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LAW SUMMARY

State Drug Testing Requirements for Welfare Recipients: Are Missouri and Florida's New Laws Constitutional?

ABBY E. SCHABERG*

I. INTRODUCTION

In recent years, there has been a proliferation of state proposals for laws requiring welfare recipients to submit to drug testing as a condition to receiving state assistance.¹ A number of these proposals provide for suspicionless, blanket drug testing of welfare recipients, while others require some form of reasonable suspicion of drug use in order to justify a drug test.² These laws seem to garner significant support from the public; however, these laws also have passionate critics. Supporters contend that these laws prevent the misuse of public funds, namely, for the purchase of drugs.³ Conversely, critics argue that these laws authorize unreasonable searches in violation of the Fourth Amendment.⁴ However, the constitutionality of such laws has yet to be definitively determined. There has only been one challenge to a law requiring the drug testing of welfare recipients to date,⁵ and the Sixth Circuit Court of Appeals came to a split decision regarding the constitutionality of such a law.⁶

This Summary examines the framework set up by the Supreme Court for analyzing the constitutionality of drug testing on welfare recipients. It discusses the states' implementation of such programs, and specifically analyzes laws recently passed by Florida and Missouri that authorize drug-testing requirements on welfare recipients. The likely outcome of challenges to these

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1. Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 783 (2011).

2. *See id.*

3. A. G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, N.Y. TIMES, Oct. 11, 2011, at A1.

4. *Id.*

5. *See Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1135 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

6. *Marchwinski*, 60 F. App'x 601.

laws appears to be dependent, at least in part, on whether the law provides for suspicionless drug testing or calls for drug testing based on some reasonable suspicion of drug use.

II. LEGAL BACKGROUND

This Part begins by examining how federal welfare reform enacted in 1996 enabled states to implement drug testing requirements on welfare recipients. Next, this Part will discuss the Supreme Court's framework for analyzing the constitutionality of such measures. A brief discussion of states' implementation of this framework will follow. Finally, Missouri case law will be examined in an effort to provide guidance regarding the constitutionality of the new Missouri law which calls for drug testing of welfare recipients as a condition for receipt of state assistance.

A. Federal Welfare Reform

In 1996, the United States Congress and President Clinton passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),⁷ which promulgated a substantial reform to the welfare system in the United States.⁸ Notably, PRWORA implemented extensive changes to welfare when it replaced Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF).⁹ TANF called for a variety of administrative changes that limited the ability of individuals to obtain assistance and made it more difficult for those individuals to retain assistance.¹⁰ The purported rationale of these changes under PRWORA was "to hold recipients accountable for the assistance they receive[d]" by creating obligations on the part of recipients and penalties for failure to fulfill these obligations.¹¹

7. Robert Scheer, *Clinton Ended Welfare, Not Poverty*, HUFFINGTON POST (Aug. 30, 2006), http://www.huffingtonpost.com/robert-scheer/clinton-ended-welfare-not_b_28348.html; see also Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 [hereinafter PRWORA] (codified as amended in scattered sections of 7, 8, 21, 25, and 42 U.S.C.).

8. William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millenium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 101-02 (1998).

9. *Id.*

10. *Id.* at 102 ("[TANF] restricts access to Supplemental Security Income . . . excludes immigrants . . . makes receiving food stamps more difficult . . . explicitly ends the entitlement status of assistance for needy children and families, imposes comprehensive work requirements, and initiates a five year lifetime limit on those seeking assistance." (footnotes omitted)).

11. Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1186 (2000); see

The enactment of PRWORA allowed for sweeping changes in the United States welfare regime because it permitted states to construct their own welfare programs.¹² A common trend among states arose in adopting administrative measures that promoted making discretionary decisions rather than rule-based decisions.¹³ These decisions presumably affect, among other things, eligibility of recipients and their retention of benefits.¹⁴ Furthermore, PRWORA specifically authorizes states to administer suspicionless drug tests, that is, tests without any individualized suspicion that a recipient uses drugs as a qualification to receiving assistance: “Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”¹⁵ PRWORA’s allowance of states to create their own welfare programs and its authorization of drug testing laid the foundation for states to propose statutes mandating drug tests for welfare recipients.

B. Federal Case Law and the Framework for Welfare Drug Testing Challenges

State drug testing requirements naturally implicate searches under the Fourth Amendment of the United States Constitution.¹⁶ The Fourth Amendment requires that searches and seizures be reasonable,¹⁷ which generally means that they must be supported by a valid warrant based on a showing of probable cause.¹⁸ However, the United States Supreme Court recognizes certain exceptions to the warrant requirement that justify a warrantless search.¹⁹ The Supreme Court has developed a general framework of analyzing whether a warrantless state drug testing requirement is reasonable under

generally Linda C. McClain, “Irresponsible” *Reproduction*, 47 HASTINGS L.J. 339 (1996) (discussing the theme of irresponsibility in debate over welfare reform).

12. Diller, *supra* note 11, at 1147.

13. *Id.* These discretionary decisions are marked by evaluative judgments about whether the facts of an applicant or recipient’s case fall within the regulation’s mandate. *Id.* at 1148.

14. *See id.* at 1150.

15. 21 U.S.C. § 862b (2006); *see* Budd, *supra* note 1, at 775.

16. *See* Budd, *supra* note 1, at 790.

17. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

18. Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 535-36 (1997).

19. *See id.* at 536-38.

the Fourth Amendment.²⁰ This framework involves the “special needs” exception to the warrant requirement.²¹ The special needs analysis is a two-fold inquiry: First, the court must determine whether the search furthers a special need of the state, and second, the court must determine whether this government interest outweighs the individual’s privacy interest.²² The special need of the state must be sufficiently important to both suppress the normal Fourth Amendment requirement of individualized suspicion and offset the individual’s privacy interest.²³ However, if the court finds no special state need, the analysis terminates and the search is unreasonable.²⁴

The special needs analysis has been applied to evaluate the reasonableness of state drug testing requirements for welfare recipients,²⁵ as well as the reasonableness of drug testing requirements in other contexts.²⁶ The following discussion demonstrates the use of the special needs analysis and how it applies to state drug testing requirements of welfare recipients and other instructive court cases involving a variety of contexts.

