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Id*.

The Supreme Court has had five occasions to evaluate suspicionless drug testing policies in the last twenty-five years. We therefore know the kinds of interests that are important enough to subject certain limited categories of individuals to suspicionless drug tests, and, moreover, we know that some of the 85,000 current state employees fall within those categories. In *Skinner*, the Supreme Court established that the government has a compelling need to test railroad employees. In that case, the Federal Railroad Administration ("FRA") required suspicionless drug testing of workers involved in railroad accidents. 489 U.S. at 606. As for the first factor in the balancing test, the FRA's interest, the Court's inquiry focused intently on the special characteristics of the railroad industry, where on-the-job intoxication was "a significant problem" that had resulted in "21 significant train accidents" in a ten-year period. *Id.* at 607. On the other side of the ledger,

the Court reasoned that "the expectations of privacy of covered employees [we]re diminished by reason of their participation in an industry that is regulated pervasively to ensure safety." *Id.* at 627. As the Court pointed out, railroad "employees ha[d] long been a principal focus of regulatory concern," with various federal laws subjecting railroad employees' physical fitness to testing and regulation. *See id.* at 627-28. The two other factors were the character of the intrusion and the efficacy of the policy. The FRA's urine testing was not overly intrusive because it did not require direct observation, *id.* at 626, and testing was effective because it "deterr[ed] employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place." *Id.* at 629; *accord id.* at 631-32. In light of these factors, most notably the serious risks to public safety implicated by this specific category of employees, the Court upheld the constitutionality of the FRA's policy. *See id.* at 633. The principle we draw from *Skinner* is that government "employees . . . engaged in safety-sensitive tasks," *id.* at 620, particularly those involved with the operation of heavy machinery or means of mass transit, may be subject to suspicionless drug testing.

In *Von Raab*, the Supreme Court identified several other job categories that a suspicionless drug testing policy may cover. At issue in that case was the United States Customs Service's required urinalysis testing for three job categories: first, those directly involved in drug interdiction; second, those who carried firearms; and third, those who handled classified material. *Id.* at 660-61. The Court began by identifying the government's special

needs with regard to the first two categories. *Id.* at 668. Customs employees responsible for drug interdiction were "exposed to th[e] criminal element and to the controlled substances it s[ought] to smuggle into the country"; the Customs Service was concerned not only about those employees' "physical safety" but also the risk of bribery or corruption. *See id.* at 669. Thus, the Supreme Court found that "the Government ha[d] a compelling interest in ensuring that front-line interdiction personnel [we]re physically fit, and ha[d] unimpeachable integrity and judgment." *Id.* at 670. Similar logic applied to those who carried firearms. Employees "who may use deadly force plainly discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* (internal quotation marks omitted).

As for the privacy interests implicated by the search, the Supreme Court began by noting that "certain forms of public employment may diminish privacy expectations even with respect to such personal searches." *Id.* at 671. The Court explained that, "[u]nlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms." *Id.* at 672. "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," and thus their privacy could not "outweigh the Government's compelling interests in safety and in the integrity of our borders." *Id.*

As for employees who handled classified information, however, the Court remanded. While noting that the protection of "truly sensitive information" is "compelling," *id.* at 677, the Court questioned the Customs Service's designation of several classes of employees—for instance, baggage clerks and messengers—as belonging to this category. *See id.* at 678. Since the Court could not determine "whether the Service ha[d] defined this category of employees more broadly than is necessary," it remanded for the lower courts to determine more precisely which employees truly dealt with sensitive information. *See id.*

The Supreme Court next approved of suspicionless drug testing in a far different context than government employment: schools. The Court upheld the constitutionality of two schools' policies of randomly drug testing student athletes, *Vernonia,* 515 U.S. at 648, and students participating in competitive extracurricular activities, *Earls,* 536 U.S. at 825. The Supreme Court found that there was a special need in the public school context, where teachers were responsible for their young charges. *See Vernonia*, 515 U.S. at 661 ("Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . or deterring drug use by engineers and trainmen . . . ."); *Earls,* 536 U.S. at 829. As for the students' privacy interests, the Court noted that the students by definition were "(1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Vernonia,* 515 U.S. at 654. The State, acting *in loco parentis*, exercised "a degree of

supervision and control that could not be exercised over free adults." *Id.* at 655; *see Earls,* 536 U.S. at 831. Those diminished privacy interests could not overcome the government's important interests in protecting children from drug use. *See Vernonia,* 515 U.S. at 665; *Earls,* 536 U.S. at 838.

In contrast to the preceding cases, the Supreme Court rejected a Georgia statute that required all candidates for certain state offices to submit to a drug test at a time of their choosing prior to the election. *See Chandler,* 520 U.S. at 309-10. Georgia attempted to justify its policy based on "the incompatibility of unlawful drug use with holding high state office," contending that illegal drug use "draws into question an official's judgment and integrity" and "jeopardizes the discharge of public functions." *Id.* at 318. The Court dismissed these broad and general rationales, finding "[n]otably lacking . . . any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." *Id.* at 318-19. Unlike the railroad employees in *Skinner* or the law enforcement officers in *Von Raab*, "th[e Georgia] officials typically d[id] not perform high-risk, safety-sensitive tasks, and the required certification immediately aid[ed] no interdiction effort." *Id.* at 321-22. Worse still, Georgia's testing program was not even well-crafted to detect drug use, since the candidates themselves scheduled the drug test and could easily evade a positive result. *Id.* at 319-20. The Supreme Court therefore had little trouble declaring this policy unconstitutional.

Appendix B

Although this Court recently has addressed the constitutionality of suspicionless drug testing in a different context, *see Lebron v. Sec'y, Fla. Dep't of Children & Families,* 710 F.3d 1202, 1218 (11th Cir. 2013) (affirming a preliminary injunction barring suspicionless testing of welfare recipients), we have not considered the propriety of testing current or potential government employees since *Chandler v. Miller,* 73 F.3d 1543 (11th Cir. 1996), *rev'd*, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513. Our sister circuits, however, have confronted a wide variety of drug testing policies and have identified several other safety-sensitive job categories. In cases similar to *Skinner*, the courts of appeals have upheld suspicionless drug testing of categories of employees whose work involves heavy machinery or the operation of large vehicles, such as planes, trains, buses, or boats. Thus, although *Skinner* itself addressed railroad employees, the courts of appeals have extended its logic to those involved in the operation of aircraft. *See, e.g.*, *Bluestein v. Skinner,* 908 F.2d 451, 457 (9th Cir. 1990); *Nat'l Fed'n of Fed. Emps. v. Cheney,* 884 F.2d 603, 610-11, 280 U.S. App. D.C. 164 (D.C. Cir. 1989). Another category—a natural extension of the Supreme Court's holding in *Von Raab*—encompasses police officers, *see Carroll v. City of Westminster,* 233 F.3d 208, 213 (4th Cir. 2000), correctional officers who interact with parolees or inmates in a prison, *see Int'l Union v. Winters,* 385 F.3d 1003, 1013 (6th Cir. 2004), and firefighters, *see Hatley v. Dep't of the Navy,* 164 F.3d 602, 604 (Fed. Cir. 1998).

The crucial point is that, to affirm the district court's declaration and injunction in this case, we would have to find that none of the 85,000 current employees covered

by the district court's relief belong to the special-needs categories identified by the Supreme Court. However, the Union's own submissions belie this. Indeed, the Union itself observed that, "[o]f the approximately 85,000 employees in 2010, 33,052 of them . . . served in arguably safety-sensitive positions." More precisely, during discovery, the Union asked the State to identify:

- "How many employees affected by EO 11-8 regularly carry firearms on the job?" (Interrogatory 16)
- "How many employees affected by EO 11-58 are sworn law enforcement officers?" (Interrogatory 17)
- "How many employees affected by . . . EO 11-58 regularly interact on the job with detainees in the correctional system?" (Interrogatory 18)
- "How many employees affected by EO 11-58 regularly interact on the job with primary or secondary school students?" (Interrogatory 19)
- "How many employees affected by EO 11-58 regularly work as mass transit operators?" (Interrogatory 20)
- "How many employees affected by EO 11-58 regularly work as transportation safety inspectors?" (Interrogatory 21)

The State provided fairly detailed figures in its responses, including, for example, the following categories of

employees who carry firearms: 157 employees in the Department of Business & Professional Regulation, 146 inspectors in the Department of Corrections (along with another 1,088 employees who were authorized but not required to carry firearms), 136 employees in the Department of Environmental Protection, and 23 in the Department of Military Affairs. Based on the holding in *Von Raab*, it is apparent that, at least as to these employees, the EO is very likely constitutionally applicable. The State further identified several distinct categories of employees who operate heavy machinery or large vehicles, with almost a thousand working for the Department of Transportation alone. *Skinner* makes it likely that the State also may subject these, or at least some of these, employees to suspicionless drug testing. Yet by extending the declaratory judgment and injunction to *all* current employees, the district court effectively disregarded these portions of the record and barred testing of the safety-sensitive employees included among the 85,000 current employees.

Under *Salerno*, the EO could not possibly be unconstitutional as to all current employees, and the district court's order therefore cannot "satisfy [the Supreme Court's] standards for a facial challenge to the extent of [the order's] reach." *Doe,* 130 S. Ct. at 2817. Since it is well-settled that a district court abuses its discretion when it grants relief that is improperly or even unnecessarily broad, *see Alley v. U.S. Dep't of Health & Human Servs.,* 590 F.3d 1195, 1205 (11th Cir. 2009), we vacate and remand the judgment and the injunction for the district court to more precisely tailor its relief to the extent the Executive Order may be unconstitutional.

Nonetheless, the Union maintains that the scope of the injunction was proper anyhow and fell well within the district court's broad discretion. In fact, the Union continues to assert that the court "was also within its discretion to award facial relief" because the Union had demonstrated that no set of circumstances exists under which the EO would be valid. This places the Union's arguments in palpable tension. On the one hand, it concedes that suspicionless drug testing of safety-sensitive employees would be constitutional. On the other hand, it maintains that the EO is facially unconstitutional.

The way that the Union squares the circle is by misapplying *Salerno*'s "no set of circumstances" test. According to the Union, the Executive Order requires suspicionless drug testing of all employees, and "there are no circumstances in which suspicionless drug testing of all employees and applicants would be constitutional." Therefore, the EO fails across the board. Under the Union's interpretation of *Salerno*'s test, a single application of the EO means its application to *all* employees. But under *Salerno* and our precedents, *see, e.g.*, *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1313 (11th Cir. 2009) ("Th[e] mere possibility of a constitutional application is enough to defeat a facial challenge to [a] statute."), a single "application" of the EO must mean the suspicionless drug test of a *single* employee. The EO is facially valid, in other words, if the Fourth Amendment permits at least one covered employee to be tested. The Union's position completely inverts *Salerno* and renders a facial attack, far from being the "most difficult" of challenges, 481 U.S. at 745, the easiest to make. To prevail

under the Union's version of *Salerno*, the Union needs to show only one employee as to whom suspicionless drug testing is unconstitutional. Then, it would follow, the EO is unconstitutional as a whole because there is no way that testing of all employees is constitutional.[3] Under the correct understanding of *Salerno*, we are compelled to conclude that the EO is not facially invalid since safety-sensitive employees may be subjected to suspicionless drug testing.

The Union offers another argument: that the district court was required to facially invalidate the EO because otherwise the court would have been "put in the untenable position of having to rewrite" it. The Union claims that the Supreme Court's case law cautions against partial invalidation and cites *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006). *Ayotte*, however, hardly supports this proposition. As the Supreme Court stated in that case,

---

3. The Union cites only one case in support of this understanding of facial challenges: *Baron v. City of Hollywood,* 93 F. Supp. 2d 1337 (S.D. Fla. 2000). The district court in *Baron* accepted an argument essentially identical to the one the Union makes in this case, *see id.* at 1339, and facially invalidated a suspicionless drug testing policy when the city could not justify its application as to all employees, *id.* at 1342. In the first place, *Baron* has no precedential value. Second, *Baron* makes the same mistake we have identified in the Union's argument. It implicitly defines the application of a drug testing policy as the testing of *all* employees, rather than the testing of one employee. As the Ninth Circuit has explained in rejecting an argument that relied upon *Baron*, this mistake "would turn *Salerno* on its head." *See Lanier v. City of Woodburn,* 518 F.3d 1147, 1150 (9th Cir. 2008).

"the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Id.* at 329 (quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985)). In *Sabri v. United States*, the Court identified the "few settings" in which it had "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term)": free speech, the right to travel, abortion rights (the category to which *Ayotte* itself belongs), and legislation under § 5 of the Fourteenth Amendment. 541 U.S. 600, 609-10, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004). As the Court put it, "[o]utside these limited settings, and absent a good reason, we do not extend an invitation to bring overbreadth claims." *Id.* at 610. The Supreme Court has not sanctioned this type of facial invalidation in the Fourth Amendment context, and we can discern no basis to do so here.

C.

As a fallback position, the Union suggests that we could refashion the judgment and injunction simply by cutting them down to cover only those categories of employees as to whom the Executive Order's application is unconstitutional. While an appellate court undoubtedly has the power to modify injunctions, *see United States v. Nat'l Treasury Emps. Union,* 513 U.S. 454, 480, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995), or to affirm a judgment as to some plaintiffs but not others, *see Allen v. Bd. of Pub. Educ.,* 495 F.3d 1306, 1320 (11th Cir. 2007), we decline

to do so because the sort of fact-intensive line-drawing required is a task that properly belongs to the district court. Unlike the typical case where we may affirm a judgment as to some plaintiffs but not as to others, we are dealing here not with a manageable number of individual plaintiffs but with a current workforce of some 85,000 state employees. Nor is the district court's order as amenable to modification as the injunction in *Nat'l Treasury Emps. Union*, which the Supreme Court altered solely to exclude non-plaintiffs. In sharp contrast, in order to modify the judgment and injunction before us, we would be required to "differentiate[] between job categories designated for testing," scrutinize the State's rationale for testing each job category, and "conduct[] the balancing test" laid out in *Skinner* and its progeny. *See Nat'l Fed'n of Fed. Emps. v. Vilsack,* 681 F.3d 483, 489, 401 U.S. App. D.C. 152 (D.C. Cir. 2012). As it currently stands, the district court's order does not break down the covered employees on a job-category-by-category basis, which leaves us with little basis for determining which portions of the declaratory judgment and the injunction are proper. Thus, while we could simply enjoin the EO as to all employees except those in certain safety-sensitive job categories—those who carry firearms in the course of law-enforcement duties, for instance, or those who operate heavy machinery—and end up probably being right, we would be pronouncing the law without really knowing the facts. *Cf. United States v. Banks,* 347 F.3d 1266, 1271-72 (11th Cir. 2003).

