UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LUIS W. LEBRON, individually
and as class representative,

Plaintiff,

v. Case No.: 6:11-cv-01473-MSS-DAB

DAVID E. WILKINS, in his official
capacity as Secretary of the Florida
Department of Children & Families,

Defendant.

_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW

Defendant David E. Wilkins, in his official capacity as Secretary of the Florida Department of Children and Families, pursuant to Federal Rule of Civil Procedure 56 and this Court's case management order, respectfully moves for summary judgment.

INTRODUCTION AND BACKGROUND

The sole issue in this case is the facial constitutionality of section 414.0652, Florida Statutes (the "Statute"), which requires a drug test as a condition of participation in the Temporary Assistance for Needy Families ("TANF") program. Plaintiff contends the Statute, on its face, violates the Fourth Amendment, and Plaintiff asks this Court to permanently enjoin its enforcement. DE1 at 10-12. In October of 2011, this Court entered a preliminary injunction. DE33. Based on the limited record before it, this Court concluded that Plaintiff was substantially likely to prevail on the merits, *id.* at 34, a conclusion with which the Secretary

respectfully disagreed.[1] The record now before the Court demonstrates that the Secretary is entitled to judgment as a matter of law.

STATEMENT OF MATERIAL FACTS SUPPORTING SUMMARY JUDGMENT

In addition to the stipulated facts jointly submitted by the parties, DE77, Defendant also submits that the following facts support this Motion. [2]

I. TANF Is a Jobs and Family-Stability Program.

1) TANF is a program established by Congress in 1996 to replace and fundamentally transform traditional welfare. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601 *et seq*.). TANF is a rigorous and multifaceted rehabilitative *program*—not a benefits handout—designed to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." 42 U.S.C. § 601(a)(2).[3] TANF is also designed to "provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives," to "prevent and reduce the incidence of out-of-wedlock pregnancies," and to "encourage the formation and maintenance of two-parent families." *Id.* §§ 601(a)(1), (a)(3)-(4).

2) TANF is not an entitlement program, and while it offers temporary cash assistance ("TCA"), it also conditions participation on completion of a host of work-search, work, and other

[1] The Secretary appealed the Court's preliminary injunction order, DE36, and the appeal remains pending. *See Lebron v. Wilkins*, Case No. 11-15258 (11th Cir.).

[2] The Court "may consider other materials in the record," Fed. R. Civ. P. 56(c)(3), and Defendant encourages the Court to review the entirety of the declarations, deposition transcripts, and other materials filed with this Motion. Furthermore, because this case calls for the Court to fashion a constitutional rule, Defendant maintains that many of the facts contained herein constitute legislative, rather than adjudicative, facts, and for that reason do not require a trial, even if disputed by Plaintiff. *See* Note, Fed. R. Evid. 201., Advisory Committee Notes ("[T]he view which should govern judicial access to legislative facts … renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level.").

[3] Under TANF, the federal government provides grants to states, which design and administer their own aid programs within certain limitations prescribed by federal statutes and regulations. *See* 42 U.S.C. § 601(a). Florida's TANF program is set out in Chapter 414, Florida Statutes, and associated regulations.

requirements. Stip. ¶¶ 5, 6, 8; *see also* 42 U.S.C. § 601(b) (no entitlement); Fla. Stat. § 414.025(2) (same). TANF eligibility is limited to families with children or expectant mothers, *id.* § 414.095, and TCA is limited to a lifetime maximum of forty-eight months, Stip. ¶ 10. In short, TANF's purpose is not merely to give money to those falling below a certain economic threshold—it is to "help move people from welfare to work." 64 Fed. Reg. 17720, 17721-22; *accord* Ex. 1 (Carroll Dep.) at 41:15-18; 107:20-21 ("the program is designed … [to] work with the folks intensively to get them ready to work, get them out to work, and get them off the cash assistance program"; "it was never intended to be a program you could live off of"); Ex. 2 (Ferguson Dep.) at 20:24-25; 80:11-13 ("it is an employment and training grant"; agreeing that "the entire focus of [the workforce board] is getting people employed").

3) Consistent with its purposes, the TANF program provides substantial non-cash benefits. Of the federal TANF block grant the State received in state fiscal year 2011-12, the State disbursed approximately $31 million in TCA; allocated approximately $70 million to Florida's workforce boards for use in job-assistance related activities for TANF-eligible persons; and spent approximately $20 million on related child-care services. Stip. ¶ 8.

4) Workforce services include employability assessments, job-training and other educational services, child care, assistance acquiring work-related supplies (such as uniforms or scrubs), and gas cards, bus fares, or even utility assistance to support applicants' work search. *Id.*; Ex. 3 (Phinney Dep.) at 51:1-52:23; Ex. 2 (Ferguson Dep.) at 46:18-47:12. These components are provided by Florida's twenty-four publicly funded regional workforce boards, which are administered by the Florida Department of Economic Opportunity. Ex. 2 (Ferguson Dep.) at 13:12-18; 15:2-5. These workforce boards are also responsible for ensuring TANF recipients meet their work-search requirements. *Id.* at 16:17-25.

5) Pursuant to 21 U.S.C. § 862b, Congress authorizes states to "test[] welfare recipients for use of controlled substances" and to "sanction[] welfare recipients who test positive for use of controlled substances." In addition to Florida, Georgia has recently enacted a statute requiring drug testing of TANF applicants, Ga. Code § 49-4-193, and according to the National Conference of State Legislatures, at least twenty-eight states, including Alabama, put forth proposals in 2012 to require some form of drug screening in the TANF program.[4]

II. TANF Participants Are Required to Meet Substantial Work-Search Requirements.

6) After the Department of Children and Families ("DCF") approves a TANF application, DCF refers that individual to a regional workforce board. Ex. 4 (Digre Dec.) ¶ 5; Ex. 2 (Ferguson Dep.) at 16:14-25. The workforce board then conducts an interview, evaluates the participant's skills, educational attainment, interests, and work history, and identifies potential barriers to gainful employment. Ex. 2 (Ferguson Dep.) at 46:20-47:20; Ex. 3 (Phinney Dep.) at 19:1-8.

7) Plaintiff was required to meet with a counselor to verify his eligibility, including work-search and verification of school information. Ex. 5 (Lebron Dep.) at 93:13-25.[5] He also participated in telephone interviews associated with his TANF application and enrollment, and he does not recall refusing to answer any questions. *Id.* at 137-41.

8) Based on individual circumstances, the workforce board creates an Individual Responsibility Plan for each TANF recipient. Ex. 2 (Ferguson Dep.) at 77:24-78:12. The individual plans, which are typically different for each person, are essentially career development

[4] *See* http://www.ncsl.org/issues-research/human-services/drug-testing-and-public-assistance.aspx, last visited September 10, 2012.

[5] Before filing Mr. Lebron's deposition transcript (Ex. 5) and selected deposition exhibits, counsel for the Secretary redacted certain personal information.

plans, which establish specific strategies for achieving gainful employment for the applicant. *Id.*[6]

9) A workforce board continually interacts with a TANF participant throughout his or her time in the program. The workforce board must have contact with the participant a minimum of once every thirty days, Ex. 3 (Phinney Dep.) at 21:4-7, and a TANF participant must report to the workforce board more frequently. Plaintiff, for example, was required to provide a weekly report (signed by his teacher) verifying educational activities, such as which classes he attended that week. Ex. 5 (Lebron Dep.) at 94:10-20. Although Plaintiff considers this "excessive monitoring," which contributed to what he perceives to be "subhuman treatment," *id.* at 94:19, 96:14, 101:9-12, he complied with the educational-activity verification requirement, submitting numerous forms to his monitors. *Id.* at 97:17-21.

10) In addition to educational-activity reports, TANF participants must submit weekly reports verifying work-search efforts. *Id.* at 97:12-25; *see also* Ex. 1 (Carroll Dep.) at 38:6-9 ("they are subject to much more rigorous job search and work requirements than there are present in our other programs like food stamps or Medicaid"). On these reports, Plaintiff hand wrote information about jobs for which he applied or interviewed, along with the amount of time he spent on such efforts. Ex. 5 (Lebron Dep.) at 95-96 & Dep. Ex. 7. Like the educational-activity reports, Plaintiff considered these job-search reports "excessive monitoring," but he nonetheless complied with the requirements, completing and submitting the reports on a weekly basis. *Id.* at 97:1-5.

