From Loving Mother to Welfare Queen to Drug Addict: Lebron v. Secretary of Florida Department of Children and Families and the Evolving Public View of the Poor as a Class of Sub-Humans with Sub-Rights

Nikita McMillian
FROM LOVING MOTHER TO WELFARE QUEEN TO DRUG ADDICT?

Nikita McMillian*

I. INTRODUCTION

“Don’t Feed the Alligators!” Those were the words that occupied the sign held by Florida’s Congressional Representative John Mica during a 1995 House debate concerning welfare reform. Comparing welfare recipients to alligators, Representative Mica’s sign exemplified how some in the public had come to perceive the poor as a class of dangerous sub-humans who must be eyed with suspicion.

The labeling of welfare beneficiaries as sub-human, dangerous, or deserving of suspicion was not always the public view. Welfare programs were initially constructed to help poor, widowed mothers care for their children. Initially the beneficiaries were depicted as mothers who were just trying to stay

---

* J.D. Candidate, May 2016, Mississippi College School of Law. A loving thank you to all of my family and friends who have been an unwavering source of support. A very special thanks to Professor Angela Mae Kupenda for her guidance, motivation, and resourcefulness while completing this Note.


I represent Florida where we have many lakes and natural reserves. If you visit these areas, you may see a sign like this that reads, ‘do not feed the alligators.’ We post these signs for several reasons. First, because if left in a natural state, alligators can fend for themselves. They work, gather food and care for their young. Second, we post these warnings because unnatural feeding and artificial care creates dependency. When dependency sets in, these otherwise able-bodied alligators can no longer survive on their own. Now, I know people are not alligators, but I submit to you that with our current handout, non-work welfare system, we have upset the natural order. We have failed to understand the simple warning signs. We have created a system of dependency. . .


3. While expressing her view on the failure of the federal welfare system as it was in 1995, Wyoming Representative Barbara Cubin compared welfare recipients to wolves:

My home State is Wyoming, and recently the Federal Government introduced wolves into the State of Wyoming, and they put them in pens and they brought elk and venison to them every day. This is what I call the wolf welfare program. The Federal Government introduced them and they have since then provided shelter and they have provided food, they have provided everything that the wolves need for their existence. Guess what? They opened the gate to let the wolves out and now the wolves will not go. . . . What has happened with the wolves, just like what happens with human beings, when you take away their incentives, when you take away their freedom, when you take away their dignity, they have to be provided for.


home so they could take care of their families—an applauded calling for White mothers. These welfare programs were thus tailored to the White mother and her children, as impoverished Black women and their children were largely excluded as beneficiaries of such programs. Hence, initial public opinion of the deserving beneficiaries of state and federal aid programs bears a sharp contrast to the prevailing view of welfare beneficiaries that we have come to know today.

As more Black mothers were included as welfare beneficiaries, the public view of these welfare recipients deteriorated. Beginning with the “welfare queen” rhetoric of the seventies and eighties, racialized stereotypes of these welfare mothers dehumanized them. The images—painting welfare recipients as Black female criminals misusing the aid and cheating the community—played a substantial role in the shaping of the negative public opinion about welfare beneficiaries as we know it today.

5. See Lucy A. Williams, The Ideology of Division: Behavior Modification Welfare Reform Proposals, 102 YALE L.J. 719, 723 (1992). According to legislators, Aid to Dependent Children was “designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society.” Id. at 746 n.32 (quoting Economic Security Act: Hearings Before the H. Comm. on Ways and Means on H.R. 4120, 74th Cong. 48 (1935)).

6. As stated by former Supreme Court Justice Joseph Bradley, “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.” Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (upholding the constitutional validity of a statute barring women from practicing law) (Bradley, J. concurring). But this attitude of romantic paternalism did not apply to society’s conception of black motherhood. See Frances Dana Gage, Sojourner Truth, Ain’t I a Woman? (May 29, 1851), in ANTI SLAVERY STANDARD, May 1863, http://www.sojournertruth.org/Library/Speeches/AntiSLA Woman.htm (last visited Feb. 29, 2016).


8. See e.g., Lucy Madison, Fact-checking Romney’s “47%” Comment, CBS NEWS (Sept. 25, 2012, 10:57 AM), http://www.cbsnews.com/news/fact-checking-romneys-47%-comment/ (Republican presidential candidate Mitt Romney referred to the poor as “47% . . . who are dependent on government, who believe that they are victims, who believe the government has a responsibility to care for them, who believe that they are entitled to health care, to food, to housing . . . . These are the people who pay no income tax.”); Representative and former Republican Vice Presidential candidate Paul Ryan stated:

We have got this tailspin of culture, in our inner cities in particular, of men not working and just generations of men not even thinking about working or learning the value and culture of work, and so there is a real culture problem here that has to be dealt with.


This negative public opinion is evident in many laws presently proposed by States. The current nationwide proposals for mandatory drug testing of Temporary Assistance for Needy Families ("TANF") recipients are an exact illustration and manifestation of the negative public views of today’s TANF beneficiaries. The drug testing requirement suggests that the TANF recipients are dangerous drug addicts and deserving of the public’s and Government’s suspicion. This public view has evolved detrimentally and is a long way from the initial sympathetic view held of White widowed mothers trying to stay home and raise their children.

This Note focuses on the judicial consideration of legislation in Florida which seems premised on the public and governmental view that TANF beneficiaries are typically drug users and inherently deserving of suspicion rather than assistance. Florida’s mandatory drug testing legislation for TANF recipients is at the forefront of Lebron v. Secretary of Florida Department of Children and Families,¹² an Eleventh Circuit case and the topic of this Note. In Lebron II,¹³ the United States Court of Appeals for the Eleventh Circuit affirmed a grant of a permanent injunction against Florida’s suspicionless, mandatory drug testing of TANF applicants.¹⁴ In doing so, the Eleventh Circuit held that Florida’s mandated drug testing regime under Florida Statute section 414.0652¹⁵ violated the United States Constitution’s Fourth Amendment’s¹⁶ protection against unreasonable searches.¹⁷

The Fourth Amendment typically requires a search to be based on some form of individualized suspicion in order to be deemed reasonable.¹⁸ An exception is warranted under the special needs doctrine when there are “special needs, beyond the normal need of law enforcement, which make the requirement of [individualized suspicion] impracticable.”¹⁹ The Eleventh Circuit’s ruling expressly recognized that Florida had not demonstrated a substantial special need

---


¹¹ TANF is a block grant program that was implemented by Congress as part of the Personal Responsibility and Work Opportunity Act ("PRWOA") on August 22, 1996. 42 U.S.C. § 601 (2012); Lebron v. Wilkins (Wilkins I), 820 Supp. 2d 1273, 1276 (M.D. Fla. 2011). Through the TANF program, federal grants are offered to States to aid “needy families with short term financial assistance and with finding employment. Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron I), 71 F.3d 1202, 1205 (11th Cir. 2013); see 42 U.S.C. § 601(a).

¹² Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron II), 772 F.3d 1352 (11th Cir. 2014).

¹³ This term will be used to refer to the topic case in a short citation form. This Note addresses the ruling in Lebron II. The first case, Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron I), 710 F.3d 1202 (11th Cir. 2013), will be discussed later in the procedural history and will be referred to as Lebron I.

¹⁴ Lebron II, 772 F.3d at 1378.

¹⁵ The statute provides that “[t]he [Department of Children and Families] shall require drug test . . . to screen each individual who applies for [TANF].” FLA. STAT. ANN. § 414.0652(1) (West 2014). Further, “The department shall provide notice of drug testing to each individual at the time of application. The notice must advise the individual that drug testing will be conducted as a condition of receiving TANF benefits. . . .” Id. § 414.0652(2)(a).

¹⁶ U.S. CONST. amend. IV.

¹⁷ Lebron II, 772 F.3d at 1378.


warranting exemption from the Fourth Amendment’s suspicion requirement.\(^20\) Implicitly, and as discussed below, the Circuit Court’s ruling suggests that public and governmental opinions about welfare beneficiaries are based solely on stereotypes. The Circuit Court refused to uphold the Florida law signifying that TANF recipients as a group are automatically deserving of being treated as suspected drug users without evidence of such.

Part II of this Note provides a factual summary and procedural history of the instant case. As will be demonstrated, even the facts regarding this particular TANF applicant challenge the former public opinions of welfare beneficiaries as deserving White mothers or as welfare queens. Further, the facts in the instant case challenge the present public opinions of welfare beneficiaries as drug addict sub-humans. Part III gives a historical overview of the welfare system in the United States, explaining how stereotypes of race and class formed the nation’s view of the poor today. These negative views are reflected in laws and policies, such as in the Florida law, which is the subject of this Note. This Part also thoroughly explains prior case law that is relevant to the instant case. While this Note refutes the reasonableness of suspicionless drug testing for TANF beneficiaries, in cases such as *Skinner v. Railway Labor Executives’ Association*,\(^21\) *National Treasury Employers’ Union v. Von Raab*,\(^22\) *Veronica School District 47J v. Acton*,\(^23\) and *Board of Education v. Earls*,\(^24\) the United States Supreme Court upheld the reasonableness of suspicionless drug testing within the context of inherently dangerous employment and within the school setting. But significantly, *Chandler v. Miller*\(^25\)—to which the Circuit Court likened the topic case—invalidate the suspicionless drug testing of state candidates for public office.

Part IV of this Note discusses the majority and concurring opinions in the instant case, assessing how the Circuit Court arrived at its holding. Looking to the benchmark cases mentioned above, the Circuit Court unanimously determined that Florida failed to demonstrate the existence of substantial special needs to justify its mandatory suspicionless drug testing of TANF applicants and declared section 414.0652 unconstitutional.\(^26\)

In Part V the writer goes beyond the Circuit Court’s reasoning, providing analytical insight on the main issues of the case and society’s public opinion of the poor. The Circuit Court directly held Florida could not require mandatory, suspicionless drug testing of TANF applicants as the State had not demonstrated a substantial special need warranting exemption from the Fourth Amendment’s suspicion requirement.\(^27\) This Note argues that the Circuit Court is correct because no such special need exists to justify suspicionless drug testing of TANF

\(^{20}\) *Lebron II*, 772 F.3d at 1378.

\(^{21}\) 489 U.S. 602.


\(^{24}\) 536 U.S. 822 (2002).

\(^{25}\) 520 U.S. 305 (1997).

\(^{26}\) *Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron II)*, 772 F.3d 1352, 1378 (11th Cir. 2014).

\(^{27}\) *Id.*
From Loving Mother to Welfare Queen

applicants. Rather, what is special is the Government’s refusal to recognize data establishing that welfare recipients do not abuse drugs any more than the general population.28 This Note asserts that ideas about race, gender, and class are the driving force behind such drug testing laws. Fortunately, the Circuit Court rejected Florida’s argument that TANF applicants were more suspicious of drug use than the general population.29 The State’s proof was indeed lacking, as the basis for the governmental requirement of suspicionless testing was not grounded in evidence of actual suspicion, rather it was based on stereotypes of welfare beneficiaries. What is more, the public’s and the State’s dehumanizing views about the poor have now resulted in their diminished rights.

Finally, Part VI concludes by briefly summarizing the highlights of the writer’s thesis and analysis. The writer leaves the reader with additional questions to consider as the country’s poor increase in number30 and as the country’s policies toward the poor continue to evolve. As a remedy the writer urges courts, especially the United States Supreme Court, to forthrightly address the effects that factually inaccurate racial, gender, and class stereotyping has on the Fourth Amendment rights of the nation’s poor and the development of our laws.

II. FACTS AND PROCEDURAL HISTORY

The issue in this case is simple: whether Florida is justified in conducting mandatory drug testing of welfare beneficiaries without individualized suspicion.31 The facts and the procedural history make this simple question and this Part more complicated for two reasons. First, the applicant in the instant case does not fit into the stereotyped past or present public views of welfare recipients. Second, this case was considered by the Circuit Court twice. This Part will be divided into three sections to help explain how a simple question generated such complexity.

A. Who is the TANF Applicant Named Luis Lebron?

In July 2011, Luis Lebron32—an honorably discharged veteran,33 college

28. Prior to enacting Florida Statute section 414.0652, Florida’s Department of Children & Families implemented the Demonstration Project to test “whether TANF applicants were likely to abuse illegal drugs and whether that abuse affected employment opportunities.” Id. at 1366. The study revealed that only 335 individuals tested positive out of the 1,447 tested—5.2% of 6,462 total individuals screened. Id. at 1366. During the four months that the State enforced section 414.0652, only 2.67 percent of TANF applicants tested positive for illicit drug use in Florida. Id. at 1367. However, “Florida has an illegal drug use rate of 8%.” Darlena Cunha, Why Drug Testing Welfare Recipients is a Waste of Taxpayer Money, TIME (Aug. 15, 2014), http://time.com/3117361/welfare-recipients-drug-testing/. This data demonstrates that Florida’s TANF population abuses drugs at a far less rate than those in the general population. Id.; see also John Couwels, Federal Judge Temporarily Bars Florida’s Welfare Drug-test Law, CNN (Oct. 25, 2011, 10:08 PM), http://www.cnn.com/2011/10/25/us/florida-welfare-drug-tests/index.html.