Although the Union did divide the covered employees at least into an "arguably" safety-sensitive group (encompassing roughly 40 percent of all covered employees)

and a non-safety-sensitive group, we understand that the Union's position is that some of the employees in the arguably safety-sensitive group actually are not subject to suspicionless testing, while the State's position is that some employees in the non-safety-sensitive group are subject to suspicionless testing. Thus, for instance, the State included all employees at the Department of Corrections within its answer to the Union's interrogatories. The Union will undoubtedly contest whether some categories of DOC employees should be included within the safety-sensitive category. Meanwhile, the State may be able to identify job categories that the Union has labeled non-safety-sensitive but that actually present real, substantial, and immediate threats to public safety. The Union's interrogatories, for instance, never asked about the number of doctors or medical personnel employed by the State. Yet some courts of appeals have held that government-employed medical residents or emergency medical technicians are safety-sensitive employees. *See Pierce v. Smith,* 117 F.3d 866, 874 (5th Cir. 1997); *Piroglu v. Coleman,* 25 F.3d 1098, 1102, 306 U.S. App. D.C. 392 (D.C. Cir. 1994). In light of the wholly undefined nature of the non-safety-sensitive group, and the fact that the current division was found only in the submission of one party in an answer to some interrogatories rather than in the district court's own finding, we are convinced that determining the proper composition of those groups is a task best left to the district court in the first instance. In order for the district court to accomplish this task, the parties must provide the court with more extensive, job-category-specific facts than the record currently contains. It is difficult to imagine how this category-specific balancing task can be accomplished without additional discovery.

Thus, we vacate and remand both the declaratory judgment and the corresponding injunction in order for the district court to conduct further factfinding and to recraft its relief to cover only those groups as to which the Executive Order's application is unconstitutional.

III.

The State does not ask us merely to vacate and remand; boldly, it urges us to reverse the denial of its summary judgment motion and to direct the district court to grant judgment in its favor. The State argues that there is no need for the district court to conduct the very job-category-by-category balancing that the Supreme Court's case law commands. Instead, the State offers several reasons that, it claims, can justify suspicionless drug testing of all 85,000 government employees regardless of the nature of their specific job functions. Based on these generic reasons, the State asks us to approve a testing policy of unprecedented scope. We are unpersuaded.

The State's arguments, which are stated so abstractly, cannot satisfy the special-needs balancing test laid out in *Skinner* and its progeny. Those cases conducted the special-needs balancing test not at a high order of generality but in a fact-intensive manner that paid due consideration to the characteristics of a particular job category (e.g., the degree of risk that mistakes on the job pose to public safety), the important privacy interests at stake, and other context-specific concerns (e.g., evidence of a preexisting drug problem). The State's arguments have not convinced us that *Skinner* and its progeny

are inapplicable, nor can they obviate the need for job-category-by-category scrutiny. Just as we know that some subset of state employees almost certainly can be tested due to specific, important safety concerns, we know that there are some employees who almost certainly cannot be tested without individualized suspicion. Again, the problem is that the factual record is almost barren, and the balancing calculus required by Supreme Court case law cannot be exercised in a vacuum.

A.

The State's first justification is that employees have consented to testing by submitting to the testing requirement rather than quitting their jobs, and that this consent renders the Executive Order's search reasonable and hence constitutional. 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. Moreover, rather than treating this exacted consent as part of the special-needs balancing test, the State instead argues that this consent, standing alone, justifies suspicionless drug testing.

To begin with, we do not agree that employees' submission to drug testing, on pain of termination, constitutes consent under governing Supreme Court case law. *See Lebron,* 710 F.3d at 1214-15. Although a "search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), consent must

be "in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248; *see also Bumper v. North Carolina,* 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); *Johnson v. United States,* 333 U.S. 10, 13, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (consent invalid when "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right"). Employees who must submit to a drug test or be fired are hardly acting voluntarily, free of either express or implied duress and coercion. *See Bostic v. McClendon,* 650 F. Supp. 245, 249 (N.D. Ga. 1986); *cf. Garrity v. New Jersey,* 385 U.S. 493, 497-98, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) (holding that the government cannot require its employees to relinquish their Fifth Amendment rights on pain of termination because "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination" was "the antithesis of free choice").

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. In *Skinner*, the Court weighed the railroad employees' "participation in an industry that is regulated pervasively to ensure safety," 489 U.S. at 627, as a factor militating in favor of drug testing. In *Von Raab*, the Court explained that employees' choice of "certain forms of public employment may diminish privacy expectations even with respect to . . . personal searches." 489 U.S. at 671. For instance, "[e]mployees of the United States Mint . . . should expect to be subject to certain routine personal searches when they leave the workplace every

day." *Id.* Finally, the Court echoed this view of consent in *Vernonia*, in which the student athletes and their parents had signed explicit consent forms granting the school the right to test the athletes. *See* 515 U.S. at 650. Nonetheless, the Court did not treat this factor as dispositive. Instead, as the Court saw it, the athletes' choice to participate was a choice to "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally," and amounted to "an additional respect in which school athletes have a *reduced* expectation of privacy." *Id.* at 657 (emphasis added). Thus, there seems to be no way to square *Skinner* and its progeny with the argument that consent justifies the Executive Order's drug testing requirement.

This Court's recent decision in *Lebron* rejected a similar argument that welfare recipients had consented to suspicionless drug testing when the State required testing as a precondition to the receipt of their benefits. As the panel in *Lebron* put it, a welfare recipient's "mandatory 'consent'" was of no "constitutional significance" because it was a "'submission to authority rather than . . . an understanding and intentional waiver of a constitutional right.'" 710 F.3d at 1214-15 (quoting *Johnson*, 333 U.S. at 13). The panel in *Lebron* also canvassed the suspicionless drug testing cases and concluded that, to the extent consent was relevant, it had already been incorporated into the balancing calculus. While the context in *Lebron* was different because the State sought to test a population of private citizens, which implicates somewhat different privacy concerns, the panel's logic and reasoning are fairly applicable to these circumstances. As the panel in *Lebron*

explained, every time the Supreme Court has addressed a suspicionless drug testing policy—whether those tested were private citizens or government employees—it has analyzed the issue through the prism of *Skinner*'s special-needs balancing test. *See id.* at 1215. 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.[4]

---

4. The State cites several cases that, it claims, compel us to conclude that this exaction of consent renders suspicionless drug testing reasonable notwithstanding *Skinner* and its progeny or our recent pronouncement in *Lebron*. Those cases are all readily distinguishable.

In *Wyman v. James*, the Supreme Court addressed whether a welfare beneficiary could refuse a caseworker home visit that was a requirement of receiving her benefits. 400 U.S. 309, 310, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971). James argued that the visitation requirement violated her Fourth Amendment rights, but the Supreme Court ultimately held that there was no Fourth Amendment violation because the caseworker visit was not a search. *See id.* at 317. Since the *Wyman* Court held the visit not to be a search, while the Supreme Court has repeatedly and squarely held that a drug test is a search, *see, e.g.*, *Vernonia,* 515 U.S. at 652, *Wyman* is inapposite.

United States v. Sihler concerned a warrantless search by prison officials of a guard who had smuggled drugs into the prison. 562 F.2d 349, 350 (5th Cir. 1977). The prison had a prominent sign that stated, "All persons entering upon these confines are subject to routine searches of their person, property or packages." *Id*. The Fifth Circuit held that "Sihler voluntarily accepted and continued an employment which subjected him to search on a routine basis," and, therefore, "the search . . . was made with

Indeed, at least one court of appeals has rejected a similar argument to the one that the State has made here. In *McDonell v. Hunter*, a case decided even before *Skinner*

---

his consent." *Id.* at 351. Notably, *Sihler* preceded *Skinner* and its progeny. Nevertheless, *Sihler* is consistent with those cases because it dealt with a specific, safety-sensitive context—a federal penitentiary. Much like "[e]mployees of the United States Mint . . . should expect to be subject to certain routine personal searches when they leave the workplace," *Von Raab,* 489 U.S. at 671, a prison guard may fairly expect to be searched for contraband at work. *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.

Finally, the State cites a Third Circuit case, *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, where the plaintiff applied for a job that required a pre-employment drug test. 263 F.3d 61, 64 (3d Cir. 2001). The plant hired him on a probationary basis after he failed one drug test but passed a second. *See id.* Later, when asked to submit to a third test, Kerns did so, failed again, and was fired. *Id.* at 64-65. Kerns sued, alleging that the plant violated his Fourth Amendment rights. The district court granted the township summary judgment after finding that Kerns had consented to the test. *See id.* at 65. The Third Circuit reviewed that factual finding for clear error and affirmed because the record provided some evidence to support the finding that Kerns had consented to the test. *Id.* at 65-66.

Kerns cannot support the State's sweeping argument that all current employees consent to drug testing simply by choosing to remain employed. *Kerns* turned on a factual finding of consent in an individual case, which the Third Circuit reviewed for clear error. In this case, the State asks us to rule that, as a matter of law, all of its employees consent to drug testing by simply choosing to remain employed in their current position. Nothing we have read sustains this argument.

and its progeny lent further support to our position, the Eighth Circuit squarely rejected the idea that "employees who signed consent forms have no legitimate expectation of privacy." *See* 809 F.2d 1302, 1310 (8th Cir. 1987). "If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment." *Id*. (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)); *see also United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 856-57 (5th Cir. 1998). The courts of appeals have also applied the special-needs balancing test, rather than treating consent as the sole determinant of a policy's constitutionality, in cases where the government attempted to compel consent to drug testing as a condition for obtaining some privilege. *See, e.g.*, *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1055 (7th Cir. 2000); *id.* at 1067 (upholding a policy insofar as it provided for alcohol testing of student drivers but striking it down insofar as it provided for nicotine testing, despite the fact that student drivers signed consent forms authorizing both).

In short, the State's consent argument cannot, standing alone, render the EO constitutional.

B.

Next, the State argues, again at a high order of abstraction, that the Executive Order is constitutional under *Skinner*'s special-needs balancing test because the need for a safe and efficient workplace necessarily outweighs state employees' expectations of privacy. This

argument, however, does not entitle the State to summary judgment. The State's abstract reasons do not fit within the narrow scope that the Supreme Court has given to the special-needs exception and, therefore, cannot justify testing every category of employee covered by the EO. Indeed, if those reasons could suffice, then there would never be any need to balance anything or consider any job-category-specific rationales.

We repeat that individualized suspicion is the normal requirement in this context, and the special-needs cases are only "particularized exceptions to the main rule." *See Chandler*, 520 U.S. at 313. To the extent the State's justifications hinge on drug-related productivity loss and other expenses, such as medical care, they are insufficient. Although at oral argument, counsel suggested that the State's need to maintain an orderly and efficient workplace is enough of a special need to justify suspicionless testing, the authority cited—*O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987)—cannot sustain this proposition. *O'Connor* held only that, in the workplace context, the "need for supervision, control, and the efficient operation of the workplace" meant that a workplace search was not subject to the warrant or probable-cause requirements. *See id.* at 720-26. *O'Connor* neither held nor remotely suggested that the need for an efficient workplace could justify searches without individualized suspicion.

The only employment-related rationales that the Supreme Court has endorsed as being sufficient to justify suspicionless drug testing are a "substantial and real" risk

to public safety or direct involvement in drug interdiction functions. *Chandler,* 520 U.S. at 323; *see also Von Raab,* 489 U.S. at 670. Indeed, if safety is the justification, then public safety must be "genuinely in jeopardy," *Chandler,* 520 U.S. at 323; *see also Lanier v. City of Woodburn,* 518 F.3d 1147, 1151-52 (9th Cir. 2008). Notably, in *Chandler*, the Court summed up the principle undergirding this line of precedent:

> [W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other office buildings. But where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

520 U.S. at 323 (citation omitted).

The State's safety argument, at least in its current, global form, is insufficient. The State does not advance specific concerns relating to particular job categories and instead asserts only a broad concern for safety that applies to all employees. But we have little doubt that a clerk, for example, cannot be subject to suspicionless drug testing under the theory that she presents some vague and indefinite safety risk. In comparison, the safety risks that justified suspicionless drug testing regimes in *Skinner* and its progeny were far more pressing. In *Skinner*, railroad accidents had led to 25 deaths, 61 non-

fatal injuries, and extensive property loss. *See* 489 U.S. at 607. In *Von Raab*, the concern was with law enforcement officers who carried firearms. *See* 489 U.S. at 671. Here, the State offers the hypothetical examples of an office employee "present[ing] a danger when driving a car in the workplace parking lot" or falling prey to "the myriad hazards that exist in the workplace environment (from stacks of heavy boxes, to high stair cases, to files on high shelves, to wet floors, to elevators and escalators)." We reject the idea that a stack of heavy boxes or a wet floor falls within the same ballpark of risk as the operation of a ten-thousand-ton freight train or the danger posed by a person carrying a firearm.

As the Supreme Court did in *Chandler*, the courts of appeals consistently have rejected testing policies that the government justified based only on generalized and indefinite safety concerns. Those cases underscore that, "where the government asserts 'special needs' for intruding on Fourth Amendment rights, . . . the specific context matters." *Vilsack,* 681 F.3d at 492. "[T]he governmental concern in the general 'integrity of its workforce' [i]s insufficiently important to warrant random drug testing . . . ." *Id.* at 491-92. Thus, in *Vilsack*, the D.C. Circuit rejected a random drug testing policy that covered all Forest Service Job Corps Center employees. *Id.* at 499. Similarly, in *Lanier*, the Ninth Circuit prohibited the application of a city's drug-testing policy to a library page. *See* 518 F.3d at 1152. As the panel in *Lanier* explained, "the need for suspicionless testing must be far more specific and substantial than the generalized existence of a societal [drug] problem." *Id.* at 1150.

Indeed, if the State's rationale sufficed to justify suspicionless drug testing, then the exception would swallow the rule and render meaningless *Von Raab*'s distinction between those employees for whom physical fitness, mental sharpness, and dexterity are paramount and "government employees in general." 489 U.S. at 672. Since the State's generic justifications could apply to all government employees in any context, there would be nothing left of the individualized-suspicion requirement in any type of government employment, and no interests to balance.

Nor does the State shore up its case for across-the-board, suspicionless drug testing with evidence of a preexisting drug problem. Although the State does not need to present evidence of a drug problem in the group it seeks to test, *see Von Raab,* 489 U.S. at 674-75, a showing of an existing problem "would shore up an assertion of special need," *Chandler,* 520 U.S. at 319. The problem with the State's evidence is that some of it is too broad to be of any use, and the rest is too specific to justify the breadth of the testing regime the EO mandates. The bulk of the evidence canvasses the prevalence and harms of drug use in the general population. But Supreme Court case law contemplates a more targeted showing of drug abuse *in the group to be tested*, not people as a whole. In *Skinner*, for instance, the Federal Railroad Administration identified a score of drug or alcohol-related train accidents, and industry participants admitted that there was a serious drug problem among railroad workers. 489 U.S. at 607-08. The State's evidence is so general that, if accepted as evidence of a drug problem among state employees,

it would have to be accepted in every other government employment context.

On the other hand, the relevant data the State presents is too narrow to justify the EO. First of all, the evidence actually suggests that drug use is a relatively small problem in the three departments already subject to random testing prior to the EO's issuance. The worst result the State obtained was when 2.5 percent of DOC employees tested positive in 2011. This hardly demonstrates the existence of a serious drug problem. In fact, as the State itself submitted, a 2010 national survey indicated that 8.4 percent of full-time employees nationwide were illicit-drug users. If anything, then, the results of the State's random testing reveals that there is substantially *less* of a drug problem among state employees than among the general working population as a whole. *Cf. Lebron,* 710 F.3d at 1211 n.6 (evidence showed that Florida Temporary Assistance for Needy Families recipients tested positive at a 5.1 percent rate, which "was lower than had been reported in other national studies of welfare recipients").