[6] *See also* 42 U.S.C. § 608 ("with respect to an individual, the State agency, in consultation with the individual, may develop an individual responsibility plan for the individual, which (i) sets forth an employment goal for the individual and a plan for moving the individual immediately into private sector employment; (ii) sets forth the obligations of the individual, which may include a requirement that the individual attend school … or do other things that will help the individual become and remain employed in the private sector ….").

11) The workforce board's role is not only to monitor the individual's job-search and reporting requirements, but also to enforce them. Ex. 4 (Digre Dec.) ¶ 5. If the TANF participant fails in meeting the obligations, the regional workforce board can impose sanctions, including termination or suspension of TCA benefits. If the workforce board imposes such a sanction, it notifies DCF, which imposes the suspension or termination of TCA. *Id.*; Ex. 1 (Carroll Dep.) at 96:23-97:1.[7]

12) The assistance TANF provides—and the responsibilities it imposes on recipients—support the workforce board's fundamental mission to obtain employment for TANF participants. Ex. 2 (Ferguson Dep.) at 80; Ex. 1 (Carroll Dep.) at 41:10-18.

III. The State's Efforts to Move TANF Recipients Into the Workforce Are Hampered By Participants' Drug Use.

13) The workforce boards work with TANF participants to overcome barriers to self-sufficiency and employment. Ex. 2 (Ferguson Dep.) at 16:24-25, 47:13-14. Barriers to employment negatively affect the ability of the workforce boards to fulfill their purposes, so an initial step after referral is to review the participant's employment barriers, Ex. 3 (Phinney Dep.) at 19:1-8. One such barrier is drug use, which is a substantial obstacle in securing and maintaining employment. Ex. 2 (Ferguson Dep.) at 69:8-13, 74:13-19, 80:22-24; Ex. 4 (Digre Dec.) ¶ 5; Ex. 6 (Carroll Dec.) ¶ 8; Ex. 1 (Carroll Dep.) at 43:20-44:5; Ex. 7 (Mack Dec.) ¶¶ 7, 18-19, 22-23.

[7] The requirements are consistent with federal and state law. *See, e.g.,* 42 U.S.C. § 602(a)(1)(A)(i) (state program must "provide[] parents with job preparation, work, and support services to enable them to leave the program and become self-sufficient"); *id.* § 604(f) (states may use block grants "to make payments (or provide job placement vouchers) to State-approved public and private job placement agencies"); *id.* § 607 (mandatory work requirements); Fla. Stat. § 414.065 (establishing penalties for noncompliance with work requirements); *id.* § 414.095(1) ("applicant shall be required to register for work and in work activities").

14) To be harmful to a TANF participant's employability, drug use need not be lengthy or substantial; any amount of drug use can interfere with obtaining and maintaining employment. Ex. 7 (Mack Dec.) ¶ 19. The harmful effects may vary by other individual characteristics and job responsibilities, but ultimately, substance abuse directly impairs a person's ability to secure and retain a job. *Id.* ¶¶ 18-19. Thus, it is not surprising that the rate of drug use is greater for those who were unemployed than those who were employed. *Id*. ¶ 20. And among those who *are* employed, drug use impedes occupational performance. *Id*. ¶¶ 19-23; *accord* Ex. 2 (Ferguson Dep.) at 74:17-19.

15) TANF participants with drug problems are typically not considered job ready. Ex. 2 (Ferguson Dep.) at 74:11-15.

16) One reason drug users are not typically work-ready is that they are unlikely to pass a prospective employer's drug test. Ex. 2 (Ferguson Dep.) at 50:14-23; 69:4-15, 74:11-19; Ex. 3 (Phinney Dep.) at 33:5-7; 49:25-50:11. A substantial number of employers who hire TANF participants require drug tests. The personal experience of employees of the Northeast Florida workforce board demonstrates that a majority of the employers to whom their workforce board refers TANF participants require drug testing.[8] Ex. 3 (Phinney Dep.) at 41:10-15; Ex. 2 (Ferguson Dep.) at 52:18-19; 70:9-11 ("Many, and I think most employers do that today"; "I know that most employers today do drug testing as a prerequisite for hiring").[9]

17) It is important that the workforce board refer only qualified TANF participants to prospective employers. Ex. 2 (Ferguson Dep.) at 47:21-48:3, 51:5-7. Otherwise, the workforce board's credibility is threatened, which hampers its ability to place participants into jobs. *Id.*

[8] The workforce board for Northeast Florida comprises Baker, Clay, Duval, Putnam, and Nassau counties. Ex. 2 (Ferguson Dep.) at 13:24-14:1.

[9] Notably, the workforce board itself drug tests its own employees as a matter of course. Ex. 2 (Ferguson Dep.) at 69:16-17; Ex. 3 (Phinney Dep.) at 39:7-8.

When the drug-testing at issue was in place, the Northeast Florida workforce board knew that individuals referred to it would be able to pass an employer's drug test. *Id.* at 50:17-51:7; 52:1-19.

18) Whether because of employer drug testing, because of the adverse effects of drug use on individuals, or both, DCF's experience demonstrates that a strong correlation exists between drug use and unemployability. Ex. 6 (Carroll Dec.) ¶ 8; Ex. 4 (Digre Dec.) ¶ 7.

IV. Drug Use Harms Child Welfare, Family Stability, and Individual Health and Wellbeing.

19) Drug use is harmful to families. Ex. 7 (Mack Dec.) ¶ 12; Ex. 1 (Carroll Dep.) 16:6-10. Children and families can be negatively affected directly by a parent's substance use due to any impairment or disability that affects the parent. Ex. 7 (Mack Dec.) ¶ 12. A parent's drug use can impair that parent's capacity to provide the consistent care, supervision, and guidance that children need. *Id*. Similarly, drug use can reduce a parent's frustration tolerance, organization, and modeling, all of which impair a parent's capacity to allow for healthy child development. *Id*.

20) Empirical evidence demonstrates unhealthy outcomes for children whose parents use drugs. *Id*. ¶ 13. These include poor emotional regulation and social interaction as toddlers as well as the development of attention deficit-hyperactivity disorder, oppositional defiant disorder, and conduct disorder. *Id*. In addition, parental drug use is associated with a child's greater exposure to violence in and out of the home, and that greater exposure has been shown to contribute to adverse psychological outcomes in adolescence, including higher rates of depression and posttraumatic stress disorder. *Id*. A well-established link also exists between parental drug use and adolescent substance abuse. *Id*. ¶ 15.

21) In Florida, a substantial portion of the cases in which DCF removes children from parental care involve drug use. In any given month in Florida's SunCoast region, for example, at least sixty percent of child removals are related to drug use. Ex. 6 (Carroll Dec.) ¶ 10.

22) Drug use also harms family stability by fomenting out-of-wedlock pregnancies. Ex. 7 (Mack Dec.) ¶ 17.[10]

23) Drug use harms individuals. *Id.* ¶ 7. The deleterious effects on individuals manifest themselves in biological, social, and psychological manners. *Id.* Deleterious effects may result from use of any drug at any amount. *Id.* ¶ 8.

24) The association between substance use and crime is well established, and the frequency of criminal behavior increases with the severity of substance use. *Id.* ¶ 11.

25) Pre-natal exposure to drugs creates harm to unborn children. *Id.* ¶ 14. DCF has established special programs targeted at assisting pregnant women to reduce the incidence babies born with addiction or other drug-related harm. Ex. 6 (Carroll Dec.) ¶ 9.

