# No. 00-2115

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**TANYA L. MARCHWINSKI, TERRI J. KONIECZNY, and WESTSIDE MOTHERS, on behalf of all similarly situated persons,**

**Plaintiffs-Appellees,**

**Cv.C**

**DOUGLAS E. HOWARD, in his official capacity as Director of THE FAMILY INDEPENDENCE AGENCY of Michigan, A Governmental Department of the State of Michigan,**

**Defendant-Appellant.**

**Appeal from the United States District Court**
**for the Eastern District of Michigan**

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## ISSUE PRESENTED FOR REVIEW

Whether the District Court abused its discretion when it held that plaintiffs have a strong likelihood of success on the merits of their claim that Michigan=s requirement of suspicionless drug testing for all applicants and recipients of welfare violates the Fourth Amendment.

## STATEMENT OF THE CASE

The question at the heart of this case is whether Michigan[1] can demonstrate a special need so important that it may override normal Fourth Amendment protections in order to pursue its novel experiment with the suspicionless drug testing of all welfare applicants and recipients. On September 30, 1999, Plaintiffs-Appellees filed suit in the United States District Court for the Eastern District of Michigan. Following discovery by each party, the District Court conducted a full hearing and entered a temporary restraining order against the State on November 10, 1999, and, on September 1, 2000, granted plaintiffs= motion for a preliminary injunction. The Court held Michigan=s program unconstitutional, finding that A[i]n this instance, there is no indication of a concrete danger to the public safety,@ Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1135 (E.D. Mich. 2000), and that recognizing a special need in this case would justify the supsicionless testing of virtually every parent, see id. at 1142.

## STATEMENT OF FACTS

The background of this case is set forth in the District Court=s statement of facts, see Marchwinski, 113 F. Supp. 2d, at 1135-37, in which the state concurs, see Appellant=s Brief, at 11. Accordingly, this statement primarily covers points not conceded by the State.

[1] Defendant-Appellant is referred to hereinafter as “Michigan” or “the State.”

1. Michigan=s Unprecedented Drug Testing Scheme.

The idea of drug testing welfare applicants has its origins in the political rhetoric of symbolism and stereotype, not in any governmental needCspecial or otherwise. Trading policy barbs, Senator Dole and President Clinton took to the field of welfare reform during the presidential campaign of 1996. After Clinton endorsed a Wisconsin welfare-to-work program, Dole tried to regain the political advantage by Apromising to let states test welfare recipients for drug use and deny benefits to those who test positive.@ Carol Jouzaitis, Jousting Heats Up Over Welfare Reform, Chicago Tribune, May 23, 1996, at 28. Clinton retorted that his administration had already endorsed the idea. See id. The candidates= political spar was eventual encoded in a provision of Congress=s reform law of 1996, authorizing, but not mandating, state drug testing programs. See 21 U.S.C. ' 862b.

Michigan=s testing scheme has similarly rhetorical beginnings. Governor Engler proposed the measure, styled AOperation Zero Tolerance,@ in his State of the State address on January 29, 1998. See George Weeks, Even Granny Wouldn=t Escape Engler=s Medicaid Drug Tests, The Detroit News, March 29, 1998, at B4. According to Senate Majority Leader Dick Posthumus, the proposal was designed to prevent state funds from going to drug users. He called the measure Athe second round of welfare reform,@ and said it was designed Ato reduce the dependence on welfare and to save dollars.@ Gary Heinlein, Welfare Reform Splits the Senate, The Detroit News, March 30, 1998, at D1. Neither Governor Engler nor Senator Posthumus made any mention of the goals claimed by the State in this litigation.

On October 1, 1999, Michigan became the first (and remains the only) state to implement universal testing of welfare applicants and recipients, making urinalysis Aa condition for family

independence assistance eligibility.@ M.C.L.A. ' 400.571 (Athe Act@). Until enjoined by the District Court, the Family Independence Agency (AFIA@) operated its drug testing pilot program pursuant to the FIA Program Eligibility Manual (APEM@). JA 323-33 [R 26, Exh. U]. The PEM articulates as rationales for the testing program FIA=s beliefs (1) that Ahaving strong family relationships may be more difficult if there are substance abuse issues in the home@ and (2) that Asubstance abuse is a barrier to employment.@ JA 324a [R 26, Exh. U, at 1]. Again, nowhere does the State=s official explanation of its program articulate any concern with public safety.

Under the challenged program, any applicant for assistance under the Family Independence Program (AFIP@) who fails to sign a consent form and complete a drug test by the close of the following business day will be denied benefits. See Marchwinski, 113 F. Supp. 2d, at 1137; JA 325 [R 26, Exh. U, at 2] (PEM), 445 [R 27, Exh. Y, at 39-40] (Sims Dep.). Drug testing is also mandatory for any adult in the Aapplicant group@: the applicant=s spouse or domestic partner and any adult sons or daughters living in the applicant=s home. JA at 324a [R26, Exh. U, at 1]. Additionally, after six months, twenty percent of recipients up for redetermination will be randomly selected for mandatory testing. JA 325 [2]. The drug test screens for marijuana, cocaine, amphetamines, opiates and phencyclidine, but not for the most commonly abused substance, alcohol. JA 326 [3]. Upon a positive test result, the applicant or recipient must undergo an assessment by the Department of Community Health. See Marchwinski, 113 F. Supp. 2d, at 1136. The department relies upon independent contractors, many of which are private agencies, to determine whether the applicant requires treatment. The State has not outlined a protocol for such private contractors, instead allowing them to set their

own standards. JA 447-48 [R 27, Exh. Y, at 47-48, 51-52] (Sims Dep.); JA 493, 494-95 [R 60, Exh. Z, at 6-8, 12-14] (Degnan Dep.). ACompliance@ too is determined at the discretion of the treatment provider, often a private contractor acting without guidance or standards from the State. JA 480-81 [R 57, & 30]. FIP recipients who submit to drug testing but whom an independent contractor deems to be Anon-compliant@ with assessment or treatment will have their cases closed. See Marchwinski, 113 F. Supp. 2d at 1137; JA 327 [R 26, Exh. U, at 4]. They also risk loss of State Emergency Relief and reduction of Food Stamps, programs normally available for critically needed food, shelter and utilities. JA 329-31 [R 26, Exh. U, at 6-8].

2. Results from the Pilot Program Showing Low Levels of Drug Abuse, Little Success at Drug Treatment, and High Rates of Benefit Denial.

Results from the pilot program prove that there is no pronounced drug problem among welfare applicants in Michigan, that the testing program accomplishes little, and that it harms many families. During the five weeks before the program was enjoined by the District Court, Michigan tested 435 applicants for FIP benefits. Of the 435 tests, only 45 were positiveCa rate of about 10%. Of those 45 positive tests, 33 were for marijuana, 11 for cocaine and 1 for amphetamines. In sum, less than 3% of test results indicated use of Ahard@ drugs. JA 1827-28 [R 85, at 5-6].

The Aassessment@ process by independent contractors did not contribute meaningfully to identifying individual substance abusers. While the vast majority of positive tests reflected solely marijuana use, all assessments following a test resulted in referralsCin effect, treating a positive urine test as a proxy for drug abuse. JA 500 [R 60, Exh. Z, at 34] (Degnan Dep.), 525-26 [R 60, Exh. DD]. Drug test results similarly failed to contribute in any meaningful way to

placing FIP applicants into treatment, instead serving more to block eligibility for vital financial assistance. More than half of the individuals who tested positive (26 of 45) had their FIP application denied for failing to comply with the drug-testing procedures (18 did not complete the assessment process, and 8 did not enter treatment following their assessment). JA 525-26 [R 60, Exh. DD]. Overall, Michigan=s drug testing program resulted in drug treatment for Ahard@ drugs in less than one percent of cases (4 out of 435). Id. Thus, although a large percentage of those who tested positive suffered denial of benefits, only a handful of positive test results detected the use of Ahard@ drugs. Furthermore, the number of people who actually entered treatment as a result of suspicionless drug testingCfourCpales in comparison to the number of those who regularly enter treatment voluntarily or after individualized assessmentCbetween 9,000 and 14,000 per year. JA 1829 [R 85, at 7].

3. Poor Parents Do Not Engage in Any Particularly Dangerous Activity.

FIP participants do not, by virtue of their receipt of governmental benefits, pose any risk to public safety, markedly unlike the train drivers, armed customs agents, and nuclear power plant operators for whom drug testing has been upheld. The District Court found as a factual matter that A[i]n this instance, there is no indication of a concrete danger to public safety.@ Marchwinski, 113 F. Supp. 2d, at 1135. At the TRO hearing, the court explained that Athe threat posed by drug use among individual FIA recipients is no greater or less than the threat posed by drug use among the general public.@ JA 1868 [R 86, at 36]. Any safety risk created by drug use among FIP recipients does not occur because of receipt of assistance, but rather because recipients undertake the same activities (parenting, driving, etc.) as countless other Michigan residents who do not receive public assistance. The State offers no evidence that people who are poor are any less caring and devoted parents than people who are not poor. The State admits that FIP applicants do not Aperform a safety sensitive function, carry firearms, or engage in any other activities that pose a particularized risk to public safety or law enforcement.@ JA 340 [R 26, Exh. V, at 7].

