No.00-2115

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TANYA L. MARCHWINSKI; TERRY J. KONIECZNY;
WESTSIDE MOTHERS,
on behalf of all similarly situated persons,

Plaintiffs-Appellees,

v.

DOUGLAS E. HOWARD, in his official capacity as
Director of the Family Independence Agency of Michigan,

Defendant-Appellant

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**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the following a*mici* c*uriae* -- physicians, public health officers, substance abuse treatment professionals and social workers, through their professional associations and legal counsel -- move for leave to file the attached Brief A*mici Curiae* In Support of Plaintiff-Appellees Response to Defendant-Appellant's Interlocutory Appeal from the preliminary injunction entered by the United States District Court Eastern District of Michigan, Southern Division in Civil Case No.99-10393:

> American Public Health Association, National Association of Social Workers, Inc., National Association of Alcoholism and Drug Abuse Counselors, American College of Obstetricians and Gynecologists, National

Council on Alcoholism and Drug Dependence, Association of Maternal and Child Health Programs, National Health Law Project, National Association on Alcohol, Drugs and Disability, Inc., National Advocates for Pregnant Women, National Black Women's Health Project, Legal Action Center, National Welfare Rights Union, Youth Law Center, Juvenile Law Center, National Coalition for Child Protection Reform.

*Amici curiae* represent clients and serve patients who are profoundly affected by Appellant's policy of requiring all applicants for, and many recipients of state welfare benefits to submit to urine drug testing in order to receive public assistance. The constitutional issues presented by Appellant's policy and the decision below enjoining that policy cannot properly be understood in isolation from the facts and statistics about drug use and abuse among Michigan's welfare population, and the impact of drug use on family and employment for Michigan's poor – *i.e.*, the very grounds upon which Appellant tries to justify its unprecedented policy. Nor can the constitutionality of Appellant's policy be properly assessed absent awareness of the sweeping and dangerous ramifications that Appellant's policy, if resurrected, portends for the health and well-being of many of Michigan's most needy families.

Through this brief, *amici* offer this Court their technical knowledge and concrete experience concerning the medical, sociological and public health issues relevant to assessing the constitutionality of Appellant's mandatory suspicionless drug testing policy. *Amici* distill and present for this Court the most current, authoritative, peer-reviewed and published research on the connection between substance abuse and poverty, the impact of substance use on parenting, and the marked deterrent effect of mandatory drug testing policies on the willingness of individuals – particularly pregnant and parenting women – to access essential medical and social services. In short, the brief of *amici curiae* provides critical scientific and factual information directly relevant to the Fourth Amendment

"special needs" analysis that this Court must undertake to assess the constitutionality of Appellant's policy and the correctness of the decision below.

WHEREFORE, *amici curiae* respectfully move this Court for leave to file the attached brief and make such oral argument relative to the Interlocutory Appeal as the Court may direct.

Respectfully submitted,

_____
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## I. INTERESTS OF THE AMICI CURIAE

*Amici curiae* are professional organizations representing the leading practitioners and researchers in the areas of social work, alcohol and substance abuse treatment, women's health, and public benefits. *Amici* are committed to combating alcohol and drug abuse and the attendant harms they cause through the responsible intervention and collaboration of public health, medicine and social services. Many members of the *amici* organizations provide social and/or health services to poor individuals and families, including those struggling with substance abuse. *Amici*, therefore, are well-situated to provide this court with critical insight into why the suspicionless drug testing of persons seeking or receiving public assistance is fundamentally flawed not simply as a matter of constitutional law but also as a matter of public policy.[1]

## II. STATEMENT OF FACTS

*Amici* incorporate the statement of the case and statement of facts from Appellee's Brief on the Merits.

## III. INTRODUCTION

Michigan stands alone among the states in attempting to implement a mandatory program of drug testing applicants for welfare benefits, their adult family members, and current welfare recipients absent any individualized

[1] Descriptions of *amici curiae* are set forth in Appendix A to this brief.

suspicion of wrongdoing. Michigan asserts that its policy of suspicionless drug testing of will "assist adult recipients in finding and maintaining permanent employment, in making welfare a temporary experience, and in strengthening families." Appellant's Opening Brief at 6. These goals, while laudable, do not give rise to concerns for public safety that are sufficiently weighty to bypass the Fourth Amendment's individualized suspicion requirement. Nor are these goals adequately addressed by the universal drug testing policy designed by Michigan. In fact, Michigan's policy is *counterproductive* to its stated goals.

As explained below, Michigan's policy does not rest on sound epidemiological data, is not based on proven strategies, fails to advance the purported goals of the program, and, in fact, will likely undermine its stated interest in promoting employability and family stability. Michigan cannot credibly claim that its policy of searching peoples' urine absent individualized suspicion constitutes a reasonable and appropriately tailored response to the problem it is seeking to remedy. Michigan's scheme of suspicionless urine testing of applicants and recipients fails to distinguish between drug use and drug abuse or drug impairment and levels of impairment. Nor does the program screen for alcohol, *the primary substance of abuse* in America. Simply put, the fact that a urine sample tests positive for drugs does not mean that the person who provided the

sample was drug dependent, was a drug abuser, is drug impaired, or is in any way unfit to raise a family or hold a job.