V. Drug Use Among the TANF Population Is a Demonstrated Problem.

26) Unfortunately, drug use among the TANF population is neither rare nor isolated. DCF officials have long witnessed a high correlation between drug use and poverty, Ex. 6 (Carroll Dec.) ¶ 8; Ex. 4 (Digre Dec.) ¶ 7, and they have testified to numerous examples of TANF participants using drugs, Ex. 1 (Carroll Dep.) at 16:12-19 ("One of the number one things that we deal with in every program I manage is substance abuse and its impact on these programs."). Some individuals actually "self-identify" to workforce board staff as having drug problems. Ex. 2 (Ferguson Dep.) at 47:14-20; 48:7-12. Some also admit to workforce board staff that drugs are the reason they have been unable to obtain employment. Ex. 3 (Phinney Dep.) at 25:8-12. Over a recent ninety-day period, some forty-two individuals self-identified to

[10] *See also* materials cited at Section II.A.2, below.

the Northeast Florida regional workforce board as having substance-abuse (either drug or alcohol) problems. Ex. 2 (Ferguson Dep.) at 41:4-6; 57:22-58:2. Some individuals do not admit to drug use at the outset of the job-placement process, instead waiting until the workforce board has scheduled a job interview with an employer that requires drug screening. Ex. 3 (Phinney Dep.) at 25:13-22. Sometimes after learning of the employer's drug-testing program, the participants acknowledge that they might fail the screening because of drug use. *Id.*

27) DCF officials have personally observed hundreds of TANF applicants who appear to be under the influence of drugs. Ex. 6 (Carroll Dec.) ¶ 13. Currently, nearly all TANF applicants apply for benefits through an Internet-based form. *Id.* ¶ 11. Before implementation of the Internet-based form, however, most applicants would personally visit a DCF office to apply for benefits. *Id.* DCF employees frequently observed among these applicants indications of drug use, including slurred speech, bloodshot eyes, inability to focus, and other similar symptoms indicating drug use. *Id.* ¶ 13. In many instances, DCF staff personally detected the odor of marijuana on applicants. *Id.*

28) In recent years, the TANF program has had to confront the dramatic spike in prescription drug abuse, a particular problem in Florida. Ex. 1 (Carroll Dep.) at 16:21-23, 17:21-22, 18:12-15, 60:21-25; *see also* Office of Florida Attorney General, Pill Mill Initiative, http://myfloridalegal.com/pages.nsf/Main/AA7AAF5CAA22638D8525791B006A30C8 ("Florida leads the nation in diverted prescription drugs…. Our state has become the destination for distributors and abusers through the proliferation of pill mills.).

29) TANF officials, through observation and experience, believe that TANF recipients are more likely to use drugs than recipients of other government benefits. Ex. 6 (Carroll Dec.) ¶ 14; Ex. 4 (Digre Dec.) ¶ 10.

30) Scholarly research and study provides evidence that the rate of drug use in the TANF population exceeds the rate found in the general population. Ex. 7 (Mack Dec.) ¶¶ 27-28. Analyses demonstrate that about 5% of TANF recipients satisfied criteria for drug dependence, which is elevated in comparison to the general population (which comprehensive studies estimate to be less than 2%). *Id.* ¶ 27. Elevated levels also apply to *use* of drugs, even when that use does not rise to the level of a clinical diagnosis of drug dependence. Ex. 7 (Mack Dec.) ¶ 28. The percentage of adults with reported past-twelve-month drug use is approximately five percent. *Id.* Yet the corresponding number for TANF participants is approximately twenty percent. *Id.* Overall, extensive academic studies show that TANF recipients are more likely to use drugs than non-TANF recipients, and, in any event, that drug use is a demonstrated problem in the TANF population. *Id.* ¶¶ 25, 27-28.[11]

31) DCF statistics suggest that the rate of drug use among Florida's TANF recipients is greater than the rate of drug use among recipients of other government benefits. Through its ACCESS database, DCF maintains data regarding current and former recipients of TANF, Supplemental Nutrition Assistance Program ("SNAP") (formerly known as food stamps), and Medicaid. Ex. 8 (Brown Dec.) ¶ 2. Through its Substance Abuse and Mental Health Information Systems ("SAMHIS"), DCF maintains data regarding current and former recipients of DCF-funded drug abuse treatment. Ex. 9 (Wasserman Dec.) ¶¶ 5-6. DCF compared data from its ACCESS database to data in its SAMHIS database to determine which recipients of TANF, SNAP, or Medicaid as of March 28, 2012 (limited to age eighteen or older) had

[11] In its Preliminary Injunction Order, the Court discussed the results of a "demonstration project" that employed drug screening for a limited set of TANF applicants in 1999-2000. Defendant submits that, for a variety of reasons, that limited "demonstration project" is not dispositive of this case, but Defendant will offer further analysis if Plaintiff successfully introduces the "demonstration project" into the summary judgment record and affirmatively relies on it.

corresponding records in the SAMHIS database showing the individual received drug treatment services from 2000 to the present. Ex. 8 (Brown Dec.) ¶¶ 6-7; Ex. 9 (Wasserman Dec.) ¶¶ 7-9. The data matching revealed the following: Of the 1,571,179 individuals over age 18 receiving Medicaid as of March 28, 2012, there were 62,210 (or 4.0%) who had a record of having received DCF-funded substance abuse treatment. Ex. 8 (Brown Dec.) ¶ 8. Of the 1,915,741 individuals over age 18 receiving SNAP as of March 28, 2012, there were 127,109 (or 6.6%) who had a record of having received DCF-funded substance abuse treatment. *Id.* Of the 17,606 individuals over age 18 receiving TANF as of March 28, 2012, there were 1,605 (or 9.1%) who had a record of having received DCF-funded substance abuse treatment. *Id.* Thus, the TANF percentage exceeded the percentages of the other groups.[12]

32) DCF also compared ACCESS data to data in its Florida Safe Families Network "FSFN" database (which contains information about child-abuse reports, Ex. 10 (Graham Dec.) ¶¶ 5-6), to determine which recipients of TANF, SNAP, or Medicaid as of March 28, 2012 (limited to those age eighteen or older) had corresponding records in the FSFN database showing that the individual was associated with a verified allegation of substance misuse in a child abuse investigation. Ex. 8 (Brown Dec.) ¶¶ 5, 7, 8.[13] The data matching revealed the following: On March 28, 2012, there were 1,571,179 individuals over age 18 receiving Medicaid. *Id.* ¶ 8. Of those, 17,327 (or 1.1%) had a record of being associated with a verified allegation of substance misuse in a child-abuse investigation. *Id.* As of the same date, 1,915,741 individuals over age 18 were receiving SNAP. *Id.* Of those, 25,942 (or 1.4%) had a record of

[12] DCF ran similar matches for other periods to determine whether the March 28, 2012 results were anomalous. As demonstrated in the chart attached to the Declaration of Pat Brown, they were not. Ex. 8 (Brown Dec.).

[13] As the term is used within DCF, and consistent with DCF operating procedures, a finding is considered verified "when a preponderance of the credible evidence results in a determination that the specific harm or threat of harm was the result of abuse, abandonment or neglect." DCF Operating Procedure No. 175-28; *see also* Ex. 10 (Graham Dec.) ¶ 10.

being associated with a verified allegation of substance misuse in a child-abuse investigation. *Id.* Among the TANF population, on March 28, 2012, there were 17,606 individuals over age 18 receiving TANF. *Id.* Of those, 613 (or 3.5%) had a record of being associated with a verified allegation of substance misuse in a child-abuse investigation. *Id.* The TANF percentages were thus approximately twice their SNAP and Medicaid counterparts.[14]

33) The transition from in-person applications to electronic applications, while increasing accessibility for TANF applicants, has decreased the ability of TANF officials to personally detect drug use. Ex. 1 (Carroll Dep.) at 86:13-22, 87:11-18.

VII. Drug Testing Is Prevalent in the Private Sector.

34) As Plaintiff has already stipulated, "the private sector is rife with drug testing." DE45 (Tr. at 6), and drug testing among employers is prevalent in the American workplace, Ex. 11 (Wilson Dec.) ¶¶ 15-16. Drug tests are now routinely required of job applicants and employees. Ex. 11 (Wilson Dec.) ¶ 15. More than two-thirds of employers with 100 or more employees have drug-testing programs, and Florida ranks tenth in the nation with a prevalence rate of almost 52 percent of all employers requiring drug tests, significantly higher than the U.S. average. *Id.* ¶ 16. Indeed, of the fifty largest employers in Florida, more than half of them indicated on their website that they have drug testing programs. Ex. 11 (Wilson Dec.) Exh. A at p. 4-6. Since the economic recovery began in July 2009, 69.4 percent of all new hires were drug tested by establishments with 25 or more employees and, on average, 67.8 percent of the employees in those establishments reported their employer had a drug testing program. *Id.* at p. 3.

[14] After matching these data for recipients of public benefits as of March 28, 2012, DCF ran similar matches for other time periods to determine whether the March 28, 2012 results were anomalous. As demonstrated in the chart attached to the Declaration of Pat Brown, they were not. Ex. 8 (Brown Dec.)

35) The workforce board for Northeast Florida sees on "many, many job listings" in its system where employers require drug testing before an applicant can start work. Ex. 2 (Ferguson Dep.) at 50:24-51:1; 52:18-19; 70:9-11. In fact, most such employers require drug testing as a prerequisite for hiring. *Id.* at 70:9-11.