There is still another problem with the State's submissions. The data, even assuming it did indicate a drug problem among employees at DOC, DOT, and DJJ, does not demonstrate the prevalence of drug abuse in other state agencies. Thus, even if those results could bolster a case for testing employees at those three agencies—testing which in any event is independently authorized by state statutes not at issue in this case—it would not provide strong support for extending testing to

all state employees. In short, the State has fallen far short of showing a preexisting drug problem that pervades its entire workforce.

On the other side of the balancing test, the State also claims that state employees' expectations of privacy are diminished for two reasons other than consent. First, drug testing among private employers has become common, and this "customary social usage [has] a substantial bearing on Fourth Amendment reasonableness." *Georgia v. Randolph,* 547 U.S. 103, 121, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006). Second, Florida has a tradition of open government that diminishes state employees' expectations of privacy. We find neither argument persuasive.

The problem with the first one is that it confuses what the Supreme Court means by a diminished expectation of privacy—or, more precisely, what baseline courts should use to determine whether an employee's expectation of privacy is diminished. The proper baseline is the ordinary government employee's expectation of privacy. In *Von Raab*, for example, the Supreme Court concluded that Customs Service employees involved in drug interdiction had a diminished expectation of privacy precisely because, "[u]nlike most private citizens or *government employees in general*, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." 489 U.S. at 672 (emphasis added). In other words, the appropriate inquiry is whether the employee being tested has a diminished expectation of privacy relative to the ordinary government employee because her position depends on physical fitness and

judgment. The State's broad-based argument that all of its employees have a reduced expectation of privacy contradicts binding case law.

The second argument is similarly unpersuasive. Open government laws require state employees to disclose certain financial information and also their official work product. The logical leap from disclosure of financial information and work product to a diminished expectation of privacy in an employee's physical body is a substantial one. All of the Supreme Court's cases discuss the diminished expectation of privacy specifically with regard to *physical* or *bodily* privacy, not privacy more broadly conceived. Thus, in *Skinner*, employees' expectations of privacy were "diminished" because of regulations pertaining to their "health and fitness." *See* 489 U.S. at 627; *see also Von Raab,* 489 U.S. at 672 (Customs Service employees should have expected inquiries into their "fitness" and "dexterity"). *Vernonia* is perhaps the clearest example of this focus on physical privacy. When explaining why athletes have a lower expectation of privacy, the Court pointed out that "[s]chool sports are not for the bashful" and require "'suiting up' before each practice or event, and showering and changing afterwards" in "locker rooms . . . not notable for the privacy they afford." 515 U.S. at 657. It is readily apparent, then, that when courts analyze employees' expectations of privacy in this context, it is their physical privacy that is relevant.

None of the State's arguments demonstrate that all state employees, including those who have no reasonable relation to safety-sensitive tasks, have a reduced

expectation of privacy. Just as the State must demonstrate job-category-specific interests, so too must it demonstrate why each particular job category it seeks to cover under the Executive Order has a diminished expectation of privacy compared to the ordinary government employee.[5]

In sum, we cannot find that the State's proffered rationales warrant summary judgment in the State's favor concerning all job categories and all employees covered by the EO. In this case, the character of the intrusion is relatively noninvasive and, "if the 'special needs' showing had been made, the State could not be faulted for excessive intrusion." *Chandler,* 520 U.S. at 318. However, the State has failed to make that showing. As

---

5. The special-needs balancing test also considers the nature of the intrusion—in other words, how invasive the drug-testing protocol is—and the efficacy of the testing. Neither factor plays a determinative role in this case. The character of the intrusion here is very similar to that in *Skinner*, *Von Raab*, *Vernonia*, and *Earls*. The State's urinalysis protocol, which does not require direct observation and which shields results from being used as evidence or disclosed in any public or private proceeding, is no more invasive than those procedures that the Supreme Court characterized as "minimally intrusive" in *Earls* or as "negligible" in *Vernonia*. In those cases, a monitor accompanied the students to the bathroom, where they produced a sample without the monitor's direct visual inspection. *See Earls,* 536 U.S. at 832-34; *Vernonia,* 515 U.S. at 658; *see also Skinner,* 489 U.S. at 626. The confidentiality of test results also weighs in favor of finding the intrusion more minimal. *See Von Raab,* 489 U.S. at 672 n.2. Thus, the nature of the intrusion poses no more of a barrier to a finding of reasonableness in this case than it did in those Supreme Court cases. Nor do the parties contest the policy's efficacy.

the district court concluded, the State's case most closely resembles Georgia's failed justification of the policy held unconstitutional in *Chandler.* Unlike in *Skinner* or *Von Raab*, where the specific job categories subject to testing had a diminished expectation of privacy, the State has failed to demonstrate that all 85,000 state employees somehow have diminished privacy rights. Moreover, it has failed to provide a compelling or important reason for testing; indeed, it has offered only general and weak justifications regarding workplace efficiency and the possible—not "substantial and real," *see Chandler,* 520 U.S. at 323—risks to safety that any state employee may pose.

IV.

One final issue has been raised by the parties: who bears the burden in a suspicionless drug testing case. In light of limited authority on this issue, and in order to provide the district court with guidance on remand, we clarify the precise burdens each party bears.

There are several different burdens that arise in this case. For starters, on a motion for summary judgment, "[t]he moving party bears the burden of showing that there are no . . . genuine factual issues and that [it] is entitled to summary judgment as a matter of law." *Gossett v. Du-Ra-Kel Corp.,* 569 F.2d 869, 872 (5th Cir. 1978).[6]

6. In *Bonner v. City of Prichard, 6*61 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Moreover, "in a [42 U.S.C.] § 1983 action, the plaintiff bears the burden of persuasion on every element." *Cuesta v. Sch. Bd. of Miami-Dade Cnty., Fla.*, 285 F.3d 962, 970 (11th Cir. 2002). Thus, in *Cuesta*, when a § 1983 plaintiff alleged that she was subjected to a strip search without reasonable suspicion, it was "her burden to show that the County lacked reasonable suspicion to search her." *Id.* There is no question, therefore, that the Union ultimately bears the burden of persuasion in this case.

In the drug testing context, a plaintiff may initially meet both the burden of going forward and the initial burden of persuasion by demonstrating that (1) there was a search; and (2) it was conducted without individualized suspicion, which ordinarily is the minimum requirement of the Fourth Amendment. *See Chandler,* 520 U.S. at 313. That showing creates a presumption that the search was unconstitutional and shifts the burden of production to the testing policy's proponent to make the special-needs showing explicated in *Skinner* and its progeny. If the proponent of testing fails to respond, or fails to produce a sufficient special-needs showing, then the plaintiff would prevail. If the proponent does respond by demonstrating that it had special needs sufficiently important to justify a suspicionless search, then the district court must conduct the special-needs balancing test, bearing in mind that the ultimate burden of persuasion remains squarely on the plaintiff. In this case, the Union met its initial burden because on its face the EO mandates random, suspicionless testing across the board. At this point, the burden of going forward—that is, the burden of production—then shifted to the State to articulate its justification for conducting those tests without individualized suspicion.

We apply this burden-shifting framework for several reasons. To begin with, a panel of this Court in *Lebron* held that the burden of producing the special-needs showing rests with the State. *See* 710 F.3d at 1211 n.6 ("[T]he Supreme Court has unequivocally stated that it is the state which must show a substantial special need to justify its drug testing."). As the concurring opinion in *Lebron* noted, "[i]t is undisputed that a drug test is a search under the Fourth Amendment, and that the government generally has the burden of justifying a warrantless search." *Id.* at 1219 (Jordan, J., concurring) (citing *United States v. Bachner*, 706 F.2d 1121, 1126 (11th Cir. 1983)); *accord id.* (explaining that "the government has the burden of establishing a 'special need' for a warrantless and suspicionless drug testing requirement."). And although there is scant authority outside this Circuit discussing the distribution of burdens in suspicionless drug testing cases, the D.C. Circuit has observed that, "[a]lthough neither *Von Raab* nor *Skinner* directly addressed this question, *Von Raab* may hint that the burden rests with the government." *Am. Fed'n of Gov't Emps. v. Skinner*, 885 F.2d 884, 894, 280 U.S. App. D.C. 262 (D.C. Cir. 1989).

Indeed, the relevant Supreme Court cases suggest that the government bears the burden of producing the special-needs showing once the plaintiff has made an initial showing of an unconstitutional search. In *Von Raab*, for example, the Supreme Court concluded that "*the Government has demonstrated* that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees." 489 U.S. at 677 (emphasis added). Similarly, in *Chandler*, the

Court stated, "[W]e note, first, that the testing method the Georgia statute describes is relatively noninvasive; therefore, if the 'special needs' showing had been made, the State could not be faulted for excessive intrusion." 520 U.S. at 318; *accord id.* ("Georgia has failed to show, in justification of [its drug testing statute], a special need of that kind."). These passages imply that the burden rests with the proponent of the testing policy to come forward with evidence of a special need. This is true even though both cases were civil lawsuits in which the plaintiffs challenged the testing and thus bore the ultimate burden of persuasion. What happened in those cases is that the plaintiffs met their initial burden, and the burden of production then shifted to the government to demonstrate a special need sufficiently important to outweigh the plaintiffs' privacy interests.

Moreover, this burden-shifting framework follows directly from Fed. R. Evid. 301, which states that, "[i]n a civil case . . . the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." Once a § 1983 plaintiff proves that the Fourth Amendment's ordinary requirements have not been met, we presume that a search is unconstitutional. *Cf. Groh v. Ramirez,* 540 U.S. 551, 564, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (since a home search ordinarily requires a warrant, "a warrantless search of the home is presumptively unconstitutional"). Then, the government, which is the party against whom the presumption is directed, must make a sufficiently powerful showing to justify its intrusion on the plaintiff's expectation of privacy. Consistent with the general rule in § 1983 cases,

Fed. R. Evid. 301 "does not shift the burden of persuasion, which remains on the party who had it originally."

Shifting the burden of production to the government to justify a warrantless search is a familiar feature of § 1983 civil lawsuits raising Fourth Amendment claims. Thus, for example, when a plaintiff asserts that the police conducted an unconstitutional warrantless search, and the government claims that its search was legal under an exception to the warrant requirement, other courts of appeals have held that the plaintiff meets its initial burden by demonstrating the absence of a search warrant. At that point, it is the *government* that bears the burden of coming forward with evidence that an exception to the warrant requirement applied. *See Der v. Connolly,* 666 F.3d 1120, 1127-28 & n.2 (8th Cir. 2012) (when § 1983 plaintiff shows a search is presumptively violative of the Fourth Amendment, the government has the "burden of going forward with evidence to meet or rebut the presumption," e.g., "evidence of consent or of some other recognized exception"); *Valance v. Wisel,* 110 F.3d 1269, 1279 (7th Cir. 1997); *Ruggiero v. Krzeminski,* 928 F.2d 558, 563 (2d Cir. 1991).

Finally, this allocation of burdens makes sense. The proponent of testing is the party best positioned to come forward with its reasons for conducting suspicionless drug testing. We will not require plaintiffs to do the impossible: to speculate as to all possible reasons justifying the policy they are challenging and then to prove a negative—that is, prove that the government had no special needs when it enacted its drug testing policy. Here the plaintiff

Union demonstrated that the State intended to conduct a suspicionless broad-based search, which shifted the burden of production to the State to justify itself based on a special-needs exception to the individualized-suspicion requirement. On remand, therefore, the State must come forward with the requisite special-needs showing for all categories of employees it seeks to test. For some categories, this showing may turn out to be quite simple and may amount simply to describing precisely the nature of the job and the attendant risks. Thus, for example, as to state law enforcement employees who carry firearms in the course of duty, the State likely will need to do little more than identify those employees. *Von Raab*'s holding makes it clear that those employees present the type of serious safety risk that justifies suspicionless drug testing. For other categories of employees, however, the State must make a stronger and more specific showing than it has produced thus far. Thus, as to run-of-the-mill office employees, for example, the State must demonstrate how those employees present a serious safety risk comparable to those recognized in *Skinner* and its progeny.

V.

To date, the parties' litigation strategies in this case seem to have focused on avoiding the kind of job-category-by-category balancing that *Skinner* and its progeny teach us is the proper modality for evaluating the constitutionality of a suspicionless drug testing policy. The Union originally sought, and ultimately received, facial relief that cannot be sustained in light of the Executive Order's constitutional applications. Meanwhile, the

State has resisted providing the district court with any specific special-needs showings that apply to individual job categories and instead has insisted that a few broad, abstract reasons can justify the EO across the board. Admittedly, providing job-category-specific reasons and evidence—which the district court must have in order to conduct the proper analysis—is a substantial, even onerous, task. Nonetheless, convenience cannot override the commands of the Constitution.

Nor can the parties' desire for expediency allow a court to conduct the necessary calculus in the abstract and in the absence of any real factual record. Since the State has failed to meet its burden of production under the special-needs balancing test, we can discern no basis to reverse the district court's order and direct that judgment be entered in the State's favor. The State has fallen far short of justifying the breathtaking scope of the Executive Order, and we have found no precedent approving so indiscriminate a testing regime. On the other hand, the Union has presented a serious and substantial claim that large swathes of the EO's applications are unconstitutional. But we cannot affirm a judgment and injunction that forbid both constitutional and unconstitutional conduct.

Accordingly, we vacate both the declaratory judgment and the injunction and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

APPENDIX C — ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED APRIL 26, 2012

United States District Court, S.D. Florida.

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) COUNCIL 79,

Plaintiff,

v.

RICK SCOTT, in his official capacity as Governor of the State of Florida,

Defendant.

Case No. 11–civ–21976–UU. | April 26, 2012.

ORDER ON CROSS–MOTIONS FOR SUMMARY JUDGMENT

URSULA UNGARO, District Judge.

THIS CAUSE is before the Court upon Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment. D.E. 33, 35.

THE COURT has considered the Motions, the pertinent portions of the record, and is otherwise fully advised on the premises.

Appendix C

I. BACKGROUND

The instant motions address the constitutionality of Executive Order 11–58 ("EO"). Issued by Defendant, Governor Rick Scott ("the Governor") on March 22, 2011, the EO directs all state agencies "within the purview of the Governor" to provide for mandatory drug testing for all "prospective new hires." The EO also requires that the covered agencies provide for random drug testing of all existing employees such that any employee at these agencies can be tested at least quarterly. By drug testing, the Governor means exclusively urinalysis.[1]

1. Although the EO does not require a specific method of drug testing, the Governor indicates in his motion for summary judgment that urinalysis is the method that will be used to implement the testing program. D.E. 35 at 19. Additionally, the Governor asserts that the testing process will be private and confidential in compliance with existing provisions that regulate urinalyses performed under the Drug–Free Workplace Act ("the Act"), Fla. Stat. § 112.0455. The Act, first passed in 1990 and still in effect, permits state agencies to test job applicants, *id*. at 7(a), as well as current employees based upon "reasonable suspicion," *id*. at 7(b), as part of a routine fitness-for-duty medical examination, *id*. at 7(c), or as a follow-up to an employee's entrance into an assistance program for drug-related problems, *id*. at 7(d). The Act specifically prohibits the results of a drug test performed under its authority from being used as evidence, obtained in discovery, or otherwise disclosed in any public or private proceeding. *Id*. at. 11(a). Fla. Admin. Code 59A–24.005(3)(b) further provides that "individual privacy" must be afforded to the individual submitting to a drug test under the Act "unless there is reason to believe that a particular individual intends to alter or has altered or substituted the specimen to be provided." The Union does not challenge the Governor's assertion that urinalyses—as opposed to another form of drug-testing, such as blood or hair sampling—will be

Approximately 85,000 individuals, comprising 77 percent of state government personnel, work at the covered agencies. The parties have not provided figures for the typical yearly number of new hires at the covered agencies. D.E. 19–1; D.E. 36 n. 2; D.E. 49 ¶ 16.