Perhaps most disturbingly, Michigan's drug testing scheme, far from identifying drug-impaired poor persons and channeling them into treatment, is likely to *deter* such individuals – particularly parents of minor children – from seeking critical public benefits for fear that their substance abuse will result in state sanctions, including loss of both public benefits and the custody of their children. The likely deterrent effect of the testing policy will deprive needy families of essential supports, with disastrous consequences.

*Amici* do not take issue with the motives that gave rise to Michigan's policy. But even the most ardent concern for the well-being of others cannot in-and-of-itself constitute a "special need" that excuses the searching of peoples' urine absent constitutional safeguards. For the reasons more fully explained below, *amici* urge this Court to reject Michigan's argument that its drug testing policy is permitted under the "special needs" exception to the Fourth Amendment and to uphold the preliminary injunction entered below.

## IV. ARGUMENT

The Fourth Amendment of the U.S. Constitution protects "the right of the people to be secure in their persons . . . against unreasonable searches and seizures." The parties do not dispute that the collection and analysis of bodily fluids by Michigan pursuant to its welfare drug testing policy is a search within the meaning of the Fourth Amendment. At issue, rather, is whether it is proper to side-step the general requirement that such an intrusion be preceded by individualized suspicion by virtue of the very limited "special needs" exception to the Fourth Amendment.

In assessing whether the special needs exception to the Fourth Amendment applies, courts look first to whether there is some heightened threat to, or an "immediate crisis" implicating public health or safety that necessitates a governmental response circumventing the privacy protections embodied in the Constitution. *See City of Indianapolis v. Edmond*, 121 S.Ct. 447, 455 (2000) (noting that "exigencies" and "emergency" situations sometimes can justify "a regime of suspicionless searches or seizures"); *Chandler v. Miller*, 520 U.S. 305, at 323 (1997) (holding that where "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arrayed."). Similarly, the court must determine that there is an "obvious connection" between the special need and the means chosen by the state

to address that need. *See Edmond*, 121 S.Ct. at 453 (2000). *See also Chandler*, 520 U.S. at 320 (drug testing scheme must be a "well designed, . . . credible means" of addressing State's special need).

The court must then balance the asserted special need against the constitutional interest of persons in maintaining their personal privacy and bodily integrity against the prying eyes of government. Specifically, the court must assess whether the special need is "substantial" or "important enough to override the individual's acknowledged privacy interest [and] sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler*, 520 U.S. at 318. *See also National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 673-75 (1989).

Michigan's drug testing policy fails the special needs analysis at each juncture. As *amici curiae* make clear below, the threat to public health or safety is not sufficient to trigger a state policy that singles out public assistance applicants and recipients and subjects them to diminished constitutional protections by mandatory suspicionless drug testing. The District Court was thus correct to end its inquiry by finding that no special need exists to justify Michigan's policy.

Even assuming *arguendo* that the state could assert a public safety justification for targeting poor people for suspicionless searches, Michigan's drug testing scheme fails to achieve the State's goals of promoting employment and

strengthening families and thus cannot constitute a reasonable search under the Fourth Amendment. In fact, Michigan's policy is likely to deter impoverished persons – particularly needy pregnant and parenting women – from accessing public benefits, and is thereby *counterproductive* to its avowed goals.

### A. There is no "special need" to protect pubic safety that justifies Michigan's circumvention of Fourth Amendment protections.

Michigan's policy rests on the assertion that the type or scope of drug use by people receiving public assistance presents a significant threat to public health and safety that cannot be adequately addressed – by law enforcement, social services, state medical providers, or other government actors – without circumventing the privacy safeguards afforded by the Constitution. Although this assumption may be consistent with certain sensationalized media accounts of drug abuse, it lacks support in empirical data.

It is important that the constitutionality of a policy like the one at issue here be assessed against the backdrop of reliable data so that the policy can accurately be said to respond to a real and pressing social need. *Amici* share Michigan's desire to reduce the negative effects of alcohol and drug abuse on people's lives. Moreover, *amici*, members of whom are on the front lines of combating substance abuse wherever it occurs, have no reason to downplay the devastating consequences that substance dependence can cause individuals, families and their communities. Indeed, it is by virtue of their depth of experience and commitment

to research that *amici* adamantly reject Michigan's assertion – unique among the 50 states – that the rate and severity of substance abuse among welfare applicants and recipients justifies mandatory suspicionless drug testing of this population.

Although Michigan casually characterizes substance abuse among its welfare population as "prevalen[t]", Appellant Brief, at 8, the State is unable to show that substance abuse by this population presents a substantial and real risk to public safety sufficient to engender a special need. In fact, one year *before* Michigan began drug testing welfare applicants and recipients, a comprehensive article examining substance abuse within this population published in a leading peer-reviewed scientific health journal, concluded that "the recent spate of welfare reform legislation [like Michigan's program] targeted at substance abusing recipients relies on a weak base of data and research regarding the overall burden of alcohol and drug problems on the welfare system, particularly the relationships between problems of substance abuse and welfare dependency." Laura Schmidt *et al.*, *Substance Abuse and the Course of Welfare Dependency*, 88 Amer. J. Pub. Health 1616, 1616 (1998) [hereinafter "Schmidt *et al.*, *Substance Abuse"*].