36) Moreover, society has come to view drug testing as an accepted practice—a social norm that permeates many areas of life. Ex. 11 (Wilson Dec.) ¶ 16. Studies and polls demonstrate that the public attitudes in the U.S. have become increasingly favorable toward drug testing. *Id.*

VIII. Plaintiff Lebron.

37) Mr. Lebron is a 36-year-old resident of Orlando, Florida. Stip. ¶¶ 26-27. He was a participant in the TANF program from the entry of the Court's preliminary injunction until August, 2012. *Id.* ¶ 30. He currently receives, or in the past has received, SNAP benefits, Medicaid benefits, VA benefits, unemployment benefits, and student financial aid. *Id.*; Ex. 5 (Lebron Dep.) at 40:5-11.

38) To participate in TANF, an individual must meet numerous eligibility requirements and complete an extensive application. DE 19-1 at 2-3; DE 19-3. The application requires disclosure of much personal and private information. Stip. ¶ 3. In his multiple TANF applications, Plaintiff provided, without objection, all of the information requested. Ex. 5 (Lebron Dep.) at 81:19-21; 84-85. For example, he provided to DCF his child's medical evaluation, information about his student financial aid, and copies of his driver's license and social security card, even though he considers all of this information to be private. *Id.* at 83:13-84:1; 140:10-141:4.

39) Once enrolled in TANF, Plaintiff voluntarily executed a "General Release of Confidential Information" related to the entity charged with monitoring his compliance and

continued TANF eligibility (ZuCan). *Id.* at 108:20-109:2. In doing so, he was comfortable giving the program staff the authority to obtain and disclose information from his "educational providers, instructors, physicians, counselors, therapists, employers, [and] childcare service providers." *Id.* & Dep. Ex. 8.

40) Plaintiff is willing to take a drug test as a condition of employment. Ex. 5 (Lebron Dep.) at 107:23-108:1; 159:13-17. Indeed, in the course of his employment search as part of the TANF program, he acknowledged to potential employers that he would submit to drug testing as a condition of employment. *Id.* at 114:14-25; 124:4-15 & Dep. Ex. 10, 11.

41) As an employee, Plaintiff has repeatedly and willingly submitted to drug testing as a condition of employment—both in the U.S. Navy and when working for private employers. *Id.* at 41, 72; Ex. 12 (Lebron Int. Resp.) ¶¶ 5, 6.[15] And during the course of this litigation, Plaintiff sought term life insurance and voluntarily submitted to a drug test and other medical evaluations as policy conditions. Ex. 5 (Lebron Dep.) at 48:17-22; 49:19-24.

42) The employer drug testing to which Plaintiff has been subjected over his lifetime was not sufficiently intrusive such that he remembers all of the tests or details about them. In Interrogatory responses, Plaintiff swore he was tested at Universal Orlando. Ex. 12 (Lebron Int. Resp.) ¶ 6. But at his deposition just four months later, he did not recall being drug tested at any private employer other than Darden. Ex. 5 (Lebron Dep.) at 42:15-43:5. He testified at deposition that he did not recall whether he submitted to testing at Universal, or whether he was tested at Darden more than once, or whether Darden's tests were by means other than urinalysis. *Id.* at 154:20-55:8; 43:5; 46-47. Regarding the Darden test, he does not recall the location, whether it was taken in a restroom, or whether he offered the sample in private. *Id.* at 44:20-21;

[15] Plaintiff testified that, while in the Navy, he "was the first in line to take the drug test." This was "to prove a point . . . that I don't use drugs." Ex. 5 (Lebron Dep.) at 70:3-4, 19-20.

47:3-17. Plaintiff "do[es]n't even think about" whether firms drug test when applying for jobs. Ex. 5 (Lebron Dep.) at 107:9.

SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

ARGUMENT

It does not offend the Fourth Amendment to require TANF applicants to pass a urinalysis drug test in order to qualify for participation in the program. First, applicants are drug tested only if they voluntarily consent, and consent has long been a cure for any potential infringement of Fourth Amendment rights. This was the precise holding of *Wyman v. James*, 400 U.S. 309 (1971), in which the Supreme Court upheld a home-search requirement for welfare participants. Second, even if the consent doctrine is insufficient to resolve this case, the drug tests at issue are reasonable upon a balancing of the State's special needs against the Plaintiff's diminished expectations of privacy. *See Board of Educ. v. Earls*, 536 U.S. 822, 830-38 (2002). TANF is concerned with employment and family stability (particularly child welfare). Drug use is antithetical to both missions, and drug testing thus furthers the program's purposes. TANF applicants, who must disclose a broad range of private information in order to participate in the program, have a substantially diminished expectation of privacy. Moreover, drug testing is commonly required in today's society—particularly in the *very* job market that TANF prepares participants to enter.

I. The Statute Does Not Violate the Fourth Amendment Because the Drug Test Is Conditioned On the Applicants' Consent.

Although the Statute requires drug testing as a condition of participating in TANF, it does not force anyone to submit to a screening. If a TANF applicant objects to the drug-testing condition, he is free to decline the offer to participate in the program, and no drug test occurs. If the applicant consents, he may participate in the program upon passing a drug test.

Courts have long recognized that voluntary consent to a search renders it constitutionally permissible. *See, e.g.*, *United States v. Drayton,* 536 U.S. 194, 207 (2002) (search is reasonable where consent is voluntary); *United States v. Mendenhall*, 446 U.S. 544, 555 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *United States v. Martinez*, 949 F.2d 1117, 1119 (11th Cir. 1992) ("A consensual search is manifestly reasonable so long as it remains within the scope of the consent.").

In the welfare context specifically, the Supreme Court has held that consent to a required search cures any potential Fourth Amendment violation. In *Wyman,* 400 U.S. 309, the Court upheld a requirement that a welfare participant (in AFDC, the precursor to TANF) submit to a home investigation by a state official. The Court began the opinion by recognizing that "over the years [it] consistently has been most protective of the privacy of the dwelling," and that "[w]hen a case involves a home and some type of official intrusion into that home … [there is] concern about Fourth Amendment rights." *Id.* at 316-17. The case, however, did not present "any search by the New York social service agency in the Fourth Amendment meaning of that term" because "the visitation in itself is not forced or compelled, and … the beneficiary's denial of permission is not a criminal act." *Id.* at 317. The fact that benefits could be withheld after denial of permission did not vitiate consent: "If consent to the visitation is withheld, no visitation takes

place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." *Id.* at 317-318.

That was the end of the case. While the Court engaged in further discussion of why it would "nevertheless conclude" that the home visit passed muster even if the Court "were to assume that a caseworker's home visit ... does possess some of the characteristics of a search in the traditional sense," *id.* at 318, that alternative analysis did not in any way qualify or detract from the principal holding of the case: consent to an administrative-search requirement in the public-assistance context renders the search constitutional.[16]

The Third Circuit has specifically applied the consent principle in a case challenging drug tests as a condition of government employment. *See Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61, 65-66 (3d Cir. 2001). In *Kerns*, a government agency extended an offer of employment that was "contingent upon successful completion of … [a] drug test." *Id.* at 65; *see also id.* at 64 (the agency "established an unwritten policy and practice that all new hires must submit to and pass a drug screening urinalysis as a condition of employment"). The Third

[16] Earlier in this case, the Court preliminary opined that *Wyman* was not applicable here because the "nature of the intrusion" differed—namely, that the government official entered the home "not [as] a sleuth but rather … [as] a friend to one in need." DE33 at 16. But this difference cannot be dispositive. First, the consent ruling in Part IV of *Wyman* (as opposed to the alternative ruling in Part V) did not turn on the notion that the government official was a "friend." Second, far from downplaying the overall investigatory nature of the home visit, the *Wyman* Court repeatedly quoted material showing that the purpose of the visit was to *investigate* eligibility. *See id.* at 311 n.2 ("The circumstances of a person receiving continued care shall be reinvestigated as frequently as the rules … may require."); *id.* ("any investigation or reinvestigation of eligibility…."); *id.* at 312 n.4 ("Required home visits and contacts. Social investigation … shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility."); *id.* at 314 (quoting review officer explaining: "The home visit which Mrs. James refuses to permit is for the purpose of determining if there are any changes in her situation that might affect her eligibility…."). Third, even if the *Wyman* search was "friendly," that factual difference does not lead to a contrary legal outcome. If the government's unilateral assertion of beneficence is enough, then this case is over. As this Court has already noted, the State's purposes here are "laudable," DE33 at 23, and discouraging drug use is a friendly motive. But the Fourth Amendment has no "government-helper" clause. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985); *Ferguson v. City of Charleston*, 308 F.3d 380, 396 (4th Cir. 2002). It speaks only in terms of reasonableness. The question here is whether consent renders the drug test reasonable. *Wyman*'s clear holding, in line with the well-established doctrine of consent, is that it does.