29. Lebron II, 772 F.3d at 1378.


31. See generally Lebron II, 772 F.3d 1352.

32. For a picture of Luis Lebron, see Rachel Bloom, The Daily Show Tells Florida Legislators: “I Think I’m Gonna Need You to Pee into this Cup,” ACLU (Feb. 03, 2012, 12:09 PM), https://www.aclu.org/blog/criminal-law-reform-racial-justice/daily-show-tells-florida-legislators-i-think-im-
student, and single father to his young son—applied for financial assistance benefits for himself and his child through Florida’s TANF program. In addition to caring for his son and himself, Lebron was also responsible for caring for his disabled mother, with whom he lived. A full-time student majoring in accounting at the University of Central Florida, Lebron found himself surviving off of student loans and grants after his veteran’s benefits terminated. Lebron’s gender and other characteristics, therefore, defied the general stereotypes about welfare beneficiaries.

Further, Lebron did not stand to become rich or to live a lavish lifestyle from the monetary welfare benefits. If eligible for TANF benefits, he and his son would have received only a maximum of $241 per month in cash assistance under Florida’s TANF program. Still, he needed the assistance so he applied. Upon applying, Lebron was informed that he would be required to submit to a mandatory drug test as a final condition of eligibility, in accordance with newly enacted Florida Statute section 414.0652. He was notified that he had to sign a release consenting to the test before the Department of Children and Families (“DCF”) would allow him to continue with the application process. Lebron signed the release and met all of the eligibility requirements of the TANF program, but was denied benefits because he refused to submit to the mandatory, suspicionless drug testing. Later, Lebron filed suit and initially sought a preliminary injunction.
B. Lebron I: Preliminary Injunction against Florida’s Mandatory, Suspicionless Drug Testing of TANF Applicants

Lebron filed a lawsuit in the United States District Court for the Middle District of Florida challenging Florida’s mandatory, suspicionless drug testing of TANF applicants as a violation of his and all other applicants’ Fourth Amendment right against unreasonable searches and sought to enjoin the DCF from enforcing the statute. He argued that a preliminary injunction was necessary to prevent the irreparable harm that would be caused to him and other TANF applicants. In response, the State contended the following: section 414.0652’s requirement that TANF applicants consent to a drug test does not constitute a search within the Fourth Amendment; the mandatory suspicionless drug testing is justified by the State’s special needs to conduct drug testing within the realm of TANF funds; Lebron would not suffer irreparable harm because he is free to refuse the drug test; and there is a public interest in guaranteeing that public funds are used for their intended purpose and not in ways that will endanger the public.

The district court ruled in favor of Lebron. Addressing the State’s contention that drug testing under section 414.0652 does not constitute a search, the district court noted that the “Supreme Court has routinely treated urine samples taken by state agents as searches within the Fourth Amendment,” regardless of an individual’s opportunity to refuse. In light of this precedent and “the inherently investigative character of the drug test,” the district court rejected the State’s argument that drug testing did not constitute a search. Continuing to argue that such suspicionless drug tests are justifiable under the Fourth Amendment, the State maintained that the following proffered interests are special needs:

(1) ensuring that TANF funds are used for their dedicated purpose, and not diverted to drug use; (2) protecting children by ensuring that its funds are not used to visit an “evil” upon the children’s homes and families; (3) ensuring that funds are not used in a manner that detracts from the goal of getting beneficiaries back to employment; (4) ensuring that the government does not fund the “public health risk” posed by the crimes associated with the “drug epidemic.”

The district court awarded Lebron the preliminary injunction he sought, finding no competent evidence in the record to support the State’s proffered interests nor the conclusion that drug use is a concrete danger among TANF recipients. The court determined that the State had not demonstrated a substantial special need to justify the suspicionless drug testing of all TANF

48. Id.
49. Lebron v. Wilkins (Wilkins I), 820 Supp. 2d 1273, 1281 (M.D. Fla. 2011).
50. Id.
51. Id.
52. Id. at 1283.
53. Id. at 1286.
54. Id. at 1286-92.
In doing so, the court concluded that Lebron had “shown a substantial likelihood of success on the merits” of his claim. \(^{57}\)

Further, the district court found that Lebron had shown that subjecting him, as well as all who were similarly situated, to suspicionless drug testing as a condition for receiving TANF benefits would cause irreparable harm due to the potential violation to the Fourth Amendment right against unreasonable searches. \(^{58}\) In addition, the district court held that issuing a preliminary injunction to protect against a likely violation of the Fourth Amendment rights of TANF applicants serves the public interest and outweighs the minimal harm that would be caused to the State by the injunction. \(^{59}\) As a result of the foregoing findings, the district court granted a preliminary injunction against the State’s enforcement of Florida Statute section 414.0652. \(^{60}\)

Subsequently, the State appealed the grant of the preliminary injunction to the United States Court of Appeals for the Eleventh Circuit. \(^{61}\) On appeal, the only issue presented by the State was a challenge to the district court’s finding that Lebron had shown a “substantial likelihood of success on the merits” of his claim that Florida’s mandatory suspicionless drug testing of TANF applicants violates the Fourth Amendment right against unreasonable searches. \(^{62}\)

The case was heard in this first appearance in the Eleventh Circuit by Judge Rosemary Barkett, \(^{63}\) Judge Adalberto Jordan, \(^{64}\) and Judge James Randal Hall. \(^{65}\) This panel of judges unanimously affirmed the district court’s decision, holding that the lower court did not abuse its discretion by granting a preliminary injunction against the State’s enforcement of Florida Statute section 414.0652. \(^{66}\) The Eleventh Circuit based this holding on its conclusion that the State failed to demonstrate a substantial special need to support its mandatory suspicionless drug testing of TANF applicants. \(^{67}\) In reaching this conclusion, the Eleventh

---

56. Id.
57. Id. at 1292.
58. Id.
59. Id. at 1293.
60. Id. The court denied the request for a class certification without prejudice due the State’s stipulation that it would “apply the ruling to all persons similarly situated to [Lebron].” Id.
61. Lebron v. See’y of Fla. Dep’t of Children and Families (Lebron I), 710 F.3d 1202, 1205 (11th Cir. 2013).
62. Id. at 1206.
63. Appointed by President Bill Clinton in 1994, Judge Rosemary was the first woman to serve as chief justice on the Florida Supreme Court prior to her appointment. WORLD HERITAGE ENCYCLOPEDIA, http://www.worldheritage.org/articles/Rosemary_Barkett (last visited Jan. 11, 2015).
66. Lebron I, 710 F.3d at 1218.
67. Id. Because the Eleventh Circuit found that the State failed to establish a substantial special need for its mandatory, suspicionless drug testing of TANF applicants, it did not deem it necessary to weigh any competing governmental interests. Id.
Circuit noted that the State’s policy did not fit the two exceptional circumstances that the United States Supreme Court has recognized as substantial special needs justifying an exemption from the Fourth Amendment’s individualized suspicion requirement: “the specific risk to public safety by employees engaged in inherently dangerous jobs and the protection of children entrusted to the public school system’s care and tutelage.”

Nevertheless, the State argued that drug use undermines the program’s goals of transitioning applicants into employment and promoting child welfare and family stability. Thus, ensuring that TANF funds were not expended for drug use was a substantial special need which justifies Florida’s mandatory, suspicionless drug testing of applicants. In rejecting this argument, the Eleventh Circuit reasoned that the State failed to present any factual support or empirical evidence of a concrete danger of illegal drug use within Florida’s population of TANF recipients. The only known shared characteristic among the tested individuals was financial need, which the Eleventh Circuit reasoned does not support the conclusion that there is a concrete danger that such individuals are prone to drug use. Moreover, if drug use does occur, there was no proof that the lives of TANF recipients are “fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.”

As a result, the Eleventh Circuit concluded that the State’s argument was based on a presumption of unlawful drug use among TANF recipients. Likening the State’s argument to that advanced by Georgia in Chandler v. Miller, the Eleventh Circuit asserted that a State must provide adequate factual support that substantiates the existence of a concrete danger in order to establish a substantial special need that warrants abrogating an individual’s Fourth Amendment rights. The State’s conjecture did not suffice.

The Eleventh Circuit also rejected the State’s alternative argument that the search was constitutionally valid because the drug tests were only administered after obtaining an individual’s consent. By informing TANF applicants of ineligibility upon refusal to consent, the Eleventh Circuit reasoned that the individual’s “consent” to drug testing “amounts to nothing more than ‘submission to authority rather than . . . an understanding and intentional waiver of a constitutional right.’” Further, this mandated consent violated the doctrine of unconstitutional conditions, which prohibits the government from denying a

---

68. Id. at 1207.
69. Id. at 1211.
70. Id.
71. Id.
72. Id. at 1213.
73. Id.
74. Id.
75. 520 U.S. 305 (1997).
76. Id.
77. Id.
78. Id. at 1214.
79. Id. at 1215.
benefit to an individual on grounds that encroach upon the individual’s constitutional rights.80 Thus, the Court held that the State could not indirectly accomplish the suspicionless search by conditioning eligibility for TANF benefits on an applicant’s mandated “consent” to drug testing.81 Essentially, such precondition compelled one to choose between desperately needed financial assistance at the expense of abandoning Fourth Amendment rights against unreasonable searches.82

Concluding that the State did not establish a substantial special need that justified its mandatory, suspicionless drug testing of TANF applicants, the Eleventh Circuit held that the district court did not abuse its discretion by granting the preliminary injunction.83 The Eleventh Circuit denied the State’s petition for a rehearing en banc.84

C. Lebron II: Permanent Injunction against Florida’s Mandatory, Suspicionless Drug Testing of TANF Applicants

In the meantime, the parties had neglected to seek a stay of the preliminary injunction in the district court pending appeal.85 Before the Eleventh Circuit even issued its judgment on the matter, both parties filed summary judgment motions with the district court.86 Following the Eleventh Circuit’s decision affirming the preliminary injunction order, the district court proceeded to adjudicate the parties’ cross-motions for summary judgment addressing the facial validity of section 414.0652.87 Although the State’s arguments asserting its interests had been rejected by both the district court and the Eleventh Circuit in Lebron I, the State still maintained, in Lebron II, that its interests constituted substantial special needs which rendered the mandatory, suspicionless drug testing of TANF applicants constitutional.88 Citing no supporting authority, the State contended that the special needs exception applied because there was a concern that a drug use problem existed among TANF applicants.89 Expressing

---

80. Id. at 1217. Although the Circuit Court discussed the doctrine of unconstitutional conditions in Lebron I, the Circuit Court did not focus its analysis on the doctrine in the topic case. The doctrine has been recognized since Bailey v. Alabama, in which the plaintiff was charged under an Alabama statute which criminally punished a person who entered a contract with one’s employer and failed to perform services after receiving compensation. Bailey v. Alabama, 219 U.S. 219, 227–29 (1911). The statute created a presumption that the plaintiff did so with the intent to injure or defraud his employer. Id. Upon conviction, the plaintiff was required to refund the payment or be sentenced to labor for the employer in lieu of the fine. Id. at 231. As it was clear that the State could not “punish the [individual] as a criminal for the mere failure or refusal to serve without paying his debt, [the Court held] it was not permitted to accomplish the same result by creating a statutory presumption which . . . expose[d] him to conviction and punishment.” Id. at 244. Reasoning that the statute was an instrument for involuntary servitude, which is prohibited by the Thirteenth Amendment, the Court declared it invalid. Id. at 243–45. In short, the Court declared that when a State cannot directly transgress a constitutional prohibition, it is precluded from doing so indirectly. Id. at 239, 244.
81. Lebron I, 710 F.3d at 1217.
82. Id. at 1217-18.
83. Id. at 1218.
84. Lebron v. Wilkins (Wilkins II), 990 F. Supp. 2d 1280, 1284 (M.D. Fla. 2013).
85. Id.
86. Id.
87. Id. at 1287.
88. Id. at 1292.
89. Id.
doubt as to whether evidence of a drug use problem is alone sufficient to apply the special needs doctrine, the district court pointed out that the State had not demonstrated that such a problem exists among its TANF population. On the contrary, the district court found that the only competent evidence—the results of Florida’s 1998 Demonstration Project and the data collected during the brief implementation of section 414.0652—demonstrated that TANF applicants had a lower rate of drug usage than Florida’s population as a whole. Other evidence supporting the existence of a drug use problem was offered by the State in the form of expert and lay witness testimony, which the district court deemed inadmissible or irrelevant. Determining that the record lacked any competent evidence of a pervasive drug problem among TANF applicants, the district court concluded, once again, that the State failed to establish a substantial special need to justify mandatory, suspicionless drug testing of TANF applicants.

Rejecting the State’s alternative argument that consent renders the drug testing a reasonable search, the district court cited to the Eleventh Circuit’s prior opinion in Lebron I in determining that consent under the statute was not voluntarily given. Ultimately, the district court granted final summary judgment to Lebron, declaring section 414.0652 unconstitutional and permanently enjoining the State from enforcing it.