Plaintiff, the American Federation of State, Country, and Municipal Employees (AFSCME) Council 79, ("the Union"), which represents approximately 40,000 employees at the covered agencies, D.E. 34–22, contends that the EO violates the Fourth Amendment's prohibition of unreasonable searches. D.E. 33. The Governor makes three arguments for why the Union's Complaint should be dismissed as a matter of law. He argues that the Union lacks standing to challenge the EO. He claims that the EO does not violate the Fourth Amendment. Finally, he characterizes the Union's challenge to the EO as "facial," and contends that the Union cannot show that the EO is unconstitutional in all possible applications. D.E. 35.

The Court rules that the EO is inconsistent with controlling case law, and therefore grants the Union's motion for the reasons herein.

---

used to implement the EO. *See* D.E. 35 at 19 (Governor's assertion); D.E. 1 (Plaintiff's Complaint); D.E. 46 at 15–16 and D.E. 50 at 6–10 (pertinent sections of Plaintiff's response and reply briefs). The Union also does not challenge the Governor's claim that the urinalyses performed under the EO would be discrete, private, and confidential. *Id.*

II. STANDARD OF REVIEW

Summary judgment is appropriate only when the moving party meets its burden of demonstrating that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. The Supreme Court explained in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), that when assessing whether the movant has met this burden, the court should view the evidence and all factual inferences in the light most favorable to the party opposing the motion.

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact, the nonmoving party must make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Poole v. Country Club of Columbus, Inc.,* 129 F.3d 551, 553 (11th Cir.1997); *Barfield v. Brierton,* 883 F.2d 923, 933 (11th Cir.1989).

III. QUESTIONS PRESENTED

Here, the parties present no genuine issue of material fact. The case turns instead on three questions of law raised by the parties in their respective motions for summary judgment (D.E. 33 and D.E. 35):(1) does the Union have standing to challenge the EO on its own behalf,

on behalf of its members, and on behalf of prospective new hires?; (2) is the EO unconstitutional because it requires state agencies to conduct unreasonable searches?; and (3) does the Union bring a facial or an as-applied challenge and to what extent does this affect the relief that can be granted?

IV. DISCUSSION

Question (1)—Standing

The Union brings the present action under 42 U.S.C. § 1983, asserting that the EO violates the Fourth Amendment's prohibition of "unreasonable searches and seizures."[2] The Eleventh Circuit recognizes two theories under which an association has standing to sue under § 1983: "(1) to protect the rights of its members and (2) to protect its own rights as a corporate institution." *White's Place, Inc. v. Glover,* 222 F.3d 1327, 1328 (11th 2000) (quoting *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1276 (5th Cir.1981)).[3] Accordingly, the Union must establish that it has standing to sue either on its own behalf or on behalf of its members. *Id.* at 1328–29. The Court addresses each of these possibilities in turn.

---

2. The amendment provides in full: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

3. All decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. Prichard,* 661 F.2d 1206, 1207 (11th Cir.1981)(*en banc*).

Appendix C

(A) The Union's standing to sue on its own behalf

To sue on its own behalf, the Union must establish that: (1) it suffers or will suffer an injury-in-fact that is concrete, particularized, and imminent ("injury"); (2) that the injury is fairly traceable to the Governor's challenged action ("traceability"); and (3) that the injury will likely be redressed by a favorable decision ("redressability"). *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.,* 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

The Governor does not argue that the Union fails to meet the second and third requirements, and this Court, in any event, finds that these elements are satisfied. Instead, the Governor argues that the injury that the Union asserts-a search contrary to the Fourth Amendment-provides standing only to the individuals whose Fourth Amendment rights are infringed, and not to an association, such as the Union. D.E. 48 at 2–3. Thus, the outcome here turns on whether the Union has demonstrated that it has or will suffer an injury in fact.

The Supreme Court has explained that injury-in-fact means "an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) actual and imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In the situation of an association suing on its own behalf, the injury-in-fact requirement is satisfied where "the defendant's illegal acts impair [the association]'s ability to engage in its projects by forcing

the organization to divert resources to counteract those illegal acts." *Fla. State Conf. of the NAACP v. Browning,* 522 F.3d 1153, 1165 (11th Cir.2008) (citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)); *see also Common Cause/Georgia v. Billups,* 554 F.3d 1340, 1350–51 (11th Cir.2009) (applying *Browning* to hold that plaintiff-association demonstrated injury where the alleged constitutional violation caused plaintiff-association "to divert resources from its regular activities" to address the alleged harm). The *Browning* court added that the extra expenses incurred to counteract the illegal act do not need to be calculated in advance of the litigation and can be small. 522 F.3d at 1165 ("The fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury.") (quoting *Ind. Democratic Party v. Rokita,* 458 F.Supp.2d 775 (S.D.Ind.2006)), *aff'd sub nom., Crawford v. Marion County Election Bd.,* 472 F.3d 949 (7th Cir.2007), *aff'd*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008).

In this case, the Union's special counsel, Alma R. Gonzalez, testifies that the EO subjects more than 40,000 Union members to suspicionless drug testing. Gonzalez insists that if the EO is upheld, the Union will have to devote considerable resources "dealing with the implications of the policy." Specifically, Gonzalez claims that since drug testing is a mandatory subject of collective bargaining, the Union will have to engage in protracted negotiations over the policy, which, in turn, will detract from the Union's ability to bargain effectively over other issues. Gonzalez further testifies that the Union will have

to expend considerable resources representing Union members selected for testing. Here again, the Union's concern, according to Gonzalez's testimony, is that representing members selected for testing will detract from its ability to represent employees in other matters. D.E. 34–22.

The Court is persuaded that the Union has satisfied the injury in fact requirement as expressed above in *Browning* and *Common Cause/Georgia.* Under Florida law, public employees have the right to be represented by any employee organization of their own choosing and to engage in collective bargaining over the terms and conditions of their employment. Fla. Stat. § 447.301(2). The Governor responds that the Union has never initiated collective bargaining over drug testing even though, under existing state law, some Union members have been subjected to testing for years. D.E. 51 at 1. But the EO is also different than the existing testing regime. Currently, the Drug–Free Workplace Act, Fla. Stat. § 112.0455, authorizes pre-employment, reasonable suspicion, routine fitness-for-duty, and follow-up testing, but not random testing of all employees under the purview of the Governor as does the EO. *See supra* n. 1. The scope of the random testing provision in the EO is particularly significant for present purposes because the Florida Supreme Court has expressed the view that random testing of all public safety personnel—much less then the far broader swath of employees covered by the EO—triggers collective bargaining unless the legislature provides otherwise. *Fraternal Order of Police, Miami Lodge 20 v. City of Miami,* 609 So.2d 31, 35 (Fla.1992).

Eleventh Circuit case law, moreover, supports the finding of injury for standing purposes where the association, as here, asserts that it will have to divert resources as a result of the challenged action. In *Browning,* the Court of Appeals cited the plaintiffs-associations' avowal that they would have to devote resources to helping voters comply with a contested voter registration law. 522 F.3d at 1164–65. Similarly, in *Common Cause/Georgia,* the Court of Appeals ruled that the plaintiff-association demonstrated a valid injury where it was undisputed that the association would have to "divert resources from its regular activities" as a direct result of the challenged statute. 554 F.3d at 1350.

The Governor attempts to defeat the Union's standing claim by pointing out that the "only 'harms' claimed by the Union itself are that it 'will have to spend considerable time in bargaining over the testing, and will have to expend considerable resources in representing state employees who are selected for testing.'" D.E. 48 at 3. Yet the claims that the Governor dismisses as immaterial for the purposes of demonstrating standing are the very types of assertions that the Court of Appeals in *Browning* and *Common Cause/Georgia* deemed relevant to satisfying the operative standard.

The Governor also argues that a separate rule bars standing here. Citing *Rakas v. Illinois,* 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) and *Crosby v. Paulk,* 187 F.3d 1339 (11th Cir. 1999), the Governor asserts that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." D.E. 48 at 3.

But *Rakas* and *Crosby* do not address the availability of associational standing. Both are criminal cases in which defendants sought to suppress evidence taken in violation of another individual's Fourth Amendment rights. They stand for the proposition that Fourth Amendment rights are personal and cannot be asserted vicariously. As the Court put it in *Rakas:* "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." 439 U.S. at 134, 99 S.Ct. 421. (emphasis added). In other words, the defendants in *Rakas* and *Crosby* lacked standing because they suffered no injury at all.

In the present case, the Union is not seeking to assert its members interests vicariously. Instead, it is seeking to assert its own interests by identifying an injury that it will suffer as a consequence of having to devote its resources toward representing members affected by the EO. This claim, supported by the testimony of the Union's special counsel, suffices to show standing under *Browning* and *Common Cause/Georgia.*[4]

---

4. The Governor also refers to *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), where the Supreme Court held that the prudential standing rule typically bars a plaintiff who does not assert any personal right under the Constitution from asserting the rights or legal interests of others in order to obtain relief from injury to themselves. However, the Governor's reliance on *Warth* is unavailing. In *Warth,* the Supreme Court declined on prudential grounds—that is, not on the basis of the Article III standing requirements at issue here—to find that the association

Appendix C

(B) Union's standing to sue on behalf of its members

The Court also finds that the Union has standing by means of the alternative route for associational standing—the right to sue on behalf of its members.

In *Hunt v. Wash. State Apple Adver. Comm'n,* the Supreme Court held that an association has standing to bring suit on behalf of its own members when:

> (a) its members would have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the law suit.

432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Here, the Union's members would have standing to sue in their own right. The alleged injury in this case is a violation of the constitutional protection against unreasonable searches and, as discussed, satisfies the injury-in-fact elements, is traceable to the EO, and can be redressed by the relief requested. The second

---

plaintiffs had standing to challenge the alleged discriminatory zoning practices created under a local zoning ordinance. Relevant to the present case, the *Warth* Court further indicated: "There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." 422 U.S. at 511, 95 S.Ct. 2197.

element is satisfied by Fla. Stat. § 447.301(2) (authorizing collective bargaining on the terms and conditions of public employment) together with the holding in *Fraternal Order,* 609 So.2d at 35, that the drug testing of all public safety employees triggers mandatory collective bargaining. As to the third element, an individual plaintiff need not maintain the action where, as here, a plaintiff-association seeks an injunction, which, if granted, "can reasonably be supposed ... [to] inure to the benefit of those members of the associations actually injured." *Hunt,* 432 U.S. at 343, 97 S.Ct. 2434.

The Governor contends, however, that the Union must provide "detail about the context in which individual AFSCME members face actual or imminent injury-in-fact." D.E. 35 at 4. But the Court is hard-pressed to find any ambiguity in the "context" of the alleged harm. The EO subjects all state employees under the purview of the Governor—including approximately 40,000 members of the Union—to suspicionless drug testing, a practice which, without reaching the merits here, has been deemed by the Supreme Court to be subject to the limitations of the Fourth Amendment. *See, e.g., Chandler v. Miller,* 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). As such, the Union has standing to sue on behalf of its members.

(C) Union's standing as to new hires

Finally, the Governor claims that the Union lacks standing to challenge the portions of the EO that require pre-employment testing of prospective new hires because these prospective new hires are not union members.

Under Eleventh Circuit case law, unions lack standing to assert the rights of non-members. *United States v. City of Miami,* 115 F.3d 870, 872 (11th Cir.1997) ("Local 587 lacks standing to assert rights of potential new hires because they are not union members.") Insofar as an applicant to a covered position is not, at the time of the pre-employment testing, a member of the Union, the Court agrees that, under *City of Miami,* the Union lacks standing to sue on behalf on these individuals. *Id.*

However, the Union claims that it has standing to represent current members, who, the Union asserts, are also affected by the pre-employment testing provision. Where a current member applies for a promotion or transfer, the Union contends, the member will be treated as a new hire and thus required to undergo mandatory pre-employment testing. D.E. 46 at 1; D.E. 34–22 ¶ 5. The issue here is whether the pre-employment testing presents a real and immediate threat to the Union. In *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), the Supreme Court held that a plaintiff in a pre-enforcement challenge to official conduct, as here, must show that he or she "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 101–02, 103 S.Ct. 1660 (citations omitted).

Although the EO does not state explicitly that the term "new hire" includes current employees who are hired to fill another position at a covered agency, the

Court is persuaded the EO provides as much. The Court looks to the Governor's construction of this term, as he issued the EO and the covered agencies charged to implement it have not yet had the opportunity to apply the policy. *See Gay v. Canada Dry Bottling Co.,* 59 So.2d 788, 790 (Fla.1952) ("the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight ...."); *see also, State ex rel. Szabo Food Services, Inc. v. Dickinson,* 286 So.2d 529, 531 (Fla.1973) (holding that regulations from state agency charged with implementing state revenue statute "should be accorded considerable persuasive force before any court called upon to interpret the statute."). The plain language of the EO indicates that the Governor's intent is to require pre-employment testing of "all prospective new hires," as the EO specifically dictates. D.E. 1–3 § 1. By thus emphasizing that every new hire will be tested, the EO clearly implies that current employees who apply for promotions or transfers are not exempt from mandatory pre-employment testing. This interpretation is also consistent Florida's Administrative Code insofar as it assigns the same probationary status to newly hired, newly promoted, and newly transferred employees, thereby suggesting that a current employee who transfers or receives a promotion will be treated the same as a new hire under the EO. *See* Fla. Admin. Code 60L–33.003(d)(1).

The facts in the record further indicate that the pre-employment testing provision in the EO poses an imminent harm to the Union. First, the Court notes that the Governor never corrected the Union's assertion that the

EO's provision for "new hires" covers *current* employees seeking a promotion or transfer. *See* D.E. 48 at 3–4 and D.E. 51 at 1 (neither contesting Union's construction of "new hire"). Second, the pre-employment provision is a critical part of the EO. It comprises one of the order's two sections. (The other provides for random drug testing). *See* D.E. 1–3. Ms. Gonzalez, the Union's special counsel, specifically addresses the preemployment provision in her affidavit: "Thousands of AFSCME represented state employee bargaining unit members are now subject to random drug testing in their current positions, and pre-employment drug testing when they seek promotion to another job (and are considered new hires)...." D.E. 34–22 ¶ 5. Ms. Gonzalez further testifies that the Union will have to expend time and resources dealing with the "implications of the policy." *Id.* ¶ 8. Additionally, the special counsel indicates that the Union will have to devote resources to answering member questions about the EO, engaging in collective bargaining over the testing, including "the conditions under which such testing takes place," and representing "bargaining unit employees who are selected for testing." *Id.* ¶ 8–10.