Other studies similarly conclude that welfare recipients are no more likely to have substance abuse problems than members of the general public. *See, e.g.* Bridget Grant and Deborah Dawson, *Alcohol and Drug Use, Abuse and Dependence Among Welfare Recipients*, 86 Amer. J. of Pub. Health 1450 (1996)

(finding rates of alcohol and drug use and abuse among welfare recipients are similar to federally-estimated rates of citizens not receiving public benefits); National Institutes of Health, *National Institute on Alcohol Abuse and Alcoholism Researchers Estimate Alcohol and Drug Use, Abuse and Dependence Amongst Welfare Recipients*, News Release: Oct. 23, 1996 (finding that proportion of welfare recipients using, abusing, or dependent on drugs matches that of general adult population not on welfare); Rukamalie Jayakody *et al.*, *Welfare Reform, Substance Abuse, and Mental Health*, 25 J. Health, Pol., Pol'y & L. 623, 644 (2000) (reviewing results from the 1994 and 1995 National Household Survey of Drug Abuse that fail to show widespread substance abuse among welfare recipients).

In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), the United States Supreme Court permitted suspicionless drug testing of a narrow group of student athletes, where the school district was able to show that these students engaged in a potentially dangerous sport in a "drug infested school" experiencing a "state of rebellion," and that the crisis was fueled by widespread drug use among these particular athletes. *Vernonia*, 515 U.S. at 649, 662. By stark contrast, as the above studies make clear, *before* Michigan fashioned its scheme to drug test welfare applicants and recipients absent any individualized suspicion of drug use, substantial, persuasive and widely available data undercut the very premise for

targeting this population. *See also* U.S. Department of Health and Human Services, *Patterns of Substance Abuse and Substance-Related Impairment Among Participants in the Aid to Families With Dependent Children Program (AFDC)*, at 23 (1994) (noting that just seven percent of adults ages 18-44 who were significantly impaired by substance abuse were AFDC (now TANF) recipients); Julie Strawn, *Substance Abuse and Welfare Reform Policy*, 1 Welfare Information Network 1 (1997) (www.welfareinfo.org/hardtoplace.htm) (drug abuse impairs only five percent of welfare recipients in their day-to-day functioning).

Research published *after* Michigan implemented its policy further weakens the State's claim of a "special need." *See e.g.*, Nancy Campbell, *Using Women: Gender, Drug Policy, and Social Justice* 27 (2000) (finding by National Institute on Alcohol Abuse and Alcoholism that the percentage of substance abusers among welfare recipients is "virtually identical" to the percentage in the general population); Sheldon Danzinger *et. al.*, *Barriers to the Employment of Welfare Recipients* 14 (2000) (Michigan study finding participants in Family Independence Program ("FIP") – the State's program for administering Temporary Assistance to Needy Families ("TANF") benefits – "no more likely to [be] drug and alcohol dependen[t] than adult women in the general population"). Unlike the student athletes in *Vernonia*, whom the Court characterized as "leaders of [a] drug culture," posing an "immediate crisis" to the safety and well-being of themselves

and others, *Vernonia*, 515 U.S. at 649, 663, Michigan's welfare population, with regard to the rate and severity of substance abuse, is a representative cross-section of America. Put differently, it is simply not true that a disproportionate number of people suffering from substance abuse receive public benefits – this is a problem spread evenly across socio-economic strata, afflicting persons independent of their race, class or gender.

Michigan tries to justify its policy not only by claiming that the welfare population experiences heightened levels of substance abuse, but also by alleging that the members of this population are disproportionately impaired by substance abuse in their ability to find and maintain employment or establish family stability. The data, however, do not support this assertion. To be sure, Michigan invokes various articles in its attempt to portray a substance abuse crisis among Michigan's poor. *See* Appellant Brief, 6-9. But the sources cited by Michigan stand only for the unremarkable (and uncontested) propositions that 1) "a certain percentage of welfare recipients use drugs," a subset of whom are impaired by that drug use, *id.* at 7, and 2) for these individuals, substance abuse is one among several barriers to achieving stable employment and family relationships, *id*. at 6. These facts, alone or in combination, do not establish that welfare recipients are more likely than the general population to be impeded in finding employment or maintaining family stability because of drug use. Indeed, Michigan's acknowledgement that substance

abuse is but one of several barriers confronting welfare clients sharply *undercuts* its claim that substance abuse presents a "special need" that justifies eschewing the Fourth Amendment and subjecting poor people to suspicionless drug testing.

In fact, substance abuse is "*not* a significant determinant of long welfare stays, repeat welfare use, or the total time a person remained on welfare." Schmidt *et al.*, *Substance Abuse, supra*, at 1620 (emphasis added). Other widely recognized impediments to family and employment stability facing this group include lack of basic skills, childcare and housing; low wages; mental illness (particularly depression); poor general health; and having a child with a chronic medical condition or severe disability. *See* Krista Olson and La Donna Pavetti, *Personal and Family Challenges to the Successful Transition from Welfare to Work* (1996). *See also* Margaret Brooks and John Buckner, *Work and Welfare: Job Histories, Barriers to Employment, and Predictors at Work Among Low-Income Single Mothers*, 66 Am. J. Orthopsychology 566, 527 (1996).