4. The Absence of a Drug Problem Among FIP Recipients.

Unlike drug testing programs fashioned to respond to a proven problem, the Michigan program is founded upon no credible evidence that abuse of illegal drugs is greater among FIP recipients and applicants than among other Michigan residents. Specifically, the Michigan officials charged with implementing FIA=s drug testing, assessment, and treatment programs all reject the emotionally-charged stereotype of the drug-addicted welfare mother, finding no evidence that Adrug abuse is greater among Welfare benefit recipients than generally in the population.@ JA 452 [R 27, Exh. Y, at 67] (Sims Dep.), see also JA 501 [R 60, Exh. Z, at 39-40] (Degnan Dep.), 522 [R 60, Exh. CC, at 35] (Hollis Dep.). Considering both direct observation and scientific studies, the administrator of FIA=s drug-testing program, Ms. Sims, concludes that A[e]verything I=ve seen says that it should reflect about the same level as in the general population.@ JA 67 [R 27, Exh. Y, at 67] (Sims Dep.). A recent University of Michigan study bears out the officials= observations; it concludes that FIP participants Ahave unusually high levels of some barriers to work, such as physical and mental health problems, domestic violence, and lack of transportation, but relatively low levels of other barriers, such as drug or alcohol dependence.@ JA 265-66 [R 26, Exh. R, at 3-4] (Sandra Danzinger et al., Barriers to the Employment of Welfare Recipients, University of Michigan, Poverty Research and Training Center (July 1999)).

National welfare statistics confirm that the ten percent rate of drug use detected among Michigan welfare applicants during the trial period is typical for the general adult populationCand may actually be lower than the rate of drug use for younger adults who more accurately reflect the demographics of FIP participants. See JA 315-16 [R 26, Exh. S, at 70-71] (Office of Applied Studies, Dept. of Health and Human Services, Summary of Findings from the

1998 National Household Survey on Drug Abuse (Aug. 1999)), JA 452, 459 [R 27, Exh. Y, at 67, 94] (Sims Dep.); JA 248 [R 26, Exh. P, at 1450] (Bridget F. Grant & Deborah A. Dawson, Alcohol and Drug Use, Abuse, and Dependence Among Welfare Recipients, 86 Am. J. Pub. Health 1450 (Oct. 1996)); JA 988 [R 68, Exh. 16, at 23] (citing 1992 National Longitudinal Alcohol Epidemiological Study); JA 733 [R 66, Exh. 7, at 20] (Rukmalie Jayakody et al., Welfare Reform, Substance Abuse, and Mental Health (1999)). The brief of amici curiae details numerous additional scientific studies finding that drug abuse among welfare recipients is no greater than among the general population. See Lindesmith Amicus Brief, at 7-10.

Even the studies that the State has unearthed retrospectively for this litigation refer only to the nation as a whole, not specifically to Michigan. This flaw is serious, because levels of abuse vary significantly from place to place, as one of the State=s own reports notes. JA 653 [R 66, Exh. 4, at 5]. Moreover, many of Michigan=s own studies were careful to warn that both welfare participation and elevated use levels are also correlated with youth and low income. In other words, welfare participants are about as likely to abuse drugs as non-participants, holding income and age constant. JA 990 [R 68, Exh. 16, at 26-27], 777-78 [R 67, Exh. 11, at 2-3], 653-54 [R 66, Exh. 4, at 5-6], 940 [R 67, Exh. 14, at 1], 1029 [R 68, Exh. 17, at 13], 1090 [R 68, Exh. 20, at viii]. Finally, the studies cited by Michigan caution that Aonly a minority of welfare recipients . . . use[] prohibited drugs. . . . we must be careful not to characterize all or even most AFDC recipients as drug abusers.@ JA 988 [R 68, Exh. 16, at 23], 778 [R 67, Exh. 11, at 3] (A[M]ore parents who have illicit drugs in the past month have incomes above 300% of the poverty line than have incomes below poverty.@). In sum, there is simply no pronounced drug problem among FIP applicants and participants.

5. Individualized Assessment is Not Only Practicable, But Preferable to Universal Urine Testing.

Michigan=s dragnet search, which treats every FIA applicant and recipient as a covert drug abuser, offers no advantage over non-invasive methods of identifying substance abuse. Michigan enacted its suspicionless drug testing program as its first and only effort to address drug abuse, without exploring the proven methods of individualized assessment employed successfully by every other state. Officials in charge of the drug-testing program testified that the FIA gave established drug screening instruments no consideration whatsoever, and was not asked to do so. See JA 454 [R 27, Exh. Y, at 74-75] (Sims Dep.); JA 519 [R 60, Exh. CC, at 23] (Hollis Dep.).

In fact, prior to legislation imposing mandatory drug testing, FIA had taken virtually no interest in identifying substance abuse or steering its clients to treatment. Specifically, the application process has never sought to elicit any information related to substance abuse, and social workers receive no instruction on detection of abuse. JA 460 [R 27, Exh. Y, at 100-01] (Sims Dep.).

Michigan has also neglected the opportunity to identify substance abuse problems during home visits or other interactions with case workers, despite Mrs. Sims=s recommendation that substance abuse training be provided more widely as something that Aour new [case] workers need before they can do a complete job of either identification of barriers or barrier removal.@ Id. at 443 [31-32]. When asked, A[w]hat kind of training are [case workers] given in detecting whether a person is likely or at least at risk of being a substance abuser?@ id. at 446 [44], she answered, AI=m not aware of any,@ id. She explained that the issue has received far less

priority than other areas like child care or transportation, in which caseworkers have, in fact, received training. See id.

Every state but Michigan has devised effective strategies, other than suspicionless drug testing, for addressing substance abuse as a barrier to employment. JA 80 [R 26, Exh. C, at 2]. According to The Lindesmith Center, a project of the Open Society Institute, which has conducted the most recent survey of state policies, the 49 other states share common reasons for rejecting suspicionless drug testing: at least 21 states concluded that such a program Amay be unlawful@; 17 states cited cost concerns; 11 states have not considered drug testing at all; and 11 gave a variety of practical/operational reasons. JA 347 [R 27, Exh. X, at 2] (The Lindesmith Center, Drug Testing Welfare Applicants: A Nationwide Survey of Policies, Practices, and Rationales (Nov. 1999)); see generally id. at 353-434 [R 27, Exh. X, App. B] (Appendix B to the Lindesmith report, containing reports from states). For example:

- Alabama concluded that Aother interventions focused on work requirements would bring the caseload down sharply . . . we would have been spending money on testing unnecessarily.@ JA 354.

- Arkansas uses a screening questionnaire developed by public health authorities that helps to identify those persons who might be in need of substance abuse treatment. JA 355.

- Iowa cited the fact that alcohol contributes to a greater percentage of substance abuse than non-legal substances; it also mentioned cost-effectiveness, the availability of appropriate treatment, and problems with testing methodology. JA 388.

- Oregon decided against universal drug testing for four reasons: 1) offices

implementing mandatory testing found that it angered recipients, making it difficult to encourage treatment upon a positive result; 2) drug testing is expensive and has not proven cost-effective; 3) testing does not identify alcohol abuse; and 4) staff found SASSI (Substance Abuse Subtle Screening Inventory), an individual assessment tool, to be an effective, though not perfect, means of identifying those in need of treatment. See JA 632 [R 66, Exh. 3, at 24], 1171 [R 68, Exh. 21, at vi].

- Wisconsin noted that A[t]here are alternative ways to screen for alcohol and drug abuse problems.@ JA 432 [R 27, Exh. X, App. B].

Amici detail the success of multi-tiered, individualized methods of detection and treatment in other states. See Lindesmith Amicus Brief, at 22-24, 31-33. In sum, at least 26 states seek to identify substance abuse problems among welfare recipients using a variety of non-invasive, individualized screening tools: Awritten questionnaires, questionnaires administered verbally, and observational methods.@ JA 80 [R 26, Exh. C, at & 8]; see also JA 479 [R 57, at & 21], 796 [R 67, Exh. 12, at 9]. These states= experiences conform with recent scientific opinion that Aapproaches might be more carefully targeted to specific cases in which authorities have reasonable suspicion of child mistreatment or other adverse behaviors.@ JA 733 [R 66, Exh. 7, at 20]. Michigan, in contrast, has made no effort to develop any screening tool other than universal urinalysis. JA 496, 506 [R 60, Exh. Z, at 17, 57-58].

The studies that Michigan cites to retrospectively justify its suspicionless test

only confirm the practicalityCindeed, the preferabilityCof individualized screening techniques. An Oklahoma study found that the SASSI questionnaire Ahas been validated as identifying 94 of every 100 substance abusers and its strength is that it is not easy to fool.@ JA 947a [R 67, Exh. 15, at 5]. And the House Subcommittee on Human Resources heard expert testimony that A[m]any short and simple screening toolsCboth written and verbalCare available for identifying individuals with drug and alcohol problems. . . . [s]creening and assessment . . . is far more effective at a fraction of the cost.@ JA 1024 [R 68, Exh. 16, at 95]; see also JA 1090 [R 68, Exh. 20, at viii]; 1026 [R 68, Exh. 16, at 98]. And finally, a national report cited by Michigan concludes that A[s]creening for the use of illicit drugs through urine testing . . . is an inadequate measure to fully assess the use of AOD [alcohol and other drugs] . . . . Urine drug screening does not measure an individual=s level of AOD-related impairment and is often prohibitive to implement on a wide-scale basis due to the cost of the procedures.@ JA 1029 [R 68, Exh. 17, at 13]. Non-invasive screening techniques, unlike testing, also detect alcohol abuse. In sum, the data show not only that individual screening techniques are practicable, as experience from other states proves, but that they are preferable for detection and treatment.