To date, there has only been one challenge to a state law authorizing drug tests of welfare recipients.²⁷ In *Marchwinski v. Howard*, the plaintiffs challenged a Michigan state statute arguing that its drug testing requirement for welfare recipients was an unconstitutional search under the Fourth Amendment.²⁸ The state law challenged in *Marchwinski* authorized suspicionless drug testing as a blanket condition to receiving state assistance, whereas other similar state laws require a reasonable suspicion of drug use in order to administer drug tests.²⁹ Since this was the first challenge to a law authorizing drug testing of welfare recipients, the reasoning in the *Marchwinski* decisions³⁰ are highly instructive in evaluating how courts might approach

20. *See id.* at 543-45 & n.62.

21. *Id.* at 544-45.

22. Budd, *supra* note 1, at 793.

23. *Id.*

24. *Id.*

25. *See infra* notes 63-77 and accompanying text.

26. *See infra* notes 38-55 and accompanying text.

27. *See Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1135 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

28. *See id.*

29. *See id.* at 1136-37.

30. *Marchwinski* was originally heard by the Eastern District of the Michigan Federal District Court, which ruled that Michigan’s law requiring suspicionless drug testing of welfare recipients was unconstitutional. *Id.* at 1144. An appeal was heard by a Sixth Circuit Court of Appeals panel, which ruled that the law was constitutional. *Marchwinski v. Howard*, 309 F.3d 330, 338 (6th Cir. 2002), *vacated*, 319 F.3d 258 (6th Cir. 2003). A majority of judges for the Sixth Circuit voted to hear the case en banc. *Marchwinski*, 319 F.3d at 259. This resulted in a split decision of the court,

similar laws.³¹ The *Marchwinski* decisions relied heavily on previous Fourth Amendment challenges of laws requiring drug tests and state actions in other contexts.³² Therefore, a summary of the reasoning used in these challenges is prudent.

In *Wyman v. James*, a New York welfare recipient challenged the constitutionality under the Fourth Amendment of the state's action in terminating her AFDC benefits after she refused to allow a welfare case worker to enter her home, which was required in order to receive assistance.³³ The United States Supreme Court found that the purpose of the Social Security Act of 1935, which provided for the AFDC program, was to encourage the care of dependent children in their own home,³⁴ and that the home visits by caseworkers furthered this purpose by assuring that use of state aid was made in the best interest of the child.³⁵ The Supreme Court held that the home visitation requirement of the New York statute was a reasonable administrative tool which served a proper purpose in the dispensation of benefits, "and that it violate[d] no right guaranteed by the Fourth Amendment."³⁶ In reaching this conclusion, the Supreme Court found support in the fact that recipients who refused to permit home visits merely lost the payment of their benefits but were not criminally prosecuted by their caseworkers, whom the court considered to be friends of those in need.³⁷

In 1989, two Supreme Court cases regarding statutory drug test requirements for employees were decided by applying the special needs exception to the Fourth Amendment warrant and probable cause requirement for searches.³⁸ In *Skinner v. Railway Labor Executives' Association*, the Court held that the Federal Railroad Administration's regulation requiring suspicionless drug and alcohol testing of railroad employees involved in train accidents was reasonable within the meaning of the Fourth Amendment because the government's safety interest served by toxicology tests outweighed the

and procedural rules of the court called for the reinstatement of the district court decision. *Marchwinski*, 60 F. App'x 601.

31. See Budd, *supra* note 1, at 791.

32. See, e.g., *Marchwinski*, 113 F. Supp. 2d at 1142-43 (citing *Wyman v. James*, 400 U.S. 309 (1971)); *id.* at 1138-40 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989)); *id.* at 1138 (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989)); *id.* at 1138-39, 1141 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)); *id.* at 1138-40, 1143-44 (citing *Chandler v. Miller*, 520 U.S. 305 (1997)); see also *Marchwinski*, 309 F.3d at 333-37 (citing *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002)).

33. *Wyman*, 400 U.S. at 313-16.

34. *Id.* at 315.

35. *Id.* at 316.

36. *Id.* at 326.

37. *Id.* at 323-24.

38. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

union's interest in protecting an expectation of privacy.³⁹ Similarly, in *National Treasury Employees Union v. Von Raab*, the Court addressed the suspicionless testing of United States Custom Service employees who applied for promotions to positions that involved the interception of illegal drugs and required the employee to carry firearms.⁴⁰ It held that such a search was reasonable under the Fourth Amendment because the government's compelling interests in preventing drug users from attaining such sensitive positions outweighed the privacy interests of the employees.⁴¹ In both *Skinner* and *Von Raab*, the Supreme Court reached its decision by reasoning that the preservation of governmental interests in promoting safety in dangerous or highly sensitive professions justified departure from the Fourth Amendment requirements that a warrant or probable cause precede any search.⁴²

The Supreme Court also applied the special needs exception to the warrant and probable cause requirements to cases involving suspicionless drug testing requirements for student athletes in public school.⁴³ In *Vernonia School District 47J v. Acton*, students challenged the school district's policy requiring students who participated in athletics to sign a form consenting to urinalysis drug testing, and requiring them to participate in a "pool" in which their name could be drawn to submit to a random drug test.⁴⁴ The Supreme Court held that since student participation in athletics was voluntary, the students had a decreased expectation of privacy.⁴⁵ It further held that because student athletes have a decreased privacy expectation, the search was relatively unobtrusive, and that since the State had a compelling interest in preserving the safety of students, the policy requiring drug testing was reasonable under the Fourth Amendment.⁴⁶

The Supreme Court followed the reasoning of *Vernonia* in deciding *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.⁴⁷ The students in *Earls* challenged a school district's policy that required all students to submit to a random urinalysis drug test to participate in any extracurricular activities, in addition to drug tests performed upon reasonable suspicion of drug use.⁴⁸ The Supreme Court in *Earls* similarly held that since student participation in extracurricular activities is voluntary and students subject themselves voluntarily to intrusions on their privacy,⁴⁹

39. *Skinner*, 489 U.S. at 634.

40. *Von Raab*, 489 U.S. 656.

41. *Id.* at 679.

42. See *Skinner*, 489 U.S. at 620-21; *Von Raab*, 489 U.S. at 666-67.

43. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829-30 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

44. *Vernonia*, 515 U.S. at 650.

45. *Id.* at 657.

46. *Id.* at 664-65.