Grasping for a justification of their policy outside the realm of the welfare statutes and regulations, Michigan then invokes as a "special need" its obligation to protect children against child abuse and neglect. The District Court correctly held that "since TANF generally, and Michigan's FIP specifically, are not designed to ameliorate child abuse and 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." *Marchwinksi*, at 1141-1142. But even if the state FIP personnel could somehow show jurisdiction, Michigan fails to demonstrate any connection between substance use among adult welfare recipients and child abuse or neglect. As section III.B.2 below makes clear, a review of the scientific literature belies any claim (or stereotype) that welfare-eligible parents are any more likely to engage in drug-induced incidents of child abuse or neglect than more affluent families, or that the state is in any way justified in diminishing the constitutional rights of poor people in order to address either their substance and/or child abuse.

Michigan's tenuous justification for its welfare drug testing policy – that combating substance abuse improves family ties and employment opportunities – together with its negligible evidence of a specific crisis of drug abuse afflicting the welfare sector resembles the highly general argument recently rejected by the Supreme Court that searching vehicles absent individualized suspicion of illegal activity in the name of drug interdiction was reasonable under the Fourth Amendment. *Edmond*, 121 S.Ct. 447. It simply cannot be said that Michigan's policy of drug testing its welfare population "fit[s] within *the closely guarded* category of constitutionally permissible suspicionless searches." *Chandler*, 520 U.S. at 309 (emphasis added). To hold otherwise would expand the narrow special needs doctrine beyond recognition and invite myriad state breaches of cherished

privacy interests. In fact, if Michigan's drug testing policy were upheld on the ground that it promotes full employment and family stability, the State could justify suspicionless drug testing of virtually the entire adult population of the state.

In sum, since Michigan's justification for its policy is refuted by contemporaneous and reliable data, it cannot possibly fall within the special needs exception, and must be struck down.

### B. Michigan's policy is not appropriately tailored to further the State's goals and should be struck down as unreasonable.

Assuming *arguendo* that Michigan could make a case for a special need – namely, that substance abuse among its welfare recipients posed a serious and concrete threat to public health and safety – the policy at issue would still not pass constitutional muster. Michigan's suspicionless urine testing policy is not "well designed to identify" the subset of drug users whose substance abuse impairs their family relationships and employability, thereby failing to serve as a "credible means" to detect and address any negative effects of drug use. *Chandler*, 520 U.S. at 319. *See also Edmond*, 121 S.Ct. at 455. Without this crucial nexus between a special need and the means employed by Michigan to address it, Fourth Amendment reasonableness requirements are not met.

#### 1. Substance abuse or impairment cannot be conflated with substance use, and the use of drug testing fails to detect impairments to employability and family relationships.

Medical, drug treatment, and social services professionals distinguish between simple drug ingestion and problematic drug abuse or dependence, employing generally accepted criteria set forth in the American Psychiatric Association's *Diagnostic and Statistic Manual of Mental Disorders, IV* (1994) ("DSM-IV"). The DSM-IV defines substance "use" as the occasional alcohol, tobacco, or drug use for non-medical purposes, and substance "abuse," as use that leads to social, legal, or interpersonal problems and "dependence or addiction" (used interchangeably). Dependence or addiction, in turn, is described as "uncontrollable" drug use that results in substantial impairment of functioning and health.

Michigan's drug testing policy is fundamentally flawed because it does not distinguish between drug use and drug abuse or impairment. While "universal drug testing would quickly inform states about how many of their welfare clients had recently used drugs, [] it would not provide useful information about how many of them had an alcohol or drug problem that, without treatment, would prevent them from working and taking care of their families." Legal Action Center, *Making Welfare Reform Work: Tools for Confronting Alcohol and Drug Problems Among Welfare Recipients* 31 (1997). The fact that a urine sample tests positive for drugs does not mean that the person who provided the sample was drug dependent, was a drug abuser, is drug impaired, or is unfit to raise a family or

hold a job. Instead, a positive urinalysis, if accurate, simply announces the presence of a drug or its metabolite in the body.[2] *See* Nancy Young and Sidney Gardner, *Implementing Welfare Reform: Solutions to the Substance Abuse Problem* 9 (1997).

The distinctions drawn by the DSM-IV are particularly relevant given Michigan's stated goals – to promote strong family relationships and employment. Michigan neither argues nor offers evidence that occasional alcohol or drug use impairs family stability or one's ability to be gainfully employed. As it so happens, 70% of *all* illicit drug users (and presumably a much higher percentage of alcohol users), ages 18-49, are employed full-time. Substance Abuse and Mental Health Services Administration, *Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997 National Household Survey on Drug Abuse* 1 (1999). *See also* Schmidt *et al.*, *Substance Abuse*, *supra*, at 1620 (finding results that contradict the proposition that substance abuse problems inhibit recipients' prospects for obtaining stable jobs). Although Michigan professes a

[2] Drug tests commonly report "false-positives." For example, detecting drugs that were medically prescribed, passively ingested, or are mimicked by drug metabolites produced by commonplace foods such as poppy seeds. Edward Shepard and Thomas Clifton, *Drug Testing Productivity; Estimates Applying a Production Function Model*, Le Moyne Institute of Industrial Relations, Research Paper No. 18 (1998); Jorg Morland et. al. *Cannabinoids in Blood and Urine after Passive Inhalation of Cannabis Smoke*, 30 J. Forensic Sciences 997 (1985).

desire to root out substance *abuse* among Michigan's poor, its policy of searching their urine does not, and cannot, distinguish between simple use and problematic abuse. *See e.g*., Jayakody *et. al., supra*, at 644 (noting "widespread drug testing of welfare recipients will detect many women who have no accompanying problem with impaired social performance or employment").