Circuit rejected Kerns's Fourth Amendment claim because "it is … settled law that a search conducted with the free and voluntary consent of the person searched is constitutional." *Id.* Kerns "signed a document in which he agreed to 'successful[ly] complet[e]' a pre-employment drug test as a condition of his employment," and that was enough to vitiate any constitutional concern. *Id.* at 66.

While the Eleventh Circuit has not addressed the effect of consent on the constitutionality of a urinalysis drug test, it has squarely held that consent cures any potential constitutional problem when a government employer subjects employees to a routine search policy. In *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977),[17] a prison-employer searched the lunch bag of a guard and found marijuana. Rejecting his Fourth Amendment claim, the court found dispositive the fact that the prison's policy—of subjecting all employees to "routine searches of their person, property or packages"—had been prominently displayed "for at least nine months preceding the search." *Id.* at 350. Sihler, a six-year employee, had "voluntarily accepted and continued an employment which subjected him to search on a routine basis," and thus had no Fourth Amendment claim. *Id.* Just four years ago, the Eleventh Circuit reaffirmed *Sihler*, holding that in light of a post-office "regulation … that purses are subject to inspection," a postal employee, "by virtue of her voluntary employment and her decision to bring her purse on postal property," consented to a search and had no Fourth Amendment claim. *United States v. Esser*, 284 Fed. Appx. 757, 758-59 (11th Cir. 2008) (unpublished) (citing *Sihler*).

The principle laid down in *Wyman*, *Kerns*, and *Sihler*—of the Fourth Amendment consent doctrine generally—controls this case. In some circumstances, the government's compelled taking and analysis of bodily fluids raises a "concern about Fourth Amendment

[17] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

rights." *Wyman*, 400 U.S. at 316. *See, e.g.*, *Schmerber v. California*, 384 U.S. 757, 767 (1966). But where the analysis of bodily fluids, as here, is not "forced or compelled, and [] the beneficiary's denial of permission is not a criminal act," then there can be no "concern[] … with any search by the … social service agency in the Fourth Amendment meaning of that term." *Wyman*, 400 U.S. at 317. "If consent … is withheld … there is no search." *Id.*[18]

It is undisputed that Plaintiff was not tested in the absence of his consent. The Statute makes clear that the test is conditioned on consent, § 414.0652(2)(a), Fla. Stat., and Plaintiff executed a consent form acknowledging that he "hereby voluntarily consent[s] to providing a urine sample for drug testing as a condition of eligibility for [TANF]." Ex. 5 (Lebron Dep.) at 76:8-10; 109:24-110:4 & Dep. Ex. 9. There is no evidence of any TANF applicant being tested without similarly assenting, and no one ever told Plaintiff that he could not revoke his consent—or that he could not forego the test. Ex. 5 (Lebron Dep.) at 136:2-13. Indeed, Plaintiff purported

[18] This Court has preliminarily opined that "[t]he post-*Wyman* cases dealing with suspicionless drug testing … negate" *Wyman* and hold that "'urine screens taken by state agents [are] searches within the meaning of the Fourth Amendment' … regardless of whether the person subjected to the test has the opportunity to refuse it." DE33 at 16-17 (quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 77 n.9 (2001)). While it is true that the Supreme Court has held that a drug screen is a search, it has *not* addressed the very different question of whether consent renders the search permissible. Indeed, this is illustrated by *Ferguson*, a Fourth Amendment drug-testing case in which the state, in the district court, advanced two defenses: (i) informed consent, and (ii) "that, as a matter of law, the searches were reasonable, even absent consent, because they were justified by special non-law-enforcement purposes." *Id.* at 73. The Supreme Court "granted certiorari" only to "review the appellate court's holding on the 'special needs' issue" and "assume[d]" without deciding "that the searches were conducted without the informed consent of the patients." *Id.* at 76. The Court specifically "remanded for a decision on the consent issue." *Id. See also United States v. Knights*, 534 U.S. 112, 118 (2001) (declining to address Fourth Amendment consent issue because search was reasonable under balancing approach); *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1327 n.7 (11th Cir. 2008) (declining to address special-needs inquiry because Fourth Amendment claim resolved by consent). If anything, *Ferguson* suggests that the Supreme Court believes consent *can* resolve a drug-testing case. Accordingly, as the Third Circuit has explained, while "[i]t is settled law that the collection and analysis of a urine sample to test for drug use constitutes a search, … it is also settled law that a search conducted with free and voluntary consent of the person searched is constitutional," *Kerns*, 263 F.3d at 65, and that the latter inquiry is sufficient to resolve this case.

to revoke his consent, DE1 ¶ 11, and he was never drug tested in connection with TANF, Ex. 5 (Lebron Dep.) at 136:14-17.

II. Even If Consent Does Not Resolve the Challenge, the Statute Satisfies the "Special Needs" Test.

If the Court determines that the consent doctrine does not resolve this case, it must then analyze whether the "'special needs' exception applies." *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1327 n.7 (11th Cir. 2008). A "search unsupported by probable cause may be reasonable when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Bd. of Ed. v. Earls*, 536 U.S. 822, 829 (2002) (citations omitted). In such cases, "it is necessary to balance the individual's privacy expectations against the Government's interests." *Nat'l Treas. Emp. Union v. Von Raab*, 489 U.S. 656, 665 (1989). The Supreme Court has used the special-needs exception to uphold suspicionless drug-testing programs several times. *See Earls,* 536 U.S. 822 (upholding testing of students participating in extracurricular activities); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (upholding testing of student athletes); *Von Raab*, 489 U.S. 656 (upholding testing of customs officials); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding post-accident railroad employee testing). As discussed below, similar special needs justify testing here and, as in those cases, the reasonable privacy expectations of those tested are sharply reduced by the nature of the government program at issue.

A. The State Has Special Needs that Support Drug Testing TANF Applicants.

Because drug use specifically and seriously undermines TANF's main purposes—job preparation and family stability—the State has a special need to detect drug use in TANF applicants. Drug testing is one means of doing so, and the need for it has only increased in

recent years as Internet applications have come to far outnumber in-person applications. *See* Statement of Facts ("SOF") ¶ 27.

1. *The State Has a Special Need To Ensure TANF Participants' Job Readiness.*

As explained above, TANF is a highly regulated jobs program that imposes significant work, or work-preparation, requirements. *See, e.g.*, § 414.095(1), Fla. Stat. ("an applicant shall be required to register for work and engage in work activities"); *id*. § 445.024. The purpose of TANF is to provide assistance to those economically needy individuals who, with help, can shift to long-term self-sufficiency. That is why the program offers only limited-time cash assistance and imposes sanctions on those not moving toward employment. *See* SOF ¶ 2. It follows, then, that there is a special need to screen out those persons ill-equipped to meet the goals and requirements of the program.[19]

It is well established that illicit drug use impairs the ability to obtain, perform, and retain a job. The United States Supreme Court has recognized as much. *See NASA v. Nelson*, 131 S. Ct. 746, 759-60 (2011) (recognizing that employers have an interest in knowing about employees' recent drug use in seeking "projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties") (marks omitted) (citing Gerald-Mark Breen & Jonathan Matusitz, *An Updated Examination of the Effects of Illegal Drug Use in the Workplace*, 19 J. HUMAN BEHAV. SOC. ENV'T 434 (2009), for proposition that "illicit drug use [is] negatively correlated with workplace productivity"); *see also Willner v. Thornburgh*, 928 F.2d 1185, 1192 (D.C. Cir. 1991) ("empirical studies have shown that individuals who test positive in pre-employment drug tests have higher rates of absenteeism and involuntary separation"). The

[19] Plaintiff himself believes that for potential employers "one of the important things [is] to know a lot about a particular person" applying for a job. Ex. 5 (Lebron Dep.) at 20:16-17.

summary judgment record confirms as much. *See* SOF ¶¶ 13-18. And Plaintiff has admitted as much. Ex. 5 (Lebron Dep.) at 32:24-25; 151:9-11 (testifying that it is in his best professional interest not to use drugs and that drug use would "absolutely" affect his ability to perform tasks in finance, his chosen field, in which "[a]ccuracy, efficiency and timeliness are very crucial" and employers "have … performance expectations").[20]