47. *Earls*, 536 U.S. at 830.

48. *Id.* at 826.

49. *Id.* at 831.

the school district's policy was a reasonable means of advancing its interest in preventing and deterring student drug use.⁵⁰ Although the Supreme Court emphasized the special context public schools present in drug testing,⁵¹ it nonetheless evinced a willingness to uphold mandatory drug tests in certain circumstances and greatly influenced the courts' decisions in the *Marchwinski* challenges.⁵²

Although the Supreme Court used the special needs analysis to uphold the constitutionality of drug tests as outlined above, it used the same framework of *Skinner*, *Von Raab*, and *Acton* to reach a different result in *Chandler v. Miller*.⁵³ In *Chandler*, candidates for state office challenged the constitutionality of a Georgia statute that required all candidates to submit to a drug test to qualify for a place on the ballot.⁵⁴ The Court distinguished *Chandler* from *Skinner*, *Von Raab*, and *Vernonia* by noting that the statute in *Chandler* was not enacted to preserve some safety interest of the State, and it was not an effective means to deter drug use.⁵⁵ The Court found that because the State purported to hold no interest in protecting public safety by drug testing candidates for public office, the preservation of personal privacy outweighed the State's interest in deterring drug users from becoming candidates, and therefore the statute upholding suspicionless searches was unconstitutional under the Fourth Amendment.⁵⁶

The *Marchwinski* decision, which was highly influenced by these preceding cases, represents the first challenge to a statute that required the state welfare program (Family Independence Program) to administer random drug testing of welfare recipients and to sanction those recipients who test positive.⁵⁷ The Michigan statute created a policy for blanket drug testing of welfare recipients, which required no reasonable suspicion as a prerequisite for administering the tests.⁵⁸ In other words, the statute created a suspicionless drug testing scheme.⁵⁹ The Michigan statute provided for a pilot program in which welfare recipients in three counties would be required to submit to random drug testing in order to open a case, and recipients with active cases

50. *Id.* at 838.

51. *See Earls*, 536 U.S. at 829-30; *Vernonia*, 515 U.S. at 653-54.

52. *See Marchwinski v. Howard*, 309 F.3d 330, 333-37 (6th Cir. 2002), *vacated*, 319 F.3d 258 (6th Cir. 2003); *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1138-41 (E.D. Mich. 2000) *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

53. *See Chandler v. Miller*, 520 U.S. 305, 318-23 (1997).

54. *Id.* at 309.

55. *Id.* at 319.

56. *Id.* at 323.

57. *Marchwinski*, 113 F. Supp. 2d at 1136.

58. *See id.*

59. *See id.*

would be randomly tested after six months.⁶⁰ In the event of a positive drug test, recipients were required to participate in a substance abuse assessment and later a treatment plan.⁶¹ Failure to submit to a test or noncompliance with a treatment program without good cause would result in reduced payments for each month of noncompliance.⁶² At the end of the fourth month of noncompliance a recipient's welfare would be terminated.⁶³

Michigan welfare recipients challenged this statute in the United States District Court for the Eastern District of Michigan.⁶⁴ The district court ultimately held that the statute was unconstitutional because the State did not show that the statute served a special need based on an interest in protecting public safety, thereby justifying suspicionless drug testing.⁶⁵ In reaching its decision, the district court applied the special needs analysis to determine if the special need was important enough to override the Fourth Amendment's requirement of individualized suspicion.⁶⁶ The district court interpreted *Chandler* as holding that suspicionless searches were permissible only if the alleged special need of the State concerned public safety.⁶⁷ The court agreed that suspicionless drug testing was permissible when the State's interest was in regulating substantial risks to public safety, as in *Von Raab*, *Skinner*, and *Vernonia*.⁶⁸ However, here the district court found the State did not show a special need because it failed to show the statute was designed to protect public safety, i.e., to prevent child abuse or neglect.⁶⁹ Indeed, the district court found that at most, Michigan's welfare program was designed to encourage strong family relationships and self-sufficiency.⁷⁰

On appeal, a Sixth Circuit Court of Appeals panel reversed the district court and held that the State's "special needs" included public safety concerns, as well as other significant needs, and as such, the statute was constitutional under the Fourth Amendment.⁷¹ The Sixth Circuit relied on the reasoning in *Earls*, which was decided after the district court heard *Marchwinski* and which stated that public safety is only one factor to be considered in the

60. *Id.*

61. *Id.*

62. *Id.* at 1137.

63. *Id.*

64. *Id.* at 1136.

65. *Id.* at 1143.

66. *Id.* at 1138-39.

67. *Id.* at 1139.

68. *Id.* at 1139-40.

69. *Id.* at 1140.

70. *See id.* at 1141.

71. *Marchwinski v. Howard*, 309 F.3d 330, 337 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

special needs analysis.⁷² It did not agree with the district court's determination that *Chandler* limits "special needs" to only those concerned with public safety.⁷³

Thus, the Sixth Circuit held that the proper standard of the special needs analysis "is whether Michigan has shown a special need, of which public safety is but one consideration."⁷⁴ The panel found that Michigan's program did indeed have a special need based on public safety interests in that substance abuse contributes to child abuse and neglect.⁷⁵ It noted that, in addition to safety interests, the State also had a special need based on its interest in ensuring public funds were used by recipients for their proper purposes, and not drug use.⁷⁶ The panel also analogized to *Skinner* in noting that welfare assistance diminishes recipients' expectation of privacy, since programs require applicants to submit private information to apply.⁷⁷ Thus, the court determined that the statute was constitutional because the State's special needs outweighed recipients' privacy interests.⁷⁸

Ultimately, a majority of the Sixth Circuit voted to rehear the case en banc.⁷⁹ The court was equally divided, with six members voting in favor of affirming the district court, and six members voting for reversal of the district court.⁸⁰ Pursuant to Sixth Circuit case law, the equally divided vote required an affirmance of the district court decision,⁸¹ which terminated Michigan's welfare drug testing but left the question of constitutionality of a suspicionless drug testing requirement in a welfare program somewhat uncertain.⁸²

C. State Case Law Concerning the Constitutionality of Drug-Testing Requirements

Although there have been no state law challenges specifically to welfare programs requiring drug testing of recipients,⁸³ there have been state chal-

72. *Id.* at 334; see *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 835 (2002).