2. Michigan's drug testing lacks sufficient nexus to its stated goal by ignoring alcohol and over-identifying cannabis.

Michigan's drug testing program is fundamentally flawed for still another reason: it fails to identify *alcohol* use and abuse. As every substance abuse expert knows, alcohol abuse far surpasses the use or abuse of all illicit drugs combined and is the principal cause of drug-related morbidity, impairment and death in the United States, irrespective of class.[3] *See e.g.*, Substance Abuse and Mental Health Services Administration, *Summary of Findings from the 1999 National Household Survey on Drug Abuse* Appendix G at Table 8, Table 9, and Table 29 (1999) (alcohol use far exceeds that of all other drugs combined); Grant and Dawson,

[3] Indeed, "alcohol abuse forms a prominent part in many if not most drug users' lives." Loretta Finnegan and Stephen Kandall, *Maternal and Neonatal Effects of Alcohol and Drugs in Substance Abuse: A Comprehensive Textbook* 529 (Joyce H. Lowinson, *et al.* eds., 1997).

*Alcohol and Drug Use, Abuse and Dependence Among Welfare Recipients, supra* at 1451-52 (incidence of alcohol abuse/dependence in AFDC recipients is double that of dependence on all other drugs combined). Yet Michigan does not test for alcohol. *See* Appellant's Brief at 11. Assuming *arguendo* that the Michigan's substance abuse problem rises to the level of a special need, Michigan's drug testing policy neglects the foremost drug-related threat to public health and safety.

Instead, Michigan's urine testing scheme is most likely to detect cannabinoids, even though cannabis is far less likely to affect family stability and job performance. *See e.g.*, Lynn Zimmer and John Morgan, *Marijuana Myths, Marijuana Facts: A Review of the Scientific Evidence* 63-68 (1997) (marijuana users are similar to non-users in most employment related measures, including grade-point average, diligence on the job, and earning capacity); *See also* Joyce Lowinson *et al.*, *Substance Abuse: A Comprehensive Textbook*, 3d ed. at 374 (1997). Cannabis is most likely to be detected by urine testing not only because marijuana is the most commonly used illicit drug, but also because marijuana takes far longer than most other drugs to be fully excreted from the bloodstream, tissues and urine.[4] Zimmer and Morgan, *supra*,at 121-22 (it takes days to weeks for marijuana to be excreted from the body). *See also* Richard Hawks and C. Nora Chiang, "Examples of Specific Drug Assays," in *Urine Testing for Drugs of Abuse*,

NIDA Research Monograph Series 73 (1987). *See generally*, Young and Gardner, *supra*, at 11-12 (Since urinalysis largely identifies low-level marijuana use, New York and Maryland concluded that drug testing welfare recipients is less effective and more costly than other types of assessment).

3. Drug testing does not detect child abuse and neglect.

Michigan erroneously attempts to justify its drug testing policy by averring to its need to protect children from abuse and neglect. *See Marchwinski* at 1141; Appellant's Brief at 28. The District Court held, however, that this goal, though laudable, does not fall within the mandate of the FIP program that administers Michigan's drug testing program. *Marchwinski* at 1141-42. *Amici* wish to note, however, that even if Michigan was empowered to address issues of child welfare, the State's drug testing policy is woefully ill-suited to achieve this separate goal and so does nothing to justify its breach of Fourth Amendment protections.

Michigan's argument boils down to the claim that urine testing somehow detects child abuse and neglect, and that mandatory suspicionless drug testing is therefore a critical tool for combating this scourge. Let it first be said that *amici curiae* yield to no one in their concern for the well-being of children and their understanding of the devastating effects that substance abuse can cause entire

[4] During the five weeks that Michigan's policy was in effect, 73% of the positive results detected only cannabis. Resp. to Pls' First Interrog., No. 2.

families, and it is for this very reason that it is incumbent upon *amici* to expose the fallacies in Michigan's reasoning.

Michigan's first mistake is to ignore the over-inclusive nature of drug testing. As pointed out above, a positive urine screen cannot be equated with problematic drug use. A multitude of data shows that parental drug use, across economic strata, is not a reflection of parenting abilities or commitment. *See, e.g.*, Susan Boyd, *Mothers and Illicit Drugs: Transcending the Myths* 14-15 (1999); Lynn Paltrow *et al.*, *Year 2000 Overview: Governmental Responses to Pregnant Women Who Use Alcohol and Other Drugs* 6-7 (2000); Margaret Kearney *et al.*, *Mothering on Crack Cocaine: A Grounded Theory Analysis*, 38 Soc. Sci. Med. 351, 359 (1996). A parent's positive drug test, in other words, is neither a sufficient nor necessary indicator that the parent is abusing or neglecting his or her children.