The existence of several realistic harms, both in the present and immediate future, makes the present case readily distinguishable from *Lyons.* In that case, the Supreme Court held that the plaintiff, who had been choked by the Los Angeles police, lacked standing to enjoin the police department from continuing to authorize the use of chokeholds because the plaintiff had not shown any "real or immediate threat" that he would suffer injury from being choked again by the Los Angeles police. *Lyons,*

461 U.S. at 111, 103 S.Ct. 1660. As such, Lyons's request for an injunction against the city's conduct was based on a "hypothetical state of facts," *see id.* at 129, 103 S.Ct. 1660, which will always fail to satisfy the "case or controversy" requirement of Article III of the U.S. Constitution.

By contrast, the injurious effects of the pre-employment provision on the Union are immediate and real. Covered agencies have sixty days from the issuance of the EO to begin pre-employment testing. The EO leaves no room for discretion or chance. It provides supervisors no flexibility in enforcing the policy: All new hires must take the drug test—no exceptions. D.E. 1–3. As Ms. Gonzalez testifies, the consequence of the pre-employment provision is to compel the Union to devote resources in the present and the near future in response to its members' concerns with the EO, including the apparent requirement that members take a drug test upon becoming "prospective new hires." Unlike the plaintiff in *Lyons,* the Union is paying the price of the EO now, and has sufficiently shown that the preemployment provision will continue to cause real harm by requiring the Union to divert resources to address it. *See* in *supra* section IV(A), *Browning,* 522 F.3d at 1165, and *Common/Cause,* 554 F.3d at 1350–51 (holding, in both, that forcing an organization to divert resources to counteract official conduct constitutes a valid injury for standing purposes).

Accordingly, the Union has standing to challenge the pre-employment portion of the EO.

Appendix C

Question (2)—The lawfulness of the EO

The issue is not whether the Governor can fire or take disciplinary action against a state employee for unlawful drug use. The EO does not address the consequences of unlawful drug use. Its concern is drug testing. The issue is whether the drug testing program mandated by the EO can be squared with the Fourth Amendment.

The Supreme Court maintains that the government, unlike private employers, can test its employees for illegal drug use only when the testing is consistent with the Fourth Amendment. "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable ... these intrusions must be deemed searches under the Fourth Amendment." *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. *Chandler,* 520 U.S. at 313, 117 S.Ct. 1295. To warrant an exception from the main rule, the government must show that it has a "special need, beyond the normal need for law enforcement." *Id.* When, as here, the government alleges such a need, "courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314, 117 S.Ct. 1295. The permissibility of a drug-testing program "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Skinner, 489 U.S. at 619–620, 109 S.Ct. 1402 (quoting *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)).

(A) Assessing a public interest

In assessing the weight of the public interest rationale articulated by the Governor, this Court is guided by the analyses undertaken by the Supreme Court in the handful of cases in which it has considered the constitutionality of drug testing. The Court upheld testing programs against claims that they impermissibly intruded upon an individual's Fourth Amendment interests in three of these cases, *Skinner, Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), while striking down a program in *Chandler.* In the present case, the Court considers whether the Governor asserts a sufficiently compelling public interest, as was the case in *Skinner, Nat'l Treasury,* and *Vernonia,* or whether the asserted public interest here fails to justify the program as in Chandler.[5]

5. The Court has also considered *Bd. of Educ. v. Earls, infra,* 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). But in light of the Supreme Court's statement in that case that it was "[a]pplying the principles of *Vernonia* to the somewhat different facts" in question, *Earls,* 536 U.S. at 830, 122 S.Ct. 2559, this Court has chosen to rely primarily on *Vernonia,* which established the principle, applied in *Earls,* that "Fourth Amendment rights ... are different in public schools than elsewhere." *Id.* (quoting *Vernonia,* 515 U.S. at 656, 115 S.Ct. 2386).

Appendix C

In *Skinner,* the Supreme Court considered whether the Federal Railroad Administration could require railroad operating personnel at private railroads to be tested for illegal drug or alcohol use following train accidents. "Employees subject to the tests," the Court observed, "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." 489 U.S. at 628, 109 S.Ct. 1402. The Court likened the covered employees to personnel at nuclear power plants in that the potential for "great human loss" was present if they worked under the influence of drugs or alcohol. *Id.* Moreover, the Court indicated that evidence demonstrating that alcohol and drug use by railroad employees had caused or contributed to numerous significant train accidents had prompted the government's adoption of the testing regime. *Id.* at 607, 109 S.Ct. 1402. Citing the "surpassing safety interests" behind the policy, *id.* at 634, 109 S.Ct. 1402, the Court upheld the testing program.

Similarly, in *Nat'l Treasury,* the Court recognized the special need behind a testing program that covered U.S. Custom Service officials who applied for promotion to positions directly involving the interdiction of illegal drugs or requiring the incumbent to carry a firearm. 489 U.S. at 670, 109 S.Ct. 1384. "It is readily apparent," the Court remarked, "that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.*

Unlike in *Skinner,* however, the Court in *Nat'l Treasury* did not refer to a concrete showing of past drug or alcohol use by the covered officials. The relevant data in *Nat'l Treasury* told the opposite story. The head of the Service testified that Customs was "largely drug-free." But this did not dissuade the Court, which held that where "the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches to advance the Government's goal."[6] *Id.* at 660, 674–675, 109 S.Ct. 1384.

In *Vernonia,* the Court upheld a mandatory drug testing program for public school students primarily because of the special responsibility that the state has toward public school children. Although the Court had the benefit of extensive evidence of a genuine drug problem among the covered student athletes, it emphasized that the "most significant" reason for affirming the testing program was that it was "undertaken in furtherance of the government's responsibility, under a public school system, as guardian and tutor of children entrusted to its

6. The dissenting opinion rebuked the majority for not requiring the government to produce concrete evidence of past drug use leading to an actual harm. "What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of even a single instance in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use." *Nat'l Treasury,* 489 U.S. at 683, 109 S.Ct. 1384 (Scalia, J., dissenting).

care." 515 U.S. at 665, 115 S.Ct. 2386. Subsequently, in *Bd. of Educ. v. Earls,* which upheld a public school district's policy requiring students who participated in any of the district's competitive extracurricular activities to submit to urinalysis drug testing, the Supreme Court reiterated that "'special needs' inhere in the public school context" and that "Fourth Amendment rights ... are different in public schools than elsewhere." 536 U.S. 822, 829–30, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002).

Finally, in *Chandler* the Court struck down a Georgia statute that required candidates seeking election or nomination to various offices, including Governor, Lieutenant Governor, Secretary of State, Attorney General, Justices of the state Supreme Court, members of the General Assembly, and various commissioners, to verify that they had tested negatively for illegal drug use. Before addressing the statute, the *Chandler* Court reiterated its rationale for finding that the government interests asserted in *Skinner, Nat'l Treasury,* and *Vernonia* were sufficiently compelling to justify the testing program in each case. "Surpassing safety interests," the Court noted, warranted the testing regulations in *Skinner.* 520 U.S. at 315, 117 S.Ct. 1295. The program in *Nat'l Treasury* was legitimate given that it was "developed for an agency with an 'almost unique mission,' as the 'first line of defense' against the smuggling of illicit drugs into the United States." *Id.* at 315–316, 117 S.Ct. 1295. In *Vernonia,* the Court noted, "[t]he program's context was critical," referring here both to the fact that the program covered school children for whom the state had a special responsibility, and that

the student athletes subjected to the tests had been identified as "leaders of the drug culture." *Id.* at 316–17, 117 S.Ct. 1295. "Our precedents establish," the *Chandler* Court summarized, "that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318, 117 S.Ct. 1295.

Moving to the Georgia statute in question, the Court held that merely aspirational goals, such as promoting public confidence and trust in elected officials and demonstrating the government's commitment to the struggle against drug abuse, which are not tied to any real, concrete danger, do not constitute a "special need" sufficient to exempt a state from its normal Fourth Amendment requirements. According to the Court, Georgia had failed to present any evidence of a "concrete danger" that would demonstrate that the hazards the state sought to avoid were "real and not simply hypothetical." *Id.* at 319–20, 117 S.Ct. 1295. In particular, the state had asserted "no evidence of a drug problem among the State's elected officials," nor did the covered individuals "typically ... perform high-risk, safety-sensitive tasks." *Id.* "Symbolic" public concerns, the *Chandler* Court concluded, warrant no special departure from the Fourth Amendment. *Id.* at 322, 117 S.Ct. 1295.

(B) The EO's asserted public interest

In support of the EO, the Governor cites numerous public benefits that the testing policy is intended to

achieve, including ensuring that the public workforce is fit for duty, increasing health and safety at the public workplace, promoting greater productivity among state employees, saving taxpayer money, reducing theft at the public workplace, and decreasing the risk to public safety that drug-impaired employees pose. D.E. 1–3. To demonstrate how the EO will achieve these goals, the Governor has filed numerous studies, surveys, reports, articles, handbooks, and statistics–105 exhibits accompany the Governor's summary judgment motion alone-which show the prevalence of drug use in the workplace and the ill effects that drug use causes.[7] *Cf.* exhibits cited in D.E. 36 ¶¶ 7–12; D.E. 49 ¶ 24.

Most, if not all of the Governor's supporting exhibits lack probative value because they operate at such a high level of generality. The Governor presents various national studies that address the extent of drug use in the general population, and the effects that it has on the productivity, health, and safety of the national workforce. The studies do not describe the risks associated with drug users performing the specific jobs held by the Florida state employees covered by the EO.[8]

---

7. The exhibits are also offered to show that drug testing has become a common and accepted practice in the private sector. *See particularly* exhibits cited in D.E. 36 ¶ 12. In this regard, the exhibits serve to support the Governor's contention that state employees have diminished privacy interests that are outweighed by the public interest in drug testing. The Court addresses this issue, and the exhibits to the extent relevant to this issue, *infra.*

8. *See, e.g.,* "Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings," D.E. 36–6,

Nor do any of the reports document, much less evaluate, the extent of illegal drug use at the covered agencies. Here, the Governor presents drug-use data from the Departments of Corrections (DOC), Juvenile Justice (DJJ), and Transportation (DOT), each of which has conducted suspicion-less testing of a limited range of employees under the Drug–Free Workplace Act, Fla. Stat. § 112.0455. Together, the three departments comprise approximately forty-five percent of the employees subject to the EO. D.E. 33 at 2–3.

The random tests of employees at DOT and DJJ yielded positive results in less than one percent of cases between 2008 and 2011. D.E. 40–11; D.E. 40–14. At DOC, the random tests 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, respectively. D.E. 40–4. In all three agencies, the number of positive results from pre-employment tests has been less than one percent between 2008 and 2011. D.E. 40–4; D.E. 40–11; D.E. 40–14. By contrast, in *Skinner,* which the Supreme Court later cited in support of the holding that evidence of drug use could "shore up" an assertion of special need for

---

"Workplace Substance Use: Quick Facts to Inform Managers," D.E. 36–7, and "General Workplace Impact." D.E. 36–8, and "What You Need to Know about the Cost of Substance Abuse." D.E. 37–9. *See also* concerning Florida as a whole but not the covered agencies, "Florida Drug Control Update," D.E. 36–12, "State Estimates of Substance Use from the 2007–2008 National Surveys on Drug Use and Health," D.E. 36–13, "Drugs Identified in Deceased Persons by Florida Medical Examiners (2010)," D.E. 37–1, "Pill Mill Initiative," D.E. 37–2, and "Statewide Grand Jury Report." D.E. 37–3.

suspicionless drug testing, *Chandler,* 520 U.S. at 319, 117 S.Ct. 1295, the Court noted that the government's testing program was supported by studies showing that 23 percent of operating personnel were "problem drinkers, and that from 1972 to 1983 there had been at least 21 significant train accidents where alcohol or drug use was a probable cause or contributing factor, resulting in 25 fatalities, 61 non-fatal injuries, and property damage of approximately $ 27 million in 1982 dollars." 489 U.S. at 607, 109 S.Ct. 1402. *See also Vernonia,* 515 U.S. at 649, 115 S.Ct. 2386 (1995) (emphasizing that the student athletes implicated in the testing program were not simply included among the drug users, but the leaders of the local drug culture).

The evidence that the Governor submits demonstrates, at length, that there is a public interest in a drug-free workforce, which is manifestly more productive and less of a health and safety risk than the drug-impaired alternative. But this interest is notably broad and general compared to the interests that the Supreme Court has held justify suspicionless drug testing. In *Skinner,* the Supreme Court found a compelling interest in testing railroad personnel where the government produced evidence that drug or alcohol abuse by the covered employees had led to and would continue to lead to "great human loss" unless a suspicionless testing regime was established. 489 U.S. at 628, 109 S.Ct. 1402. Similarly, in *Nat'l Treasury,* the Court found that the government's compelling interest in national self-protection was readily apparent where the testing directive applied to front-line U.S. Customs Service agents, who interdict drugs or carry firearms in the line of duty. 489 U.S. at 670, 109 S.Ct. 1384.

And in *Vernonia,* the Court emphasized that in addition to the fact that the government had demonstrated an immediate drug-abuse problem among student athletes, the government's role in educating and guiding students heightened the government's interest in drug-testing. 515 U.S. at 660, 115 S.Ct. 2386.

All of the upheld drug-testing policies were tailored to address a specific, serious problem. In contrast, the rationale for the Governor's policy consists of broad prognostications concerning taxpayer savings, improved public service, and reductions in health and safety risks that result from a drug-free workplace. D.E. 1–3. The Governor's explanation of the EO's concern with public safety offers a particularly telling example of the speculative nature of the public interest behind the testing policy. His brief explains:

> Even a desk-bound clerk may become violent with other employees or the public, may present a danger when driving in a car in the workplace parking lot, or may exercise impaired judgment when encountering any of the myriad hazards that exist in the workplace environment (from stacks of heavy boxes, to high staircases, to files in high shelves, to wet floors, to elevators and escalators.)

D.E. 35 at 14. In other words, the Governor's safety rationale for the EO essentially relies on the Governor's common sense belief that because illegal drug use exists in the general population, it must also exist among

state employees. And, the Governor predicts these drug-impaired employees will be less reliable and more accident-prone; thus, a public benefit will be attained by ensuring that all state employees under the Governor's purview are drug-free. The Governor may be right, but unlike the programs in *Skinner, Nat'l Treasury,* and *Vernonia,* which were moored to concrete dangers, the Governor's program is detached from any readily-apparent or demonstrated risk. Rather, the Governor's broadly-defined objectives more closely resemble the state of Georgia's argument, rejected in *Chandler,* that the testing of state officials was justified because "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including anti-drug law enforcement efforts; and undermines public confidence and trust in elected officials." 520 U.S. at 318, 117 S.Ct. 1295. And in Chandler, the Supreme Court held that without evidence of a drug problem among the state's elected officials (who typically do not perform high-risk, safety-sensitive tasks), this justification was "symbolic, not 'special,'" as required by the relevant precedents. *Id.* at 322, 117 S.Ct. 1295.

This Court is mindful that when evaluating the public interest in the context of drug testing, it is erroneous to think that there is a "fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here?" *Vernonia,* 515 U.S. at 661, 115 S.Ct. 2386. Rather, the appropriate consideration is whether the concern "appears important enough to justify the particular search at hand, in light of other factors that

show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.*

But this does not change the scope of the EO or the nature of the public interest behind it—the general health, safety, economic, and public benefits that the Governor predicts would accrue from subjecting more than three-fourth's of the state's public workforce to random and pre-employment drug testing. And it is this general and essentially speculative interest that the Court must weigh against the individual privacy interests of those subject to the EO.

