No. 13-841

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

REPLY BRIEF

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

April 1, 2014

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

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Cited Authorities

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The Court should grant review because the circuits are deeply divided, the appeal raises important issues, and the Eleventh Circuit's decision is wrong on the merits. Petition ("Pet.") 12-35. As explained below, nothing in the Brief in Opposition ("BIO") that AFSCME ("the Union") submitted alters that conclusion.

I. The Court Should Resolve The Circuit Split Over Whether Public Employees May Consent To Random Drug Testing.

The courts of appeals are divided over whether government employees may validly consent to drug testing. Pet. 14-22. Like the Eleventh Circuit, the Union tries to dodge the issue by claiming that *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), implicitly resolved it, BIO 7-10. "Had the Court in those cases agreed with the State's position in this case," the Union argues, "there would have been no need to engage in a special-needs analysis." BIO 8. That argument is unsustainable.

The Court did not reach the consent issue in those cases for a straightforward reason: the parties did not raise it. Pet. 22-23. Nor was the issue raised in other drug-testing programs the Court has since reviewed. *See 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); *Chandler v. Miller*, 520 U.S. 305 (1997). This Court has long "follow[ed] the principle of party presentation" because "the parties know what

is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (citation omitted). There was no reason to adjudicate an issue not presented. The Court resolved those cases on the parties' terms, *viz.*, Fourth Amendment reasonableness grounds.

Moreover, those cases did not present an instance where the Court might have raised the issue on its own. In *Von Raab*, the case most similar to this one, the United States deliberately waived a stand-alone consent defense. The United States acknowledged that "it may also be argued, as this Court concluded in [*Wyman v. James*, 400 U.S. 309, 317-18 (1971)], that the Customs drug-testing program is not a Fourth Amendment search" because it is "a reasonable condition of employment" and the employee consents "as he might in any other pre-employment examination." Br. for United States, *Von Raab* (No. 86-1879), 1987 WL 880093, at *24 n.18. Yet the United States concluded that "[t]o resolve that issue … would require this Court to render a decision with broader implications than the facts of this case demand" and "rest[ed] [its] defense … on the essential reasonableness of the program itself." *Id.* In other words, it waived the very defense Petitioner presses here. Pet. 26-29. The Union is therefore right that "*Von Raab* is particularly instructive." BIO 8. Just not for the reason it thinks.

Ferguson v. City of Charleston, 532 U.S. 67 (2001), which the Union limits to a footnote, BIO 9 n.5, confirms that the consent issue remains open. After ruling that the searches could not be upheld on "special needs" grounds, the Court "remanded for a decision on the consent issue" because the Fourth Circuit had not reached that issue.

Ferguson, 532 U.S. at 76. The Union does not attempt to explain—nor could it—why this Court would remand the consent issue for decision if it had been implicitly resolved years earlier in *Von Raab* and *Skinner*. Indeed, such a remand "would have been inexplicable and unnecessary." BIO 9.

The Union's only response is that, on remand, the Fourth Circuit "held that 'a rational jury could not find voluntariness.'" BIO 9 n.5 (quoting *Ferguson v. City of Charleston*, 308 F.3d 380, 404 (4th Cir. 2002)). But that just confirms the circuit split's persistence. Unlike the Eleventh Circuit, and the other courts on that side of the divide, Pet. 14-17, the Fourth Circuit did *not* declare even the prospect of consent invalid as an unconstitutional condition. Rather, like the Third and Fifth Circuits, Pet. 18-21, the Fourth Circuit conducted a proper Fourth Amendment inquiry to determine whether the hospital had secured consent from the pregnant women before drug testing them. Specifically, it held that, "[i]n determining whether consent to [a] search was freely and voluntarily given, the factfinder must examine the totality of the circumstances surrounding the consent." *Ferguson*, 308 F.3d at 396 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).

The Union's emphasis on the "different factual context" of *Ferguson* thus misses the point. BIO 9 n.5. To be sure, the Fourth Circuit held that the hospital was unable to meet the more rigorous standard of "informed consent" under the totality of the circumstances. *Ferguson*, 308 F.3d at 397-404. But the fact that the Fourth Circuit held that it was possible under the Fourth Amendment for a pregnant woman in a hospital to validly consent to drug

testing, while the Eleventh Circuit and several others hold that random drug testing of government workers is *always* involuntary as a matter of law irrespective of the factual circumstances, underscores the fundamental difference in approaches taken by the appellate courts on opposite sides of this divide.

The Union's attempt to reconcile the decision below with the governing rule in the Third and Fifth Circuits is meritless as well. The Union concedes both that the Third Circuit held "that a public employee did, in fact, consent to urinalysis screening," BIO 11-12 (citing *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61 (3d Cir. 2001)), and that as many as five other circuits hold that a government employee can *never* consent to random drug testing, BIO 11-13. That alone confirms the existence of an entrenched circuit split here. Pet. 21.