But even if Michigan's urine drug screens could somehow identify substance abusers, the State's argument would still fail. As a publication of the Foster Care Project of the American Bar Association notes: "[M]any people in our society suffer from drug or alcohol dependence yet remain fit to care for a child." American Bar Association, Foster Care Project, National Legal Resource Center for Child Advocacy and Protection, *Foster Children in the Courts*, 206 (Mark Hardin ed. 1983). Notwithstanding popular misconceptions and misleading media

accounts, it is simply not true that parents, particularly women, who suffer from substance abuse problems, are not effective caretakers. The research has shown that notwithstanding their addiction, "mothering is of central importance," to women substance abusers, and that "their children [are] a stabilizing force in their lives." Boyd, *supra*, at 14-15. *See also* Kearney *et al.*, *supra,* at 355, 359 (mothers who use cocaine are often able to care for their children); Paltrow *et al.*, *supra*, at 6-7. In fact, many parents who use illicit drugs go to great lengths to protect themselves and their families from addiction-related harms even as they may be unable to abstain completely from using alcohol or drugs. Boyd, *supra*, at 9-17; *See also* Sheigla Murphy and Marsha Rosenbaum, *Pregnant Women on Drugs: Combating Stereotype and Stigma* (1999). In its last-ditch effort to salvage its policy by claiming that substance use is synonymous with child abuse or neglect, Michigan repudiates bedrock principles of family law that prevent the State from interfering with parental custody absent a specific determination that the child's welfare is jeopardized. *See e.g.* Mich. Comp. Laws § 712A.2 (2000) (authority and jurisdiction of the probate court).

In making these points *amici* do not mean to suggest that parents who suffer from substance abuse are not in need of drug treatment or other services. But Michigan's drug testing policy is neither an adequate nor effective tool for identifying or combating child abuse or neglect, and to think otherwise could lead

to a serious misallocation of the limited resources needed to address this very important problem.

Because Michigan's policy fails to achieve *any* of its stated objectives, it cannot survive Fourth Amendment scrutiny and must be struck down.

### C. There are many methods, far less-intrusive than suspicionless drug testing, that better identify problematic drug use.

It is constitutionally significant that there are less-intrusive and more effective methods for identifying and assessing drug abuse than the mandatory suspicionless urine testing scheme adopted by Michigan. As studies examining welfare reform note, to identify the barriers to family and employment stability "states have overwhelmingly opted to use a 'tiered sequence' of events for conducting assessments of new and returning TANF clients." Scott Brawley, *Research Notes, TANF Client Assessments: Program Philosophies and Goals, Sequencing of Process, Uses of Information and State Changes or Modifications, Promising Practices, and Lessons Learned* 1 (2000) [hereinafter "*Lessons Learned*"]. As the term suggests, with tiered sequencing, clients initially receive a brief general assessment when they begin a job search. This general assessment, typically done by an interview, lacks the invasiveness of a search or seizure.

Furthermore, in order to qualify for and remain eligible for benefits, welfare recipients must participate in an ongoing series of appointments and other obligations including frequent meetings with their case workers to determine

eligibility, develop employment plans, and engage in job search activities, and classes related to life skills and job readiness. This ongoing scrutiny allows benefits workers to "spot[] and bring to account drug abuse," *Vernonia*, 515 U.S. at 664, and permits more in depth assessment upon a showing of need, while taking into account the daily realities and changes experienced by the welfare client. *See Lessons Learned*, *supra,* at 11. The Supreme Court's observation in *Chandler* is apt: the invasive nature of mandatory suspicionless drug testing is difficult to justify when its purpose is to ensure adequate performance and where, as in this case, there is opportunity for continuous review of conduct. *See Chandler*, *supra* at 307.

### D. Mandatory suspicionless drug testing of welfare clients is inimical to the State's goal of promoting self-sufficiency by deterring many of the most needy from accessing public benefits.

Michigan asserts an interest in helping poor people become self-sufficient – yet its policy of drug testing welfare applicants and recipients will likely *deter* eligible individuals from accessing the very benefits they need to get on their feet. A foreseeable result of Michigan's policy, therefore, will be to impede rather than improve the well-being of a significant number of people. *See, e.g.*, Legal Action Center, *Steps to Success: Helping Women with Alcohol and Drug Problems Move from Welfare to Work*, 18 (1999) [hereinafter "*Steps to Success*"]; Laura Schmidt and Dennis McCarty, *Welfare Reform and the Changing Landscape of Substance*

*Abuse Services for Low-Income Women,* 29 Alcoholism: Clinical and Experimental Research 1298, 1304 (2000).

1. Suspicionless drug testing erodes the trust between welfare recipients and benefit workers that is essential in achieving self-sufficiency.

In passing the Personal Responsibility and Work Opportunity Act (PROWRA) in 1996, Congress emphasized individualized assessments and service delivery systems designed to best help recipients get jobs and get off of welfare. The law left to the states the charge of working with each individual welfare recipient to create individualized plans for achieving self-sufficiency, and then to provide adequate training, services and job opportunities for clients.