(C) Assessing privacy interests

The Supreme Court has held that drug testing by the government "intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner,* 489 U.S. at 617, 109 S.Ct. 1402. However, the Supreme Court has explained that an individual's expectation of privacy varies "with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Vernonia,* 515 U.S. at 654, 115 S.Ct. 2386 (internal citations omitted). In drug-testing cases, courts have held that extensive government regulation of an individual's profession, *Skinner,* 489 U.S. at 627, 109 S.Ct. 1402, direct involvement in drug interdiction or the carrying of a firearm in the line of duty, *Nat'l Treasury,* 489 U.S. at 672, 109 S.Ct. 1384, invasive background checks, *Willner v. Thornburgh,* 928 F.2d 1185, 1188 (D.C.Cir.1991), and medical examinations, *Nat'l Treasury,* 489 U.S. at 677, 109 S.Ct. 1384, diminish

an individual's reasonable expectation that he or she will not be subject to suspicionless drug-testing.

(D) The privacy interests affected

The Union contends that the majority of the covered employees here do not have reduced privacy expectations. By the Union's estimate, at most only 33,052 of the approximately 85,000 covered employees, hold "safety-sensitive positions."[9] D.E. 34 ¶ 19. The Union reasons, in short, that holding a "safety-sensitive position" is a necessary condition for a covered employee to have a diminished privacy interest. D.E. 33 at 11.

The Governor, in response, asserts that all of the covered employees—regardless of position—have reduced privacy expectations as a result of three factors: (1) the widespread use of drug testing among private employers; (2) the fact that the tests can be administered only with the employee's consent; and (3) Florida's tradition of transparency in state government. D.E. 35. The Court considers, in turn, the Governor's claims as to the significance of each factor on the privacy interests of the individuals covered by the EO.

(1) Use of drug testing by private employers

In support of the first argument, the Governor asserts that the prevalence of testing programs at private

9. Neither of the parties has advised the Court of the number of "safety-sensitive positions" held by the approximately 50,000 Union members covered by the EO.

companies should be indicative of the "reasonableness" of the Governor's drug testing program because the Supreme Court has maintained that "customary social usage [has] a substantial bearing on Fourth Amendment reasonableness in specific circumstances." *Georgia v. Randolph,* 547 U.S. 103, 121, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). *see also, Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan J., concurring); *United States v. Jones,* ––– U.S. ––––, 132 S.Ct. 945, 953, 181 L.Ed.2d 911 (2012) (Alito, J., concurring).

But the case law provides little or no support for the Governor's conclusion. He cites only a single case, *Willner,* in which the D.C. Circuit relied upon data demonstrating the use of drug-testing programs by private employers to assess the "reasonableness" of a drug testing program. 928 F.2d at 1191–92. However, in *Willner,* the D.C. Circuit cautioned against overemphasizing data showing the prevalence of testing programs among private employers nationwide, calling such statistics "quite general," and noted that they said "nothing" about the practice that was used by private firms in the specific field of the plaintiff. *Id.* at 1192. Thus, while the Willner Court recognized that drug testing in the private sector was "a measure of the degree of privacy that [government] job applicants can reasonably expect," 928 F.2d at 1191, the D.C. Circuit placed greater weight on other factors in determining the "reasonableness" of the challenged drug test, including the "extraordinarily intrusive" background investigation that was required of those applying to be assistant U.S. attorneys, the position that the plaintiff sought. *Id.* Additionally, in Skinner and Nat'l Treasury, both of which

dealt with employee testing, the Court never indicated that the use of drug testing by private employers is relevant to the "reasonableness" determination.

Putting aside the fact that the Governor has not cited a controlling legal authority that requires this Court to assign any weight to the use of drug testing by private employers, the pertinent exhibits that the Governor submits simply are not persuasive. Nearly all of the surveys concerning the prevalence of testing nationwide date back several years, *see, e.g.,* D.E. 38–8, D.E. 38–12, D.E. 38–13, and report the percentages of firms that test their employees, and not the overall percentages of employees tested either nationally or broken down by employment sector or firm, *see, e.g.,* D.E. 38–14, D.E. 38–17, D.E. 38–18, D.E. 38–19. And with respect to private sector drug testing in Florida, the Governor merely submits a list, taken from the Internet site of an organization opposing drug testing, of some of Florida's largest employers who test, and a sampling of Web-based job applications from many of the state's largest employers, requiring applicants to consent to drug testing. D.E. 38–20; D.E. ¶ 12(*l*)-(k); D.E. 39.

None of the exhibits explains the nature of the drug-testing programs adopted by these employers, and the exhibits, in the aggregate, fail to demonstrate the extent to which random drug testing of all employees has become a common practice. In other words, what the list and applications mean for the reasonable expectation of privacy of any of the individuals covered by EO is left unstated. The evidence that the Governor presents on

drug-testing programs at private firms, in sum, does not convince the Court that the individuals covered here have diminished privacy interests simply because many private-sector employers have adopted drug-testing programs.

(2) Consent to drug testing

Additionally, the Governor argues that because no one is compelled to take a drug test—covered individuals can refuse and find other employment without legal consequence—the employees' submission to testing, albeit as a condition of continued employment, vitiates entirely their reasonable expectation of privacy. D.E. 35 at 5–8. Even assuming that submission could somehow be equated with consent, the dispositive question in the cases decided by the Supreme Court is not whether an individual has consented to a drug test, but rather whether he or she has chosen an occupation that entails a standard or diminished expectation of privacy. Thus, when the Court considered the privacy interest that applied to the railroad personnel *Skinner,* it explained that these employees' had diminished privacy expectations, not because they were free to avoid taking the test without legal consequence, but "by reason of their participation in an industry that is regulated pervasively to ensure safety." 489 U.S. at 627, 109 S.Ct. 1402. Similarly, in *Nat'l Treasury,* the Court held that the privacy interests of the covered border patrol agents were overcome not because they consented to the test, but because by "seek[ing] to be promoted" to high-risk, safety-sensitive positions, they incurred a diminished privacy interest. 489 U.S. at 677, 109 S.Ct.

1384. And likewise in *Vernonia,* what mattered to the Court's assessment of the privacy interest was not that the drug test was a condition for participation in student athletics—the school district required the student and his or her parents to sign a General Authorization Form-but that "[b]y choosing to 'go out for the team,' [the student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students regularly." 515 U.S. at 657, 115 S.Ct. 2386.

The Governor contends that in *Skinner* and *Nat'l Treasury,* the government never argued to the Court that the consent of the covered employees overcame their privacy interest, and therefore the question remains unsettled. But this interpretation ignores the fact that in these cases and in *Vernonia,* the Court considered the question of consent, and determined that it was relevant only to the assessment of whether the affected individuals' privacy interests were diminished in light of their chosen professions (*Skinner*) and *Nat'l Treasury* or chosen activities (*Vernonia*). *See Skinner,* 489 U.S. at 627, 109 S.Ct. 1402; *Nat'l Treasury,* 489 U.S. at 677, 109 S.Ct. 1384; *Vernonia,* 515 U.S. at 657, 115 S.Ct. 2386. The Governor's claim that consent makes a search reasonable may indeed describe the role of consent in criminal cases in which Fourth Amendment claims are routinely made to seek the suppression of physical evidence, but it does not conform at all with the approach taken by the U.S. Supreme Court in regulatory drug testing cases. Thus, the fact that the covered employees have the option to submit to the drug tests or seek other employment does not make the search reasonable under the Fourth Amendment.

(3) Florida's transparency in state government

Finally, the Governor cites state laws requiring some state employees under certain circumstances to make financial disclosures, Fla. Stat. §§ 112.3145 and 112.3148, and providing open access to public records, Fla. Stat. §§ 119.01, 119.011(2), (12) and § 119.07(1)(a), as establishing a tradition of transparent government sufficient to show that all state employees under his purview have diminished privacy interests with respect to random and pre-employment urinalyses. But the Governor's reasoning is hardly transparent and frankly obscure. He offers no plausible rationale explaining why the fact that a state employee's work product and financial status are publically accessible leads to the conclusion that the employee's expectation of privacy in his or her bodily functions and fluids is then diminished. And in any event, no court has relied upon a policy of transparent government, embodied in laws such as those cited by the Governor, as sufficient to overcome a public employee's reasonable expectation of privacy in the contents of his or her urine.[10] This Court sees no reason to be the first.

---

10. The types of employment conditions that courts have recognized as reducing an individual's privacy include, as stated *supra,* extensive government regulation of an individual's profession, *Skinner,* 489 U.S. at 627, 109 S.Ct. 1402, direct involvement in drug interdiction or the carrying of a firearm in the line of duty, *Nat'l Treasury,* 489 U.S. at 672, 109 S.Ct. 1384, invasive background checks, *Willner,* 928 F.2d at 1190, and medical examinations, *Nat'l Treasury,* 489 U.S. at 677, 109 S.Ct. 1384.

Appendix C

(E) Balancing the public and private interests

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler,* 520 U.S. at 313, 117 S.Ct. 1295. But as the Supreme Court explained in *Skinner:* "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." 489 U.S. at 624, 109 S.Ct. 1402. Although the Supreme Court has not precisely articulated an analytical framework for determining what constitutes an "important governmental interest," it can be readily gleaned from *Skinner, Nat'l Treasury, Vernonia*, and *Chandler* that an interest sufficient to justify a drug testing regime in the context of public employment must be more narrowly defined than the public concern behind the EO. In *Skinner,* the Court upheld a testing program in light of its "surpassing safety interests." *Id.* at 634, 109 S.Ct. 1402. In *Nat'l Treasury,* the Court was swayed by "the extraordinary safety and national security hazards" at issue there. 489 U.S. at 646, 109 S.Ct. 1402. *See also Vernonia,* 515 U.S. at 662, 115 S.Ct. 2386 (indicating that the testing program was "directed more narrowly to drug use by school athletes," leaving the non-athletes free from the privacy intrusion).

In the present case, the Court searches in vain for any similarly compelling need for testing. The EO does not identify a concrete danger that must be addressed

by suspicionless drug-testing of state employees, and the Governor shows no evidence of a drug use problem at the covered agencies. Like the Georgia statute overturned in *Chandler,* the EO is designed to improve governmental operations and public confidence in government employees generally by testing for illegal drug use. In *Chandler,* the policy's proponents also insisted that unimpaired state officials would exercise better judgment, discharge public functions more fruitfully, and demand greater trust and confidence from the electorate. 520 U.S. at 318, 117 S.Ct. 1295. Yet the Supreme Court found the program constitutionally deficient.

The fundamental flaw of the EO is that it infringes privacy interests in pursuit of a public interest which, in contrast to the concrete and carefully defined concerns in *Skinner, Nat'l Treasury,* and *Vernonia,* is insubstantial and largely speculative. *Compare Chandler,* 520 U.S. at 318, 117 S.Ct. 1295 (rejecting unsubstantiated claim that illegal drug use impairs the discharge of public functions). The privacy interests infringed upon here outweigh the public interest sought. That is a fatal mix under the prevailing precedents.

Question (3)—Facial v. As Applied Challenge

The Governor's final argument is that the Union has brought an unsuccessful facial challenge to the EO because the Union cannot show that "no set of circumstances exist" under which the EO is valid. The U.S. Supreme Court has held that "[t]o succeed in a typical facial attack, [a plaintiff] would have to establish that no set of circumstances exists

under which [the challenged law] would be valid, or that the statute lacks any plainly legitimate sweep." *United States v. Stevens,* 559 U.S. 460, 130 S.Ct. 1577, 1587, 176 L.Ed.2d 435 (2010).[11] As the Governor correctly points out, the Union concedes that testing some of the employees covered by the EO is constitutionally permissible. "The Fourth Amendment," it writes, "permits a state to drug-test state workers holding safety-sensitive or special risks jobs. The Union has no quarrel with that." D.E. 35 at 3–4; D.E. 19 at 7–8.

However, the Court construes the Union's concession as consistent with an "as-applied" challenge. In its filings, the Union asserts at most that the EO cannot be constitutionally applied to any current employee at a covered agency.[12] *See Citizens United v. FEC,* 558

11. The Supreme Court has explained that facial challenges, which are frequently speculative and rely upon underdeveloped factual records, "also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450–51, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008).

12. In its Complaint, the Union alleged that "[t]he drug-testing regime mandated by the order inflicts real harm upon state employees represented by AFSCME because it violates their constitutional right to be free from unreasonable governmental searches." D.E. 1 ¶ 19. The Union's discovery disclosures, cited by

the Governor as evidence that the Union was bringing only a facial challenge. D.E. 35 at 4, display the Union's belief that the EO is unconstitutional as applied to current employees at the covered agencies. For example, the Governor quotes Union as stating the following in response to an interrogatory: "we deny that [the EO] can ever be constitutionally applied to anyone." D.E. 36–3 ¶ 6. Yet the question to which this statement responded asked the Union to identify any "person or position" at a covered agency to which the EO could not be constitutionally applied. The Union responded that "[b]ecause the drug-testing regime mandated by EO 11–58 unlawfully fails to limit random drug-testing to employees in safety-sensitive jobs, or to employees reasonably suspected of drug abuse, we deny that it can ever be constitutionally applied to anyone." *Id.* The context of the response makes it apparent that the Union was stating that the EO could not be constitutionally applied to "anyone" currently employed at a covered agency. In other early filings, the Union reiterated this theory that EO could not be applied to any covered employee, regardless of whether he or she was a member of the Union. *See, e.g.,* D.E. 12 ¶ 3 (claiming that the central issue presented in the case was whether the Fourth Amendment permits "the state to drugtest *all executive branch workers,* regardless of whether the worker holds a safety-sensitive job, and regardless of whether there is a reasonable suspicion that the worker is using drugs") (emphasis added); *see also* D.E. 19 at 8 (asserting that the Union was challenging the EO because "it indiscriminately commands the drug-testing of *all* employees, without regard for whether they hold safety-sensitive jobs and without regard for whether reasonable suspicion of drug abuse exists.") (emphasis in original). The Court considers the statement, made via e-mail by Union's counsel and cited here by the Governor, that the Union was "alleging that [the EO] was facially unconstitutional," D.E. 46–1, not to foreclose the as-applied challenge that the Union had articulated in the pleadings and other filings.

U.S. 310, 130 S.Ct. 876, 893, 175 L.Ed.2d 753 (2010) (holding that "[t]he distinction between facial and as-applied challenges ... goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint;") *see also Doe v. Prosecutor,* 566 F.Supp.2d 862, 877 (S.D.Ind.2008) (interpreting plaintiffs' challenge to sex-offender registration law as an as-applied challenge where plaintiffs' theory did not challenge application of the law to persons on parole or probation but only as-applied to convicted sex offenders who had completed their criminal sentences). The Union makes no claims as to the constitutionality of the EO as it relates to preemployment testing of non-current employees, or the random testing of those hired after the issuance of the EO. The Court, moreover, leaves these questions unresolved in this order. Accordingly, this Order disposes only of the Union's contention that the EO violates the Fourth Amendment "as applied" to current employees in the covered agencies.