73. *Marchwinski*, 309 F.3d at 334.

74. *Id.* at 335.

75. *Id.* at 336.

76. *Id.*

77. *Id.* at 337.

78. *Id.*

79. *Marchwinski v. Howard*, 319 F.3d 258, 259 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

80. *Marchwinski*, 60 F. App'x 601.

81. *Id.*

82. See *Marchwinski*, 319 F.3d at 259; Budd, *supra* note 1, at 803.

83. The author deduced that there have been no state law challenges to date specifically involving drug testing requirements for welfare recipients because the numerous searches she ran in Westlaw Next yielded no such results. In addition, a search for cases that cite to *Marchwinski* yielded no case law involving challenges to

lenges to drug testing requirements in other areas similar to *Skinner*, *Von Raab*, *Vernonia*, and *Earls*.⁸⁴ However, since state constitutions frequently afford citizens greater protections than under the United States Constitution, challenges of drug testing requirements which would not violate the Fourth Amendment under the United States Constitution have been found to violate a state's constitution.⁸⁵ Examples of state decisions below demonstrate the disparity among states in how they analyze challenges to drug testing requirements.

The Supreme Court of New Jersey's ruling in *Joye v. Hunterdon Central Regional High School Board of Education* provides an example of a state constitutional analysis that mirrors the federal analysis of drug-testing requirements in schools.⁸⁶ In reaching its conclusion that a high school's random, suspicionless drug-testing program for students involved in extracurricular activities did not violate the New Jersey Constitution, the New Jersey Supreme Court noted that, although it followed the constitutional analysis of the United States Supreme Court, this did not indicate a withdrawal from the court's tradition in upholding enhanced protections under the state constitution.⁸⁷ The court found that the New Jersey constitutional counterpart to the Fourth Amendment was nearly identical in prohibiting "unreasonable searches."⁸⁸ Furthermore, the New Jersey Supreme Court acknowledged that it previously had upheld the federal special needs test as an appropriate framework for evaluating state constitutional protections, and it found that analysis was appropriate also for the instant case.⁸⁹ Using the federal special needs test, the court held that the school had a compelling need in preventing a known problem of drug and alcohol abuse by students, and that the school had an interest in caring for and ensuring the safety of children entrusted to them.⁹⁰ The court also held that students had a diminished expectation of privacy in school, and that the test was relatively unobtrusive.⁹¹ Therefore,

drug testing requirements for welfare recipients. The author can only assume that any challenge to a statute requiring the drug testing of welfare recipients would inevitably cite to *Marchwinski* since that was the first (and apparently only) challenge to such a statute.

84. See *infra* notes 86-102 and accompanying text.

85. See Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1833, 1840-41 (2004).

86. See *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 648 (N.J. 2003).

87. *Id.* at 626-27.

88. *Id.* at 637.

89. *Id.* at 640-41.

90. *Id.* at 641, 645.

91. *Id.* at 642-43.

the program did not violate the search and seizure provision of the state constitution.⁹²

Conversely, the Supreme Court of Washington's ruling in *York v. Wahkiakum School District No. 200* provides an informative example of a state court finding that a state constitution affords greater protections against government searches and seizures than the Fourth Amendment of the United States Constitution.⁹³ In *Wahkiakum*, the Supreme Court of Washington asserted that although the challenged school policy requiring the random urine drug testing of student athletes was permitted under the federal constitution, the state constitution provided a greater level of protection.⁹⁴ Specifically, the court held that the Fourth Amendment's protection against government searches and seizures was based on whether a search is reasonable; however, the Washington Constitution's counterpart to the Fourth Amendment is dependent on whether a search has "authority of law," meaning that a warrant is required.⁹⁵

After having settled that the Washington Constitution provided greater protection than the Fourth Amendment of the United States Constitution, the Supreme Court of Washington then outlined a two-step analysis of its state constitution with regard to searches and seizures.⁹⁶ First, the court must decide whether the state action disturbs one's private affairs.⁹⁷ If the first question was answered in the affirmative, then the court must determine "whether authority of law justifies the invasion."⁹⁸ The court held that although there is a lesser expectation of privacy for students in schools, this expectation is not so diminished as to justify a urinalysis drug test, and therefore, the school's program was a substantial invasion of a student's fundamental right of privacy.⁹⁹ Since the school conducted drug tests of students without a warrant, the court ruled that under the state constitution, the search had to be justified by a "jealously and carefully drawn exception[]." ¹⁰⁰ However, the court declined to extend the federal special needs exception to the case, reasoning that there was no need to apply such a broad exception in the absence of state common law support for such an exception in this context.¹⁰¹ Therefore, the school's random and suspicionless drug testing of student athletes was without "authority of law" and violated the state constitution.¹⁰²

92. *See id.* at 655.

93. *York v. Wahkiakum Sch. Dist. No. 200*, 178 P.3d 995, 999 (Wash. 2008) (en banc).

94. *Id.* at 1006.

95. *Id.* at 1001 (quoting WASH. CONST. art. I, § 7).

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* at 1002.

100. *Id.* at 1003 (quoting *State v. Hendrickson*, 917 P.2d 563, 568 (Wash. 1996)).

101. *Id.* at 1005.

102. *Id.* at 1006.

Missouri has relatively little case law providing guidance on the constitutionality of state drug testing requirements. The most instructive Missouri case regarding the constitutionality of a state drug testing requirement appears to be *Reeves v. Singleton*.¹⁰³ In *Reeves*, the Missouri Court of Appeals, Western District appeared to accept the federal special needs analysis of the Fourth Amendment.¹⁰⁴ In doing so, the court did not discuss any differences of analysis between the United States Constitution and the Missouri Constitution in evaluating drug testing requirements;¹⁰⁵ therefore it can reasonably be assumed that Missouri closely follows the Fourth Amendment of the federal constitution.¹⁰⁶

In *Reeves*, a state hospital employee was terminated for refusing to take a drug test after hospital staff received an anonymous tip that he used illegal drugs during working hours.¹⁰⁷ The court acknowledged that the federal special needs exception authorizes uniform or random employee drug testing without probable cause or reasonable suspicion.¹⁰⁸ However, since the state hospital did not request that the employee submit to a drug test pursuant to a standardized or random drug testing policy, but only because hospital staff received an anonymous tip, the special needs exception did not apply.¹⁰⁹ The court ruled that even without the special needs exception, the warrantless drug test could be justified based on reasonable suspicion.¹¹⁰ Nevertheless, since the anonymous tip did not contain specific facts about the employee's alleged drug use, which thereby could not be corroborated by hospital staff, the anonymous tip did not form a basis for reasonable suspicion to justify the drug test.¹¹¹ Therefore, the court held that the state hospital could not fire the employee for refusing to submit to the drug test.¹¹²

103. 994 S.W.2d 586 (Mo. App. W.D. 1999).