The Union also argues that the Third and Fifth Circuit decisions are distinguishable as they were "based on a robust evidentiary record that supported [a] finding of consent in light of the totality of the circumstances." BIO 12; BIO 14 (same). But that only cuts against the Union's position. An evidentiary record would be meaningless to the Eleventh Circuit because it has found consent invalid as a matter of law irrespective of factual circumstances. Pet. 21-22. Indeed, it is the pre-enforcement, class-based nature of this suit that makes it especially vulnerable under *Schneckloth*. The Union cannot emphasize the need for a "robust evidentiary record" and then prevail on a claim that Petitioner could *never* obtain valid consent for *any* random drug testing from *any* Union member irrespective of individual circumstances. Pet. 22; *Vill*age *of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455

U.S. 489, 504 n.22 (1982) ("In a pre-enforcement challenge it is difficult to determine whether Fourth Amendment rights are seriously threatened.").

The Union relatedly argues that the Third and Fifth Circuit decisions were just applying the special-needs test to the peculiar facts. BIO 12. But that is not correct, as then-Judge Alito's opinion in *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807 (3d Cir. 1991) (en banc), proves. Relying on *Von Raab* and *Skinner*, the Third Circuit held "that SEPTA had no special need to subject Bolden to a drug test based on any dangers presented by his job." *Id.* at 824. The opinion then addressed the distinct issue of whether "Bolden consented to the drug test," *id.*, and ultimately concluded that he in fact did, *id.* at 825-29. *Kerns* likewise focused on consent, resolving the appeal on that "alternative ground" to avoid "evaluat[ing] the constitutionality of the Authority's drug testing policy." 263 F.3d at 65; *United States v. Sihler*, 562 F.2d 349, 351 (5th Cir. 1977) (same).

The Union alternatively argues that "*Bolden* rests exclusively on the scope and binding nature of collective bargaining agreements, not on consent, thereby rendering it inapposite to this case." BIO 16. But the decision refutes that assertion as well; the union settlement "had the same effect … under the Fourth Amendment as if Bolden himself had consented to such future drug testing." *Bolden*, 953 F.2d at 829. Further, the suggestion that public employees only can validly consent to drug testing through a union representative is troubling and without foundation. Public unions do not have superior Fourth-Amendment rights to consent to drug testing than do their individual members or those public employees who

are not unionized. If anything, the opposite is true. *Cf. Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2288-91 (2012). If unions can bargain for drug testing, individuals can too. That was the point of *Bolden*.

Last, the Union implies that this case differs from *Bolden*, *Kerns*, and *Sihler* by framing it as about whether government employees have "constructively consented to random drug testing simply by accepting employment with the State" or whether "the mere fact of public employment represents consent by every public employee to random drug testing." BIO 7-8. But that badly mischaracterizes what occurred here. Pet. 7-8, 22. The Florida Department of Corrections ("DOC")—the only agency to implement Executive Order 11-58 ("EO")—presents the employee with "a written notice" that secures "voluntary consent [for] the sampling and subsequent testing of … body fluids, including urine and blood (if applicable)." App. 123a-124a. Petitioner is not arguing for constructive consent premised on the fact of employment or "silent submission" to testing. *Bolden*, 953 F.2d at 824. The written consent contemplated by the EO is as valid as the written contracts upheld in *Bolden* and *Kerns*, the posted sign deemed sufficient in *Sihler*, Pet. 18-20, and the notice given in *Wyman*, Pet. 26-27. The form of consent is not a basis for distinguishing the present case. The Eleventh Circuit's decision squarely implicates an entrenched circuit split the Court should resolve in Petitioner's favor.

II. Whether States May Randomly Drug Test All Public Employees Is A Nationally Important Issue Warranting Review.

The Petition also raises nationally important issues regarding drug testing in the government setting. Pet. 23-

26. That the Eleventh Circuit has denied to Petitioner the same right to condition employment on consent to random drug testing that private employers throughout the nation enjoy is reason enough to grant certiorari. Pet. 25. Equally worrisome, the decision below "jeopardizes" drug testing in many other States that likewise "require … consent as a condition of employment." Amicus Br. of Texas and Six Other States 1, 4 ("Texas Br."). The Union's assertion that Petitioner's drug-testing program is broader than those in other States, BIO 19-20, is not only incorrect, Pet. 5, but misses the mark regardless. The ability of a State to rely on consent does not turn on the drug-testing program's narrowness or breadth. And, as this case shows, rejecting consent as a basis for a program's constitutionality has serious legal and practical consequences for States. *Infra* pp. 10-11.

The Union's focus on the EO's scope also ignores that the Eleventh Circuit's rationale goes well beyond public-employee drug testing. Many States, like Florida, condition receipt of benefits on consent to drug testing. Pet. 26; Texas Br. 5-7. Yet the Eleventh Circuit held that submission to drug testing in order "to remain eligible for a government benefit such as … welfare" may not be upheld based on consent. App. 43a. The Ninth Circuit has, remarkably, applied this reasoning to strike down consent to drug testing as a condition of pretrial release, *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), and the D.C. Circuit's longstanding rejection of consent forced the United States to (unsuccessfully) defend drug testing of counselors at camps for at-risk children on special-needs grounds, *Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012). Only this Court's intervention will "remove the cloud" such decisions have "placed over

existing state laws requiring drug testing in the public-benefits context and other States' prospects of enacting similar laws." Tex. Br. 7.