But even if drug use did not negatively affect a person's ability to perform and keep a job, it surely impairs that person's ability to obtain a new job from an employer that requires drug screening as a condition of employment. As the D.C. Circuit has recognized, "private companies have increasingly turned to drug testing," *Willner*, 928 F.2d at 1191, and as Plaintiff has admitted, "the private sector is rife with drug testing," DE45 (Tr. at 6). Moreover, the undisputed record in this case demonstrates that drug tests are now routinely required of job applicants and employees, Ex. 11 (Wilson Dec.) ¶ 16, that many private employers in Florida

[20] Numerous additional authorities confirm this common-sense reality. *See, e.g.*, Ellen Meara, *Welfare Reform, Employment, & Drug & Alcohol Use Among Low-Income Women*, 14 HARV. R. PSYCH. 223, 226-27 (2006) (TANF recipients with substance-use problems are less likely to be employed and face more barriers to employment); Lisa R. Metsch *et al*., *Moving Substance-Abusing Women from Welfare to Work*, 20 J. PUB. HEALTH 36, 37, 43, 48 (1999) (Florida-based welfare study showing negative link between employment outcomes and drug use); Issac Montoya, *Mental Health, Drug Use & the Transition from Welfare to Work*, 29 J. BEHAV. HEALTH SERVS. & RESEARCH 144, 148 (2002) (in TANF study "persons with drug problems tended to lag behind those without drug problems in terms of employment"); Denise B. Kandel & Kazuo Yamaguchi, *Job Mobility and Drug Use: An Event History Analysis*, 92 AM. J. SOC. 836, 858, 861 (1987) (drug use correlated with higher job turnover); Wayne E.K. Lehman & D. Dwayne Simpson, *Employee Substance Use and On-the-Job Behaviors*, 77 J. APPLIED PSYCHOL. 309, 309, 317 (1992) (discussing "significant relationships between employee drug use and . . . absenteeism, accidents, turnover, worker's compensation claims, and medical insurance costs"' drug-using employees engage in "job withdrawal behaviors more frequently than non-using employees"); Wayne E.K. Lehman et al., *Prediction of Substance Use in the Workplace*, 25 J. DRUG ISSUES 253 (1995) (association between "excessive absenteeism," "accidents at work," "poor job performance," and "turnover"); The NSDUH Report, Substance Abuse and Mental Health Services Administration, Substance Use Disorder and Serious Psychological Distress, by Employment Status (Issue 38, 2006), at 1 ("Substance abuse disorders . . . have . . . negative impact on . . . [the] ability to hold jobs and be productive in the workplace.", http://www.samhsa.gov/data/2k6/employDual/EmployDual.pdf (last visited September 10, 2012).

rely on drug testing, *see* SOF ¶¶ 34-36, and that a majority of employers with whom the Northeast Florida workforce board tries to place TANF participants require drug testing, *id*. ¶ 35.

In short, the undisputed facts demonstrate that drug use is a substantial barrier to employment.[21] Because a primary purpose of TANF is to move participants into the workforce, and because drug use is an impediment to doing so, the State has a special need to screen TANF applicants for drug use.

2. *The State Has a Special Need To Ensure TANF Meets Its Child-Welfare and Family-Stability Goals.*

TANF's other major purpose is to ensure child welfare, and relatedly to promote a stable and healthy two-parent family, during times of acute financial distress. *See* 42 U.S.C. §§ 601(a)(1), (3)-(4), 608(a)(1). As the undisputed facts in the record demonstrate, drug use seriously undermines this goal. A parent using drugs is more likely to engage in child neglect or abuse, is more likely to come into contact with the criminal justice system, and is more likely to set an inappropriate example for children. *See* SOF ¶¶ 19-25.[22] Plaintiff was thus quite correct

[21] In Interrogatory responses, Plaintiff stated he has "no position" and that "the evidence varies" as to whether drug use is "detrimental to an individual's ability to secure employment." DE 76-2 (Resp. to 2d Interrog.) ¶ 4. To the extent this latter contention is correct (and Plaintiff has produced nothing in discovery to validate this contention), legislative deference is appropriate. *See Marshall v. United States*, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad . . . ."). The Legislature's determination regarding drug use and employment was reasonable. *See supra.*

[22] Numerous other authorities demonstrate that drug use imposes significant harm on families. *See, e.g.*, U.S. Dep't of Health and Human Servs., Office on Child Abuse and Neglect, Protecting Children in Families Affected by Substance Use Disorders (2009) (parental drug use has negative impact on physical and emotional well-being of children), http://www.childwelfare.gov/pubs/usermanuals/substanceuse/chapterthree.cfm#fnh49 (last visited Sept. 10, 2012); Christine Walsh et al., *The Relationship Between Parental Substance Abuse & Child Maltreatment*, 27 CHILD ABUSE & NEGLECT 1409 (2003) (parental substance abuse associated with more than two-fold increase in childhood physical and sexual abuse); Florida DCF, Substance Abuse Program Office, Policy Paper on Substance Abuse and Family Safety: Developing an Integrated System of Care for Children and Families (Aug. 25, 2000) at 2 ("over the past 10 years, fueled by alcohol and illegal drugs, the number of abused and neglected children has more than doubled"; "substance abuse causes or exacerbates seven out of ten cases of child abuse or neglect"; "[b]etween one-third and two-thirds of substantiated child abuse and neglect reports involve substance abuse"; "[c]hildren in substance abusing households . . . were much more likely than others to be served

when he admitted in his deposition that "it's in the best interest of a minor child that you don't use illegal drugs." Ex. 5 (Lebron Dep.) at 151:6-8.

Drug use also undermines the maintenance of two-parent families and the avoidance of out-of-wedlock pregnancy. Ex. 7 (Mack Dec.) ¶ 17; SOF ¶ 22; Robert Kaestner, *Drug Use, Culture, & Welfare Incentives*, 24 E. ECON J. 395, 411-12 (1998) (marijuana increases probability of out-of-wedlock pregnancy); Robert Kaestner, *The Effects of Cocaine & Marijuana Use on Marriage & Marriage Stability*, 18.2 J. Fam. Issues 148 (1997); Isaac Montoya, *Mental Health, Drug Use & the Transition from Welfare to Work*, 29 J. BEHAV. HEALTH SERVS. & RESEARCH 144, 148 (2002) (marital status associated with substance abuse).

Accordingly, the State has a special interest in not providing TANF funds to parents who might redirect those monies to a purpose that specifically and seriously undermines the family-stability and child-protection goals of the program.[23] The Supreme Court has twice held that

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in foster care . . . [and] spent longer periods of time in foster care"), http://www.dcf.state.fl.us/programs/samh/publications/safspolicypaper.pdf (last visited Sept. 10, 2012); Florida DCF, An Integrated System of Care for Substance Abuse and Family Safety in Florida, Progress Report 1999-2003 ("parental substance abuse was a major contributing factor to child neglect and abuse, and was one of the key barriers to family reunification"), http://www.dcf.state.fl.us/programs/samh/publications/safsintegratedcare.pdf (last visited Sept. 10, 2012); University of Miami Comprehensive Drug Research Center, State Epidemiology Workgroup, Florida's 2009 Annual Data Report, Substance Use and Abuse, Consumption and Consequences: Patterns and Trends (Oct. 2009) at 51 ("Florida recognizes the role of methamphetamine as a cause of child endangerment"), http://www.dcf.state.fl.us/programs/samh/SubstanceAbuse/docs/FINAL_2009_SEW_Annual_Data_Report.pdf (last visited Sept. 10, 2012); Florida DCF, Substance Abuse and Mental Health Overview ("A significant percentage of men . . . who commit acts of domestic violence also have substance abuse problems. Many people convicted of battery or assault are raised by parents who abused drugs or alcohol."), http://www.dcf.state.fl.us/samh/ (last visited Sept. 10, 2012); Prevent Child Abuse America, Fact Sheet: The Relationship Between Parental Alcohol or Other Drug Problems and Child Maltreatment, http://member.preventchildabuse.org/site/DocServer/parental_alcohol.pdf?docID=125 (last visited Sept. 10, 2012).