104. *See id.* at 591-92.

105. *See id.*

106. The Missouri Constitution's counterpart to the Fourth Amendment of the United States Constitution protects the people from "unreasonable" government searches and seizures, MO. CONST. art. I, § 15, which is nearly identical to the Fourth Amendment of the United States Constitution, see U.S. CONST. amend. IV. This is similar to the situation in *Joye*, in which the New Jersey Supreme Court held that since its state constitution Fourth Amendment counterpart closely modeled the Fourth Amendment of the United States Constitution, the state would follow the federal "special needs" analysis. *See supra* notes 86-92 and accompanying text.

107. *Reeves*, 994 S.W.2d at 589.

108. *Id.* at 591-92.

109. *Id.* at 592.

110. *Id.*

111. *Id.*

112. *Id.* at 593.

III. RECENT DEVELOPMENTS

Marchwinski remains the only challenge to a state drug-testing requirement for welfare recipients, although there have been many court challenges in other contexts. However, without a clear and dominant prohibition from the Sixth Circuit in *Marchwinski*, states have remained confident in their ability to propose new laws creating such requirements. In fact, several states, including Missouri, have recently passed laws imposing drug testing requirements on welfare recipients.

The passage of federal welfare reform in 1996 invited states to adopt welfare programs that would require drug testing of welfare recipients.¹¹³ Following this authorization, several states adopted programs that imposed drug testing as a condition of receiving state assistance.¹¹⁴ However, these programs avoided PRWORA's invitation to administer mandatory drug tests to welfare recipients and adopted a more limited approach requiring drug testing of recipients only if based on some reasonable suspicion of drug use.¹¹⁵ Michigan was the only state to adopt a suspicionless drug testing requirement as a condition to receiving welfare assistance pursuant to Congress' invitation.¹¹⁶ Yet, as discussed above, this statute was struck down in *Marchwinski* as a violation of the Fourth Amendment of the United States Constitution.¹¹⁷

Since 2007, there has been a proliferation among the states of proposals for statutes mandating drug testing as a condition to receive welfare assistance, and a handful of these statutes have been passed.¹¹⁸ It has been suggested that this resurgent interest in implementing aggressive welfare restrictions has coincided with the recession and is consistent with the theory that periods of economic decline spur adversity toward the receipt of public assistance.¹¹⁹ Most of these legislative proposals put forward requirements

113. See *supra* Part II.A.

114. Budd, *supra* note 1, at 781-82; see IDAHO CODE ANN. § 56-209(j) (LEXIS through 2011 Reg. Sess.); LA. REV. STAT. ANN. § 46:460.10 (LEXIS through 2011 2011 Reg. Sess.); MINN. STAT. ANN. § 609B.435 (West, Westlaw through 2011 1st Spec. Sess.); N.C. GEN. STAT. § 108A-29.1 (LEXIS through 2011 Reg. Sess.); VA. CODE ANN. § 63.2-605 (LEXIS through 2011 Reg. Sess., Acts 2011, cc. 1 to 890, and 2011 Spec. Sess. I, c. 1, and 2012 Reg. Sess., Acts 2012, cc. 1 to 3); WIS. STAT. ANN. §§ 49.79(5), .148(4) (West, Westlaw through 2011 Act 114); H.R. 2013, 49th Leg., 3d Spec. Sess. (Ariz. 2009).

115. See Budd, *supra* note 1, at 781.

116. *Id.* at 782; see MICH. COMP. LAWS ANN. § 400.571 (West, Westlaw through 2012 Reg. Sess.).

117. See *supra* Part II.B.

118. Budd, *supra* note 1, at 783.

119. *Id.*; see, e.g., Clark Allen Peterson, *The Resurgence of Durational Residence Requirements for the Receipt of Welfare Funds*, 27 Loy. L.A. L. REV. 305, 334 n.195 (1993).

for suspicionless drug testing; however, some proposals model the more limited laws adopted following the federal welfare reform that require reasonable suspicion in order to administer a drug test.¹²⁰ Missouri and Florida's new laws requiring the drug testing of welfare recipients provide examples of drug testing laws that require reasonable suspicion and suspicionless drug testing laws, respectively. A discussion of these two laws follows.

A. Recent Laws Requiring Drug Testing of Welfare Recipients Based on Reasonable Suspicion

Since the federal welfare reform, several states have enacted laws that require drug tests of welfare recipients based on some level of individualized suspicion. Some states base reasonable suspicion on prior or present drug convictions. For example, a Minnesota statute requires persons who have been convicted of a drug offense to submit to random drug testing in order to receive state welfare benefits.¹²¹ Similarly, in order to receive food stamps in Wisconsin, a statute requires submission to a drug test if an applicant or recipient, or a member of an applicant or recipient's household, was convicted of any felony with a controlled substance possession or distribution element.¹²²

However, some state statutes establish grounds other than drug convictions to form the reasonable suspicion of substance abuse. In North Carolina, those who are determined by a professional to be addicted to alcohol or drugs and in need of professional substance abuse treatment must submit to testing for the presence of alcohol or drugs to receive welfare benefits.¹²³ An Idaho statute provides that the Department of Health and Welfare develops a screening program for welfare applicants, and the statute requires applicants to take a drug test if the department has reasonable suspicion to believe the applicant is at risk for substance abuse based on the screening or other factors.¹²⁴ Likewise, seven states and the District of Columbia have proposed legislation requiring drug testing of welfare recipients based on some level of reasonable suspicion since 2007.¹²⁵

Recently, Missouri followed the trend among these states to impose drug testing requirements on welfare recipients in order to receive state aid.