F. The Ineffectiveness of Michigan=s Drug Testing Program.

Michigan=s drug testing scheme is literally incapable of pursuing even the goals that the State has belatedly articulated. The test is ineffective in several respects: (1) it is entirely avoidable due to its timing; (2) it is capable of detecting only use, not abuse; and (3) it is incapable of testing for the substances most likely to have an impact upon the State=s articulated concerns.

First, the drug test as administered by the State will necessarily fail in its central goal of detecting drug abuse, because it will fail to register drug use among applicants or recipients who make an effort to avoid detection. The timing of a drug test is entirely within the control of applicants. FIA=s administrator admits that A[v]ia the test you would not@ detect drug use or abuse for applicants who strategically schedule their test. JA 439 [R 27, Exh. Y, at 14] (Sims Dep.). The program administrator also concedes that recipients can avoid detection because redetermination interviews (which trigger drug testing) occur in predictable intervals and can be scheduled at will. Id. at 446 [42].

Second, the testing is capable of detecting only use, not the State=s articulated concern with abuse. Amici describe this decisive failure in detail. See Lindesmith Amicus Brief, at 19-21. The test is powerless, in fact, to yield any information concerning the functional impact of use upon its putative goals. A

positive urine test Adoesn=t tell anyone at FIA what kind of relationship the person who tested positive has with his or her children,@ JA 438 [R 27, Exh. Y, at 11] (Sims Dep.), or the effect of the drug on home or work performance, id. at 438, 460 [11-13, 98], 484 [R 57, & 40]. A recent study confirms that A[w]idespread drug testing of welfare recipients will detect use among many women who have no accompanying problem with impaired social performance or employment.@ JA 733 [R 66, Exh. 7, at 20]; see also JA 777 [R 67, Exh. 11, at 2]. Drug use that does not impact upon welfare concerns can be addressed through usual methods of law enforcement.

And finally, the drug test is not designed to detect the substances that most affect the State=s purported concerns. On the one hand, it does not screen for the presence of alcohol, the most abused, most debilitating substance of all. JA 250 [R 26, Exh. P, at 1452], 315-16 [R 26, Exh. S, tables 8 &9], 353-434 [R 27, Exh. X, App. B]. On the other hand, of the substances theoretically detectable by the test, only marijuana is used to any appreciable degree. JA 315-16 [R 26, Exh. S, tables 8 &9]. And only marijuana is difficult to hide through timing of a urine test. A person who refrains from using cocaine or heroin for a day or two will pass a drug test; but marijuana, because its metabolites are absorbed into body fat, will remain detectable for a longer period of time. See R. Hawks & C. Chiang, Examples of

Specific Drug Assays, in Urine Testing for Drugs of Abuse, NIDA Research Monograph Series 73 (1987).[2] Predictably, Michigan=s trial period detected a higher rate of marijuana use. In sum, the test omits the most frequently debilitating substanceCalcoholCand is capable of detecting only the drug least likely to interfere with employment or family relationshipsCmarijuana.

7. Welfare Recipients= Legitimate Privacy Interests.

[2] Drugs metabolize and are filtered out of the urine over a period of hours or days, depending on the amount and frequency of consumption. The average detection range for the drugs tested by Michigan is:

| | |
|---|---|
| Marijuana | 1-3 days for casual use; up to one month for chronic use |
| Cocaine | 24-48 hours |
| Amphetamines | 24-48 hours |
| Opiates | 24-48 hours |
| Phencyclidine | 2-7 days for casual use; up to a month for chronic use |

See Hawks & Chiang, supra.

Universal urine testing is a serious invasion of privacy, both because of the indignity of having to submit a urine sample and for the intimate medical information it can reveal, as many courts have noted. See infra, at 50. Welfare applicants and recipients in Michigan have done nothing to lower or waive their legitimate expectations of freedom from invasive testing. They are not wards of the state, prisoners, or students subject to in loco parentis authority (as the State admits, JA 339 [R 26, Exh. V, at 6]). They do not, by virtue of receiving or applying for welfare, submit to physical examinations or shower and change clothes in locker rooms, as did the student athletes of whom drug testing has been permitted. Nor are they participants in an industry that is regulated pervasively to ensure safety. The State admits that AFIP recipients are not required to meet health requirements as a condition of eligibility.@ JA 339 [R 26, Exh. V, at 6]. The FIP application forms reveal only informationCemployment status and incomeCthat is commonly given to government agencies like the IRS by most residents of this country and that relates directly to eligibility for assistance. And home visits, as described by the program director, are likewise confined to determining program eligibility and are strictly limited to protect the privacy of FIP recipients. Case workers should not Abe wandering around the home@; they cannot conduct a search of the home or the FIP recipient; and they cannot demand a urine sample. JA 452 [R 27, Exh. Y, at 69]. Application questionnaires and limited home visits cannot compare to urine testing conducted not in order to determine eligibility for assistance, but putatively to help FIP recipients along the path to self-sufficiency.

The severity of the privacy intrusion caused by Michigan=s policy is seriously aggravated by the State=s complete disregard for, and affirmative violation of, confidentiality guarantees. The program director admits that a positive drug test result can be distributed to unspecified

employees of each of the following entities: the managerial staff and case workers within FIA; the private laboratory performing drug test; the private company or municipal health department hired to assess whether treatment is needed; the Administrative Law Judge and other court staff if someone appeals the drug test result or the assessment; the private drug treatment agency; and employees of Child Protective Services, if they request the test results. JA 449, 463 [R 27, Exh. Y, at 55-57, 112-13].

The involvement of Child Protective Services represents a particularly harmful and lasting invasion of privacy. Whenever observation during a home visit or an unsubstantiated Areferral by somebody in the general public@ results in a child neglect investigation, Child Protective Services has full access to drug test results for the parents. Id. at 463 [112-13]. A positive test result remains forever on file, ready to be used at any future time, without warning, to separate parents from their children. The most innocuous of tips (e.g., an anonymous, unsubstantiated phone call) could spark a devastating investigation into the fitness of a parent, fueled by a positive drug test result. Far from protecting confidentiality, Michigan=s welfare manual both encourages Ashar[ing] information@ with children=s services, JA 327 [R 26, Exh. U, at 4] and even requires case workers to notify child welfare authorities when a case is terminated, id. at 332 [9]. Whereas some privacy invasions occasion only embarrassment, welfare recipients face far more dire consequences: the loss of a child and criminal prosecution.

## SUMMARY OF ARGUMENT

The issue in this case is not whether Michigan can, like other states, screen welfare applicants and recipients for drug abuse. Nor is it whether Michigan may mandate treatment. The question here, instead, is whether Michigan may pursue its goals with a unique testing

program that eschews the Fourth Amendment=s protection against broad suspicionless searches.

The danger of the presumptively-suspect suspicionless search intersects here in a particularly potent way with the dangers of stereotype and symbolism. There is little political cost and much gain for legislators who proclaim a policy of AZero Tolerance@ against the stereotypical drug-using welfare parent. Principled courts are most needed in precisely such situations to scrutinize the policy ambitions of zealous government. As Justice Brandeis once remarked, A[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . [t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal.@ Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

Michigan=s motivation for its testing program, founded on symbolism and stereotype, falls far short of the Aspecial need@ that courts have required to override the Fourth Amendment=s fundamental rule of individualized suspicion. The State has offered no evidence that program participants are engaged in any particularly dangerous activity, merely by virtue of applying for or receiving benefits. Nor has it shown that FIP recipients are more likely to use drugs than other parents in Michigan. The State=s contemporaneous concerns plainly fail under established Fourth Amendment jurisprudence.

Eager to articulate some rationale of public safety, the State invokes for the first time in this litigation a concern for child Aabuse and neglect.@ Michigan=s retrospective rationalization fails for myriad reasons. First, the law disfavors post-hoc justifications that conflict with clear contemporaneous evidence to the contrary. Second, a charge of Aabuse and neglect@ is a serious matter; courts insist upon an individualized showing of unfitness before they will allow the State to

override a parent=s constitutional rights. Finally and most seriously, there is absolutely no nexus, let alone any close connection, between the group targeted for testing and the State=s purported interests. Rather, the concerns that Michigan invokesCfamily unity and parental employmentCreflect at most beneficent governmental aspirations for all parents. To permit Michigan=s program here would be to authorize suspicionless drug testing of every parent of a child that receives a governmental benefitCthat is, of virtually all parents. If one principle is clear, it is that the Fourth Amendment will not permit such a sweeping suspicionless search.

There are compelling reasons to suspect that Michigan=s testing scheme is motivated more by a political desire to publically castigate the stereotypical drug-abusing welfare mother than by the concerns it has belatedly articulated here. Prior to instituting testing, the State studiously ignored established techniques of individualized assessment employed successfully by other states. These traditional, non-invasive, suspicion-based screening systems are not only practicable, but preferable for detecting and treating drug abuse. In Chandler, the Supreme Court overturned Georgia=s policy of testing candidates for state office precisely because the state=s interest in demonstrating its commitment to the war on drugs was solely symbolic, not Aspecial.@ There, as here, there was no pronounced drug problem among the targeted group, and there, too, those subject to testing engaged in no particularly risky activity. And the drug test in Chandler, like the one here, was entirely ineffective because subjects could avoid detection by strategically scheduling their testCrendering the test incapable of effecting deterrence. Michigan=s peremptory embrace of suspicionless testing leads to the inescapable conclusion that Michigan, like Georgia, is far more interested in symbolism than in any goal Aspecial@ enough to justify forswearing the Fourth Amendment.