The Union also attempts to diminish the petition's importance by denying the existence of a drug problem among Florida's public employees. BIO 1-2. But Florida discovered—through only a limited testing sample—that "2.5 percent of DOC employees tested positive" for illegal drugs. App. 50a; App. 84a. At that rate, just the one agency would have had 644 positive drug tests over three months. Pet. 3. And if extended to all agencies covered by the EO, it would mean that thousands of public employees are abusing illegal narcotics. The Union claims that this is not a serious problem because the rate of drug use among Florida public workers is still lower than the rate "among those in the general population." BIO 1. But that wrongly assumes that the epidemic rate of drug abuse in the general population is an acceptable baseline. It is not acceptable to Florida taxpayers, Pet. 24-25, nor is it acceptable to the Governor given his responsibility to ensure that government functions safely and efficiently, *NASA v. Nelson*, 131 S. Ct. 746, 759-60 (2011).

III. The Petition Is An Appropriate Vehicle To Decide The Questions Presented.

Finally, the Union claims that review is premature because final judgment has not yet been entered. BIO 17-18. That argument also fails. The Court routinely grants review "after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court." 17 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4036 (3d ed.). Where "there is some

important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status—particularly if the lower court's decision is patently incorrect and the interlocutory decision … will have immediate consequences for the petitioner." Stern & Gressman § 4.18, at 283 (10th ed. 2013); *see, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam).[1]

That rule describes the present case. The Eleventh Circuit "has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Stern & Gressman, § 4.18, at 285. Consent is outcome determinative, and the Eleventh Circuit's decision is unsustainable on the merits. Pet. 26-29; Texas Br. 5-10. Likewise, the remand proceedings will be obviated if the Court rules, as it should, that Petitioner's drug testing program does "not violate the Fourth Amendment" because such testing is "normal in the private-employer context." *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 757 (2010) (quoting *O'Connor v. Ortega*, 480 U.S. 709, 732 (1987) (Scalia, J., concurring

1. Many of these cases arose in a posture indistinguishable from this one: a court of appeals reversed or vacated the grant of summary judgment and remanded to the district court for further proceedings. *See, e.g.*, *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *Marine Bank v. Weaver*, 455 U.S. 551 (1982); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

in the judgment)). There will not be "piecemeal review" if the Court grants certiorari and reverses. BIO 18. Review of these non-final but "novel and important question[s] of law" instead will "render the decision wholly void." Stern & Gressman § 4.18, at 284-85.

Thus, this dispute does not resemble cases in which the "determination of an appropriate remedy" on remand might have pretermitted further appellate review. *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); *Mount Soledad Memorial Ass'n v. Trunk*, 132 S. Ct. 2535 (2012) (Alito, J., concurring) (same). Here, delay will solve nothing because the Eleventh Circuit has conclusively rejected Petitioner's consent defense, has extended that reasoning to applicants for transfer and promotion without explanation, Pet. 34,[2] and has narrowly drawn the special-needs doctrine to exclude a substantial number of public workers from the remand proceeding, App. 47a-48a.

All the remand proceeding does is highlight the urgent need for review given the significant "hardship" it imposes on Petitioner. *Stolt-Nielsen*, 559 U.S. at 670 n.2; *Mazurek*, 520 U.S. at 975 (granting certiorari because "the … judgment [had] produced immediate consequences for Montana"). The Eleventh Circuit has thrust Petitioner into a burdensome "category-by-category analysis of [hundreds of] job classifications to determine which are safety-sensitive, and whether the employees in those

2. Unable to contest this assertion, the Union claims that Petitioner never raised it below. BIO 7 n.3. But Petitioner argued that consent was valid as to this subset of employees because, among other reasons, "[i]f an applicant for transfer or promotion objects to the drug-testing condition, he or she is free to decline the job offer." Pet'r C.A.11 Initial Br. 23 (filed Aug. 17, 2012).

positions maintain a diminished expectation of privacy compared to other government workers." BIO 17. This "undertaking is far from complete," BIO 17, and is likely to continue for many more "months to come," BIO 5. Indeed, discovery on the disputed job categories has not even begun.[3] Review is thus needed to spare Petitioner the time, money, and effort to litigate these issues when a ruling on either question presented should dispose of the entire case.

3. The remand is only ongoing because the district court denied the parties' *joint* motion for a stay. Consent Motion for Stay at 7, Doc. 131, No. 11-21976 (filed S.D. Fla. Sept. 16, 2013). The Union represented to the district court that it was "not eager to dive into" litigation over testing of "the 85,000 employees" covered by the EO "until" this petition is "resolved." 9/19/13 Hr'g Tr. 3:4-5, Doc. 136, No. 11-21976 (filed S.D. Fla. Sept. 26, 2013). Petitioner will renew that motion if certiorari is granted.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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

Attorneys for Petitioner

April 1, 2014