Suspicionless drug testing, fails to "address the principal administrative challenge of developing effective integrated services to monitor and assist welfare recipients with drug-related concerns." Jayakody *et al., supra,* at 645. Key to achieving the new goals under PROWRA is the ability of the benefits workers, to work productively with their clients towards achieving self-sufficiency. La Donna Pavetti *et al., Designing Welfare-to-Work Programs for Families Facing Personal or Family Challenges: Lessons from the Field* (1996). Where trust is established, benefit workers and clients can work together to identify barriers to employment and access services to address specific needs. *See, Lessons Learned, supra*, at 11. Michigan's policy, however, by singling out indigent people who are seeking

public benefits and subjecting them to mandatory urine drug tests, is inimical to this process.

Instead, drug testing stigmatizes welfare clients as suspected drug users, holding over their head potential sanctions, including the loss of benefits, should they refuse to submit to a drug test or fail to complete treatment. This societal stigma attached to being labeled a drug user is so great as to deter many people, particularly women, and especially indigent pregnant and/or parenting women who have an acute need for public assistance, from applying for benefits. *Steps to Success, supra,* at 16 (noting that "[s]tigma against women with alcohol and drug problems, criminal records, or both can broaden the challenge for women who are making the transition into recovery, off welfare and into jobs.")

Michigan's policy, in short, is antithetical to the goal of moving poor people from welfare to work, and from family discord to stability.

2. Many poor women fear that drug testing will result in a loss of liberty or removal of children from the home.

The fear and stigma of Michigan's policy are exacerbated by how closely linked mandatory drug testing is with the criminal justice and child protective services systems, where positive urine tests can result in the revocation of probation or parole and/or the loss of one's children. It is likely if not certain that many of the people forced to undergo drug testing in Michigan as a condition of

eligibility for public benefits would fear the uses to which such drug tests might be put.

A significant fear facing many poor women is that their children will be taken out of their homes and placed in foster care. Accordingly, parents with even the remotest concern that they may test positive for drug use will avoid the welfare system altogether to reduce the possibility that they will be reported to the child protective services agency resulting in the suspension of parental rights. *Steps to Success, supra*, at 14; Young and Gardner, *supra*, at 27 (finding that drug testing acts as a disincentive to participate in supportive services); Schmidt and McCarty, *supra*, at 1304-1305 (observing that low turnouts for TANF in some states has led some welfare officials to speculate that women with alcohol and drug problems are not applying due to fears of attracting attention of Child Protective Services.); United States General Accounting Office Report to the Chairman, Committee on Finance, U.S. Senate, *Drug-Exposed Infants, A Generation At Risk*, GAO/HRD-90-138 at 20 (June 1990) (increasing fear of incarceration and loss of children to foster care is discouraging pregnant women from seeking care.)

This particular fear is heightened in Michigan for at least two reasons. First, Michigan has made clear its intention to increase the sharing of information between the agency in charge of overseeing public assistance and the state's child protective services. State of Michigan, Family Independence Agency, *Program*

*Eligibility Manual, Item 280* (Oct. 1, 1999) at 4 [hereinafter "*PEM*"].[5] Knowledge of this cooperation may well create a sufficient deterrent for potential applicants from seeking and retaining FIP/TANF benefits and accompanying services.

Second, prosecutors in Michigan have undertaken aggressive and well-publicized efforts to charge pregnant and parenting drug users with child abuse, or even more serious charges. *See e.g.*, *People v. Hardy*, 469 N.W.2d 50, 52-53 (Mich. App. 1991) *leave to appeal denied*, 437 Mich. 1046, *amended*, 471 N.W.2d619 (Mich. 1991) (criminal prosecution of woman under Michigan's drug delivery statute for "delivering" controlled substance to child through the umbilical cord). *See also* Jan Hoffman, *Pregnant, Addicted - and Guilty*, NYT Magazine, August 19, 1990 (discussing *Hardy* case); *People v. Bremer*, No. 90-32227-FH, slip op. (Cir. Ct. Muskegon Cty, Mich. Jan. 31, 1991) *appeal dismissed*, No. 137619 (Mich. App. July 14, 1992) (prosecution of pregnant woman after positive urine drug test at delivery). Similar publicized efforts of prosecutors in other states might also give women pause before submitting to drug testing. *See e.g.*, Linda Greenhouse, *Justices Consider Limits of the Legal Response to Risky Behavior by Pregnant Women*, NYT (Oct. 5, 2000) (article discussing South Carolina's policy

[5] According to Michigan's welfare Manual, "FIA and children's services can better serve the family [by sharing] information . . ." State of Michigan, Family Independence Agency, *PEM*, *supra*, at 4. FIA also reports all cases of reduced or discontinued benefits to children's services, who then conduct a home visit in thirty days. *PEM*, *supra*, at 9.

of secretly drug testing indigent women seeking prenatal care, where positive results lead to incarceration).