The State, once again, appealed the district court’s decision to the Eleventh Circuit. Nevertheless, a panel consisting of Judge Frank Hull, Judge Stanley Marcus, and Judge Amy Totenberg affirmed the district court’s judgment declaring the mandated drug testing regime under section 414.0652 a violation of the Fourth Amendment’s protection against unreasonable searches.

This long procedural history illustrates Florida’s several failed attempts to persuade the Eleventh Circuit that the Government’s assumptions about TANF applicants sufficiently established, as a matter of fact, that beneficiaries are automatically deserving of suspicion sufficient to justify the Government’s treatment of them as if they are. The next Part discusses in detail the case precedent the Eleventh Circuit relied upon to determine that the mandatory, suspicionless drug testing urged by the Government was unconstitutional.

90. Id. at 1292-93.
91. Id. at 1293-94.
92. Id. at 1294. The evidence will be discussed in greater detail in Part IV of this Note.
93. Id. at 1298.
94. Id. at 1298-99.
95. Id. at 1299.
96. Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron II), 772 F.3d 1352, 1359 (11th Cir. 2014).
98. Judge Marcus was appointed to the United States Court of Appeals by President Bill Clinton in 1997. Id.
100. Lebron II, 772 F.3d at 1378.
III. BACKGROUND AND HISTORY OF THE LAW

The criminalization of welfare recipients is not a new phenomenon, but a result of historical notions and stereotypes about race and class in the United States. After chronicling the public opinion of the poor from the inception of the federal welfare system to modern day drug testing of TANF recipients, this Part provides statistical data detailing the demographics of the beneficiaries of TANF. Part III concludes by explaining the development of law regarding the constitutionality of suspicionless drug testing—the main issue in the topic case.

A. How Did We Get Here: The Nation’s Public Opinion History about Welfare

1. The Beginning View

Initial public perception about the character of the beneficiaries of state and federal aid programs bears a sharp contrast to the prevailing view that we have come to know today. Prior to the 1930s, the poor and elderly received no assistance from the Federal Government. On the eve of the Great Depression, this segment of the population could only look to family or local and state governments for relief. Public welfare programs were instituted to provide assistance to the deserving poor, “such as the blind, deaf, insane, . . . orphaned,” and White widowed mothers. These programs were often underfunded. But due to the massive unemployment and widespread suffering caused by the Great Depression, the Federal Government was compelled to provide a national framework for assisting the poor.

Beginning with President Roosevelt’s signing of the Social Security Act of 1935 (“the Act”), Aid to Dependent Children (“ADC”) was instituted for the purpose of assisting poor widowed mothers in the care of their dependent children. Being that the language of the Act “allowed the exclusion of African Americans from [its] programs,” ADC was tailored to the White widowed mother. Impoverished African American women and their

---

102. Id.
103. Williams, supra note 5, at 721-22.
104. Id. at 721.
105. Id. at 722.
106. See Gustafson, supra note 4 (citing BARBARA J. NELSON, THE ORIGINS OF THE TWO-CHANNEL WELFARE STATE: WORKMEN’S COMPENSATION AND MOTHER’S AID, IN WOMEN, THE STATE, AND WELFARE 124 (Linda Gordon ed., 1990)) (“arguing that we should view ‘the welfare state as fundamentally divided into two channels, one originally designed for white industrial workers and the other designed for impoverished, white, working-class widows with young children’”). The text of the original Act stated that its purpose was to “provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws . . . .” SOCIAL SECURITY ADMIN., http://www.ssa.gov/history/35act.html (last visited Jan. 12, 2015) (quoting the Social Security Act of 1935).
107. Williams, supra note 5 at 722.
108. Id.
109. The terms “African American” and “Black” will be used interchangeably throughout the Note.
children were largely omitted as beneficiaries of such programs.\textsuperscript{110}

But from 1945-1960, the enrollment in ADC shifted to a growing number of families of divorced or unmarried mothers.\textsuperscript{111} Yet the number of families headed by widows decreased.\textsuperscript{112} At the same time, the number of African American welfare recipients grew, partially due to the migration of indigent African American families from the South to northern industrial cities in search of jobs.\textsuperscript{113} Changes in agricultural production in the South following World War II resulted in the unemployment of many African Americans, providing the impetus for the Great Migration.\textsuperscript{114} Unfortunately, the combination of racial discrimination and deindustrialization left an overwhelmingly vast amount of African Americans unemployed after moving to the North.\textsuperscript{115}

In the post-war period, the number of single mothers increased across all racial demographics.\textsuperscript{116} The rate of children born out-of-wedlock was twenty-three out of 1,000 for White women and 261 out of 1,000 for African American women in 1960.\textsuperscript{117} This racial gap was partially attributed to the lack of institutional resources available to African American women, such as adoption.\textsuperscript{118} By 1961, African Americans comprised forty-eight percent of the ADC rolls, as opposed to thirty-one percent in 1950.\textsuperscript{119} Whites accounted for forty-two percent of the ADC caseload.\textsuperscript{120} With these changes, many states

\begin{footnotes}
\item[110] Gustafson, supra note 4; Nadasen, supra note 7; Williams, supra note 5 at 723-24.
\item[111] Gustafson, supra note 4 at 648-49 (citing WINIFRED BELL, AID TO DEPENDENT CHILDREN 208 n.24 (1965) and Jules H. Berman, Public Assistance Under the Social Security Act, 14 INDUS. LAB. REL. REV. 83, 88 (1960)).
\item[112] Id.
\item[113] Id. at 649 (citing FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 184-89 (updated ed. 1993)). Impoverished African American women were considered employable in the South due to their long history of working outside of the household. Nadasen, supra note 7 at 56-57. Because of a strong consensus that there were “more work opportunities for [African American] women” and a “desire not to interfere with local labor conditions,” these women were intentionally denied eligibility for welfare in the South. Id.
\item[114] Nadasen, supra note 7 at 56-57.
\item[115] Id. at 57.
\item[116] Id. (citing Robert Grove & Alice Hetzel, VITAL STATISTICS RATES IN THE UNITED STATES, 1940–1960 185 (Washington, DC: U.S. Department of Health, Education and Welfare, 1968)). The rate of out-of-wedlock births expanded “by 31% for white women and 20% for nonwhites” from 1950 to 1960. Id. “[B]y the 1960s, most welfare recipients were not widows but were never-married, divorced, or deserted women.” Id. Widows only constituted 7.7% of the ADC rolls by 1961, as opposed to 61% in 1939. Susan L. Thomas, Race, Gender, and Welfare Reform: The Antinatalist Response, 28 JOURNAL OF BLACK STUDIES 419, 422 (1998).
\item[120] Roberta Wollons, "Dependent Children," in ENCYCLOPEDIA OF CHILDREN AND CHILDHOOD IN HISTORY AND SOCIETY (2004), http://www.encyclopedia.com/doc/1G2-3402800134.html (last visited Jan. 12, 2015). “Absolute numbers of white women were higher, but the percent of black women receiving ADC benefits was higher than in the general population.” Id.
\end{footnotes}
began arbitrarily enforcing more restrictive policies, such as “suitable home” provisions and “man in the house” rules. Such policies allowed administrators to deny assistance to women with illegitimate children and those cohabitating with men. Regarded as morality standards, these provisions typically functioned to eliminate African American women from ADC rolls.

2. Birth of the Anecdotal “Welfare Queen”

Around the mid-1960s, poor Black women were being condemned for the troubles of society, and the notorious Moynihan Report of 1965 inadvertently perpetuated this view. Written by Daniel Patrick Moynihan, President Johnson’s Assistant Secretary of Labor, this report asserted that “[a]s a direct result of [the] high rate of divorce, separation, and desertion, a very large percent of Negro families are headed by females.” According to the report, this disintegration of the black family corresponded to the growing rate of ADC—then, Aid to Families with Dependent Children (“AFDC”)—recipients. The report fueled the perception of the single Black mother as the source of “poverty, joblessness, and crime”—ails of the inner cities.

Subsequently, coining the term “welfare queen,” California Governor Ronald Reagan —later to become President—exploited this perception on his platform for limited government. Throughout his campaign trail in 1976, Reagan often told the inaccurate story of a Chicago woman living lavishly due to her abuse of government dole:

She has 80 names, 30 addresses, 12 Social Security cards and is collecting veterans’ benefits on four non-existing deceased husbands. And she’s collecting Social Security on her cards. She’s got Medicaid, getting food stamps, and she is collecting welfare under each of her names. Her tax-free cash income

121. Gustafson, supra note 4 at 649 (citing WINIFRED BELL, AID TO DEPENDENT CHILDREN 76 (1965)).
122. Nadasen, supra note 7.
124. Gustafson, supra note 4 at 649 (citing WINIFRED BELL, AID TO DEPENDENT CHILDREN 76 (1965)).
125. Id. at 650 (referencing DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965)).
127. Aid to Dependent Children became formally known as Aid to Families with Dependent Children in 1962. Williams, supra note 5 at 746 n.40.
128. Moynihan, supra note 127 at 12.
129. Gustafson, supra note 4 at 650; see MOYNIHAN, supra note 127 at 30.
130. See “Welfare Queen” Becomes Issue in Reagan Campaign, supra note 9.
alone is over $150,000.\(^{131}\)

The anecdotal “welfare queen” promoted an image of degeneracy and corruption among poor women of color.\(^{132}\) Thus, concerns of welfare fraud and cheating grew throughout the 1970s.\(^{133}\) During his presidential campaign, Reagan employed the rhetoric of the “welfare queen” to personify his belief of excessive spending and misappropriation of government funds in welfare programs.\(^{134}\) After assuming presidency in 1980, Reagan directed the federal government to reduce funding for government assistance programs, such as food stamps.\(^{135}\) During his re-election campaign, Reagan urged an attack on “waste, fraud, and abuse” within the government.\(^{136}\) In practice, however, this attack only targeted welfare fraud by recipients.\(^{137}\) Ridden with inaccuracies, Reagan’s anecdotal “welfare queen” was solidified as the public’s stereotype of poor Black mothers.\(^{138}\) Poor Black mothers became the image for welfare beneficiaries, although White women still made up a large percentage of those receiving welfare.\(^{139}\) Further, these Black mothers were criminalized as having rich lifestyles by exploiting the welfare program.\(^{140}\)

3. Welfare Reform: An Introduction to TANF

In the 1990s, surveys demonstrated that public perception of welfare was now a system that “rewarded laziness among African Americans.”\(^{141}\) A new terminology emerged—”welfare dependency.”\(^{142}\) The system was then reformed by Congress’s enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”).\(^{143}\) This legislation

\(^{131}\) Cammett, supra note 124 at 244; “Welfare Queen” Becomes Issue in Reagan Campaign, supra note 9.

\(^{132}\) See Gilman, supra note 9 at 259-60.


\(^{134}\) Gustafson, supra note 4 at 655 (citing Welfare Queen Becomes Issue in Reagan Campaign, N.Y. TIMES, Feb. 15, 1976, at 51).


\(^{136}\) Gustafson, supra note 4 at 656.

\(^{137}\) Id.

\(^{138}\) See Cammett, supra note 124 at 244-46.


\(^{140}\) See Gilman, supra note 9 at 257, 259-60 (stating that the welfare queen stereotypes low income women of color as individuals who live extravagant lifestyles by cheating taxpayers).

\(^{141}\) Gustafson, supra note 4 at 658 (citing Martin Gilens, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLICIES OF ANTIPOVERTY POLICY 3 (Univ. of Chicago Press 1999)). A CBS/New York Times poll revealed that 65% of the participants believed that the majority of welfare recipients were African Americans due to a “lack of effort on their own part.” Eric McBurney, So Long as Lawmakers Do Not Use the N-Word: The Maximum Family Grant Example of How The Equal Protection Clause Protects Racially Discriminatory Laws 14 J. GENDER RACE & JUST. 497, 510 (2011).

\(^{142}\) Gustafson, supra note 4 at 658 (citing ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 93–94 (2004)).

created the TANF block program, replacing ADFC.\textsuperscript{144} The purpose of the PRWORA was to give States flexibility in operating programs tailored to achieve the following goals:

(1) provide assistance to needy families so that children may be cared for in their own homes . . . ; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.\textsuperscript{145}

Under the Act, States established their own eligibility requirements for TANF applicants.\textsuperscript{146} Additionally, federal law granted States the power to test recipients for illicit drug use and to sanction those who tested positive.\textsuperscript{147} But Congress provided no direction on the manner in which States were permitted to do so constitutionally.\textsuperscript{148} States reacted in a variety of ways, many of which furthered the dehumanization and criminalization of poor, Black women.\textsuperscript{149}

With this congressional grant of authority, Florida passed section 414.0652 on May 31, 2011, requiring all TANF applicants to submit to suspicionless, mandatory drug testing as a condition to receiving aid.\textsuperscript{150} Although the focus of this Note, Florida is not alone—twelve states, including Mississippi, have currently enacted some form of TANF drug testing laws.\textsuperscript{151} And as of November 5, 2014, at least eighteen more have made proposals for such legislation.\textsuperscript{152} While this legislation seems driven by the preconceptions about welfare beneficiaries, the next section takes a more realistic look at who are factually the beneficiaries.