Because the special need test is a threshold matter, the Court=s inquiry should end here with

a finding of unconstitutionality, regardless of the strength of any privacy interest. But even if this Court were somehow to find a special need, the balance between private and public interests tips decidedly away from the government=s social experiment and toward the well-recognized privacy interests of citizens subject to urine testing. Time and again, courts have recognized the severe intrusion on privacy effected by urine testing. That intrusion is grievously exacerbated here by the scant care Michigan has taken to ensure confidentiality. Most troubling, the State actively encourages FIA to share positive test results with Child Protective Services. Program participants, by sole reason of their financial need, are subject to prosecution or, worse, to loss of a child. A more severe form of government intrusion can hardly be imagined. No parent should be put in such a position without the individualized showing required by the Fourth Amendment.

## ARGUMENT

1. STANDARD OF REVIEW

This Court will overturn the grant of a preliminary injunction only if it finds that the district court abused its discretion. See Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000). While Apure legal conclusions@ are reviewed de novo, findings of fact are not gainsaid unless clearly erroneous. Id. at 736-37. In sum, the Court affords Agreat deference to the district court=s decision.@ Gonzales v. National Bd. of Med. Examiners, 225 F.3d 620, 625 (6th Cir. 2000).

II. MICHIGAN=S DRUG TESTING OF FIP APPLICANTS AND RECIPIENTS VIOLATES THE FOURTH AMENDMENT.

Michigan=s novel experiment with welfare drug testing constitutes just the sort of sweeping governmental intrusion into private affairs prohibited by the Constitution. The Fourth

Amendment commands the state to respect Athe right of people to be secure in their persons . . . against unreasonable searches and seizures.@ U.S. Const., Amend. IV. The State of Michigan does not contestCfor it is incontestableCthat urine testing constitutes a search. See Skinner v. Railway Labor Execs.= Assoc., 489 U.S. 602, 617 (1989). And a search Ais ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.@ City of Indianapolis v. Edmond, 121 S. Ct. 447, 451 (2000).[3] The Supreme Court has recognized only Alimited circumstances@ under which the Fourth Amendment=s usual requirement of suspicion will be overlooked and generalized searches permitted. Id. Because Michigan=s welfare drug testing scheme eschews individualized determinations, it is exactly the type of Asuspicionless testing@ that this Court has cautioned is Apresumably inherently suspect.@ Knox County Educ. Assoc. v. Knox County Bd. of Educ., 158 F.3d 361, 373 (6th Cir. 1998). The District Court properly held that Michigan cannot overcome this presumption.

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[3] The Founders were reacting in part to exactly the type of generalized search for intoxicating substances at issue in this case:

> Colonial citizens also protested the Excise Act of 1754, which allowed tax collectors to interrogate citizens regarding annual alcohol consumption. . . . the public outcry against the issuance of these general warrants eventually led to legislation requiring specific warrants and the Warrant Clause of the Fourth Amendment.

O'Neill v. Louisiana, 61 F. Supp. 2d 485, 492 (E.D. La. 1998) (citations omitted).

1. Michigan Has Not Demonstrated A Special Need to Single Out Impecunious Parents for Drug Testing.

Because Michigan=s impecunious parents engage in no particularly risky activity and have no pronounced drug problem, the State has no conceivable special need for universal testing. The State=s belated invocation of child abuse and neglect cannot justify overriding parental autonomy without an individualized showing. Furthermore, the child safety rationale would apply just as well to the parent of any child who receives any governmental aid whatsoeverCbe it a tax deduction for dependent children, an educational loan, etc.Cthat is, to virtually every parent. In other words, there is no nexus between the targeted group and any activity peculiar to that group. The Fourth Amendment simply cannot countenance a rule that would sweep away the established privacy concerns of so many citizens. Finally, the record demonstrates that Michigan=s real basis for suspicionless testing is a political strategy to take a symbolic stand against the stereotypical drug-using welfare parent: the test is ineffective at pursuing the State=s belatedly articulated concerns with employability and child safety, and Michigan ignored the established, effective methods of individualized detection employed by other states. Mere symbolism cannot justify eschewing the Fourth Amendment.

On the contrary, the Supreme Court will overlook the requirement of individualized suspicion only in the rare case where the state can demonstrate a Aspecial need.@ Chandler v. Miller, 520 U.S. 305, 313 (1997). The government exigency must be exceedingly strong:

> Our precedents establish that the proffered special need for drug testing must be substantialCimportant enough to override the individual=s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment=s normal requirement of

individualized suspicion.

Id. at 318 (emphasis added). Drug use alone is not enough. In addition, the government must show (1) that drug use among the targeted group would pose serious danger to the public, and (2) that a pronounced drug problem exists among the group targeted for testing. See Chandler, 520 U.S. at 314, 321-22; Knox County, 158 F.3d at 373; 19 Solid Waste Dep=t Mechanics v. City of Albuquerque, 156 F.3d 1068, 1073 (10th Cir. 1998); 68 Am. Jur. 2d Searches & Seizures ' 97.

Both of these requirements are designed to ensure that blanket suspicionless searches are closely tailored to a specific population in certain crisis. The Supreme Court accordingly requires a nexus or close connection between the group to be testedCits characteristics and activitiesCand the danger feared by the government. The holding in Skinner, for instance, rested on Athe documented link between drug- and alcohol-impaired employees and the incidence of train accidents.@ Chandler, 520 U.S. at 314. The Chandler Court distinguished Skinner on this basis and struck down drug testing of candidates because of the lack of any proven connection between office-holding and public safety. See id. at 321-22. And most recently, the Court struck down a suspicionless search of highway drivers because of the lack of any Aobvious connection@ between highway safety and possession, as opposed to use, of drugs. Edmond, 127 S.Ct. at 453.

This Court, too, has required Aa clear, direct nexus between the nature of the [targeted group=s activity] and the nature of the feared violation.@ Knox County, 158 F.3d at 378 (internal quotation marks omitted); see also Joy v. Penn-Harris-Madison School Corp., 212 F.3d 1052, 1064 (7th Cir. 2000) (AAccording to the Supreme Court=s methodology in Vernonia [School Dist. 47J v. Acton, 515 U.S. 646 (1995)] we should [ask] . . . whether there is any

correlation between the defined population and the abuse, and whether there is any correlation between the abuse and the government=s interest . . . .@); United Teachers of New Orleans v. Orleans Parish School Bd., 142 F.3d 853, 856 (5th Cir. 1998) (striking down testing scheme in part because of an Ainsufficient nexus@); Recent Cases, 112 Harv. L. Rev. 713, 716 (1999).

The nexus requirement makes sense precisely because of the danger of blanket searches lurking in this case. The lack of a nexus between the group to be tested and the feared danger raises the specter of limitless suspicionless searches because the same proffered rationale would apply to a much larger group. In Edmond the Court rejected the highway stops at issue because allowing the state to stop highway drivers in order to enforce the general law against drug possession, a crime seemingly unrelated to driving, would establish a rule that would allow the state to broaden its search impermissibly:

> If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. . . the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.

Edmond, 121 S.Ct. at 454. The Fourth Amendment will permit such searches A[o]nly with respect to a smaller class.@ Id. at 455. The Supreme Court has made it absolutely clear that it will Anot sanction[] blanket testing.@ Willis v. Anderson Community School Corp., 158 F.3d 415, 423 (7th Cir. 1998); see also Vernonia, 515 U.S. at 669 (A[W]hat the Framers of the Fourth Amendment most strongly opposed . . . were general searches.@) (O=Connor, J., dissenting).

1. Michigan Has Demonstrated No Threat to Public Safety.

Because Michigan demonstrates no threat to public safety, it contravenes established special need jurisprudence. In Skinner, the Court emphasized that railroad employees Adischarge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.@ 489 U.S. at 628; see also id. at 634 (citing Asurpassing safety interests@ in avoiding train accidents). Similarly, in Von Raab the Court stressed the Ahigh-risk@ character of customs agents who engage in direct drug interdiction, carry firearms, and are exposed to large quantities of illegal narcotics and to persons engaged in crime. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989). In Vernonia, the Court upheld a testing regime aimed specifically at Adrug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.@ 515 U.S. at 662 (emphasis added). And the Court=s most recent drug testing case struck down the testing of candidates for state office, explaining that A[n]otably lacking in [the state=s] presentation is any indication of a concrete danger demanding departure from the Fourth Amendment=s main rule.@ Chandler, 520 U.S. at 318-19 (emphasis added). The eight-justice majority concluded:

> [W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as Areasonable@ . . . . But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

Id. at 323 (emphasis added).[4] Every testing case in this Court has likewise turned on considerations of public safety. See Knox County, 158 F.3d at 378 (public school teachers); Tanks v. Greater Cleveland Reg=l Transit Auth., 930 F.2d 475, 479 (6th Cir. 1991) (bus drivers); Penny v. Kennedy, 915 F.2d 1065, 1067 (6th Cir. 1990) (en banc) (police and firefighters).[5]

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[4] Michigan invokes Vernonia to argue that a threat to public safety is not required for a showing of special need. It characterizes the Supreme Court's explicit emphasis on the safety risks posed to student athletes as "more in the nature of an aside." Appellant's Brief at 23-24. But the Supreme Court itself has rejected this interpretation. See Chandler, 520 U.S. at 317 ("We emphasized [in Vernonia] . . . the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field.").

[5] Every other circuit has considered public safety as the dominant factor when applying the special needs test to drug testing cases. See, e.g., 19 Solid Waste, 156 F.3d at 1074. When a drug test applies to individuals whose activities do not affect safety, the drug testing program has never been upheld under the special needs test. See, e.g., Bolden v. Southeast Pennsylvania Transp. Auth., 953 F.2d 807, 823 (3rd Cir. 1991) (maintenance custodian); Plane v. United States, 750

F. Supp. 1358, 1369 (W.D. Mich. 1990) (environmental specialist); Burka v. New York City Transit Auth., 739 F. Supp. 814, 822 (S.D.N.Y. 1990) (turnstile operator).