120. Budd, *supra* note 1, at 784-85.

121. MINN. STAT. ANN. § 609B.435, subdiv. 2 (West, Westlaw through 2011 1st Spec. Sess.).

122. WIS. STAT. ANN. § 49.79(5)(a) (West, Westlaw through 2011 Act 114).

123. N.C. GEN. STAT. ANN. § 108A-29.1(a) (LEXIS through 2011 Reg. Sess.). According to this statute, a certified physician or substance abuse professional determines whether a recipient is addicted to alcohol or drugs. *Id.*

124. IDAHO CODE ANN. § 56-209j(1) (LEXIS through 2011 Reg. Sess.).

125. Budd, *supra* note 1, at 785. The states that have proposed legislation requiring drug tests for welfare recipients include Arizona, Hawaii, Missouri, New Mexico, Oregon, Virginia, Washington, and the District of Columbia. *See id.* at 784 n.287.

On July 12, 2011, the Missouri General Assembly passed a law requiring the Department of Social Services to design a program that imposes drug testing requirements on applicants for and recipients of state assistance through TANF.¹²⁶ The bill's sponsor, Ellen Brandom, a Republican representing Sikeston, Missouri, stated that the purpose of the bill was to deter both recreational drug use and drug use in support of an addiction.¹²⁷ Supporters of the bill added that the bill prevents taxpayer monies from being used improperly by drug users.¹²⁸ However, opponents argued the bill unjustly isolates a group of individuals without reason to believe a greater incidence of drug use among welfare recipients exists.¹²⁹ The bill appears to follow in the footsteps of other state laws and proposed legislation that require some level of individualized suspicion in order to require a drug test of welfare recipients, rather than suspicionless drug testing similar to the Michigan statute in *Marchwinski*.

The Missouri statute provides that the Department of Social Services shall implement a screening program for each applicant or recipient for TANF benefits.¹³⁰ The department shall administer a urinalysis drug test to each applicant or recipient "who the department has reasonable cause to believe, based on the screening, engages in illegal use of controlled substances."¹³¹ Under the law, an applicant or recipient who tests positive for controlled substance use and an applicant or recipient who refuses to submit to a test are treated the same.¹³² In either scenario, the applicant or recipient shall be declared ineligible for assistance for three years.¹³³ This fate can be avoided if after the applicant or recipient has been referred by the department, he or she successfully completes a substance abuse program.¹³⁴ In addition, such applicant or recipient must "not test positive for illegal use of . . . controlled substance[s] in the six-month period beginning on the date of entry

126. H.R. 73, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2011). This bill is to amend section A, chapter 208 of the Missouri Revised Statutes by adding two new sections, which are to be known as 208.027 and 1. *Id.* Many states have similar legislation that is pending, but not yet passed into law. *See* Budd, *supra* note 1, at 783.

127. Rebecca Berg, *Missouri Legislature Approves Drug Tests for Welfare Recipients*, STLtoday.com (May, 11, 2011, 12:16 AM), http://www.stltoday.com/news/local/govt-and-politics/article_953196cf-8104-5758-8198-60e151debe90.html (quoting Rep. Ellen Brandom).

128. Chris Blank, *Nixon OKs Drug Tests for Missouri Welfare Recipients*, KMOV.com (July 12, 2011, 10:46 PM), <http://www.kmov.com/news/local/Nixon-OKs-drug-test-for-Missouri-welfare-recipients-125466583.html>.

129. *Id.*

130. Mo. H.R. 73.

131. *Id.*

132. *See id.*

133. *Id.*

134. *Id.*

into such rehabilitation or treatment program.”¹³⁵ An applicant or recipient will continue to receive assistance during participation in the treatment program.¹³⁶ However, after an applicant or recipient’s period of treatment, the department has discretion to test randomly or at set intervals for illegal drug use.¹³⁷ A second positive test will result in automatic ineligibility for a period of three years, and the department shall refer the applicant or recipient to an appropriate substance abuse treatment program.¹³⁸

In addition, the Missouri statute implements measures to protect dependents of an applicant or recipient who tests positive for illegally using controlled substances. The statute requires case workers “to report or cause a report to be made to the children’s division” if the case worker suspects child abuse resulting from drug abuse.¹³⁹ The suspicion arises if the case worker has knowledge that either the applicant or recipient has tested positive for illegal controlled substance use, or he or she has refused to submit to an illegal substance use test.¹⁴⁰ The bill then provides that other members of a household in which an applicant or recipient has tested positive for illegal controlled substance use shall continue to receive assistance through payment to a third party.¹⁴¹

B. Recent Laws Calling for Suspicionless Drug Testing of Welfare Recipients

Although many laws have been either proposed or passed among the states that require drug testing of welfare recipients based on some reasonable suspicion, states continue to propose laws similar to the Michigan statute in *Marchwinski* that would require suspicionless testing as a prerequisite to receive welfare assistance. Since 2007, twenty-seven states have proposed legislation calling for suspicionless testing of welfare recipients.¹⁴² The drug testing in states’ proposed legislation is required without suspicion either because the bill automatically imposes mandatory drug tests on all applicants or because the bill imposes drug tests on applicants or recipients on a purely random basis.¹⁴³

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Budd, *supra* note 1, at 784-85. These states include Arizona, Arkansas, California, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia, and Wyoming. *Id.* at 785 n.284.

143. *Id.* at 786.

On July 1, 2011, a statute went into effect in Florida which requires the suspicionless drug testing of welfare recipients, similar to the Michigan statute struck down in *Marchwinski*.¹⁴⁴ The bill creating the new statute was pushed by Florida Governor Rick Scott and the Republican-controlled Florida Legislature.¹⁴⁵ The main goal of the statute, as stated by Governor Scott, is to “encourage personal accountability” and “to prevent the misuse of tax dollars” by recipients using their welfare assistance to purchase drugs.¹⁴⁶ However, opponents complain that the statute violates recipients’ constitutional rights to privacy.¹⁴⁷

The Florida statute requires that all applicants for TANF submit to a drug test, the cost of which is the responsibility of the applicant, in order to receive assistance.¹⁴⁸ If the applicant tests positive for controlled substances he or she will be ineligible to receive benefits for one year, and he or she will only become eligible again after yielding a negative result of a second test given at that time.¹⁴⁹ However, an applicant who tests positive may reapply for benefits after six months and after having successfully completed a substance abuse treatment program.¹⁵⁰ An applicant may only utilize this privilege once.¹⁵¹ An applicant will be ineligible to receive benefits for three years if he or she tests positive a second time.¹⁵²

Although this Florida statute was only recently enacted, it has already received its share of opposition. Since the statute’s implementation in July 2011, the American Civil Liberties Union has brought a lawsuit asserting that the statute authorizes an unconstitutional search under the Fourth Amendment.¹⁵³ U.S. District Court Judge Mary Scriven has already issued an injunction against the enforcement of the statute until this lawsuit is settled.¹⁵⁴ In addition, a bill was proposed in the Florida Senate to repeal the provisions

144. Kathleen Haughney, *Welfare Recipients Must Take Drug Tests*, ORLANDO SENTINEL, June 1, 2011, at B1.

145. *Id.*

146. *Id.* (quoting Florida Governor Rick Scott) (internal quotation marks omitted).