B. Who Are Factually the Beneficiaries?

The Administration for Children and Families (“ACF”), a division of the

\textsuperscript{144} Id. (citing § 402, 110 Stat. at 2113-15 (codified as amended at 42 U.S.C. § 602 (2006)).
\textsuperscript{145} Lebron v. Wilkins (\textit{Wilkins I}), 820 F. Supp. 2d 1273, 1276 (M.D. Fla. 2011) (citing 42 U.S.C. § 601(a)).
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{150} Wilkins I, 820 F. Supp. 2d at 1279.
\textsuperscript{151} The following states have passed TANF drug testing legislation: Arizona, Florida, Missouri, Oklahoma, Tennessee, Georgia, Utah, North Carolina, Kansas, Mississippi, Alabama, and Michigan. \textit{Drug Testing For Welfare Recipients and Public Assistance}, NAT’L CONFERENCE OF STATE LEGISLATURES (Nov. 6, 2014), http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx. Under Mississippi’s law—which took effect on July 1, 2014—all adult TANF applicants are required to submit to a drug test as a condition of eligibility if the results of a screening questionnaire indicate a reasonable likelihood of drug use. MISS. CODE ANN. §§ 43-17-6(2)-(3) (1972).
\textsuperscript{152} NAT’L CONFERENCE OF STATE LEGISLATURES, \textit{supra} note 149.
U.S. Department of Health and Human Services,153 was tasked with administering the TANF program.154 According to data compiled by ACF, the nationwide total of families receiving TANF aid was 1,753,021 in 2012.155 Of those families on TANF, 30.1% were White and 31.5% were African American.156 Hispanic families comprised 31.1% of the nation’s TANF recipients.157

In 2012, out of 1,009,349 adult TANF recipients,158 868,863 were women159 and only 143,486 were men.160 Further breakdown revealed that 25.7% of the total adult recipients were Hispanic, 34% were White, and 33.5% were African American.161 While these statistics revealed that, as to gender, the majority of TANF recipients are women, the beneficiaries of the program seem to evenly encompass each of the three major racial demographics in the U.S. This factual racial makeup is contrary to popular opinion, which depicts TANF beneficiaries as almost entirely Black women.162

Notably, Luis Lebron is a contradiction of popular opinion in and of himself. As an honorably discharged veteran, full-time college student, caring son to his disabled mother, and single father who fought to establish the paternity of his young child,163 Lebron does not exactly fit the mold of society’s stereotype of the lazy, extravagant, depraved welfare queen,164 or of a sub-human drug addict. But even though this stereotype of welfare beneficiaries “has no basis in fact or science,”165 it has spurred state legislatures to exempt the needy from the constitutional protections guaranteed to everyone, even the economically destitute, in the Fourth Amendment.166 All persons, even the poor, are entitled to be protected from governmental intrusive searches unless they are individually deserving of suspicion or the Government has urgent, special needs. Government’s suspicions cannot be based on unfounded stereotypes.

156. Id.
157. Id.
158. Id. at 25.
159. Id. at 24.
160. Id. at 23.
161. Id. at 25.
162. See Hawkesworth, supra note 140 at 542 (discussing how a congressional debate on welfare reform in the mid-nineties revealed that many Congressmen “had the image of a welfare recipient as an urban black woman, who irresponsibly had children, was lazy, refused to work, [and] was uneducated”).
163. Kayanan, supra note 41.
164. See Gilman, supra note 9 at 247.
165. Kayanan, supra note 41.
166. See Budd, supra note 150.
C. The Fourth Amendment’s Requirement of Suspicion and Its Exceptions

The Fourth Amendment expressly guarantees the rights of all individuals “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”\(^{167}\) Generally, a search conducted by governmental officials is not deemed reasonable, and thus prohibited, unless grounded upon individualized suspicion of wrongdoing.\(^{168}\) In furtherance of this requirement, a search typically must be conducted pursuant to a warrant issued upon probable cause.\(^{169}\) The Fourth Amendment affords this protection against unreasonable searches and seizures to all reasonable and legitimate privacy expectations.\(^{170}\) The reasonableness of a search is determined by weighing the necessity of the search against its invasion into an individual’s privacy.\(^{171}\)

In spite of this broad constitutional protection from suspicionless searches, the United States Supreme Court has recognized a narrow class of exceptions to the Fourth Amendment’s suspicion requirement where there is a showing of “special needs, beyond the normal need for law enforcement, which make the warrant and probable cause requirement impracticable.”\(^{172}\) This Part thoroughly discusses the exceptional circumstances that the Court has determined fall within this “closely guarded category”\(^{173}\) justifying suspicionless drug testing, as established in *Skinner, Von Raab, Veronia, and Earls*.\(^{174}\) Additionally, this Part thoroughly examines the Court’s *Chandler* opinion, which invalidated the blanket drug testing of candidates for state public office and emphasized that the proffered specials needs must be substantial.\(^{175}\)

1. The Specific Risk to Public Safety by Employees Engaged in Inherently Dangerous Activity

*Skinner v. Railway Labor Executives’ Association* is an illustration of the Court’s recognition of the specific risk to public safety by employees engaged in inherently dangerous jobs as an exceptional circumstance, constituting a substantial special need that warrants exemption from the probable cause and warrant requirement of the Fourth Amendment.\(^{176}\) In *Skinner*, the Federal Railroad Administration (“FRA”) promulgated regulations mandating drug testing of railroad employees involved in particular train accidents in light of findings that alcohol and drug abuse contributed to a significant amount of train accidents and fatalities.\(^{177}\) Subpart C of the regulations, entitled “Post-Accident Toxicology Testing,” mandated railroads to require all employees of the railroad

---

\(^{167}\) U.S. CONST. amend. IV.


\(^{169}\) Skinner v. Ry. Labor Execs’. Ass’n, 489 U.S. 602, 619 (1989); see U.S. CONST. amend. IV.


\(^{171}\) Id. at 337.

\(^{172}\) Skinner, 489 U.S. at 619.

\(^{173}\) Lebron v. Sec’y of Fla. Dep’t of Children and Families (*Lebron I*), 710 F.3d 1202, 1207 (11th Cir. 2013).

\(^{174}\) Id.

\(^{175}\) Chandler v. Miller, 520 U.S. 305 (1997).

\(^{176}\) 489 U.S. 602.

\(^{177}\) Id. at 606.
directly involved in certain accidents to provide blood and urine samples for toxicology testing. Individuals who refused to succumb to the required toxicology testing were not allowed to perform covered services for a period of nine months. Claiming the regulations were unconstitutional, the Railway Labor Executives’ Association filed a suit to enjoin the FRA’s enforcement.

The United States Supreme Court concluded the drug and alcohol testing prescribed by the regulations constituted Fourth Amendment searches and sought to resolve whether such searches were reasonable under the Fourth Amendment. The Court acknowledged certain circumstances warrant an exception to the general probable cause and warrant requirement of the Fourth Amendment when “special needs, beyond the normal need for law enforcement, make the . . . requirement impracticable.” When the existence of such special needs are established, the Court noted it is then proper to balance the governmental and privacy interests to determine whether adhering to the warrant and probable cause requirement is practical under the circumstances. The Court recognized the Government’s interest in regulating the conduct of railroad employees to guarantee safety qualifies as special needs because covered employees are engaged in safety sensitive tasks.

Since alcohol and other drugs are continuously eliminated from the bloodstream, the Court observed that the obligation of obtaining a warrant would cause a delay risking the loss of valuable evidence. The Court also noted that imposing the burden of obtaining a warrant on private railroad supervisors, who are unfamiliar with such procedures, would be unreasonable and further impede the Government’s objective. Thus, a warrant requirement would not contribute to the certainty already provided by the regulations, but would simply frustrate the Government’s testing program. As a result, the Government’s interest in not requiring a warrant was at its strongest.

The Court further articulated that when the search intrudes upon minimal privacy interests and an important governmental interest would be placed in jeopardy if a showing of individualized suspicion is required, a search may be deemed reasonable without such suspicion. Within the context of railroad employees, the Court reasoned that the expectations of privacy by covered employees are diminished due to their engagement in an industry that is heavily regulated in order to guarantee safety, which is dependent on the fitness of such employees. Conversely, the Government’s interest in conducting testing,
absent a requirement of individualized suspicion, was compelling since the duties of the railroad employees are filled with “such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.”

That is to say, due to the inherently dangerous nature of the employees’ work, these individuals can trigger events that result in vast fatalities before a supervisor notices any signs of impairment. Being that employees are informed that they will be tested if involved in certain specific, yet unpredictable events, the Court determined the regulations effectively increased the deterrence of employees from engaging in the prohibited conduct.

As a result of the Court’s balancing, it held the Government’s interest outweighed the established privacy concerns. Therefore, the toxicology testing without individualized suspicion, as prescribed by the FRA’s regulations, was reasonable within the meaning of the Fourth Amendment.

Along the same lines as those established by the Court in Skinner, it again recognized the specific risk to public safety by employees engaged in inherently dangerous jobs as an exceptional circumstance justifying departure from the Fourth Amendment’s warrant and probable cause requirement in National Treasury Employees Union v. Von Raab—decided on the same day as Skinner. The issue in Von Raab concerned the required urinalysis testing of employees of the United States Customs Service who sought to be transferred or promoted to certain positions. Because drug interdiction was the United States Customs Service’s primary enforcement mission, drug tests were rendered a condition for employment in positions that satisfied any of the following criteria: directly engaging in drug interdiction, carrying a firearm, or handling classified material. Employees with positive test results were subject to dismissal from the agency.

Claiming the drug testing program violated the Fourth Amendment, a union of federal employees and a union official filed suit on behalf of Customs employees who sought to be placed in the covered positions. Looking to Skinner, the Supreme Court noted that neither the requirement of a warrant, probable cause, nor individualized suspicion is a necessary element of

191. Id. at 628.
192. Id.
193. Id. at 630. The Court rejected the lower court’s contention that post-accident regulations are unreasonable because blood and urine tests cannot quantify current drug intoxication or degree of impairment. Id. at 631. It reasoned that the lower court’s analysis was inconsistent with the premise that an inquiry must only have a “tendency to make the existence of any fact that is of consequence to the determination . . . more . . . or less probable than it would be without the evidence” in order to be relevant. Id. at 631-32. Moreover, a positive test result, in addition to established information regarding the process of elimination for a particular drug and information pertaining to the employee’s activities, facilitates the FRA in reaching an informed judgment about how an accident occurred. Id. at 632.
194. Id. at 633.
195. Id. at 634.
197. Id. at 659.
198. Id. at 660-61.
199. Id. at 663.
200. Id.
reasonableness in every situation. The Court articulated the exception to the warrant and probable cause requirement where special needs, “beyond the normal need for law enforcement,” render such requirement impracticable as stated in \textit{Skinner}. It further reasoned that the drug testing program was not created to serve the normal needs of law enforcement. This conclusion was rendered because the purpose of the testing was to discourage drug use among the individuals worthy of promotion to sensitive positions and to avoid promoting drug users to those positions; its purpose was not for use in a criminal prosecution. The Court then rationalized that requiring a warrant in connection with “routine, yet sensitive, employment decisions” would compromise the agency’s mission. Additionally, it determined a warrant would not contribute much to the protection of personal privacy, within this context, since the agency does not make a discretionary determination to conduct a drug test. This determination was based on the fact that the circumstances warranting testing are narrowly defined since employees know that they will be subjected to such testing only upon seeking placement in the covered positions.

The Court concluded that the Government’s need to conduct such searches outweighed the privacy interests of employees directly involved in drug interdiction, as well as those who were required to carry guns. This conclusion was grounded on the employees’ exposure to the dangerous criminal element of drug smuggling and controlled substances. Due to the inherent dangers associated with the duties of employees directly involved in drug interdiction and those required to carry firearms, there was a strong public interest in preventing drug users from entering the positions in order to ensure protection against risks to the employees, the nation, and the public. In light of the need to be physically fit and exercise good judgment, the Court determined the employees directly involved in the interdiction of drugs and those required to carry firearms have a diminished expectation of privacy in respect to the minimal intrusions accompanied by a urinalysis. As such, the Court concluded that the infringement upon their privacy expectations did not outweigh the Government’s compelling interests.