Here, Michigan articulated no contemporaneous concern for public safety. In its PEM manual, the State said only that A[s]uccessful participation in the program will improve the client=s ability to obtain and retain employment, as well as strengthen family relationships.@ JA 324a [R 26, Exh. U, at 2] (emphasis added). Neither of these interests concerns public safety. And the fact that Michigan seeks to test all adult members of a household receiving aid further reveals the State=s inattention to genuine safety concerns. For even if it could show that the mere receipt of government assistance generates safety concerns, it could articulate absolutely no reason to suspect that sharing a residence with a welfare recipient is somehow dangerous. As the District Court held, Athe State has failed to show, in justification of the Act, a special need grounded in public safety which would warrant the suspicionless drug testing of FIP recipients,@ and therefore Athis Court=s Fourth Amendment inquiry is complete.@ Marchwinski, 113 F. Supp. 2d at 1143.

2. Michigan=s Post-Hoc Interest in the Safety of Children Intrudes on Parental Rights Without Warrant and Would Justify Drug Testing Virtually All Parents.

In an effort to articulate some concern for public safety, the state fashions a post-hoc interest in preventing child abuse and neglect. See Appellants Brief at 44-45. But even this belated concern fails for three reasons. First, courts disfavor retrospective rationalizations that fly in the face of clear contemporaneous evidence. Second, the State cannot set aside constitutional rights in the name of preventing child abuse and neglect until it makes an individualized showing of wrongdoing. Only then can the State=s interest supersede parental rights. A parent=s right to make decisions within the private sphere of family is fundamental, and the State is simply wrong to claim that it can usurp this right simply because the parent applies for public assistance. Third and most seriously, the State has demonstrated no nexus between child safety and welfare parents, as opposed to parents generally. Therefore, to approve its testing scheme would be to condone a blanket suspicionless search of virtually every parent.

First, Michigan=s rationalization comes too late. In the PEM, Michigan articulated a concern only with Afamily unity@; in this litigation, the State has claimed for the first time a concern with the much more serious matter of child Aabuse and neglect.@ Appellant=s Brief, at 9, 43, 44-45. But Apost-hoc rationalizations have no place in our Fourth Amendment jurisprudence, which demands that we >prevent hindsight from coloring the evaluation of the reasonableness of a search.=@ United States v. Montoya de Hernandez, 473 U.S. 531, 559 (1985) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976)) (Brennan, J., dissenting); see also Sims v. University of Cincinnati, 219 F.3d 559, 555 n.2 (6th Cir. 2000) (refusing to consider a Apost-hoc justification advanced by the [government] in litigation@). The District Court therefore correctly found that public assistance Ais not aimed at addressing child abuse and neglect,@ despite the State=s retrospective demur. Marchwinski, 113 F. Supp.

2d at 1141. The plain texts of the federal and state statutes lack any mention of public safety. See id. The District Court concluded that A[s]ince TANF generally, and Michigan=s FIP specifically, are not designed to ameliorate child abuse or neglect, the State cannot legitimately advance such abuse or neglect as supporting a special need sufficient to single out FIP recipients for suspicionless drug testing.@ Id. at 1141-42.

Second, the State may not set aside constitutional rights in the name of preventing child abuse without an individualized showing of parental neglect. Latching onto the State=s extraordinary power to set aside parents= constitutional rights after a showing of child abuse, the State ignores all precedent to leap to the conclusion that an interest in anticipating child abuse also trumps parental rights. A[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.@ Troxel v. Granville, 120 S. Ct. 2054, 2060 (2000). And the Atraditional presumption that a fit parent will act in the best interest of his or her child@ will only be overturned upon a convincing individualized showing. Id. at 2062. Against this principle, the State claims that, even in the absence of any evidence of neglect, it somehow can assume a parental role, Aplay[ing] a special and unique parens patriae role with respect to FIP clients.@ Appellant=s Brief, at 31. In support of this novel proposition, the State cites a single case, in which a state court uses the phrase Aparens patriae@ in passing, in dicta, in a footnote, and without legal support. See University of Colo. v. Derdeyn, 863 P.2d 929, 950 n.36 (Colo. 1993) (en banc). Moreover, the passage occurs in a case invalidating a drug testing program. No other court has so characterized a state=s relationship with a child merely because the state provides financial assistance. In fact, a state will act as parens patriae to a child only in a dependency proceeding, where there has been a

particularized showing of abuse or neglect. See Santosky v. Kramer, 455 U.S. 745, 767 n.17 (1982) (AAny parens patriae interest in terminating the natural parents= rights arises only at the dispositional phase, after the parents have been found unfit.@). Michigan cannot assume a parens patriae role without some individualized showing strong enough to overcome the traditional presumption, grounded in a fundamental right, that a parent is acting in the best interests of her child.

Finally and most seriously, Michigan=s purported concern for children would allow the state to test virtually all parents. This follows from the lack of any close connection between the group to be testedCparents receiving State assistanceCand the harm feared by the StateCneglectful parenting. The only possible correlation is between parenting generally and child safety. Were this not the case, the State would be backing the incredible proposition that only poor parents, as opposed to more Adeserving@ recipients of government benefits, can expect regular invasions of privacy. Because the state has declined to go that far, its articulated concern for children would result in a rule that would be generally applicable to all parents. The District Court held, in a finding of fact not clearly erroneous, that A[i]n this instance, there is no indication of a concrete danger to public safety.@ Marchwinski, 113 F. Supp. 2d, at 1135. At the TRO hearing, the court explained that Athe threat posed by drug use among individual FIA recipients is no greater or less than the threat posed by drug use among the general public.@ JA 1868 [R 86, at 36]. Therefore, allowing the testing proposed here would subject any parent to suspicionless drug testing as a condition of receiving any government aid on behalf of her child. See Marchwinski, 113 F. Supp. 2d at 1142 (noting that allowing the state to drug test here would

allow Atesting the parents of all children who receive . . . [any] benefit from the State.@). To take only the most obvious examples, any parent who claims a deduction on her income tax return for a dependant would be vulnerable to a suspicionless drug test, as would any parent who receives a government educational loan to help pay for her child=s schooling.[6]

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[6] A similar flaw plagues the novel "conditioned benefit" theory proposed by the amicus brief supporting the State. See WLF Amicus Brief, at 7-12. Amicus would allow the government to require the forfeit of constitutional rights as a condition for the receipt of any governmental benefit, so long as the rights bear some minimal relationship to the benefit. Thus, acceptance of, say, a tax deduction for child care might vacate the parental right to decide how best to raise a child.

Amicus's argument suffers from multiple other dispositive problems. First, it is not raised by the State on appeal, was not argued by the parties below, was not treated in the District Court opinion, and is therefore not properly before this Court. Second, no court has ever held that the so-called "conditioned benefits doctrine" applies to the Fourth Amendment. In Rust v. Sullivan, 500 U.S. 173 (1991), a First Amendment case, the Court held simply that when the government speaks, it may choose what to say. Other language cited by amicus either is pure dicta, see Wyman v. James, 400 U.S. 309 (1971); Burgess v. Lowrey, 201 F.3d 942, 947 (7th Cir. 2000), or comes from an outdated criminal case standing for the uncontroversial proposition that a defendant may consent to a search, see Zap v. United States, 328 U.S. 624 (1946), vacated, 330 U.S. 800 (1947). Third, the theory has no application to a situation where one party—the parent—decides to retain her rights while an entirely different party—the child—bears the cost of that decision. Fourth, even in the inapposite welfare cases that amicus does cite, the "condition" applied directly to determination of eligibility. See Bowen v. Roy, 476 U.S. 693 (1986), Wyman, 400 U.S. at 322. Here, by contrast, a drug test does nothing to demonstrate eligibility for benefits; indeed, the State has failed to show that drug testing vindicates any of the program's goals. And finally, the extensive case law developing the special need test would be rendered superfluous by amicus's novel theory, as all employment cases could have been resolved by simply holding that an employee's acceptance of a job forfeited her Fourth Amendment rights. Under amicus's approach, "the care this Court took to explain why the special needs in [its employment cases] ranked as 'special' wasted many words." Chandler, 520 U.S. at 322. For amicus's doctrine would have decided any

employment case, even those where courts struck down the testing scheme. See, e.g., 19 Solid Waste, 156 F.3d 1068, United Teachers, 142 F.3d 853; Bolden, 953 F.2d at 823. This Court should give amicus's argument no weight.

Realizing this flaw, the State tries to argue that welfare recipients are somehow different from other parents. See Appellant=s Brief at 45-46. It relies for this proposition solely on Wyman v. James, 400 U.S. 309 (1971). But in that case, the Court held that home visits by welfare caseworkers are not searches under the Fourth Amendment. See Wyman, 400 U.S. at 386. Because urine testing clearly is a search, Wyman is inapposite. But even the ensuing dicta in Wyman fails to provide support for the State=s argument. The home visits at issue in Wyman were tailored to the public assistance program at issue there: Information gathered by the caseworker was limited to confirming that the recipient met the Arequisites for AFDC benefits@ such as Averification of actual residence@ and Aactual physical presence in the home.@ Id. at 322. These objectives were specific to that program and had no application to the general population. The home visits here are also strictly limited in scope and purpose. See supra at 18. By contrast, Michigan has articulated no interest in drug testing that would be limited to participants in its assistance program. On the contrary, its interest in the safety of children would extend to all parentsCa group far too generalized to be searched without reasonable suspicion under the Fourth Amendment.[7]

[7] Michigan also argues more simply that "the Supreme Court in Wyman has already found that the State has such special needs in the context of the administration of public assistance." Appellant's Brief at 29. This argument is simply wrong. The Supreme Court nowhere discusses the special needs test in Wyman.