V. JUDGMENT

The Union here asks for a permanent injunction, which requires three elements: (1) there was a legal violation; (2) there is a serious risk of continuing irreparable injury if an injunction is not granted; and (3) there are no adequate remedies at law. *Bolin v. Story,* 225 F.3d 1234, 1242 (11th Cir.2000). Here, the Court finds that the EO, as applied to current employees at the covered agencies, is violative of the Fourth Amendment, and that these employees will suffer irreparable harm if subjected to it. *See Covino v. Patrissi,* 967 F.2d 73, 77 (2d Cir.1992) (holding that Fourth Amendment violation is enough to

show irreparable harm); *see also Am. Fed'n of Teachers–West Va., AFL–CIO v. Kanawha Cnty. Bd. of Educ.,* 592 F.Supp.2d 883 (S.D.W.Va.2009); *Bannister v. Bd. of Cnty. Commis. of Leavenworth Cnty., Kan.,* 829 F.Supp. 1249 (D.Kan.1993); *Marchwinski v. Howard,* 113 F.Supp.2d 1134 (E.D.Mich.2000), *but see* 309 F.3d 330 (6th Cir.2002) (holding that district court erred in granting preliminary injunction) vacated by 319 F.3d 258 (6th Cir.2003). The Court also concludes that there is no adequate remedy at law in light of the immeasurable nature of the harm that will flow from the EO's implementation; were the EO to be implemented, the current employees at the covered agencies would suffer a Fourth Amendment violation that cannot be remedied in monetary terms. "Indeed, one reason for issuing an injunction may be that damages, being immeasurable, will not provide a remedy at law." *Treasure Valley Potato Bargaining Asso. v. Ore–Ida Foods, Inc.,* 497 F.2d 203, 218 (9th Cir.1974); *cert. denied,* 419 U.S. 999, 95 S.Ct. 314, 42 L.Ed.2d 273 (1974).

The Court is mindful, however, that injunctive relief should be limited in scope to the extent necessary to protect the interests of the parties. *See Gibson v. Firestone,* 741 F.2d 1268, 1273 (11th Cir.1984). Because the Union did not contend that the EO is unconstitutional as applied to "prospective new hires," meaning individuals who are not currently employed at covered agencies, the Court does not reach the issues of whether such prospective employees can be subjected to preemployment testing and subsequent random drug testing pursuant to the EO. However, the relief encompasses both Union and non-Union employees because the EO is unconstitutional

as applied to them for precisely the same reasons. Accordingly, the Court grants permanent injunctive relief to all individuals currently employed at covered agencies.

For the reasons herein stated, it is ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED.

APPENDIX D — EXECUTIVE ORDER NUMBER 11-58, EXECUTED MARCH 22, 2011

STATE OF FLORIDA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER NUMBER 11-58

(Requiring Pre-employment and Random Drug Testing for State Employees)

WHEREAS, the taxpayers of Florida are entitled to a public workforce that is fit for duty and, as such, is free from the harmful and dangerous influence of illegal drugs; and

WHEREAS, the State, as an employer, has an obligation to maintain discipline, health, and safety in the workplace, and to ensure State employees are not engaged in illegal drug use while at work; and

WHEREAS, illegal drug use has an adverse affect on job performance, including increased injury on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services; and

WHEREAS, lost productivity due to illegal drug use harms the financial interests of every taxpayer; and

WHEREAS, the public interacts daily with state employees and, therefore, the risk to public safety is real and substantial if state employees use drugs; and

WHEREAS, the Legislature has found that illegal drug use has serious adverse effects upon a significant portion of the workforce in Florida; and

WHEREAS, the State, therefore, has a special responsibility to the public to ensure prospective employees are drug free before they are allowed to enter the state workforce and that existing employees remain drug free as long as they are employed by the State; and

WHEREAS, the State can best fulfill these obligations by requiring pre-employment drug testing and periodic, random drug testing of existing state employees; and

WHEREAS, the taxpayers of Florida are entitled to expect that Florida's public-sector employers be provided the same tools that are available to private-sector employers to ensure their workforce is drug free; and

WHEREAS, pre-employment and random drug testing are available to private-sector employers and are the best available methods to ensure drug abusers do not enter or remain in the state workforce.

NOW, THEREFORE, I, RICK SCOTT, as Governor of Florida, by virtue of the authority vested in me by article IV, section (1)(a) of the Florida Constitution, and all other applicable laws, do hereby promulgate the following Executive Order, to take immediate effect:

Section 1. I hereby direct all agencies within the purview of the Governor to amend their drug-testing

policies to provide for pre-employment drug testing for all prospective new hires and for random drug testing of all employees within each agency. The amended policy should provide for the potential for any employee, including all full-time and part-time employees, and employees of any employment classification—including, but not limited to, Senior Management Service, Select Exempt Service, Career Service, and Other Personal Services—to be tested at least quarterly.

Section 2. Within sixty days from the date of this Executive Order, each agency must amend its drug-testing policy in accordance with the requirements of this Executive Order, and must notify its employees of the amendment. Each agency must begin pre-employment drug testing immediately upon adoption of an amended policy consistent with this Executive Order. Each agency must begin random drug testing sixty days following notification to employees of the new policy.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, the Capitol, this 22nd day of March, 2011.

/s/_____
GOVERNOR

ATTEST:
/s/_____
SECRETARY OF STATE

APPENDIX E — DEFENDANT'S STATEMENT OF MATERIAL FACTS IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED NOVEMBER 29, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 11-21976-CV-UNGARO

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) COUNCIL 79,

Plaintiff,

v.

RICK SCOTT, in his official capacity as Governor of the State of Florida,

Defendant.

DEFENDANT'S STATEMENT OF MATERIAL FACTS

In support of Defendant's concurrently filed Motion for Summary Judgment, Defendant respectfully submits the following Statement of Material Facts.[1]

1. Defendant reserves the right to argue legal theories that, if adopted by the Court, might result in some of the facts stated herein being irrelevant to the outcome of this case. Furthermore, because this case calls for the Court to fashion a constitutional rule, Defendant maintains that many of the facts contained herein constitute legislative, rather than adjudicative, facts, and for that

Appendix E

A. Background Regarding Executive Order 11-58

1. On March 22, 2011, Governor Rick Scott issued Executive Order Number 11-58. The Order directs all agencies "within the purview of the Governor to amend their drug-testing policies to provide for pre-employment drug testing for all prospective new hires and for random drug testing of all employees within each agency." *See* Doc. 1-3; Doc. 12 at ¶ 2.[2]

---

reason do not constitute "genuine issue[s] to be tried." S.D. Fla. L.R. 7.5(a). *See* Note, Fed. R. Evid. 201 ("Legislative facts … are those which have relevance to legal reasoning and the lawmaking process … in the formulation of a legal principle or ruling by a judge or court….[T]he view which should govern judicial access to legislative facts … renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level.").

2. At the time of promulgation, the State agencies subject to Executive Order 11-58 were: the Department of Business and Professional Regulation; the Department of Children & Families; the Department of Community Affairs; the Department of Corrections; the Department of Elder Affairs; the Department of Emergency Management; the Department of Environmental Protection; the Executive Office of the Governor; the Department of Health; the Agency for Health Care Administration; the Department of Juvenile Justice; the Department of the Lottery; the Department of Management Services; the Department of Military Affairs; the Agency for Persons with Disabilities; the Department of State; the Department of Transportation; and the Agency for Workforce Innovation. Pursuant to Ch. 2011-42, Laws of Florida, on October 1, 2011, the Department of Community

2. On June 10, 2011, the Governor issued a memorandum to agency heads stating that while this case is pending, "it does not make sense for all agencies to move forward with logistical issues involved in instituting the new policy." Accordingly, the Governor directed the Department of Corrections to proceed with implementing Executive Order 11-58, which would permit the legal issue presented here to be resolved. Thus, for all agencies other than the Department of Corrections, the timelines established in Executive Order 11-58 are currently suspended. *See* Doc. 15-1; Doc. 12 at ¶ 2.

3. The Department of Corrections has implemented a rule and a policy that comply with the dictates of Executive Order 11-58. *See* Grant Decl. ¶¶ 5-7.

B. Plaintiff AFSCME

4. According to its contract with the State, AFSCME "represent[s] the employees in the Human Services, Professional, Operational Services and Administrative and Clerical Units." *See* Ex. B at AFSCME 000003.

5. AFSCME represents only current employees; it does not represent job applicants. *See id.*

6. In the course of this litigation, AFSCME has not identified an individual member who alleges injury relating to Executive Order 11-58. *See* Ex. A2 at ¶¶ 5-9.

Affairs and the Agency for Workforce Innovation merged into the newly created Department of Economic Opportunity.

C. Prevalence and Impact of Drug Use in the Workplace

7. Drug abuse in America is a widespread problem. *See* Ex. A1 at ¶ 19; Ex. C, U.S. Dept. of Health & Human Servs., Substance Abuse and Mental Health Services Administration, *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings* (hereinafter "*SAMHSA 2010 Survey Summary*") (in 2010, an estimated 22.6 million Americans aged 12 or older (8.9% of the population) were current users of illicit drugs).

8. The problems flowing from the drug epidemic reach American workplaces because many users of illicit drugs are employed. *See* Ex. A1 at ¶ 20 (admitting that "drug-abuse (including alcohol) adversely affects our society, and that employers are not immune from this"); Ex. C, *SAMHSA 2010 Survey Summary* (concluding that in 2010 "most illicit drug users were employed" and estimating 8.4% of the nation's full-time employees, and 11.2% of the nations part-time employees, were current users of illicit drugs); Ex. D, SAMHSA, *Workplace Substance Use: Quick Facts to Inform Managers* (2008) (estimating that 14.1% of national workforce reported using at least one illicit drug in the last 12 months, that "of all current illicit drug users age 18 and over, 74.9 percent were employed," and that over 3 percent of workers reported using at least one illicit drug while at work); Ex. E, U.S. Dept. of Labor, Working Partners for an Alcohol- and Drug-Free Workplace, *General Workplace Impact* (reporting that "[s]ubstance abuse is a concern for employers" because "[m]ost drug users … are employed," and "[a]n estimated

3.1 percent of employed adults actually used illicit drugs before reporting to work or during working hours at least once in the past year"); Ex. F, Occupational Safety and Health Administration, *Workplace Substance Abuse* ("The vast majority of drug users are employed, and when they arrive for work, they don't leave their problems at the door."); Ex. G, Avram H. Mack *et al.*, *Drugs: Abuse and Dependence*, in Jeffrey P. Kahn *et al.*, MENTAL HEALTH AND PRODUCTIVITY IN THE WORKPLACE 481 (2003) (detailing scope of drug use problem in American workplaces).

9. Illicit drug use in Florida, and in Florida workplaces, is a serious problem. *See*:

a. Ex. A1 at ¶ 20 (admitting that "drug-abuse (including alcohol) adversely affects our society, and that employers are not immune from this");

b. Ex. H, U.S. Dept. of Health & Human Servs., SAMHSA, *Results from the 2010 National Survey on Drug Use and Health: Detailed Tables*, Table 1.59B, (reporting that in 2009 and 2010, in the southeast states, approximately 14% of the population used illicit drugs in the past year, and approximately 8% of the population used illicit drugs in the past month);

c. Ex. I, White House Office of National Drug Control Policy, *Florida Drug Control Update* (reporting that in 2007-2008 approximately 8 percent of Floridians reported illegal drug use in the last month and that the rate of drug-induced deaths in Florida is higher than the national average);

d. Ex. J, U.S. Dept. of Health & Human Servs., SAMHSA, *State Estimates of Substance Use from the 2007–2008 National Surveys on Drug Use and Health* at Ch. 2 (reporting statistics for illicit drug use in Florida);

e. Ex. K, Florida Dept. of Law Enforcement, *Drugs Identified in Deceased Persons by Florida Medical Examiners* (2010) (reporting 27.9% increase in deaths caused by Oxycodone from 2009 to 2010);

f. Ex. L, Florida Attorney General, *Pill Mill Initiative* (reporting that Florida "has become the destination for distributors and abusers through the proliferation of pill mills" and that "Florida leads the nation in diverted prescription drugs, resulting in seven Floridians dying every day");

g. Ex. M, Statewide Grand Jury Rpt.: An Analysis of Florida's Drug Control Efforts (Dec. 14, 2000) (reporting that "there are 1,000,000 [current] users of illegal narcotics in Florida," that "as much as 80 percent of all crime reported in Florida is attributable to illicit drug activity," that Florida exceeded the national drug use rate in 1999, that "[i]n 1997 there were an estimated $250.8 million in hospital charges in Florida for the treatment of drug-related illnesses," that the potency and lethality of drugs in Florida has increased the number of overdoses and deaths, and that "the impact of these figures includes a financial cost associated with lost productivity in the work place, increased physical injury and disease, economic loss and emotional hardship");

h. Grant Decl. ¶ 4 & Ex. 3 (Florida Department of Corrections drug-testing results); Burdick Decl. ¶ 5 (Florida Department of Transportation drug-testing results); Snyder Decl. ¶ 3 (Florida Department of Juvenile Justice drug-testing results); Ex. N, Excerpts of Depo. of Florida Agency for Persons with Disabilities at 24-27, 31-36, 39-41 (discussing examples of agency employees who have had issues with illicit drug use in recent past).

10. Any employee under the influence of illegal drugs can present a safety hazard in the workplace, and can cause decreased productivity, decreased efficiency, and increased costs for the employer and co-workers. *See*:

a. Ex. A1 at ¶ 27; Ex. A2 at ¶ 10; Exs. WW1-WW3;

b. Ex. O, U.S. Dept. of Labor, Working Partners for an Alcohol- and Drug-Free Workplace, *Addiction (Dependence)* (reporting that drug addiction can cause "aggression, … paranoia[,] … impaired coordination, … limited attention span, [and] … slow reaction time");

c. Ex. P, U.S. Dept. of Labor, Working Partners for an Alcohol- and Drug-Free Workplace, *Workplace Drug Testing* (reporting that employers drug test because "drug abuse creates significant safety and health hazards and can result in decreased productivity and poor employee morale … [and] can lead to additional costs in the form of health care claims");

d. Ex. Q, U.S. Dept. of Labor, Working Partners for an Alcohol- and Drug-Free Workplace, *General*