In doing so, the Court rejected the petitioners’ following arguments: (1) the program was not justified because its implementation was not based on a belief that testing would disclose drug use by covered employees and (2) the program

\begin{itemize}
\item 201. \textit{Id.} at 665.
\item 202. \textit{Id.} at 665-66.
\item 203. \textit{Id.} at 666.
\item 204. \textit{Id.}
\item 205. \textit{Id.} at 667.
\item 206. \textit{Id.}
\item 207. \textit{Id.}
\item 208. \textit{Id.} at 668.
\item 209. \textit{Id.} at 669.
\item 210. \textit{Id.} at 669-71.
\item 211. \textit{Id.} at 672.
\item 212. \textit{Id.}
\end{itemize}
was not a “sufficiently productive mechanism to justify its intrusion upon Fourth Amendment interest” since drug users can easily forgo detection.213 Regarding the petitioners’ first contention, the Court recognized the program was designed to “prevent the promotion of drug users to sensitive positions as much as it was designed to detect those employees who used drugs.”214 In light of the extraordinary risks to public safety, the Government’s deterrence policy could not be deemed unreasonable.215 Further, the petitioners’ second contention overstated the case because employees cannot reasonably expect to avoid detection by simply abstaining from drug use after the testing date is assigned.216 One could expect that attempts to taint the samples will succeed, in view of the prophylactic measures taken by the sample collector to ensure the reliability of the sample.217 In the end, the Court declared that the testing of employees who are directly involved in drug interdiction and those required to carry firearms is reasonable under the Fourth Amendment.218

In sum, the Court laid the groundwork for the special needs doctrine, which recognizes exemptions to the Fourth Amendment’s general requirement of individualized suspicion where there are exceptional circumstances, in Skinner and Von Rabb.219 The Skinner Court held the suspicionless drug testing regulations that were implemented “in response to evidence [that] drug and alcohol abuse by some railroad employees”220 was linked to train accidents was justified because the significant interest in public safety.221 Acknowledging that a requirement of establishing individualized suspicion after an accident could lead to the loss of evidence, the Court determined that blanket drug testing was necessary.222 For similar reasons, the Von Raab Court upheld the United States Customs Service’s policy of subjecting employees who were on the frontlines of drug interdiction or carried a gun to suspicionless drug testing.223 Such was necessary, “[i]n light of the extraordinary safety and national security hazards that would attend the promotion of drug users to [those] positions.”224 The Court’s holdings in Skinner and Von Rabb qualified as interests in protecting against the “specific risk to public safety by employees engaged in inherently

213. Id. at 672-76.
214. Id. at 674.
215. Id.
216. Id. at 676.
217. Id.
218. Id. at 677. The Court declined to offer a similar holding in respect to the program’s coverage of employees who are required to handle classified material due to ambiguities within the record. Id. at 677-78. It was not clear whether the testing directive embodied only “those Custom employees likely to gain access to sensitive information,” because certain positions specified by the directive were potentially not likely to gain access to such information. Id. at 678. This ambiguity rendered the Court unable to assess the reasonableness of the testing program’s coverage of such employees. Id. at 678-79. As a result, the Court remanded the case to the Court of Appeals for clarification on the scope of this category. Id. at 678.
220. Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron II), 772 F.3d 1352, 1361 (11th Cir. 2014).
222. Id. at 631.
223. Lebron II, 772 F.3d at 1361.
224. Von Raab, 489 U.S. at 674.
dangerous jobs” as a special need warranting exemption to the Fourth Amendment’s requirement of individualized suspicion.\textsuperscript{225} Outside of this context, the Court has only accepted one other exception to this constitutional protection.

2. The Protection of Children Entrusted to the Public School System’s Care and Tutelage

In 1995, the Court expanded its list of exceptional circumstances meriting suspension of the Fourth Amendment’s warrant and probable cause requirement to include the need to protect children entrusted to the public school system’s care and tutelage in \textit{Veronia School District 47J v. Acton}.\textsuperscript{226} In the wake of increased drug use among its students, Veronia School District 47J ("District") implemented the Student Athlete Drug Policy.\textsuperscript{227} Concerned that student athletes were the leaders of the drug culture and that drug use increased the risk of sports-related injury, the policy required all student athletes to individually consent to drug testing, as well as obtain written consent from their parents.\textsuperscript{228} All athletes were tested at the beginning of their respective sport’s season, and 10\% of the athletes were randomly tested each week of the season.\textsuperscript{229} James Actons, a seventh grader, was denied participation in the District’s football program because he and his parents refused to consent to the drug testing.\textsuperscript{230} Claiming that the policy violated the Fourth Amendment, the Actons sought declaratory and injunctive relief from its enforcement.\textsuperscript{231}

Beginning its inquiry into the reasonableness of the policy, the Court focused its attention to the following subjects: “(1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.”\textsuperscript{232} Because a school’s custodial and tutelary responsibility permits a certain degree of supervision and control, the Court emphasized the diminished rights and expectation of privacy of children within the school setting.\textsuperscript{233} The Court also noted the privacy expectations enjoyed by student athletes are even less, given the communal nature of school locker rooms.\textsuperscript{234} By choosing to participate in interscholastic athletics, student athletes “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”\textsuperscript{235} These heightened regulations included satisfying minimum grade requirements and complying with dress codes, training hours, and rules of conduct.\textsuperscript{236}

\textsuperscript{225} See Lebron v. Sec’y of Fla. Dep’t of Children and Families (\textit{Lebron I}), 710 F.3d 1202, 1207 (11th Cir. 2013).
\textsuperscript{226} 515 U.S. 646 (1995).
\textsuperscript{227} \textit{Id.} at 648-50.
\textsuperscript{228} \textit{Id.} at 649-50.
\textsuperscript{229} \textit{Id.} at 650.
\textsuperscript{230} \textit{Id.} at 651.
\textsuperscript{231} \textit{Id.} The Actons also contended that the policy violated the Fourteenth Amendment and Article I, section 9 of the Oregon Constitution.
\textsuperscript{232} \textit{Id.} at 654.
\textsuperscript{233} \textit{Id.} at 654-57.
\textsuperscript{234} \textit{Id.} at 657.
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Id.}
Court likened this corresponding diminished expectation of privacy to that of adults who are employed in a closely regulated industry.\textsuperscript{237}

Turning then to the character of the intrusion at issue, the Court stated that the privacy interests compromised by the procedure employed to collect the urine samples was negligible, being that the conditions mimicked those typically encountered in public restrooms.\textsuperscript{238} Furthermore, the urinalysis only tested for drugs, not indications of pregnancy or health conditions.\textsuperscript{239} The test results were only provided to a narrow class of school personnel on a “need to know” basis and were not offered to law enforcement.\textsuperscript{240} The Actons argued, however, that the policy involved a greater intrusion because it required students to identify use of prescription medications prior to testing.\textsuperscript{241} Yet the Court concluded that the intrusion on the privacy interests was insignificant, as nothing in the policy contradicted the notion that the District permitted students to provide the requested information in a confidential manner.\textsuperscript{242}

Last, the Court considered the nature and immediacy of the governmental interest and effectiveness of the means employed.\textsuperscript{243} Noting its characterization of the Government’s interests in \textit{Skinner} and \textit{Von Raab} as compelling, the Court clarified that the state interest must be substantial, meaning “\textit{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.}’’\textsuperscript{244} Based on scientific proof that the severity of the “physical, psychological, and addictive effects of drug use” is at its extreme during school years, the Court reasoned that the Government’s interest in deterring drug use from schoolchildren is compelling.\textsuperscript{245} And prevalent drug use among students disrupts the educational process, affecting those students who do not use drugs.\textsuperscript{246} Thus, the State had an obligation to act because it had undertaken the responsibility of care and direction of the students.\textsuperscript{247} In addition, the Court’s reasoning embodied the concern for the safety of school athletes because the risk of immediate physical harm caused by drug use is particularly high in the context of sports.\textsuperscript{248}

The Court did not question the validity of the district court’s conclusion that “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion . . . [of] epidemic

\textsuperscript{237} Id.
\textsuperscript{238} Id. at 658. Male students were required to produce urine samples while standing at a urinal fully clothed and being observed only from behind; whereas, female students produced samples in an enclosed stall while a female monitor listened outside. \textit{Id.}
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 659.
\textsuperscript{242} Id. at 659-60.
\textsuperscript{243} Id. at 660.
\textsuperscript{244} Id. at 661.
\textsuperscript{245} Id.
\textsuperscript{246} Id. at 662.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
proportions” driven by drug use. The Court, however, stressed:

That is an immediate crisis of greater proportions than existed in *Skinner*, where [the Court] upheld the Government’s drug-testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. And of much greater proportions than existed in *Von Raab*, where there was no documented history of drug use by customs officials.

As to the efficacy of the means employed to address the issue, the Actons argued that suspicion based drug testing would be less intrusive. But the Court rejected this contention, reasoning that implementation of a suspicion based policy would be impracticable. In the Court’s opinion, conducting drug testing based on suspicion would convert the process into a “badge of shame.” Further, a suspicion based policy risks teachers simply subjecting troublesome students to drug testing, absent any indication of likely drug use. And it imposes an obligation on teachers, who are ill prepared, to identify and bring to account drug abuse. Such duty is not attuned with the occupation of teaching. In light of the “decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search,” the Court held that the drug testing policy was reasonable and, thus, constitutional.

In 2002, in *Board of Education v. Earls*, the United States Supreme Court extended its *Veronia* holding to drug testing of schoolchildren involved in *all* extracurricular activities, as opposed to just athletics, in *Board of Education v. Earls*. The Board of Education of Independent School District 92 of Pottawatomie County (“School District”) implemented the Student Activities Drug Testing Policy, which made drug testing a requirement for all students who participated in any extracurricular activities. The policy mandated all students to submit to a drug test before participating in the activity and random drug testing during the course of participation. Additionally, all students participating in extracurricular activities had to consent to be tested at any time based on reasonable suspicion. The respondents were two high school students.

---

249. *Id.* at 662-63.
250. *Id.* at 663.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 664.
256. *Id.*
257. *Id.* at 664-65.
259. *Id.* at 825.
260. *Id.* at 826.
261. *Id.*
students, along with their parents, who sought participation in extracurricular activities.\textsuperscript{262} Contending that the policy violated the Fourth Amendment, the respondents filed a suit seeking declaratory and injunctive relief.\textsuperscript{263} They put forth the contention that there was a lack of special need for testing students who participate in extracurricular activities and that no drug problem had been proven to exist.\textsuperscript{264}

Addressing the respondents’ argument that drug testing must be based on individualized suspicion, the Court noted the “Fourth Amendment imposes no irreducible requirement of individualized suspicion.”\textsuperscript{265} It echoed the same exception articulated by the Court in \textit{Skinner} and \textit{Von Raab} which applies “when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”\textsuperscript{266} Acknowledging that it previously held special needs exist in the public school setting, the Court applied the principles of \textit{Veronia} to resolve whether individualized suspicion was necessary to test students involved in any extracurricular activities.\textsuperscript{267}

Since the students engaged in nonathletic activities were not subjected to regular physicals and communal undress, the respondents argued that these students have a greater expectation of privacy than the student athletes in \textit{Veronia}.\textsuperscript{268} However, the Court characterized this distinction as insignificant because the central focus of its \textit{Veronia} decision was primarily the school’s custodial responsibility and authority.\textsuperscript{269} But the Court recognized students involved in the extracurricular activities covered by the policy still subject themselves to heightened regulations resulting in a further lessened expectation of privacy comparable to that of student athletes.\textsuperscript{270}

Moreover, the policy utilized the same method for obtaining urine samples as employed in \textit{Veronia}, except males were allowed to produce samples in an enclosed stall.\textsuperscript{271} So the Court concluded that this method was even less problematic than the already “negligible” intrusion at issue in \textit{Veronia}.\textsuperscript{272} Further, all test results were required to be kept confidential and were only disclosed to school personnel on a “need to know” basis.\textsuperscript{273} Law enforcement was not provided with the tests results, nor were they used to impose disciplinary consequences.\textsuperscript{274} The only consequence of testing positive was revocation of the student’s privilege to participate in extracurricular activities.\textsuperscript{275} In light of the minimum intrusion associated with the sample collection and the narrow uses

\begin{itemize}
\item \textsuperscript{262} Id.
\item \textsuperscript{263} Id. at 826-27.
\item \textsuperscript{264} Id. at 827.
\item \textsuperscript{265} Id. at 829 (quoting U.S. v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Id.
\item \textsuperscript{268} Id. at 831.
\item \textsuperscript{269} Id.
\item \textsuperscript{270} Id. at 831.
\item \textsuperscript{271} Id. at 832-33.
\item \textsuperscript{272} Id. at 833.
\item \textsuperscript{273} Id.
\item \textsuperscript{274} Id.
\item \textsuperscript{275} Id.
\end{itemize}
of the test results, the Court concluded that the students suffered an insignificant invasion to their privacy.\(^{276}\)

In considering the nature and immediacy of the Government’s concern and efficacy of the means employed, the Court acknowledged that the compelling interest in deterring schoolchildren from drug use had already been expressed and accepted in \textit{Veronia}.\(^{277}\) Noting that drug abuse among children had increased since its 1995 decision, the Court still supported its contention that the State had an obligation to act on behalf of the children under its care and direction.\(^{278}\) Additionally, the School District provided direct proof of drug use at the county’s school:

Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member.\(^{279}\)

The Court rejected the respondents’ claim that the proffered evidence did not sufficiently establish that there is a “real and immediate interest” justifying drug testing of nonathletes.\(^{280}\) In doing so, the Court recognized that “a demonstrated problem of drug abuse is not in all cases necessary to the validity of a testing regime, but that some showing does shore up an assertion of special need for a suspicionless general search program.”\(^{281}\) The Court concluded that the evidence provided by the School District was sufficient to support a special need for its drug testing policy.\(^{282}\) Moreover, the Court observed that it had not required particularized or pervasive drug abuse before permitting the Government to conduct suspicionless drug testing, as exemplified in \textit{Skinner} and \textit{Von Raab}.\(^{283}\) And it further reasoned that the need to prevent and deter the severe effects caused by childhood drug use offers the necessary immediacy for a school drug testing program before a substantial portion of the students engage in drug use.\(^{284}\) The Court concluded by holding that the policy of testing student participants in extracurricular activities was a “reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.”\(^{285}\) Moreover, the policy promoted the School District’s interest in guarding the students’ safety and health.\(^{286}\)

\(^{276}\) Id. at 834.  
\(^{277}\) Id.  
\(^{278}\) Id.  
\(^{279}\) Id. at 834-35.  
\(^{280}\) Id. at 835.  
\(^{281}\) Id.  
\(^{282}\) Id.  
\(^{283}\) Id. at 835-36.  
\(^{284}\) Id. at 836.  
\(^{285}\) Id. at 837.  
\(^{286}\) Id. at 836-37.
Briefly put, the Supreme Court primarily focused on the “school’s custodial responsibility and authority,” in upholding the suspicionless drug testing of student athletes in *Veronica* and students involved in any extracurricular activity in *Earls*.\(^{287}\) Giving due regard to the limitations placed on the Fourth Amendment rights of children in a public school setting, the Court determined that the schools had compelling interests in preventing the risks to health and safety of the students by deterring drug use.\(^{288}\) With these two cases, the Court recognized that “the protection of children entrusted to the public school system’s care and tutelage” constitutes a special need exception to the requirement of individualized suspicion.\(^{289}\) But the Court has cautiously declined to recognize any other circumstances as substantial enough to circumvent the constitutional protections of the Fourth Amendment.