3. Michigan=s Other Articulated Concern, Encouraging Employment, is not Supported By an Interest in Public Safety.

In acknowledging that Acourts have consistently held in [employment] cases that a public safety concern must be present,@ the State effectively concedes that its goal of placing FIP recipients in generic jobs cannot justify suspicionless testing. Appellant=s Brief, at 22 (citing cases). Preparing recipients for a working world in which they could possibly be subject to drug testing, perhaps as a condition of private employment, implicates no safety concern sufficient to justify a suspicionless search. See Appellant=s Brief at 32. The State is correct that employee drug testing cases have stressed that testing is appropriate only for safety-sensitive positions. See, e.g., Chandler, 520 U.S. at 321-22 (striking down a drug testing policy for employees that Atypically do not perform high-risk, safety-sensitive tasks@). The same rule applies when the state tests prospective employees. See Baron v. City of Hollywood, 93 F. Supp. 2d 1337, 1341 (S.D. Fla. 2000) (striking down preemployment drug testing where A[t]he City has not identified any jobs involving the type of high-risk, safety-sensitive tasks with potential for immediate injury to others that would justify the need for testing.@) (internal quotation marks omitted); Robinson v. City of Seattle, 10 P.3d 452 (Wa. Ct. App. 2000); but see Loder v. City of Glendale, 14 Cal. 4th 846 (1997). No form of legal alchemy can transform a governmental drug test related to routine employment into a special need.

4. There Is No Pronounced Drug Problem Among FIP Recipients.

Not only has Michigan failed to articulate a serious danger to the public as required under the special needs test; it has also failed to demonstrate a Apronounced drug problem@ among the targeted group. Knox County, 158 F.3d at 373; see also 19 Solid Waste, 156 F.3d at 1073; United Teachers, 142 F.3d at 856; 68 Am. Jur. 2d Searches & Seizures ' 97.[8] The Supreme Court has looked for a documented history of drug use in the population to be tested. Compare Skinner, 489 U.S. at 607 (noting that Aalcohol and drug abuse by railroad employees@ posed a Asignificant problem@); and Vernonia, 515 U.S. at 648, 663 (stressing the Aimmediate crisis@ caused by a Asharp increase in drug use@), with Chandler, 520 U.S. at 321-22 (AGeorgia asserts no evidence of a drug problem.@). Requiring drug use to be prevalent makes sense because random drug testing ousts the usual Fourth Amendment requirement of individualized suspicion. Furthermore, because courts permit suspicionless drug-testing only to address a genuine danger, A[p]roof of unlawful drug use may help to clarifyCand to substantiateCthe precise hazards posed by such use.@ Chandler, 520 U.S. at 319. In the rare instance where drug testing is permitted absent a proven drug problem, the threat to public safety must be grave and special circumstances must exist. In Von Raab, for instance, it was crucial that Awork directly involving drug interdiction and posts that require the employee to carry a firearm pose grave safety threats to employees who hold these positions.@ Chandler, 520 U.S. at 316 (characterizing Von Raab, 489

[8] Recognizing the void of evidence of a drug problem in Michigan, the State argues that the law "does not require that Michigan produce any evidence of a particular problem" within the State. Appellant's Brief at 37 n.13. However, this Court properly looks to evidence of a problem among "the group of people targeted for testing." Knox County, 158 F.3d at 373 (emphasis added). Furthermore, the State's argument that "any level [of] drug use" would be sufficient under the case law, Appellant's Brief at 38 n.14, ignores this Court's policy of searching for a

U.S. at 673-75). Here, Michigan would need to make a substantially stronger showing of a genuine drug crisis in order to avoid the conclusion that its actual aim is to take a symbolic stand against the stereotypical welfare recipient.

As discussed in detail above, see supra at 8, 9, 10, abuse of illegal drugs is no greater among FIP recipients and applicants than among other Michigan residents. Although Michigan demurs, it does not allege a pronounced drug problem in Michigan, only that selected national data show Aa certain percentage of welfare recipients use drugs,@ and that Athe percentages of use and impairment are higher among recipients than non-recipients.@ Appellant=s Brief, at 7. The more reliable evidence, from Michigan officials and from Michigan-specific data, shows that drug use among FIP recipients is no greater than among the state=s wealthier citizens. See supra at 8, 9, 10. Invocation of competing studies to quibble over the precise level of drug use does not begin to meet the requirement of an immediate, pronounced problem found in Skinner and Vernonia and required by this Court in Knox County.

5. Michigan Has No Genuine Concern for Detection and Treatment of Substance Abuse that Could Not Be Met Through the Traditional Techniques of Individualized Assessment Employed by Every Other State.

Several additional factors compel the conclusion that Michigan=s articulated concerns are not the genuine basis for its drug testing scheme. Before resorting to its social experiment, the State made no effort whatsoever to identify substance abuse: It asked no questions concerning substance abuse, offered no training to its case workers, and ignored the screening techniques

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"pronounced drug problem," Knox County, 158 F.3d at 373 (emphasis added).

employed effectively by other states. See supra at 10, 12, 13, 14. This failure also contravenes a key consideration in the Fourth Amendment analysis of suspicionless searches: whether the government can show that traditional suspicion-based methods are impracticable. Here, the experience of other states shows that such methods are not only practicable, but preferable.

In Chandler, the Court found that Georgia=s program of drug testing candidates served only to demonstrate its commitment to the war on drugs, a goal the Court determined was Asymbolic, not >special= as that term draws meaning from our caselaw.@ Id. at 322; see also Von Raab, 489 U.S. at 687 (Scalia, J., dissenting) (A[T]he impairment of individual liberties cannot be the means of making a point . . . . [S]ymbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.@); United Teachers, 142 F.3d at 857 (striking down a drug testing provision because it actually served goals other than those articulated by the state); O=Neill, 61 F. Supp. 2d at 497 (striking down a drug testing scheme as Alargely symbolic@). The Chandler Court concluded that there is Ano reason why ordinary law enforcement methods would not suffice to apprehend . . . addicted individuals.@ Chandler, 520 U.S. at 320.

Similarly here, if the State had actually been concerned to identify drug-addicted FIP recipients, one would have expected it to have explored established solutions to a problem it now claims is so grave as to warrant overriding the Fourth Amendment. Instead, Michigan has failed to make any effort to identify substance abuse and has studiously ignored the successes of other states to do so. See supra at 10, 12, 13, 14. It is uncontested that Michigan initiated its drug testing experiment as its first and only gesture of concern regarding substance abuse. Detecting

and treating abuse appears, by the State=s own practices, to be of minimal importance.[9] Rather, all the evidence indicates that Michigan seeks to pursue the political goal of appearing to be tough on stereotypical welfare drug addicts perceived as opportunistically siphoning off the state fisc.

[9] Cf. Skinner, 489 U.S. at 606-07 ("efforts to deter [substance abuse on American railroads] began at least a century ago" but government officials concluded that these "industry efforts were not adequate"); Vernonia, 515 U.S. at 649 ("Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted.").

Not only does Michigan=s past inattention to less extreme methods call into question its articulated goals and suggest other, more symbolic ends; the State=s neglect of alternatives also runs afoul of a key consideration in the Fourth Amendment analysis of suspicionless searches: whether the government can pursue its purported interests through traditional methods of individualized suspicion.[10] From its earliest drug testing cases, the Supreme Court has emphasized that its Fourth Amendment jurisprudence is designed Ato assess the practicality of the warrant and probable-cause requirements in the particular context.@ Skinner, 489 U.S. at 620. Protection may be suspended only Awhere an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.@ Id. at 624; cf. Camara v. Municipal Ct. of the City and County of San Francisco, 387 U.S. 523, 533 (1967) (A[T]he question is not whether the public interest justifies the type of search in question, but . . . whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.@). Most recently, the Court rejected a drug testing scheme in part because the government Aoffered no reason why ordinary law enforcement methods would not suffice to apprehend such addicted individuals.@ Chandler, 520 U.S. at 320; see also Vernonia, 515 U.S. at 667-68 (O=Connor, J., dissenting) (noting that Awe have allowed exceptions [to the individualized suspicion requirement] only where it has been clear that a suspicion-based regime would be ineffectual@).[11]

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[10] Michigan acknowledges this legal requirement—that it must show that individualized suspicion would be impracticable—in the first sentence of, and throughout, the governmental interest section of its brief. See Appellant's Brief at 35, 35-38.

[11] The State confuses matters by noting that there is no least-intrusive-means

requirement here. See Appellant's Brief at 38; Vernonia, 515 U.S. at 663; Skinner, 489 U.S. at 629 n.9. However, the individualized suspicion requirement does not amount to a least-intrusive-means test. See Vernonia, 515 U.S. at at 678 (O'Connor, J., dissenting) ("[A] suspicion-based search regime is not just any less intrusive alternative: the individualized suspicion requirement . . . . may only be forsaken . . . if a suspicion-based regime would likely be ineffectual."). As the Fifth Circuit has put it:

> It is true that the principles we apply [to drug testing schemes] are not absolute in their restraint of government, but it is equally true that they do not kneel to the convenience of government, or allow their teaching to be . . . lightly slipped past.