[23] Notably, Florida law provides that "[i]f a parent is deemed ineligible for TANF benefits as a result of failing a drug test … [t]he dependent child's eligibility for TANF benefits is *not* affected," and "[a]n appropriate protective payee shall be designated to receive benefits on behalf of the child." Fla. Stat. § 414.0652(3)(b) (emphasis added). The protective payee "must also undergo drug testing before being approved to receive benefits on behalf of the child." *Id.* § 414.0652(3)(c). In other words, while ensuring that funds are not diverted to drug use, the law is specifically tailored to ensure that those funds are still used for their intended child-welfare purpose. Moreover, the law provides an incentive for parents to seek

where a government program focuses on child welfare, arresting the deleterious effects of drug use is a special need sufficient to justify suspicionless searches. *See Earls*, 536 U.S. at 834-38; *Vernonia*, 515 U.S. at 660-63. *Cf. Wyman*, 400 U.S. at 322-23 (in alternative holding, finding that suspicionless home searches were reasonable because the "primary objective [was] . . . the welfare . . . [of] dependent children and the needy families of those children."). Here, too, the State has a special interest in a vulnerable population of children—those in financially distressed families. It thus has an interest in ensuring that its funds are not used to visit an evil upon the children's homes and families, but rather to pull those children's families out of financial distress.

3. *The State Has a Special Need To Ensure Public Funds Are Used For Their Intended Purposes and Not To Undermine Public Health.*

The Supreme Court recognized in *Wyman* that "[t]he State . . . has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." 400 U.S. at 318-19; *see also Sanchez v. County of San Diego*, 464 F.3d 916, 923 (9th Cir. 2006) ("the public has a strong interest in ensuring that aid provided from tax dollars reaches its proper and intended recipients"); Fla. Stat. § 414.095(9)(f) (TANF applicants obligated to use funds "for the purpose for which the assistance is intended"). When TANF funds are diverted to fund drug use, the funds not only miss their intended use but are also specifically used to harm public health. *See, e.g.*, *Earls*, 536 U.S. at 834; SOF ¶¶ 19-25.

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treatment for a drug problem: "[a]n individual who tests positive … may reapply for … benefits after 6 months if the individual can document the successful completion of a substance abuse treatment program." *Id.* § 414.0652(2)(j).

B. Drug Use in the TANF Population Is a Demonstrated Problem.

The Supreme Court has held that "'[a] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime," *Earls*, 536 U.S. at 835 (quoting *Chandler*, 520 U.S. at 319) (alterations in original), and Defendant submits that the Statute would past constitutional muster even if there were no demonstrated problem of drug use in the TANF population. But the Supreme Court has also held that "some showing [of drug use] does 'shore up an assertion of special need for a suspicionless general search program.'" *Id*. Sadly, the use of drugs in the TANF population is all too real, and this summary judgment record demonstrates more than "some showing" of drug use.

First, even in the limited time in which the Statute was in effect, more than 100 individuals took and failed the drug test. Stip. ¶ 24. Thousands more failed to take the test—whether because they knew they would fail or for some other reason. *Id.*; Stip. ¶ 24; DE 70-2 (Mack Dep.) at 117 (explaining the difference between positive test results in this case and the rate of use among TANF participation and stating that "these data here [the Florida TANF drug test results] do not refute the concept that 20 percent of the TANF population uses drugs in a 12-month period"); *cf*. Ex. 1 (Carroll Dep.) at 98:4-8. Moreover, in a recent ninety-day period, some forty-two individuals voluntarily disclosed substance use problems to the Northeast Florida workforce board. *See* SOF ¶ 26. And, as of March 2012, more than nine percent of all adult TANF recipients had received DCF-funded drug treatment at some point since 2000. *Id.* ¶ 31.[24]

Second, unrebutted expert testimony demonstrates that the TANF population uses drugs at a problematic rate (and at a greater rate than the already alarming rate found in the general

[24] This number, of course, captures only those whose use required treatment—and only the treatment funded by DCF. It necessarily excludes countless others who use drugs undetected, used at levels not demanding formal treatment, or sought treatment from other providers (or other states).

population).[25] *Id*. ¶ 30. While adult past-twelve-month drug use approximates five percent, the number for TANF recipients is approximately twenty percent. *Id.* Drug dependence (as opposed to just use) among the TANF population also exceeds that among the general population. *Id.*

Third, DCF officials have personally observed TANF applicants under the influence of drugs and even smelled marijuana on the applicants. SOF ¶ 27; *cf. Earls*, 536 U.S. at 834-35 (anecdotal evidence of a few instances of drug use at school sufficient to justify school's conclusion that it had a "drug problem" that warranted suspicionless testing). Unfortunately, drug use is to blame for some applicants' unemployment. Some applicants have admitted as much, SOF ¶ 26, and DCF has long observed a strong correlation between drug use and unemployment, *id*. ¶ 18.

Thus, while the Secretary respectfully maintains that no such showing is necessary, the undisputed facts on record satisfy any necessary showing of extant drug use.

C. TANF Applicants' Reasonable Expectation of Privacy Does Not Preclude Drug Testing.

The "special needs" test requires a balancing of the State's interests against the Plaintiff's asserted privacy interest. *See Earls*, 536 U.S. at 830-34; *see also Skinner*, 489 U.S. at 619. The asserted privacy interest must be a contextually reasonable expectation of privacy. *Earls,* 536 U.S. at 830-32. Given the nature of the TANF program, it is clear that applicants do not have a reasonable expectation of privacy that precludes drug testing.

[25] Nothing in the caselaw requires a showing that the population subject to drug testing must have greater rates of drug use than the general population or any other population. Rather, "some showing" of drug use will "shore up" a special-need showing. Indeed, given the rates of drug use in the general population, and the specific and particularized harms that drug use visits on the TANF program, the State would have a special need to drug test if the rate of drug use in the TANF population even approached the rate in the general population.

1. *TANF Applicants' Reasonable Expectation of Privacy is Diminished Because of TANF's Substantial Disclosure Requirements.*

One reason the United States Supreme Court upheld employee drug testing in *Skinner* was because "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety." 489 U.S. at 627; *accord Von Raab*, 489 U.S. at 672. Similarly, in *Vernonia* and *Earls* the many disclosures required of student participants in extracurricular activities diminished the students' reasonable expectation of privacy. 515 U.S. at 657; 536 U.S. at 831-32.

Here, too, in light of the many pervasive and invasive requirements and conditions required of TANF applicants and participants, it is not reasonable to claim that the "negligible" invasion of privacy from a common urinalysis, *Vernonia*, 515 U.S. at 658, violates the Fourth Amendment. It is undisputed that to qualify for TANF, Plaintiff was required to disclose substantial amounts of personal information, including much that he considered "private." *See* Stip. ¶ 3; SOF ¶¶ 38-39. He disclosed his child's medical records, his personal financial information, educational information, and other sensitive data. SOF ¶¶ 38-39. And during his participation in TANF, he was required to submit to frequent and close monitoring, providing weekly accounts of his job-search and educational activities for months. SOF ¶¶ 7, 9-10. This level of pervasive regulation and monitoring—which Plaintiff himself characterizes as "over-excessive," Ex. 5 (Lebron Dep.) at 94:12; 96:1; 101:9—creates a diminished expectation of privacy.

2. *The Privacy Expectation Is Diminished Because the Policy Is Clearly Announced.*

In special-needs cases, courts have routinely held that if the government openly announces the search policy in advance, any expectation of privacy guarding against the search is sharply reduced. In Judge Posner's terms, such an announcement "scotches [the] claim."

Muick v. Glenayre Elec., 280 F.3d 741, 743 (7th Cir. 2002) (fact that company "had announced that it could inspect the laptops that it furnished for the use of its employees … destroyed any reasonable expectation of privacy that [employee] might have had" with respect to the laptop). Cases to this effect are legion,[26] and the Supreme Court and D.C. Circuit have specifically applied the principle in drug-testing cases. *See Von Raab*, 489 U.S. at 672 n.2 (citing *Wyman* for proposition that advance notice minimizes intrusion); *Willner*, 928 F.2d at 1190.

Here, Section 414.0652 clearly announces the policy that drug tests are required, and the TANF application reiterates the point and requires an applicant to sign a waiver. *See* Doc. 19-3 at 11 ("I may avoid the drug test by withdrawing my … application.").