3. The Lack of a “Concrete Danger”

In 1997, the Court declined to recognize drug testing of state candidates as a limited circumstance in which suspicionless searches are justified in *Chandler v. Miller*.\(^{290}\) *Chandler* questioned the constitutional validity of Georgia Code Annotated section 21-2-140, which required candidates for certain state offices to prove that they had tested negative for illicit drugs.\(^{291}\) Under the statute, candidates were required to provide a certificate from a state-approved laboratory, documenting the candidate’s submission to a urinalysis with negative results as a precondition for qualification.\(^{292}\) Libertarian Party nominees for the offices of Lieutenant Governor, Commissioner of Agriculture, and members of the General Assembly filed an action challenging the Georgia statute as a violation of their Fourth Amendment rights.\(^{293}\) The petitioners sought declaratory and injunctive relief.\(^{294}\)

Reiterating fundamental Fourth Amendment principles, the Court established that a search typically must be based on some level of individualized suspicion in order to be reasonable.\(^{295}\) But the suspicion requirement warrants suspension when special needs—concerns other than the interdiction of crime—exist.\(^{296}\) Where justification for suspicionless searches is based upon the alleged existence of special needs, the opposing private and public interests must be balanced to determine whether an individualized suspicion requirement would be impracticable.\(^{297}\)

Beginning its inquiry into the reasonableness of Georgia’s drug testing

\(^{287}\) See id. at 831.
\(^{288}\) See id. at 834.
\(^{289}\) See *Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron I)*, 710 F.3d 1202, 1207 (11th Cir. 2013).
\(^{290}\) 520 U.S. 305 (1997).
\(^{291}\) Id. at 308.
\(^{292}\) Id. at 309.
\(^{293}\) Id. at 310. The Petitioners also asserted violations to the First and Fourteenth Amendments. *Id.*
\(^{294}\) *Id.*
\(^{295}\) *Id.* at 313.
\(^{296}\) *Id.* at 313-14.
\(^{297}\) *Id.* at 314.
requirement, the Court examined its established precedent and reaffirmed Skinner, Von Raab, and Veronia as the benchmark for assessing the constitutionality of the statute. With this framework in mind, the Court noted that the testing method utilized involved a minimal intrusion because the candidate was permitted to produce the urine sample at his private physician’s office. Additionally, the test results were only given to the candidate, who controlled further distribution of the report. Shifting focus to the required certification, the Court acknowledged 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.” Georgia’s proffered special need failed to satisfy this requirement.

Notably, the respondents failed to demonstrate any indication of a “concrete danger” in their defense of the statute. The crux of their argument for justification rested on the irreconcilability of drug abuse with occupying a high state office. The respondents merely contended that the statute was necessary “because the use of illegal drugs draws into question an official’s judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials.” In fact, the respondents conceded that the statute was not enacted in response to suspicion of drug abuse by state officials. And the record did not suggest that the dangers asserted were anything more than conjecture. What is more, the Court reasoned that Georgia’s certification requirement was not well crafted to identify candidates who abused drugs. This was so because the candidate was well aware of the test date which could be scheduled by the candidate within 30 days prior to qualification for placement on the ballot. This awareness could allow drug abusers to abstain long enough to avoid detection.

Essential to the State’s argument was the Court’s holding in Von Raab, which upheld a drug testing regime for Customs Service officers in certain

298. Id. at 314-18. The Court rejected the respondents’ argument that the State’s sovereign power to establish qualifications under the Tenth Amendment modifies the “special needs” analysis. Id.

299. Id. at 318.

300. Id.

301. Id.

302. Id.

303. Id. at 318-19.

304. Id. at 318

305. Id.

306. Id. at 319.

307. Id.

308. Id.

309. Id.

310. Id. at 319-20.

311. Id. at 320.
positions absent a demonstrated drug abuse problem. But the Court drew a distinction between the two cases by stressing that the Customs employees were “routinely exposed to the vast network of organized crime that is inextricably tied to drug use” and their primary mission was drug interdiction. Furthermore, the significant difference between the two drug testing programs was that candidates for state office are persistently scrutinized by the public; whereas, Customs employees are not subjected to normal day-to-day scrutiny on the job.

The Court concluded that the need for Georgia’s drug testing regime was symbolic, not “special.” It reached this conclusion because there was no evidence of a drug problem among the targeted individuals, state officials ordinarily do not engage in “high-risk, safety-sensitive tasks,” and the certification requirement did not immediately assist interdiction efforts. The statute only served to portray Georgia as a committed combatant against drug abuse. The Court stated, “[I]f a need of the ‘set a good example’ genre were sufficient to overwhelm a Fourth Amendment objection, then the care [the] Court took to explain why the needs in Skinner, Von Raab, and Veronia ranked as ‘special’” were unnecessary. In the end, the Court admonished that since there was no threat to public safety, “the Fourth Amendment preclude[d] the suspicionless search, no matter how conveniently arranged.”

IV. LEBRON V. SECRETARY OF FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES

Following Federal District Court Judge Mary Scriven’s final declaration that Florida Statute section 414.0652 was unconstitutional, the State found itself justifying Florida’s suspicionless drug testing regime before the United States Court of Appeals for the Eleventh Circuit once more. But with an understanding of the prior case law, the Eleventh Circuit unanimously affirmed the district court’s judgment, holding Florida’s requirement of the mandatory, suspicionless drug testing of TANF applicants as an unconstitutional violation of the Fourth Amendment’s protection against unreasonable searches. In doing so, the Eleventh Circuit recognized that many of the legal principles noted in Lebron I equally applied to the topic case, Lebron II. Acknowledging that the Fourth Amendment generally requires individualized suspicion in order for a search to be reasonable, the Eleventh Circuit noted that an exception is warranted when “‘special needs, beyond the

312. Id.
313. Id. at 321 (quoting Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989)).
314. Id.
315. Id. at 322.
316. Id. at 321-22.
317. Id. at 321.
318. Id. at 322.
319. Id. at 323.
320. Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron II), 772 F.3d 1352, 1378 (11th Cir. 2014).
321. Id. at 1360.
normal need for law enforcement,"” exist. It observed that the precedent established in *Skinner, Von Raab, Veronia, Chandler,* and *Earls* supports the principle 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.” The State’s main argument centered around the, quite bare, assertion that Florida has a special need to justify its suspicionless drug testing regime for welfare beneficiaries.

In applying the special needs doctrine, the Eleventh Circuit rejected the State’s contention that TANF applicants have a reduced expectation of privacy because they choose to expose themselves to heightened regulations. Distinguishing TANF applicants from “employees in dangerous vocations or students subject to the *parens patriae* power of the state,” the Eleventh Circuit asserted that TANF applicants do not relinquish legitimate expectations of privacy by applying for government assistance. Even if such was the case, the State bore the burden of first establishing a substantial special need, which it failed to meet.

The State’s arguments were essentially a repeat of its unpersuasive arguments from the prior case, *Lebron I.* The State maintained that the same interests promoted in *Lebron I*—“(1) ensuring TANF participants’ job readiness; (2) ensuring the TANF program meets its child-welfare and family-stability goals; and (3) ensuring that public funds are used for their intended purposes and not to undermine public health”—constituted substantial special needs that justify the suspicionless drug-testing policy.

The Eleventh Circuit, however, characterized these needs as general concerns that are not specific to TANF applicants. For instance, the State generally desires work-readiness for all of its citizens, not just the TANF population. Similarly, drug use affects children in all families, but the State does not and cannot assert the right to test all parents. And the State offered no evidence otherwise showing that the harms from drug use faced by children in TANF households differ from the general harms that children face in all families that may be dealing with drug use. Likewise, the Circuit Court reasoned that an interest in ensuring that government funds are expended wisely is not specific to the TANF program, but is inherent to all public programs. Yet this interest does not entitle a State to mandate suspicionless drug testing of

---

322. *Id.* (quoting Chandler v. Miller, 520 U.S. 305, 313 (1997)).
323. *Id.* at 1362 (quoting Chandler v. Miller, 520 U.S. 305, 318 (1997)).
324. *Id.* at 1361.
325. *Id.* at 1364.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* (quoting *Lebron v. Wilkins* (*Wilkins II*), 990 F. Supp. 2d 1280, 1291 (M.D. Fla. 2013)).
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
all beneficiaries of state funds.\textsuperscript{335}

Further, the Eleventh Circuit reasoned that drug testing is not vital to the success of the TANF program.\textsuperscript{336} The State made no effort to estimate the amount of TANF funds that are misused for the purchase of drugs, nor was any evidence presented indicating that drug testing conserves a substantial amount of funds that would be wasted on drugs.\textsuperscript{337} As stated by the Eleventh Circuit, “[a] government concern that a wholly undefined, albeit a very small, share of a program’s expenditures will be squandered cannot easily fit within the closely guarded category reserved for substantial special needs without exploding the carefully cultivated doctrine.”\textsuperscript{338} Nevertheless, the State contended that its asserted interests qualify as special needs because there is a strong concern of drug use among TANF applicants.\textsuperscript{339} But the State presented no competent evidence to support this empirical claim.\textsuperscript{340} In the Eleventh Circuit’s opinion, there was no reason to assume, as a theoretical matter, that low-income persons are intrinsically prone to drug use or have a greater propensity to use drugs than the general population.\textsuperscript{341} Nor was the Eleventh Circuit provided with any reason to perceive drug use by TANF applicants differently from the general population’s drug use.\textsuperscript{342} The panel of judges understood that “‘[w]hile ‘a demonstrated problem of drug abuse, is not in all cases necessary to the validity of a testing regime,’ such evidence could ‘clarify’ and ‘substantiate’ the dangers presented by such drug use and whether those dangers were pertinent to the government’s asserted special need for drug testing.”\textsuperscript{343}

Remarkably, as pointed out by the Eleventh Circuit, the only competent evidence suggested that TANF recipients do not abuse drugs at a greater rate than the general public.\textsuperscript{344} This competent evidence that refuted the State’s case had been generated, interestingly, by the Government of Florida itself.\textsuperscript{345} Before Florida enacted section 414.0652, the State conducted a study designed to assess whether TANF applicants had a tendency to abuse illicit drugs and whether such abuse hindered employment opportunities.\textsuperscript{346} Labeled the Demonstration Project, the study began on January 1, 1999, and ended on May 31, 2000.\textsuperscript{347} Under the Demonstration Project, TANF applicants were given a screening questionnaire to determine the likelihood that the applicant abused drugs.\textsuperscript{348} If the screening instrument indicated that the applicant likely abused drugs, then

\begin{itemize}
\item \textsuperscript{335} Id. at 1364-65.
\item \textsuperscript{336} Id. at 1364.
\item \textsuperscript{337} Id. at 1365.
\item \textsuperscript{338} Id.
\item \textsuperscript{339} Id.
\item \textsuperscript{340} Id.
\item \textsuperscript{341} Id.
\item \textsuperscript{342} Id.
\item \textsuperscript{343} Id. at 1366 (quoting Lebron v. Sec’y of Fla. Dep’t of Children and Families, (Lebron 1), 710 F.3d 1210, 1212 (11th Cir. 2013) (quoting Chandler v. Miller, 520 U.S. 305, 319 (1997))).
\item \textsuperscript{344} Id.
\item \textsuperscript{345} See id.
\item \textsuperscript{346} Id.
\item \textsuperscript{347} Id.
\item \textsuperscript{348} Id.
\end{itemize}
the individual was subjected to a drug test.\textsuperscript{349} Out of the 8,797 individuals initially screened, 2,335 failed to complete the application, which was consistent “with the historical data on ‘non-application completers.’”\textsuperscript{350} The results of the initial screening instrument led to required drug testing of 1,447 of the remaining 6,462 applicants.\textsuperscript{351} Of those 1,447 individuals, only 335 tested positive for drugs.\textsuperscript{352} Hence, only 5.2% of the individuals who completed the application process were proven to use drugs.\textsuperscript{353} Additionally, the study did not reveal that the TANF recipients who use drugs were less likely to become employed than those who tested negative.\textsuperscript{354}