United Teachers, 142 F.3d at 857. Courts only require the state to choose from among the range of practicable suspicion-based searches, not to choose the least intrusive one.

This Court too has insisted on Adetermin[ing] whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.@ Knox County, 158 F.3d at 373 (internal quotation marks omitted); see also Willis, 158 F.3d at 420 (noting that Supreme Court cases Astrongly indicate that the feasibility of a suspicion-based search is a key consideration in determinating whether it is reasonable for the government to implement a suspicionless regime@); Recent Cases, 112 Harv. L. Rev. 713, 716 & n.36 (1999). Here, Michigan has failed to show that individualized detection of substance abuse would not be practicable. See supra at 11.[12] This is not surprising, because any such claim would have to confront the fact that, in the four years since the federal welfare reform statute was enacted, none of the other 49 states has found it necessary to enact suspicionless drug testing scheme.[13] In sum,

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[12] The State objects that suspicionless testing would not be practicable because welfare recipients, like those tested in Von Raab, are not subject to daily observation. See Appellant's Brief at 36;. But Von Raab concerned the employment context. The Court there contrasted the border situation to "the norm in more traditional office environments." Von Raab, 480 U.S. at 674. Outside the public employment context, very few of Michigan's citizens are subject to daily scrutiny by the state. If that consideration were enough to make individual scrutiny impracticable, vast sectors of the population would be subject to suspicionless searches. Writing outside the employment context, the Supreme Court has not hesitated to invalidate blanket drug tests. See Chandler, 520 U.S. at 320.

[13] Michigan argues that its caseworkers "have their hands full" and could not possibly shoulder the responsibility of detecting drug use among their clients. Appellant's Brief at 39. But it offers absolutely no factual support for this allegation. And again, the evidence from other states demonstrates the contrary—none of these states has reported difficulty training its caseworkers to detect or treat substance abuse on an individualized basis. Moreover, suspicionless drug testing itself creates significant burdens on caseworkers, who now must refer

Michigan has demonstrated no interest in drug testing its least wealthy citizens that is not undermined by its reluctance to pursue individualized means of detection and treatment, and the State has failed to demonstrate that those meansCemployed unproblematically by other statesCare impracticable in Michigan.[14]

6. Michigan=s Drug Testing Scheme is Ineffective.

If Michigan=s putative governmental interest is to detect and treat drug addiction, its chosen means are so poorly designed to achieve that purpose that one can only conclude the drug testing is purely symbolic. As noted above, Michigan=s testing scheme detects only use, not

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people to tests, facilitate the test itself, and navigate the consequences of a positive result.

[14] The State raises fears of "arbitrariness" in a footnote. Appellant's Brief at 39 n.15. If anything, dispensing with Fourth Amendment protections introduces a greater danger of arbitrariness. See Camara, 387 U.S. at 528 ("The basic purpose of [the Fourth] Amendment, as recognized by countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.") (emphasis added). Specifically, the state risks arbitrarily selecting a group of people for testing as a symbolic gesture, based on stereotype and without any evidence that individualized scrutiny would uncover a pronounced drug problem.

abuse. See supra, at 15. And one of the most disturbing aspects of Michigan=s program is that it has proven far more effective at cutting the welfare roles than placing addicts in treatment. See supra, at 6. Michigan=s peremptory embrace of universal testing makes it seem far more likely that the State wishes to make a symbolic gesture against the stereotype of the drug-addicted welfare mother than that it genuinely wishes to seek out and treat individuals who suffer from chronic substance abuse.

Furthermore, the test fails to further the goals of deterrence, detection and treatment espoused by the State because the timing of Michigan=s drug test is easy to manipulate and predict. In evaluating the strength and sincerity of a claimed governmental interest in drug testing, courts examine whether the drug testing program is Awell designed to identify@ drug users and will therefore serve as Aa credible means to deter illicit drug use.@ Chandler, 520 U.S. at 319. The Court in Chandler struck down Georgia=s drug testing program in part because:

> The test dateCto be scheduled by the candidate anytime within 30 days prior to qualifying for a place on the ballotCis no secret. . . . [U]sers of illegal drugs, save for those prohibitively addicted, could abstain for a pretest period sufficient to avoid detection.. . . . [The drug test], in short, is not needed and cannot work to ferret out lawbreakers . . . .

Chandler, 520 U.S. at 319-20; see also 19 Solid Waste, 156 F.3d at 1074 (striking down Adrug tests [that] occur in predictable intervals,@ even though they targeted safety sensitive positions). Compare id. at 320 n.4 (A[i]n Treasury Employees v. Von Raab the applicant for promotion or transfer could not know precisely when action would be taken on the application.@); Skinner, 489 U.S. at 630 (upholding a drug test, Athe timing of which no employee [could] predict with certainty@).

Defendant=s drug testing program suffers the same fatal defect as the programs struck down in Chandler and 19 Solid Waste. The test date Ais no secret,@ Chandler, 520 U.S. at 320; applicants themselves determine the time for their application and, thus, for their drug tests; and recipients= redetermination interviews, which trigger drug testing, Aoccur in predictable intervals,@ 19 Solid Waste, 156 F.3d at 1074, and can be scheduled at will. See supra, at 15. The State=s drug testing program is entirely avoidable, detecting only those drug users who are not clever enough to abstain for the day or two prior to their test. Michigan argues in its brief that prospective welfare recipients will not be able to circumvent testing because their need for assistance is so desperate. See Appellant=s Brief, at 40-41. To be sure, many applicants= need is dire. But because mostCand the most seriousCdrugs metabolize quickly, see supra at 17 n.2, an applicant would only have to postpone his or her application for a day or two in order to avoid detection.[15] The State=s speculation that Ahard@ drug addicts would be unable to abstain is belied by the shorter metabolism periods for those drugs, combined with the State=s admission that even a Achronic user@ resorts to drugs as infrequently as once a week. Appellant=s Brief, at 41.

2. Welfare Applicants and Recipients Have a Legitimate Expectation of Privacy.

Because Michigan has failed to produce any credible evidence either of a threat to public safety or of a pronounced drug problem, because the State has shown no real interest in drug testing that could not be pursued by the individualized methods employed successfully by other states, and because the drug testing program is wholly ineffective and avoidable, the State=s

[15] Because of its longer metabolism period, marijuana is most likely to be detected; but its use is least likely to require treatment. See supra, at 17.

symbolic interest falls far short of a special need. This Court=s inquiry should accordingly end here in a finding of unconstitutionality.

The special needs test is a threshold matter. If the government cannot show that its interest in drug testing welfare applicants rises to this level, the inquiry ends with a determination that the Fourth Amendment has been violated, regardless of the strength of the applicants= private interests. See Skinner, 489 U.S. at 619; 19 Solid Waste, 156 F.3d at 1072 (AIf the government has not made its special need showing, then the inquiry is complete, and the testing program must be struck down as unconstitutional.@) (citing Chandler, 520 U.S. at 318); O=Neill, 61 F. Supp. 2d at 496, aff=d and reasoning adopted, 197 F.3d 1169 (5th Cir. 1999); 68 Am. Jur. 2d Searches & Seizures ' 97 (2000). The District Court accordingly ended its inquiry once it found no special need. See Marchwinski, 113 F. Supp. 2d at 1143 (ASince the State has failed to show . . . a special need grounded in public safety . . . this Court=s Fourth Amendment inquiry is complete, and it need not inquire into the relative strengths of the competing private and public interests . . . .@). Because Michigan has failed to articulate a special need, this Court should affirm without further inquiry.

Even if this Court were somehow to reach the balancing stage of the analysis, welfare recipients= well-established and legitimate expectation of privacy outweighs the State=s desire to continue its novel social experiment. On the privacy side, courts consider (1) the nature of the privacy interest upon which the search intrudes, and (2) the character of the intrusion. See Vernonia, 515 U.S. at 654, 658; Joy, 212 F.3d at 1059; 19 Solid Waste, 156 F.3d at 1072; 68 Am. Jur. 2d Searches & Seizures ' 97 (2000). Here, it is well-established that urine testing is a serious intrusion on privacy. And Michigan=s lack of adequate confidentiality procedures

exposes participants to grievous harm, including criminal prosecution and the loss of a child.

1. FIP Recipients Have Done Nothing to Reduce Their Privacy Interests.

Michigan=s drug testing scheme presents an acute intrusion into plaintiffs= legitimate expectations of privacy. Justice Scalia, author of the Vernonia decision, has called state-compelled urinalysis Aparticularly destructive of privacy and offensive to personal dignity,@ a Ademeaning bodily search,@ and a Aneedless indignity.@ Von Raab, 489 U.S. at 680, 684, 685 (Scalia, J., dissenting); see also Chandler, 520 U.S. at 313; Skinner, 489 U.S. at 617; Charles Fried, Privacy, 77 Yale L.J. 475, 487 (1968). Likewise, this Court has emphasized that Adrug testing does implicate the privacy interests of employees on several levels.@ Knox County, 158 F.3d at 380. First, the Aphysical intrusion [of a urine test] infringes an expectation of privacy that society is prepared to recognize as reasonable,@ and, second, Athe ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested [person=s] privacy interests.@ Id. (internal quotation marks and alterations omitted). Indeed, courts have consistently recognized a urine test to be a search Aprecisely because it implicates concerns about bodily integrity.@ Id. (internal quotation marks omitted). In addition, this Court has recognized that Athe limitation on an individual=s freedom of movement that is necessary to obtain blood, urine, or breath samples also amounts to a Fourth Amendment violation, if unreasonable.@ Id. (internal quotation marks omitted).