147. *Id.*

148. FLA. STAT. ANN. § 414.0652(1) (West Supp. 2012).

149. *Id.* § 414.0652(1)(b).

150. *Id.* § 414.0652(2)(j).

151. *Id.*

152. *Id.* § 414.0652(2)(h).

153. John Couwels, *Federal Judge Temporarily Bars Florida’s Welfare Drug-Test Law*, CNN (Oct. 25, 2011, 10:08 PM), <http://www.cnn.com/2011/10/25/us/florida-welfare-drug-tests/index.html>. Notably, Howard Simon, the executive director of the Florida branch of the ACLU, asserted that the governor was ignoring individual privacy and treating unemployed people “like suspected criminals.” Haughney, *supra* note 144 (internal quotation marks omitted).

154. Couwels, *supra* note 153. In issuing this injunction, Judge Mary Scriven stated, “Perhaps no greater public interest exists than protecting a citizen’s rights under the Constitution.” *Id.* (internal quotation marks omitted).

in section 414.0652 that mandate drug screening of welfare recipients.¹⁵⁵ That bill was filed by Senator Arthenia L. Joyner, a Democrat and Leader Pro Tempore of the Florida Senate.¹⁵⁶ This demonstrates the division among party lines regarding drug tests for welfare recipients, considering section 414.0652 was pushed by the Republican-dominated legislature.¹⁵⁷ However, the bill to repeal Florida's statute died in committee hearings.¹⁵⁸

IV. DISCUSSION

Both the new Missouri law and the recently enacted Florida law reflect the trend among states to propose laws requiring drug testing of welfare recipients. Although a great number of such laws have been proposed,¹⁵⁹ relatively few laws have been enacted. The Missouri law more closely models those state laws and proposed legislation that require some level of individualized suspicion in order to administer a drug test to applicants or recipients.¹⁶⁰ However, Florida's statute more closely resembles Michigan's struck-down statute and other proposed laws requiring suspicionless drug testing of welfare recipients.¹⁶¹ The differences between these laws may have a significant effect on their survival in the near future. The following is an evaluation of both the Missouri and Florida laws under established constitutional law.

A. Missouri Scheme Requires Reasonable Suspicion

Missouri's law theoretically would not be evaluated under the federal special needs test because it presents a screening program providing for individualized suspicion as a basis for administering drug tests to applicants or recipients.¹⁶² The situation this statute presents in Missouri is similar to the

155. S.B. 284, 2012 Leg., 114th Reg. Sess. (Fla. 2012). This bill was filed on September 19, 2011. *Senate Bill 284: Drug Screening for Persons Applying for Public Assistance Benefits*, FLA. SENATE, <http://www.flsenate.gov/Session/Bill/2012/284> (last visited March, 12, 2012) [hereinafter *Repeal*].

156. *Senator Arthenia L. Joyner*, FLA. SENATE, <http://www.flsenate.gov/senators/s18> (last visited Feb. 21, 2011).

157. Haughney, *supra* note 144.

158. *See Repeal*, *supra* note 155.

159. Since 2007, legislators "in at least thirty states and the District of Columbia have proposed over sixty bills" that would require drug tests as a prerequisite for welfare assistance. Budd, *supra* note 1, at 783.

160. *See supra* notes 130-41 and accompanying text.

161. *See* Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1135 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

162. *See* H.R. 73, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2011).

situation in *Reeves*, a Missouri case discussed above. In *Reeves*, the Missouri Court of Appeals, Western District held that the special needs test did not apply because the challenged drug test was not requested pursuant to a random or uniform employee drug testing policy, but instead the test was requested pursuant to reasonable suspicion of drug use based on an anonymous tip.¹⁶³ Thus, the question here becomes whether the screening program sufficiently provides reasonable suspicion of drug use to justify a warrantless drug test. The answer to this question largely depends on the procedures the Missouri Department of Social Services implements for the screening program, which the Missouri law mandates it to create.¹⁶⁴ If the Department of Social Services creates a scheme in which only those applicants or recipients who are deemed to require a drug test actually presented the Department with reasonable suspicion sufficient to satisfy constitutional scrutiny in every case, then it would be unlikely that either Missouri courts or federal courts would declare the law invalid. However, if the department creates a scheme that is more ambiguous as to whether an applicant or recipient actually presented the Department with reasonable suspicion to justify a drug test, then challenges would most likely have to be handled on a case-by-case basis rather than a general invalidation of the law in its entirety. Only if the screening program's procedures yield no basis for reasonable suspicion in any case would a court be likely to invalidate the entire scheme.

Procedures for the screening program could not be obtained by the date of this publication because the legislature must still approve the rules governing the Missouri law.¹⁶⁵ One can imagine a number of different procedures the Missouri Department of Social Services could implement. Most obviously, the Department might require welfare applicants and recipients to complete a questionnaire that, in part, might ask questions relevant to drug use. However, such a measure seems unlikely to be effective at screening applicants and recipients for drug use as they would likely not concede on the form that they have used drugs in the past. For instance, under a similar Arizona program which screens applicants for drug use on the application form, only sixteen out of 64,000 applicants answered that they had recently used drugs.¹⁶⁶ Since a questionnaire seems unlikely to be effective, other measures to screen applicants and recipients for drug use might also be applied. These measures might involve case worker recommendations based on subjective observations of the applicants or recipients. If such a measure like this were to be adopted, it could lead to challenges by recipients to the validity of the

163. *Reeves v. Singleton*, 994 S.W.2d 586, 591-92 (Mo. App. W.D. 1999).