In line with the data collected under the Demonstration Project, only 2.6% of the TANF applicants who were tested during the brief enforcement of section 414.0652 tested positive for illicit drug use—“108 out of 4,046.”\textsuperscript{355} The State argued that this figure was inaccurate because thousands of applicants did not complete the application process nor submit to testing.\textsuperscript{356} Because the State did not provide a mechanism for determining how many applications were not completed because of drug use as opposed to other deterrent factors, the Eleventh Circuit rejected this argument.\textsuperscript{357} Additionally, as noted by the Demonstration Project, historical data demonstrates that a significant number of applicants neglected to complete applications even in the absence of a drug test requirement.\textsuperscript{358} Thus, the Eleventh Circuit concluded that this data did not help the State establish a substantial special need.\textsuperscript{359}

Still asserting its concern of drug use within the TANF population, the State argued that the district court erred by not admitting the testimony of expert and lay witnesses regarding its prevalence.\textsuperscript{360} Expert witness Dr. Avram Mack, a psychiatrist and professor who practiced “in areas of drug use and related disorders,” testified that drug use is more pervasive among TANF applicants and recipients than among the general population.\textsuperscript{361} Dr. Mack’s opinion, however, was solely based on the research of others, as he had never conducted any research of his own regarding the rate of drug abuse among any particular population.\textsuperscript{362} Further, Dr. Mack did not have any experience “in studying the rates of drug use in any demographic group.”\textsuperscript{363} As noted by the Eleventh Circuit, Dr. Mack also did not have a background in social science or statistics; hence, he was not qualified to offer expert opinion on the prevalence of drug use.

\textsuperscript{349} Id.
\textsuperscript{350} Id.
\textsuperscript{351} Id.
\textsuperscript{352} Id.
\textsuperscript{353} Id.
\textsuperscript{354} Id. at 1366-67.
\textsuperscript{355} Id. at 1367.
\textsuperscript{356} Id.
\textsuperscript{357} Id.
\textsuperscript{358} Id.
\textsuperscript{359} Id.
\textsuperscript{360} Id.
\textsuperscript{361} Id. at 1367-68.
\textsuperscript{362} Id. at 1368.
\textsuperscript{363} Id. at 1369.
among the TANF population.\textsuperscript{364} Moreover, the district court did not abuse its discretion by refusing to admit the underlying articles on which Dr. Mack based his opinion because the reliability of the articles could not be readily determined without the assistance of an expert.\textsuperscript{365}

Further, the Eleventh Circuit agreed with the district court’s decision to not admit the testimony of the three lay witnesses.\textsuperscript{366} Two employees of DCF, Michael Carroll and Peter Digre, stated that they had observed firsthand the ills of drug use within the TANF population, as well as the effects of drug use on employment.\textsuperscript{367} Carroll also testified that he had personally witnessed hundreds of TANF applicants who were intoxicated from drugs and that TANF recipients are more susceptible to drug use than the beneficiaries of other government benefits.\textsuperscript{368} According to the Eleventh Circuit, the statements of Carroll and Digre crossed the line into the realm of expert opinion.\textsuperscript{369} Yet neither of the two possessed training in identifying signs of drug use nor were they qualified to speak on these grounds.\textsuperscript{370} Additional testimony was offered from Bruce Ferguson, who stated that his job duties entailed referring recipients of public assistance to substance abuse facilities and that he observed forty-two clients who disclosed their use of alcohol or drugs within a ninety-day period.\textsuperscript{371} However, the Eleventh Circuit pointed out that his testimony was not relevant to the TANF program because it did not identify which government program in which the clients participated or whether the clients specifically admitted to a problem with drug abuse, and not alcohol.\textsuperscript{372} Thus, it did not help the State demonstrate a substantial special need to support the suspicionless drug testing of TANF applicants.\textsuperscript{373}

Moreover, the Eleventh Circuit reasoned that the drug-testing regime had little deterrent effect on “applicants whose drug use will affect employability, endanger children, or drain public funds.”\textsuperscript{374} This was so because TANF applicants were required to take a drug test within ten days of being informed of eligibility under the program, but applicants controlled when the application is submitted.\textsuperscript{375} Thus, individuals could abstain from drug use for a period sufficient enough to pass the test.\textsuperscript{376}

In the alternative, the State argued that the consent of TANF applicants rendered the search reasonable, even in the absence of special needs.\textsuperscript{377} Following the case law established in \textit{Lebron I}, the Eleventh Circuit rejected this

\textsuperscript{364} Id.
\textsuperscript{365} Id. at 1370.
\textsuperscript{366} Id. at 1371.
\textsuperscript{367} Id.
\textsuperscript{368} Id.
\textsuperscript{369} Id. at 1372.
\textsuperscript{370} Id.
\textsuperscript{371} Id. at 1371.
\textsuperscript{372} Id. at 1373.
\textsuperscript{373} Id.
\textsuperscript{374} Id. at 1374.
\textsuperscript{375} Id.
\textsuperscript{376} Id. (citing Chandler v. Miller, 520 U.S. 305, 320 (1997)).
\textsuperscript{377} Id.
argument because the consent was only "'granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.'"378 Also, the State’s mandated consent was still contrary to the doctrine of unconstitutional conditions, which provides that the Government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.'"379 The Eleventh Circuit also reasoned that the special needs analysis "accounts for whether consent reduces an individual's legitimate expectation of privacy."380 Thus, consent should not be treated as a separate inquiry.381 As demonstrated by the analysis in Skinner, Von Raab, Veronia, Chandler, and Earls, "'the Supreme Court has never held that [suspicionless] drug testing regimes were constitutionally reasonable because of consent.'"382

Ultimately because the State failed to establish the existence of substantial special needs, the Eleventh Circuit held Florida’s suspicionless drug testing of TANF applicants as a condition for receiving benefits violated the Fourth Amendment.383 While the writer agrees with the Eleventh Circuit’s holding, the analysis below will go a step further by asserting that the State’s argument is grounded in stereotypes which have been used throughout history to create bias against the poor.

V. ANALYSIS

Having gained an understanding of the central issue in the topic case, as well as the function that notions of race and class have played in the development of the federal welfare system, the Analysis will now address the issues that underlie Florida’s enactment of section 414.0652—those of which the Circuit Court failed to tackle. This Part will examine the State’s refusal to accept that no special needs exist to justify suspicionless drug testing of TANF applicants, in addition to the implications that Florida’s drug testing policy has on the rights of the poor. The writer challenges Florida to end its devotion to a system of antiquated stereotypes and urges the courts to directly address the effects that such stereotypes have had on the development of the welfare system and its beneficiaries.

A. The State’s Refusal to Accept that No Special Needs Exist

In Lebron II, the United States Court of Appeals for the Eleventh Circuit declared Florida’s suspicionless drug testing regime under Florida Statute section 414.0652 a violation to the Fourth Amendment’s protection against unreasonable searches. In doing so, the Eleventh Circuit—for the second time—announced that the State had failed to meet its burden of demonstrating the existence of substantial special needs to justify its departure from the Fourth

378. Id. (quoting Johnson v. United States, 333 U.S. 10, 13 (1948)).
379. Id. at 1374-75 (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
380. Id. at 1377.
381. Id. at 1376.
382. Id. at 1377 (quoting Lebron v. Sec'y of Fla. Dep't of Children and Families, (Lebron I), 710 F.3d 1210, 1215 (11th Cir. 2013)).
383. Id. at 1378.
Amendment’s requirement of individualized suspicion. But from the inception of Luis Lebron’s challenge to Florida’s suspicionless drug testing of TANF applicants, the State has zealously maintained that such special needs do exist which support limiting the constitutional rights of the TANF population. The State has been steadfast in claiming that the following interests constitute substantial special needs justifying the suspicionless, mandatory drug testing regime: “(1) ensuring TANF participants job readiness; (2) ensuring the TANF program meets it child-welfare and family-stability goals; and (3) ensuring that public funds are used for their intended purposes and not to undermine public health.”

Yet underlying each of the asserted “special needs” is the inherent presumption that drug use is prevalent among the TANF population. The writer uses the term “presumption” because the State, as stressed by the Eleventh Circuit, has continuously failed to provide any competent empirical evidence to support its claim that concerns of drug use “are particularly strong for TANF applicants.” In fact, it has taken a less logical approach and decided to ignore the factual data that stands in direct opposition to such an unfounded claim. Indeed, one does not have to search far to find that no such drug use problem exists among Florida’s TANF population—the State’s own pilot study established this absence.

In 1998, Florida’s Legislature ordered the State’s DCF to conduct the Demonstration Project for the sole purpose of evaluating the “impact of [a] drug-screening and drug-testing program on employability, job placement, job retention, and salary levels of program participants and to make ‘recommendations . . . as to the feasibility of expanding the program.’” To fulfill this purpose, the Demonstration Project was aimed at testing (1) whether Florida’s TANF applicants were prone to illicit drug use and (2) whether such abuse adversely impacts employment opportunities. But as the Eleventh Circuit meticulously noted, 76.6% of 6,462 applicants screened by the written questionnaire did not indicate a likelihood of drug use. Of the 1,447 who were required to submit to a drug test, only 335 failed. That is to say, only 5.2% of the TANF applicants tested positive for illicit drug use between 1999 and 2001, the period in which the Demonstration Project was conducted. What is more, these results revealed the rate of drug use among TANF applicants was significantly lower than the drug use rate of 8.13% among Florida’s

---

384. Id. at 1364 (quoting Lebron v. Wilkins (Wilkins II), 990 F. Supp. 2d 1280, 1291 (M.D. Fla. 2013)).
385. See id. at 1365.
386. Id.
387. See id. at 1366 (“If anything, the evidence extant suggests quite the opposite: that rates of drug use in the TANF population are no greater than for those who receive other governmental benefits, or even for the general public.”).
388. See Kayanan, supra note 41.
390. Id. at 1277.
391. Id., 772 F.3d at 1366.
392. Id.
393. Id.
population as a whole.\textsuperscript{394} Furthermore, the study did not suggest that there was any difference in prospective employment between those who tested positive for drug use and those who tested negative.\textsuperscript{395}

Confounded by these findings, the researchers administering the Demonstration Project concluded that because of the difficulty in establishing the amount of drug use among welfare recipients, any test employed would only provide an estimate.\textsuperscript{396} "Such estimates are suitable only for planning purposes and not for sanctioning."\textsuperscript{397} Because the results of the study showed insignificant differences in employment and income, as well as the fact that the costs of drug testing outweighed its benefits, the researchers recommended that Florida’s Legislature not expand the testing program.\textsuperscript{398} Still, as Federal District Court Judge Scriven so powerfully expressed:

\begin{quote}
[\textit{d}espite the failure of the Demonstration Project to uncover evidence of rampant drug abuse among TANF applicants; despite the conclusion of researchers that drug use did not adversely impact any of the goals of the TANF program, including employability, earning capacity or independence from social assistance; despite the fact that the study revealed no financial efficacy; despite the legal ramifications; and, despite the express recommendation that the project not be continued or expand, Florida enacted section 414.0652 . . .]\textsuperscript{399}
\end{quote}

Nevertheless, the preliminary findings of the testing conducted pursuant to section 414.0652 still evidenced a significantly low rate of drug use—only 2.67\% of 4,046 TANF applicants who underwent urinalyses tested positive for drugs.\textsuperscript{400} Yet notwithstanding the overwhelming amount of evidence to the contrary, the State continues to argue that its broad interests qualify as special needs because of the existence of a peculiar drug use problem among its TANF applicants.\textsuperscript{401} The State is even willing to waste more of its taxpayers’ dollars, which it sought to protect by enacting the statute, by carrying out this witch hunt than would be spent by paying benefits to the marginal number of those who fail the test.\textsuperscript{402} Why? Well the Circuit Court’s careful analysis did not provide an answer. But the writer posits that the State cannot find competent evidence

\begin{flushright}
\textsuperscript{394} \textit{Wilkins I}, 820 F. Supp. 2d at 1277. \\
\textsuperscript{395} \textit{Lebron II}, 772 F.3d at 1366–67. \\
\textsuperscript{396} \textit{Wilkins I}, 820 F. Supp. 2d at 1278. \\
\textsuperscript{397} \textit{Id.} (quoting Robert E. Crew, Jr. and Belinda Creel Davis, \textit{Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits,} \textit{17}(1) J. HEALTH & SOC. POL’Y. 39, 52 (2003)). \\
\textsuperscript{398} \textit{Id.} \\
\textsuperscript{399} \textit{Id.} at 1279. \\
\textsuperscript{400} \textit{Lebron II}, 772 F.3d at 1368. \\
\textsuperscript{401} \textit{See id.} at 1365-67. \\
\textsuperscript{402} \textit{See Lizette Alvarez, No Savings Are Found from Welfare Drug Tests,} \textit{N.Y. TIMES}, April 18, 2012, at A14, http://www.nytimes.com/2012/04/18/us/no-savings-found-in-florida-welfare-drug-tests.html. The State expended $118,140 in reimbursements to all of the TANF applicants who were required to pay for, but passed, the mandated drug testing during the enforcement of section 414.0652. \textit{Id.} This equated to $45,780 more than the amount that would have been paid in benefits to the mere 108 individuals who failed the test. \textit{Id.}
\end{flushright}
supporting its position, nor will it accept the evidence opposing its position, because the State’s proffered “special needs” justifying the drug testing of TANF applicants are founded on stereotypes.