3. *Widespread Use of Drug Testing in the Private Sector Further Demonstrates That the Intrusion Into Privacy Is Minimal.*

The Supreme Court long ago declared that a highly relevant consideration in Fourth Amendment cases is whether "the expectation [of privacy at issue in the case is] one that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In special-needs cases, including the drug-testing cases, the Supreme Court has continued to engage in this inquiry. *See Skinner*, 489 U.S. at 616 (Fourth Amendment protects only "an expectation of privacy that society is prepared to recognize as reasonable"); *Vernonia*, 515 U.S. at 654, 665 (Fourth Amendment protects only those privacy interests "that

[26] *See, e.g.*, *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002) (government employer's "policies and procedures prevent its employees from reasonably expecting privacy in data downloaded from the Internet onto [employer] computers"); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (government employee "did not have a legitimate expectation of privacy with regard to record or fruits of his Internet use in light of [workplace] policy … [that] clearly stated that [government employer] would 'audit, inspect, and/or monitor' employees' use of the Internet'"); *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174 (1st Cir. 1997) (because employer "acted overtly in establishing … video surveillance," "the affected workers were on clear notice" and had no reasonable expectation of privacy); *Schowengerdt v. United States*, 944 F.2d 483, 488 (9th Cir. 1991) (no reasonable expectation of privacy where employee knew of daily office searches); *American Postal Workers Union v. United States Postal Serv.*, 871 F.2d 556, 560-61 (6th Cir. 1989) (no reasonable expectation of privacy against search of lockers when employer had promulgated regulations expressly authorizing random inspections).

society recognizes as 'legitimate,'" and in the workplace context "the relevant question is whether [the] intrusion upon privacy is one that a reasonable employer might engage in"); *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2628 (2010) (examining (1) whether the asserted expectation of privacy is reasonable given the "operational realities of the workplace," and (2) whether the "searches [are] of the sort that are regarded as reasonable and normal in the private-employer context"). In sum, "customary social usage [has] a substantial bearing on Fourth Amendment reasonableness." *Georgia v. Randolph*, 547 U.S. 103, 121 (2006). Thus, where a practice is ubiquitous and generally accepted, a claim of privacy that shields against that practice is necessarily weak.[27]

As explained above, PRWORA fundamentally changed government cash assistance from a "welfare program[] [to a] jobs program[]." 64 Fed. Reg. 17720, 17721. The focus is on preparing recipients to acquire, and retain, employment. *Id.* It follows that if society reasonably expects, and accepts, drug testing in the employment environment, there can be no reasonable expectation of privacy against drug testing in a program that is specifically designed to prepare individuals for the employment environment. *Cf. Willner*, 928 F.2d at 1191-92 (The fact that

[27] *See, e.g.*, *Florida v. Riley*, 488 U.S. 445, 450-51 (1989) (because "private and commercial flight [by helicopter] in the public airways is routine," defendant "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace"); *California v. Ciraolo*, 476 U.S. 207, 213-15 (1986) (same as to airplanes); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (society not prepared to recognize as reasonable an expectation that phone numbers dialed will be kept private because "pen registers and similar devices are routinely used by telephone companies"); *United States v. Cox*, 391 Fed. Appx. 756 (11th Cir. 2010) (no legitimate expectation of privacy guarding against government knocking on door and asking questions because private parties often do the same) (citing *United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006)); *United States v. Segura-Baltazar*, 448 F.3d 1281, 1288 (11th Cir. 2006) ("'expectation of privacy'" guarding against government inspection of trash left on private property "'objectively unreasonable because of the common practices of scavengers, snoops, and other members of the public in sorting through garbage'") (quoting *United States v. Hendrick*, 922 F.2d 396, 400 (7th Cir. 1991)); *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1223 (11th Cir. 1993) (no legitimate expectation of privacy guarding against government agent calling a beeper number because private parties call beepers).

"private companies have increasingly turned to drug testing … is some indication of what expectations of privacy society is prepared to accept as reasonable when the government engages in the hiring process.") (quotation marks omitted) (citing *California v. Greenwood*, 486 U.S. 35, 40-41 nn.3, 4 (1988)).

Plaintiff has stipulated that "the private sector is rife with drug testing." DE 45 (Tr. at 6). As the D.C. Circuit has explained, urinalysis drug testing "simulates what is a common medical procedure, an accepted part of a typical physical examination required by athletic teams, the military, life insurance companies and private employers." *Willner*, 928 F.2d at 1189, 1191 (describing evidence that "private companies have increasingly turned to drug testing," especially job-applicant testing). And the U.S. Department of Labor reports that more than one-third of the firms in the industry that Plaintiff hopes to enter—finance—drug test job applicants. Doc. 24-3 at 2. Additional evidence in this record further proves the point. *See* SOF ¶¶ 34-36; *see also* American Management Ass'n 2004 Workplace Testing Survey, available at http://www.amaneet.org/training/articles/2004-Medical-Testing-Survey-17.aspx (indicating that 62 to 81 percent of private employers require drug testing); Ex. 11 (Wilson Dec.) Exh. A at p. 4-6 (citing websites showing that half of Florida's fifty largest employers require drug testing of some kind).

Given this societal reality, Plaintiff's claim to a reasonable privacy expectation shielding him from drug testing in a job-preparation program is necessarily weak. Indeed, the fact that Plaintiff has provided urine samples in the past without objection—or even memory of the details—demonstrates that privately providing a urine sample is only minimally intrusive. As detailed in the Statement of Facts, Plaintiff offered conflicting evidence regarding his past drug testing and, at his deposition, could not remember whether a particular employer had drug tested

him. *See* SOF ¶ 42. Regarding the private employer for which he *did* remember taking a drug test, he could not remember the location, manner, or number of tests. *Id.* Surely Plaintiff would have a better memory of an intrusive invasion into his privacy. And if Plaintiff felt "violated" by a routine urinalysis, he would not have consented to them for past and future employers. Yet Plaintiff testified that he would be willing to submit to drug testing in connection with a job application, Ex. 5 (Lebron Dep.) at 159:13-17, and he so acknowledged to prospective employers. *See* SOF ¶ 40. Indeed, Mr. Lebron testified: "I don't even think about" drug testing when applying for jobs, and did not indicate that he feels "stigmatized" by job-applicant drug testing. Ex. 5 (Lebron Dep.) at 107:15-17; 115:7-21. He also—during the pendency of this case—voluntarily submitted to urinalysis related to a life insurance application. *Id.* at 48:12-22. Because he voluntarily submits to drug testing in connection with employment and life insurance, it appears Plaintiff is willing to hazard the "intrusion" for the economic benefit of his family—except to qualify for TANF participation.

Private employers and life insurers, to be sure, are not subject to the same limitations the Constitution imposes on government. But Plaintiff's routine voluntary consent to drug testing in other contexts demonstrates the minimal intrusion occasioned by modern drug testing and is thus instructive when considering his Fourth Amendment challenge, which turns on contextual reasonableness. *See Earls*, 536 U.S. at 830-34. Stated simply, drug testing is now a routine part of life—particularly in the private employment environment in which TANF seeks to place its participants.

4. *The Procedures For Testing and the Limited Use of the Results Demonstrate That the Intrusion Into Privacy Is Minimal.*

The degree of intrusion from urinalysis "depends upon the manner in which production of the urine sample is monitored." *Earls*, 536 U.S. at 832. In *Earls*, the Court found the testing

program it upheld "minimally intrusive" because the sample was given in privacy, the results were confidential, and the consequences of failure were associated only with the program for which it was taken. *Id*. at 833-34; *see also Vernonia*, 515 U.S. at 658 (producing a urine sample in private results in a "negligible" invasion of privacy). The testing program here is similar. By law, the test must be done in a manner to "[a]ssure each individual being tested a reasonable degree of dignity." § 414.0652(2)(f), Fla. Stat. More specifically, the "[p]rocedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual intends to alter or has altered or substituted the specimen to be provided." Fla. Admin. Code. Ch. 59A-24.005(3)(b).

Next, the fact that the test is used only for eligibility determinations—and not for criminal prosecution—demonstrates the low level of intrusion into privacy. At the preliminary injunction stage, this Court found the test to be a "far more substantial invasion of privacy than in ordinary civil drug testing cases" because positive drug tests were reported to the Florida Abuse Hotline and certain law-enforcement personnel. DE33 at 17. The undisputed record is now clear, however, that drug test results will *not* be shared with the hotline or law enforcement. Stip. ¶ 17. Therefore, rather than being a "far more substantial invasion of privacy than in ordinary civil drug testing," the limited use of positive results demonstrates the minimal nature of the intrusion. *See Ferguson*, 532 U.S. at 78 ("use of an adverse test result to disqualify one from eligibility for a particular benefit . . . involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties").

WHEREFORE, the Secretary respectfully requests that the Court enter an order (i) granting final summary judgment in the Secretary's favor and (ii) granting such further relief the Court deems appropriate.

Dated: September 10, 2012

Respectfully submitted,

/s/ *Jesse Panuccio*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via this Court's CM/ECF system this 10th day of September, 2012, to the individuals listed below.

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