That mandatory government drug testing will deter people from accessing vital health and social services is not mere speculation: it is grounded in research and experience. Pregnant women in need of prenatal care, for example, avoid health clinics, or are highly reticent to divulge medically relevant but sensitive information to treatment providers for fear that knowledge of their alcohol or drug use may be used to deprive them of their freedom or their children. *See e.g.*, Southern Regional Project, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women*, 21 (1993) (a comprehensive study of perinatal substance abuse noting that women who trust their treatment providers are more likely to enter treatment). *See also* American Soc'y of Addiction Med., Bd. of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (Sept. 25, 1989); General Accounting Office, *ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment for Pregnant Women* 5, 20 (1991).

The deterrent effect of Michigan's drug testing policy will serve to deprive many of Michigan's most needy families of the financial and familial stability conferred by state welfare benefits, stability that in turn helps substance abusers decrease or cease their drug use. Amy Hirsch, *Welfare Reform and Women With*

*Drug Convictions in Pennsylvania* 66-67 (1999). It will also prevent them from obtaining important federal benefits, such as Medicare, further jeopardizing their health and well-being and that of their children. *See e.g.*, Olson and Pavetti, *supra*, at 18, 19 (reporting that for some people, the greatest benefit of TANF is Medicare as the only health insurance for their children); *Steps to Success*, *supra*, at 16; Kristen Shook, *Does the Loss of Welfare Income Increase the Risk of Involvement with the Child Welfare System?* (1999).

In short, for many of the most deserving individuals, Michigan's drug testing policy will likely work *against* Michigan's goals of ensuring family stability and employability by deterring them from seeking benefits in the first place, or by preventing them from establishing productive relationships with benefits workers that is so critical in a successful move from welfare to work. Michigan's policy does not advance its stated goals, does not embody a reasonable exercise of state power, and should be struck down.

### E. Every state but Michigan has rejected suspicionless drug testing to address problems of substance abuse among welfare clients.

Michigan stands alone in enacting its mandatory suspicionless urine drug testing policy as part of welfare "reform." *See* The Lindesmith Center, *Nationwide Study of Drug Testing Policies of Welfare Applicants: Did States Consider TANF Applicants' Legal Rights?* (1999). By contrast, many states have adopted screening and assessment methodologies that effectively identify individuals

impaired by drug abuse *without* conducting intrusive searches or circumventing traditional Fourth Amendment principles. *Id*.

The reasons most often cited by states for not implementing a Michigan-style drug testing policy are instructive. Twenty-one states regard such testing to be legally suspect; 17 states consider urinalysis prohibitively expensive as a matter of cost-benefit analysis; and 11 states regarded mandatory urinalysis so extreme that they never seriously contemplated such an approach. *Id*.

The states' explanations for not following Michigan's example are also telling.[6] For example, *Louisiana*, provides its welfare applicants with a written screening test for drugs, noting that "[t]his process was decided on because the U.S. Supreme Court decisions stated that drug testing was [] a search [] that required either reasonable suspicion or [dealt] with sensitive or security matters or safety issues. *Since the drug testing of TANF recipients did not fall within these exceptions Louisiana decided that it needed reasonable suspicion in order to test them*." Letter from Steven Mayer, General Counsel, State of Louisiana Department of Social Services to Wyeth McAdam, The Lindesmith Center of 10/8/99, at 1 (emphasis added).

Similarly, *Arkansas* uses a less-intrusive screening process to help identify substance abusers, together with "case managers [who] have been trained to

[6] *See* Appendix B.

recognize certain warning signs that indicate a substance abuse problem." Arkansas' approach is based on its recognition that "while substance abuse is a problem for some of our applicants/recipients, it is not a problem for all." Letter from Roy Kindle, Arkansas Dept. of Human Services to Wyeth McAdam, The Lindesmith Center of 9/23/99, at 1. *Virginia*, too, has opted for a written screening device in lieu of drug testing, citing several advantages of this approach, including that it provides quicker identification of substance abuse problems (versus mere drug use), better prevents drug-related problems at the workplace, is less costly and is easier to implement than urine testing. *Recipient Drug Testing Study,* Commonwealth of Virginia S. Doc. No. 5 (1998).

*Nebraska*, meanwhile, eschews universal urinalysis of welfare applicants because that state's welfare "reform effort recognizes that each of those we serve are [sic] unique and the assessment process upon which their employment plan is based must be responsive to this uniqueness. . . *Mandatory drug testing for all applicants would not follow our policies which support and individualized assessment process.*" Letter from Ron Ross, Nebraska Health and Human Services System to Wyeth McAdam, The Lindesmith Center of 9/30/99, at 1 (emphasis added). *Georgia* follows suit, noting that it "do[es] not feel that it is appropriate to test every applicant for TANF for substance abuse. We have chosen to act only when there is indication of a problem." Letter from Sharon Lyle, Georgia

Department of Human Resources to Wyeth McAdam, The Lindesmith Center of 10/15/99, at 1.

In sum, only Michigan has seen fit to mandate suspicionless urine drug testing of its welfare population as a condition of eligibility for public assistance. Michigan's attempt to justify its policy on grounds of public safety, the need to ensure employability or to create family stability is belied by the experiences and teachings of its sister states, none of which claim "special needs" or seek to bypass the privacy protections of the Fourth Amendment to implement welfare reform.

## V. CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this court affirm the District Court's ruling in this case.

Respectfully submitted,

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