Applicants and recipients of public assistance differ markedly from the plaintiff in each Supreme Court case to uphold drug testing. Welfare recipients, unlike student athletes, do not submit to physical examination and do not Ashower[] and chang[e]@ clothes in Alocker rooms [that] are not notable for the privacy they afford.@ Vernonia, 515 U.S. at 657. Unlike railway

employees, welfare recipients are not participants Ain an industry that is regulated pervasively to ensure safety.@ Skinner, 489 U.S. at 627. And the customs agents in Von Raab faced lowered expectations of privacy that were unique to that industry because they were directly involved in drug interdiction and carried firearms. See Von Raab, 489 U.S. at 672. Unlike any of these contexts, FIP is at heart a simple financial assistance program that aims to move its participants from welfare into the working mainstream of society. Treating participants like schoolchildren or prisoners with diminished privacy rights would impede, not advance, that goal.

Michigan relies solely on Wyman for the bulk of its discussion of privacy interests. See Appellant=s Brief, at 24-33. But Wyman is entirely inapposite. First, and most obviously, the Fourth Amendment language upon which the State leans so heavily is non-binding dicta. See Wyman, 400 U.S. at 317-18. As the District Court correctly noted, the Wyman Court held that the home visits at issue did not constitute searches and therefore did not trigger Fourth Amendment protections. See Marchwinski, 113 F. Supp. 2d at 1142.

Even if this Court were to consider it, the dicta in Wyman concerning home visits would shed no light on this case. A urine test concerns a degree of invasion much greater than a home visit, which is targeted to compliance with program requirements and has strict limits protecting the privacy of FIP recipients. See supra, at 18. Indeed, the Supreme Court has repeatedly found that urine testing constitutes a Fourth Amendment search, see Chandler, 520 U.S. at 313; Skinner, 489 U.S. at 617, while the holding of Wyman is precisely that a home visit does not rise to that level of invasiveness. Michigan argues that welfare recipients have diminished expectations of privacy because they are subject to a greater degree of regulation than other citizens. See Appellant=s Brief, at 31-32 & n.8. But nowhere in Wyman does the Court say that

welfare recipients have diminished expectations of privacy. Moreover, the home visit is much more consonant with the other facets of investigation that comprise a welfare application than is a urine test. Disclosure of employment status and incomeCinformation routinely supplied by most members of the public for tax purposesCwhile arguably comparable to a home visit, hardly rises to the same level of intrusion as physical examinations.

The state argues next that Athe voluntary nature of applying for [welfare] assistance result[s] in a diminished expectation of privacy.@[16] Appellant=s Brief, at 26, 31-32. This argument ignores the obvious reality that welfare applicants are by definition in dire circumstances that do not afford the kind of choice presumed by the State. See Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (noting that welfare recipients cannot be even temporarily deprived of Athe very means by which to live@). Applying for emergency financial assistance is in no way comparable to trying out for the football team, as in Vernonia. The State=s argument also flies in the face of Supreme Court cases striking down suspicionless searches. One might just as well have argued that the drivers in Edmond could have chosen not to travel the highways and thus avoided suspicionless searches, or that the candidates in Chandler could have elected not to exercise their right to run for public office. And in many employment cases, courts have struck down testing regimes despite the obvious fact that the employee could have chosen to work elsewhere. See, e.g., 19 Solid Waste, 156 F.3d 1068, United Teachers, 142 F.3d 853;

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[16] Of the four "factors" that the State teases out of Wyman, only the fourth—voluntariness—concerns the nature of a privacy interest. See Appellant's Brief, at 25-26. The first two, impact on the state fisc and rehabilitation, relate to the government's interest and are addressed above. The third factor concerns the character of the intrusion, and is discussed next. See id. at 26.

Bolden, 953 F.2d at 823. In all of those cases, courts have held that the state could not condition participation in these governmental arenas on a forfeit of legitimate privacy expectations.[17]

Finally, no welfare recipient has ever been subject to the level of invasive scrutiny endured by candidates for high office. And yet in Chandler the Supreme Court struck down a drug testing scheme for candidates, regardless of their diminished privacy, on the ground that, as here, the state has no right to demonstrate its symbolic commitment to drug enforcement at the price of citizens= Fourth Amendment rights.

2. Michigan=s Drug Testing Procedure is Particularly Invasive.

[17] The State argues further that "those who voluntarily seek such assistance cannot argue that they have a constitutional right to protect information directly relevant to the state's ability to meet program goals." Appellant's Brief, at 28. But it should be stressed that the objection here is not to the State's need for information, but to its method for obtaining that information—suspicionless drug testing.

The privacy violation here is far greater than in the programs allowed by previous court decisions. An important consideration in assessing the degree of an intrusion is whether Athe results of the test are disclosed only to a limited class of . . . personnel.@ Vernonia, 515 U.S. at 658; cf. also Knox County, 158 F.3d at 380 (A[T]he Policy recognizes that information regarding an individual=s drug testing results is confidential and provides extensive safeguards concerning the release and dissemination of the testing information@) (emphasis added). Although its collection procedures are similar to those in other cases, Michigan=s confidentiality procedures are notably weak. As noted in detail above, the PEM contains absolutely no controls for the confidentiality of test results. See supra at 19; cf. Vernonia, 515 U.S. at 658. In fact, the State actively encourages case workers to share positive test results with Child Protective Services, and even requires it upon a positive test result. Whereas some privacy invasions might occasion embarrassment, FIP participants face far more dire consequence: the loss of a child and possible criminal prosecution.

III. IRREPARABLE HARM AND THE PUBLIC INTEREST

Michigan=s violation of welfare recipients= Fourth Amendment rights constitutes irreparable injury. It is hornbook law that A[w]hen an alleged deprivation of a constitutional right is involved . . . no further showing of irreparable injury is necessary. @ C. Wright & A. Miller, 11A Fed. Prac. & Proc. Civ. 2d ' 2948.1 (1995 & Supp. 2000) (citing numerous cases); see also Elrod v. Burns, 427 U.S. 347, 373 (1976); Planned Parenthood Assoc. v. City of Cincinnati, 822 F.2d 1390, 1400 (6th Cir.1987); Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 744 (2d Cir. 2000); Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992) (finding irreparable an alleged violation of the Fourth Amendment). The loss of Fourth Amendment rights, on even a single occasion, comprises irreparable injury.

Moreover, FIP applicants and recipients face at least three additional forms of irreparable harm. First, private medical information concerning the tested subjects may be revealed to a variety of private and governmental persons, as discussed above, constituting irreparable harm. See Kallstrom v. City of Columbus, 136 F.3d 1055, 1070 (6th Cir. 1998). Second, all applicants face the irreparable harm of being forced to choose between submitting to suspicionless drug testing and denial of FIA assistance. Ms. Sims admits that FIA is concerned that the drug test may deter families in need from applying. JA 455 [R 27, Exh. Y, at 79] (Sims Dep.). She also recognizes that A[i]t=s not unusual that [new applicants for FIP] would be in a desperate situation.@ Id. at 455 [80]. Federal courts have long recognized that the loss of needs-based public assistance like FIP constitutes irreparable harm because recipients are Acompletely reliant upon the continued receipt of [the assistance] for their very survival.@ Soave v. Milliken, 497 F. Supp. 254, 262 (W.D. Mich. 1980); see also Goldberg, 397 U.S. at 264; Beno v. Shalala, 30

F.3d 1057, 1064 n.10 (9th Cir. 1994); Chu Drua Cha v. Noot, 696 F.2d 594, 599 (8th Cir.1982); Banks v. Trainor, 525 F.2d 837, 842 (7th Cir.1975). Finally, FIP participants are suffering irreparable stigmatization. Michigan=s symbolic effort to demonstrate commitment to law enforcement has played upon and reinforced the common stereotype that FIP participants are more likely than other recipients of state financial benefits to abuse drugs.

The additional requirements for a preliminary injunction are satisfied in the present case. No harm, substantial or otherwise, can befall the State or anyone else if it is enjoined from carrying out its program of random and suspicionless drug testing of FIA recipients. See Plane, 750 F. Supp. at 1366. Finally, this Court has repeatedly held that it is always in the public interest to prevent a violation of constitutional rights. G & V Lounge, Inc. v. Michigan Liquor Control Comm=n, 23 F.3d 1071, 1079 (6th Cir. 1994); Planned Parenthood, 822 F.2d at 1400.

## CONCLUSION

For the foregoing reasons, this Court should affirm the District Court=s grant of a preliminary injunction.

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Dated: March 1, 2001

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I certify that according to the WordPerfect 8 word counter this brief contains 13,955 words, excluding cover, Table of Contents, Table of Authorities, signature block, this Certificate of Compliance, Request for Oral Argument, Proof of Service, and Cross-Designation of Joint Appendix Contents.

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Graham Boyd

## REQUEST FOR ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), Plaintiffs-Appellees request oral argument. This case presents important issues of Fourth Amendment law that have not been considered by any other circuit. The jurisprudence of suspicionless searches has so far been developed in dissimilar contexts, such as employment and schooling. Michigan is the first state in the nation to require drug testing as a condition of eligibility for welfare, and blanket drug testing in the arena of public assistance raises novel questions of law that have not been considered by any other court. Therefore, the Court=s decision in this case will not only establish binding law for District Courts in the Sixth Circuit, but will also provide persuasive authority to courts in other circuits that may consider welfare drug testing in the future. Oral argument should be granted to insure full investigation of the important questions of constitutional law presented for the first time in this case.