Services ("Many service employers wrongly believe that substance abuse is a problem only in industries that have 'safety sensitive' positions—jobs requiring the operation of vehicles, machinery and tools. However, the general services industry pays a high price for substance abuse.");

e. Ex. E, U.S. Dept. of Labor, Working Partners for an Alcohol- and Drug-Free Workplace, *General Workplace Impact* ("workers reporting substance use and abuse have higher rates of turnover and absenteeism," and "there is evidence that co-worker job performance and attitudes are negatively affected");

f. Ex. R, U.S. Dept. of Labor, Drug-Free Workplace Advisor, *How Does Substance Abuse Impact the Workplace?* ("numerous studies, reports and surveys suggest that substance abuse is having a profoundly negative effect on the workplace in terms of decreased productivity and increased accidents, absenteeism, turnover, and medical costs");

g. Ex. F, Occupational Safety and Health Administration, *Workplace Substance Abuse* ("OSHA recognizes that impairment by drug or alcohol use can constitute an avoidable workplace hazard and that drug-free workplace programs can help improve worker safety and health and add value to American businesses.");

h. Ex. D, SAMHSA, *Workplace Substance Use: Quick Facts to Inform Managers* (2008) ("Regardless of where illicit drug use or heavy alcohol use takes place, workers reporting substance use and abuse have higher

rates of turnover and absenteeism."); *id.* ("employed drug abusers cost their employers about twice as much in medical and worker compensation claims as their drug-free coworkers");

i. Ex. S, SAMHSA, *Issue Brief # 7 For Employers: What You Need to Know about the Cost of Substance Abuse* (2008) ("People who abuse drugs or alcohol are three and one-half times more likely to be involved in a workplace accident, resulting in increased workers' compensation and disability claims.");

j. Ex. T, SAMHSA, *Workplace Substance Abuse Statistics Fact Sheet* ("On-the-job drug use can lead to an increased risk of accidents and injuries. It can also lead to lower levels of productivity and employee morale, not only among those with substance abuse problems but also among those working alongside them.") (citing studies to support these propositions);

k. Ex. U, Center for Substance Abuse Prevention, *Substance Abuse Prevention in Workplaces is Good Business* (Oct. 1999);

l. Ex. V, Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration, *Alcohol and Other Drugs* ("Research has demonstrated a relatively strong correlation between violence and psychoactive substances, including alcohol and illegal drugs.");

m. Ex. W, Florida Agency for Healthcare Administration, *An Employer's Guide to a Drug-Free Workplace* (April 2005) (reporting that substance abuse costs over $100 billion annually, that "[d]rug and alcohol-related problems are one of the top four reasons for the rise in workplace violence," and that various studies show that policies confronting workplace drug problems result in significant safety and productivity benefits);

n. Ex. X, Gerald-Mark Breen & Jonathan Matusitz, *An Updated Examination of the Effects of Illegal Drug Use in the Workplace*, 19 J. HUMAN BEHAVIOR IN THE SOCIAL ENVIRONMENT, 434 (2009) (detailing harmful effects of numerous drugs on workplace activities and concluding that illicit drug use is negatively correlated with workplace productivity) (cited approvingly in *NASA v. Nelson*, 131 S. Ct. 746 (2011));

o. Ex. Y, Christopher S. Carpenter, *Workplace Drug Testing and Worker Drug Use*, 42 HEALTH SERVS. RESEARCH 795, 795 (2007) ("A large literature suggests that employee substance abuse in the workplace may impose high costs to firms in the form of lower productivity, increased absenteeism, and more workplace accidents.");

p. Ex. Z, National Business Group on Health, *An Employer's Guide to Workplace Substance Abuse* (detailing effects and negative workplace impacts of illicit drug use);

q. Ex. AA, Diagnostic And Statistical Manual IV 189 (substance-related "disorders often cause marked impairment and severe complications"); *id.* at 190 ("Substance use can be associated with violent or aggressive behavior … and can result in injury to the person using the substance or to others. Automobile, home, and industrial accidents are a major complication of Substance Intoxication and result in an appreciable rate of morbidity and mortality."); *id.* at 206 ("Aggressive or violent behavior is associated with Amphetamine Dependence" and "intense but temporary anxiety, as well as paranoid ideation and psychotic episodes … are often seen"); *id.* at 207 (amphetamine intoxication can cause "anger, fighting, and impaired judgment"); *id.* at 217 (cannabis intoxication can induce "impairment in short-term memory, difficult in carrying out complex mental processes, impaired judgment, distorted sensory perceptions, impaired motor performance"; "[w]hen taken in high doses, cannabinoids have psychoactive effects" and "[e]pisodes of depersonalization and derealization have also been reported"); *id.* at 223 (cocaine intoxication can induce "anger[] and impaired judgment"); *id.* at 232 (hallucinogen intoxication can cause "intensification of perceptions, depersonalization, derealization, illusions, hallucinations, and synesthesias"); *id.* at 239 ("The essential feature of Inhalant Intoxication is the presence of clinically significant maladaptive behavioral or psychological changes (*e.g.* belligerence, assaultiveness, apathy, impaired judgment, impaired social or occupational functioning"); *id.* at 249 (opioid intoxication can result in "inattention to the environment, even to the point of ignoring potentially harmful events");

r. Ex. BB, C.H. Ashton, *Adverse Effects of Cannabis and Cannabinoids*, 83 BRITISH J. OF ANAESTHESIA 637 (1999) (detailing effects of cannabis, including severe anxiety and panic, paranoid feelings, depersonalization, derealization, sense of loss of control and fear of dying, drowsiness, distortion of special and temporal judgment, impaired motor performance, and, for some, aggressive behavior);

s. Ex. CC, Roy Lubit & Bruce Russett, *The Effects of Drugs on Decision-Making*, 28 J. CONFLICT RESOLUTION 85, 89-95 (1984) (describing deleterious effects that several illicit drugs have on decisionmaking);

t. Center for Substance Abuse Research, *Drug Information* (root page listing links detailing the deleterious effects on behavior of 29 drugs), http://www.cesar.umd.edu/cesar/drug_info.asp;

u. National Highway Traffic Safety Administration, *Drugs and Human Performance Fact Sheets* (listing deleterious effects on behavior of numerous drugs), http://www.nhtsa.gov/people/injury/research/job185drugs/index.htm;

v. Ex. DD, U.S. Depts. of Justice and Labor, *Methamphetamine and the Workplace* (detailing workplace impact of methamphetamine use, including "occupational injuries and fatalities," "absenteeism and employee turnover," "increased illness rates and health benefit utilization," "lost productivity," "low employee morale," "workplace violence," and "identity theft";

reporting that "white collar jobs" are "hard-hit" by methamphetamine abuse);

w. Ex. EE, Office of National Drug Control Policy, *America's Drug Use Profile: Consequences of Illegal Drug Use* (discussing cost of drug abuse to workplace productivity);

x. Ex. FF, National Institute on Drug Abuse, *New Avenues of Research Explore Addiction's Disrupted and Destructive Decision Making*, 18 RESEARCH FINDINGS (Nov. 2003) (discussing controlled studies showing that "majority of substance-dependent individuals made poor decisions [in laboratory experiment], choosing high immediate gratification without regarding for higher future costs");

y. Ex. N, Excerpts of Depo. of Florida Agency for Persons with Disabilities at 8-12, 23-27, 34-36, 44, 53-54 (discussing reasons why any employee at agency under influence of illicit drugs presents a problem).

11. Because of the deleterious effects that drug intoxication has on workplace safety and productivity, the State has an interest in ensuring that its workplaces and employees are drug-free. Ex. A1 at ¶ 13; Ex. A2 at ¶¶ 11-12.

D. Prevalence of, and Attitudes Toward, Drug Testing in the Workplace

12. Drug testing in the workplace—both job-applicant testing and employee testing—is a common, routine, expected, and popular practice, both nationally and in Florida. *See*:

a. Ex. GG, ACLU of Florida, *Drug Testing in the Workplace* (reporting that "[t]oday, millions of American workers every year, in both the public and private sectors, are subjected to urinalysis drug testing as a condition for getting or keeping a job");

b. Ex. HH, ACLU, *Drug Testing: A Bad Investment* (Sept. 1999) at 4 (reporting sharply rising trend of workplace drug testing since 1986 and concluding that "[t]oday, tens of millions of American workers are drug tested, either before they are hired or as a condition of continued employment"); Ex. II, ACLU, *Privacy in America: Workplace Drug Testing* (March 12, 2002) (reporting that "[t]oday, in some industries, taking a drug test is as routine as filling out a job application," that "workplace drug testing is up 277 percent since 1987," and that "millions of American workers are tested yearly—even though they aren't suspected of drug use"); Ex. JJ, ACLU, *Legislative Briefing Kit: Drug Testing* (Dec. 31, 1998) (reporting that "drug testing of employees, especially in the private sector, has been steadily growing since 1986" and describing drug testing as an "increasingly widespread practice"); Ex. KK, ACLU, *Drug Testing* (reporting that "currently in some

industries taking a drug test is as routine as filling out a job application");

c. Ex. LL, U.S. Dept. of Health & Human Servs., *Worker Drug Use and Workplace Policies and Programs: Results from the 1994 & 1997 NHSDA* (1999) (in 1997, 49 percent of respondents reported some type of workplace drug testing, 39 percent reported job-applicant testing, and 25 percent reported random testing of employees);

d. Ex. MM, U.S. Dept. of Health & Human Servs., *Worker Substance Use and Workplace Policies and Programs* (2007) (from 2002-2004, 42.9 percent of full-time workers (47 million) were subject to job-applicant drug or alcohol screening); *id.* (nearly 95 percent of American workers would either be more likely to work for an employer who tests before hiring, or prehire testing would not affect their decision);

e. Ex. NN, U.S. Dept. of Health and Human Services, *Drug Testing Facts and Statistics* (reporting that "most workplaces include drug testing in their programs for drug-free workplaces");

f. Ex. OO-1, U.S. Dept. of Labor, Working Partners for an Alcohol- and Drug-Free Workplace, *Industry: Public Administration* (reporting prevalence of workplace drug-testing for the public administration industry at 54.7% for job applicants and 42.9% for employees); Ex. OO-2 (defining public administration industry as including "general government and support");

g. Ex. PP, U.S. Dept. of Labor, Drug-Free Workplace Advisor, *Benefits* ("According to the American Management Association's annual Survey on Workplace Drug Testing and Drug Abuse Policies, workplace drug testing has increased by more than 1,200 percent since 1987. More than 81 percent of businesses surveyed in 1996 were conducting some form of applicant or employee drug testing.");

h. Ex. QQ, American Management Association 2004 Survey at 3 (reporting that between 1995 and 2004, 62 to 81 percent of U.S. firms surveyed engaged in drug testing);

i. Ex. RR, Society for Human Resource Management Poll: Drug Testing Efficacy (Sept. 7, 2011) (reporting survey results showing that (i) 57 percent of employers require drug testing for all applicants, and (ii) 36 percent of employers conduct post-employment drug testing (of which 47 percent were random for all employees));

j. Ex. SS, Tyler D. Hartwell *et al.*, *Prevalence of Drug Testing in the Workplace*, Monthly Labor R. (Nov. 1996) at 35 (as of 1996, reporting results of numerous surveys showing dramatic increase of workplace drug testing, and concluding that "[d]rug testing is widely implemented in worksites throughout the United States," "that drug testing continues to develop as a preferred strategy to control substance abuse in the workplace," that "[p]rograms are most prevalent in larger worksites," and that "[r]andom drug testing has emerged as the most common form of testing, and most often, all employees and applicants are now included in testing programs");

k. Rust Decl. ¶ 2 & Ex. 1 (reporting Florida's fifty largest employers by number of employees); Exs. TT1-TT29 (collection of web-based job applications, from many of Florida's fifty largest employers, that require applicant to consent to drug testing); Exs. TT30-TT35 (examples of other large Florida employers whose job applications require consent to drug testing);

l. Ex. UU, Testclear.com, *The Definitive List of Companies that Drug Test* (list of hundreds of Florida-based employers that drug test based on user reports provided to company opposed to drug testing);

m. Ex. VV (showing that 70% of Floridians support the drug testing mandated by Executive Order 11-58);

n. Ex. G, Avram H. Mack *et al.*, *Drugs: Abuse and Dependence*, in Jeffrey P. Kahn *et al.*, Mental Health and Productivity in the Workplace 497 (2003) ("Both employees and organizations increasingly view a safe and drug-free workplace as a right. Employees feel that substance-abusing coworkers jeopardize everyone's safety and invite criminal behavior in the workplace.").

Dated November 29, 2011

Appendix E

Respectfully submitted,

/s/_____
Charles M. Trippe, Jr. (FBN 69760)
General Counsel
Charles.Trippe@eog.myflorida.com
Jesse M. Panuccio (FBN 31401)
Deputy General Counsel
Jesse.Panuccio@eog.myflorida.com
Michael M. Sevi (FBN 60947)
Assistant General Counsel
Michael.Sevi@eog.myflorida.com
Executive Office of the Governor
The Capitol
400 South Monroe Street
Room 209
Tallahassee, FL 32399-6536
(850) 488-3494 telephone
(850) 922-0309 facsimile

Counsel for Defendant

APPENDIX F — FLORIDA DEPARTMENT OF CORRECTIONS DRUG AND ALCOHOL TESTING CONSENT FORM

[Foldout]

Department of Corrections

DRUG AND ALCOHOL TESTING CONSENT
FLORIDA DRUG FREE WORKPLACE ACT AND RANDOM DRUG TESTING

In keeping with the requirements of Section 112.0455, Chapter 943, and Section 944.474, Florida Statutes, and Chapter 11B-27 and Rule 33-208.403, Florida Administrative Code, I do hereby voluntarily consent to the sampling and subsequent testing of my body fluids, including urine and blood (if applicable). I understand that refusal to supply the necessary sample(s) **within 24 hours of notification for drug testing and/or immediately for alcohol testing,** or as soon as a mobile collection is available; or test results that reveal the use of controlled substances, or evidence of an adulterated sample as outlined in department procedures: "Pre-Employment/Employment Drug and Medical Exam Testing Program," Procedure 208.058; "Reasonable Suspicion Drug and Alcohol Testing Program for Staff," Procedure 208.050; and "Random Drug Testing Program for Department Staff," Procedure 208.045, may be grounds for rejection of my application for employment for this position or any other position with the Department of Corrections, or for my dismissal, if hired under a conditional offer of employment. I understand that I have been requested to submit to the following drug and/or alcohol test (please check appropriate box(es)):

☐ Pre-employment
☐ Random
☐ Reasonable Suspicion – Alcohol - blood
☐ Reasonable suspicion- Drug

It has been explained to me that refusal to submit to drug and/or alcohol test may result in the rejection of my application for employment and/or disciplinary action up to and including dismissal and that any attempt to alter the drug and/or alcohol test will result in a positive test result.

I further understand that the results of the testing may be utilized in conjunction with any other information developed during the pre-employment/hiring process to determine my eligibility for employment with the department, and that written confirmatory laboratory reports may be subject to disclosure under Florida's Public Records Act.

I understand that if I am an employee of the department in a position required to be certified under section 943.13, F. S., (including staff on probationary or TEA (trainee) status) and my drug test result is confirmed positive, I will be immediately removed from my position and dismissed from employment. I understand that as an employee for the department in a position that requires certification under section 943 F. S., if I test positive for the illegal use of alcohol, I will be given a mandatory referral to the Employee Assistance Program. I will also be subject to disciplinary action up to and including dismissal. I understand that if I am an employee in a position that is not required to be certified under section 943.13, F. S., and my drug and/or alcohol test result is positive, I will be subject to either referral to the Employee Assistance Program and/or a substance abuse professional. I will also be subject to disciplinary action up to and including dismissal. These actions are outlined in the department's procedures listed above.

I acknowledge that, if requested, I will be provided with a copy of any of the above-referenced department procedures (whichever is appropriate) and that the servicing personnel office, the warden or assistant warden, circuit administrator , or authorizing individual has answered any questions regarding drug or alcohol testing.

If experiencing difficulty providing a sufficient specimen amount, remain at the lab following standard hydration protocols until a sufficient specimen amount is produced.

Donor's Printed Name	Donor's Signature
Social Security Number	Date/Time
Witness's Printed Name	Witness's Signature

DC2-848 (Revised 10/7/11)
In accordance with s. 119.071(5)(a)2., F. S., your social security number is being collected for verification purposes. This collection is imperative for the performance of this agency's duties and responsibilities as prescribed by law. Inclusion of the social security number will save staff time and result in the prompt and efficient data entry of required information.

The Department will not use the social security number collected for any purpose other than the purpose provided above.