1. The State’s “Special Needs” Seem to be Based on Stereotypes

The criminalization of the poor due to society’s perception of the needy as a class of depraved and degenerate sub-humans is not novel. Tracking the development of the federal welfare system unfortunately reveals that our nation has had a history of blaming the poor since the ADC rolls shifted to include a greater representation of African American women in the 1960s. From accusations of immorality and welfare fraud to accusations that taxpayers’ dollars are being wasted on drug use, the underlying tone of welfare reform debates has always been the same. That is to say, evidence of such allegations is not needed in order for them to be accepted as true. Only now, the dehumanization is no longer carried out through midnight raids aimed at finding men in the houses of immoral and undeserving impoverished women. It is subtly endorsed through the mandatory drug testing of TANF applicants.

Since the 1960s, conservative policymakers have used stigmatizing language when describing the poor in order to shape the public’s view on government funding for welfare programs. Though the language has been altered, there is no difference between Reagan’s use of the term “welfare queen” and Governor Scott’s employment of “drug addict.” Both terms are used as propaganda by politicians to depict the poor in a light that encourages less government spending. Further, both are plagued with inaccuracies, but accepted as true.

For instance, it is well known that Reagan embellished his tale of the Chicago welfare queen he popularized as the face of all poor people: “She has 80 names, 30 addresses, 12 Social Security cards . . . . She’s got Medicaid, getting food stamps, and she is collecting welfare under each of her names. Her tax-free cash income alone is over $150,000.” Truth revealed that Linda Taylor—the woman on which Reagan’s story was based—was only charged with using four

403. See generally Gustafson, supra note 4.
404. See Nadasen, supra note 7 at 55-56; Gustafson, supra note 4 at 648-49.
405. See, for example, Hawkesworth, supra note 140, for a discussion of how the majority of Congress ignored the empirical evidence dispelling welfare myths during congressional debates regarding PRWORA in the mid-90s. “In the words of [Michigan] Representative Barbara Collins . . . , ‘The Congress unfortunately had the image of a welfare recipient as an urban black woman, who irresponsibly had children, was lazy, refused to work, [and] was uneducated.’” Hawkesworth, supra note 140 at 542.
406. In the 1960s welfare offices raided the homes of women on the ADC rolls with the intent of finding men in the beds of unmarried women. Gustafson, supra note 4 at 6495. Single women cohabitating with men were “deemed unmorally unfit and their households therefore unsuitable for assistance.” Id.
407. Cammett, supra note 121 at 233.
408. See “Welfare Queen” Becomes Issue in Reagan Campaign, supra note 9.
aliases and receiving $8,000 in welfare fraud. By the same token, Florida’s Legislature enacted, and gained support for, section 414.0652 based on its claim of prevalent drug use among Florida’s TANF applicants, despite the fact of existing evidence to the contrary. By no means does the writer mean to suggest that misuse of government assistance does not occur, only that such isolated instances do not typify beneficiaries of government aid. But because these stigmas fit the narrative, it does not matter that they are untrue for almost all welfare beneficiaries.

According to Madeleine Burbank, a white woman who was compelled to seek government assistance after her marriage failed in the 1970s, “Reagan’s story validated some of the worst assumptions some Americans have about poor people.” For example, Reagan did not explicitly assign a race to the welfare queen, but he often described “her” as “driving a pink Cadillac to cash her welfare checks at the liquor store.” Such rhetorical clues played upon ideas that many White Americans had about African Americans within the inner cities. Hence, “she” was universally understood to be African American. This was a clever ploy since the public consensus was that African American women plagued the welfare rolls, even though White women were still the majority. Thus, the effect of the “welfare queen” was that it made society feel that the majority of welfare recipients were undeserving of government assistance.

As phrased by poverty expert Mark R. Rank, “few topics in American society have more myths and stereotypes surrounding them than poverty, misconceptions that distort both our politics and our domestic policy making.” Florida’s mandated drug testing is directly derived from misconceptions and stereotypes about the poor. As the Circuit Court noted, “without an obvious and palpable danger, the State [made] an empirical claim that a drug-use problem exists among Florida TANF applicants.” The existence of such problem was the State’s sole basis for enacting section 414.0652.
This leads one to wonder how the State can make this assertion when its own study, which was specifically commissioned for the purpose of determining whether a drug use problem existed among TANF applicants, countered this claim. Based on this nation’s history with the welfare system and the substantial lack of supporting evidence, it is only reasonable to conclude that the State’s innate suspicion towards the poor is the result of, as well as a play on, stereotypes embedded deep within society. By implying that TANF applicants are inherently prone to drug use, the State reinforces the view that the needy are comprised of those who are undeserving; thus, encouraging less government funding for antipoverty programs. It is a move that has been played many times throughout the history of federal welfare reform. There is nothing novel about it.

2. Discrediting the Myths

It is time for politicians to stop painting a dehumanizing and undeserving image of the poor in an effort to block more meaningful discussions about poverty in the U.S. “Demonizing welfare allows the country to ignore the economic and social conditions that produce poverty and inequality—class, race, gender, the economy, and inadequacies of the low-wage labor market.” But the criminalization of the needy will not end until society recognizes that the poor are not a small subclass of lazy, corrupt individuals to be viewed with an eye towards suspicion. Certainly, Luis Lebron—a Navy veteran, full-time college student, single father, and caregiver to his disabled mother—does not fit the dehumanizing view that has been imposed on the needy. But while he does not conform to the welfare queen and drug addict stereotypes, he does fit the reality of many.

Based on the poverty thresholds issued by U.S. Census Bureau in 2012, the research of poverty scholar Mark R. Rank revealed that roughly forty percent of Americans within the age group of twenty-five to sixty will live below the official poverty line—which was “$23,492 for a family of four”—for a period of at least one year. An additional fifty-four percent will live in or near poverty for one year. Moreover, four out of five Americans will resort to welfare aid, experience near-poverty, or encounter unemployment at some point.

Contrary to the popular image of poverty within the inner cities, individuals residing in urban neighborhoods only comprised about ten percent of the population living below the poverty line in 2012. Furthermore, Whites accounted for two-thirds of those living below the poverty line, dispelling the myth that poverty only affects people of color. Remarkably, these figures reveal that the majority of Americans, even those who are hardworking, will experience poverty at some point in life.

422. Gilman, supra note 9 at 264.
423. Kayanan, supra note 41.
424. Rank, supra note 421.
425. Id.
426. Id.
427. Id.
428. Id.
429. Id.
B. The Implications of Mandatory, Suspicionless Drug Testing of TANF Applicants

So while it may be difficult for society to value the constitutional rights of welfare queens and drug addicts who abuse government aid, the facts reveal that suspicionless drug testing of TANF applicants is not infringing on the rights of such stereotypical individuals. Rather, by enacting these laws, the Government is infringing on the rights of everyday law-abiding citizens who seek assistance during a year or two of economic hardship. Unfortunately, the individuals who continue to support Florida Statute section 414.0652 are very resistant to the facts.

Supporters of the law continue to argue for its justification on a basis that would be less accepted if imposed on the more affluent. In response to the low rate of drug use indicated by the data collected during the four months of the statute’s enforcement, Chris Cinquemani stated that “[t]he drug testing law was really meant to make sure that the kids were protected...that our money wasn’t going to addicts.” Along these same lines, State Representative Jimmie T. Smith said, “[w]e had to stop allowing tax dollars for anybody to buy drugs with.”

But ensuring that not a single drug user inadvertently benefits from taxpayers’ dollars does not constitute a substantial special need that warrants abrogating the Fourth Amendment rights of all TANF applicants. As the Eleventh Circuit reasoned in Lebron I, this argument is akin to the symbolic interest advanced by Georgia in Chandler, which the Supreme Court refused to regard as a special need. Being that the State has failed to demonstrate that a concrete danger of drug use among TANF applicants exists, these concerns are merely hypothetical and not real. Thus, all that is left is the image that that the State wishes to put forth—that it is committed to ensuring that taxpayer’s dollars are not used to subsidize drug use. But “if a need of the ‘set a good example’ genre were sufficient to overwhelm a Fourth Amendment objection, then the care [the Supreme Court] took to explain why the needs in Skinner, Von Raab, and Veronia ranked as ‘special’ wasted many words...” In the end, the supporters of Florida’s mandated drug testing of TANF applicants seek to reduce the constitutional rights of the nation’s most vulnerable—the poor—for a symbol’s sake.

C. What Steps Should be Taken?

Although the Eleventh Circuit properly rejected Florida’s unfounded arguments, it failed to recognize and explicitly address the stereotypes and sad

430. See id. (“[W]hile poverty strikes a majority of the population, the average time most people spend in poverty is relatively short.”).
431. Chris Cinquemani is the vice president of the Foundation for Government Accountability, which is a public policy group within Florida that supports section 414.0652. Alvarez, supra note 403.
432. Id.
433. See Lebron v. Sec’y of Fla. Dep’t of Children and Families, (Lebron I), 710 F.3d 1210, 1211 (11th Cir. 2013).
history underlying the State’s assertions. In fact, the majority stated that “[w]e do not foreclose (nor could we) the possibility that government could establish a special need if a voluntary benefits program as a whole would be rendered ineffective without suspicionless searches.”435 But while such may be possible, it is not the reality in the case of Florida’s mandatory, suspicionless drug testing of TANF applicants. By making this statement, and at the same time failing to address the effects that factually inaccurate stereotyping has on the development of our laws, the Eleventh Circuit potentially invites Florida and other States to better craft their arguments for infringing upon the rights of the poor. In declaring Florida Statute section 414.0652 unconstitutional, the Eleventh Circuit based its holding solely on the State’s failure to present evidence of the existence of special needs justifying its departure from the Fourth Amendment’s requirements. But it is not simply a matter of the State’s failure to present evidence of a pervasive drug problem among TANF recipients. As established by the data collected under the Demonstration Project and during the enforcement of section 414.0652, such evidence simply does not exist.

Florida, and other state governments, will not end their attempts to limit the constitutional rights of the poor until the courts forthrightly state that the proffered special needs for enforcing suspicionless drug testing of TANF applicants are based on biased stereotypes as opposed to factual data. Thus, the Eleventh Circuit should have taken its analysis further and condemned the State’s reliance on unfounded and inaccurate typecasting as method of perpetuating bias against the poor. But since the Eleventh Circuit failed to do so, the writer urges the United States Supreme Court, as the final arbiter of the Constitution, to grant certiorari and unapologetically address the truth of the matter. The nation’s poor will not fully appreciate the constitutional protections of the Fourth Amendment until the Court chooses to do so.

VI. CONCLUSION

The Fourth Amendment serves to protect the privacy and dignity of all American citizens by generally precluding the Government from conducting searches absent individualized suspicion. But the enactment of Florida Statute section 414.0652 stands in direct opposition to the Fourth Amendment’s protections. Despite the overwhelming amount of evidence to the contrary, Florida supports its mandated drug testing policy on the assumption of prevalent drug use among TANF applicants. The State’s innate suspicion of this targeted group is not supported by the existence of substantial special needs that warrant exempting the Fourth Amendment’s constitutional guarantees. Instead, it is rooted in this nation’s dark history of demonizing the needy and treating them as a subclass. Such ploys have long been used by politicians in order to confuse the truth about poverty in this country. However, at a time when poverty is on the rise, suspicionless drug testing laws based on inaccurate statistics and misconceptions deter many from seeking help.

The Eleventh Circuit took the correct step in refuting the State’s innuendos

435. Lebron v. Sec’y of Fla. Dep’t of Children and Families (Lebron II), 772 F.3d 1352, 1365 (11th Cir. 2014).
about the poor and calling them what they are—evidentiary lacking arguments. This writer, however, feels that the Eleventh Circuit, and all courts, must go further in bringing an end to governmental attempts to reduce the Fourth Amendment rights of the poor by explicitly addressing the Government’s devotion to antiquated stereotypes. The poor, or welfare beneficiaries, are not stereotypes contrived from racial and gender biases of policy makers. The poor are not helpless, needy White mothers; they are not Black welfare queens; and, they are not drug addicted sub-humans. They are, or could be, any one of us. They are all colors, mothers and fathers. Some are veterans. Some are college students. And some are caregivers for ailing parents. The poor are many different people; but mainly, they are persons, just like Luis Lebron, deserving of constitutional protections from governmental invasions based solely on stereotypes.