164. Mo. H.R. 73.

165. See Editorial, *Florida Judge Right to End Welfare Drug Testing Program*, STLTDAY.COM (Oct. 31, 2011, 12:00 AM), http://www.stltoday.com/news/opinion/columns/the-platform/article_b61ad2c0-257e-598e-ad58-b37f9c4aaaa6.html [hereinafter *Florida Judge*]. The Missouri law will go into effect once these guidelines are approved by the legislature. *Id.*

166. Sulzberger, *supra* note 3.

reasonable suspicion of case workers that led to their drug tests. As suggested above, challenges like this would probably be judged on a case-by-case basis.

If the Department of Social Services implements screening procedures requiring case workers to subjectively judge whether a recipient uses drugs, such procedures raise important policy considerations in addition to any constitutional concerns. For example, case workers may be reluctant to report suspicions that an applicant or recipient uses drugs for fear that if the report results in a positive drug test, this may have child custody consequences. This would put case workers in a very difficult situation and would result in ineffective reporting, which would defeat the purpose of the statute.

Even assuming the screening program does not require reasonable suspicion to justify a drug test, the Missouri law may nevertheless pass constitutional scrutiny under the special needs test because the screening program could fairly be categorized as a uniform drug testing policy in that situation. *Reeves* suggests that Missouri would apply the federal special needs test to a situation in which a state department imposes a random or uniform drug-testing program on individuals.¹⁶⁷ Under this analysis, the outcome of a challenge to the Missouri law in either the Missouri state court system or the federal court system is unclear. This determination is likely dependent on how Missouri would be guided by the instructive *Marchwinski* decisions, and whether the court follows the reasoning of the district court or the reasoning of the Sixth Circuit in *Marchwinski*.

In order for the special needs exception to the warrant requirement of the Fourth Amendment to apply to the Missouri law, the State must show that the law serves a special need of the state.¹⁶⁸ According to the District Court for the Eastern District of Michigan in *Marchwinski*, the State's special need must be based on a state interest in protecting public safety.¹⁶⁹ Alternatively, the Sixth Circuit held on appeal that a state public safety interest only constitutes one factor in the special needs analysis.¹⁷⁰ Arguably, the Missouri law could serve a compelling state interest in safety because the law provides that case workers will be required to report suspected child abuse where the case worker knows that an applicant or recipient has either failed a drug test or refused to take one.¹⁷¹ It could also be argued that the state has a further interest in safety because the statute's provisions provide that recipients who

167. See *Reeves*, 994 S.W.2d at 592 (“*In the absence of a ‘special needs’ random or uniform selection process, drug testing . . . may also be justified, without first obtaining a warrant, if it is based on individualized suspicion . . .*” (emphasis added)).

168. See *supra* notes 17-24 and accompanying text.

169. *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1139 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

170. *Marchwinski*, 309 F.3d at 334.

171. H.R. 73, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2011).

have tested positive for drug use must participate in a substance abuse treatment program in order to continue receiving benefits.¹⁷² Considering the *Marchwinski* courts did not address a statute with this type of requirement, it would be interesting to see whether courts would agree with an argument that the state has a public safety interest in providing substance abuse treatment to welfare recipients who test positive for drugs.¹⁷³ However, it is clear that the state's main interests in enacting the Missouri law are to prevent taxpayer money from being used by welfare recipients to purchase drugs¹⁷⁴ and to deter drug use in general.¹⁷⁵ Therefore, if the court follows the district court's reasoning in *Marchwinski*, it would be unlikely that the court would uphold the law, considering that safety is not the dominant basis for the state's special need. But, if the court follows the Sixth Circuit's reasoning in *Marchwinski*, then the court would likely hold that the Missouri law is constitutional, since safety, at the very least child safety, appears to be a state interest to be protected.

B. Florida Statute Draws Scrutiny

The Florida statute mandating the drug testing of welfare recipients has already come under much hostility and scrutiny, and a lawsuit has already been filed challenging its constitutionality.¹⁷⁶ The outcome of this challenge to Florida's statute seems more apparent than the outcome of a challenge to the Missouri law because the Florida law provides for suspicionless drug testing.¹⁷⁷ Since Florida's statute does not provide for any procedures that call for a finding of reasonable suspicion in order to require a drug test for welfare recipients, the statute must at least meet the special needs exception to the warrant requirement to justify a drug test.¹⁷⁸ Article I, section 12 of the Florida state constitution suggests that Florida courts are likely to adopt the federal approach to determining whether searches are valid: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . shall not be violated. . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."¹⁷⁹

Assuming Florida courts adopt the federal special needs test, it seems doubtful that the Florida statute will be upheld against a challenge either in state or federal court because it appears that the Florida statute is not based on

172. *Id.*

173. See *Marchwinski*, 309 F.3d 330; *Marchwinski*, 113 F. Supp. 2d 1134.

174. Blank, *supra* note 128.

175. Berg, *supra* note 127.

176. Couwels, *supra* note 153.

177. See FLA. STAT. ANN. § 414.0652(1) (West Supp. 2012).

178. See *supra* notes 17-24 and accompanying text.

179. FLA. CONST. art. I, § 12.

any safety interest. To withstand scrutiny, Florida's suspicionless scheme must be based, at least in part, on a state interest in public safety. Again, a determination of whether the Florida statute would withstand constitutional scrutiny depends on whether a Florida court would follow the district court's interpretation of the special needs test in *Marchwinski*, which requires that a safety interest constitutes the state's special need in suspending the warrant requirement,¹⁸⁰ or if the court would follow the Sixth Circuit's interpretation, which requires only that a state safety interest be one factor in the special need determination.¹⁸¹

The Florida statute does not seem to address a special need of the state based upon any safety interest. Unlike the Missouri law,¹⁸² the Florida statute does not contain provisions which address the connection between substance abuse and child abuse.¹⁸³ In addition, the only purpose for the statute asserted by state officials is to prevent public monies from funding drug use by welfare recipients and to encourage recipients' accountability.¹⁸⁴ However, the Florida statute does contain a provision which allows a recipient, upon a positive test result, to successfully complete a substance abuse treatment program and to reapply for benefits after six months in order to receive benefits,¹⁸⁵ similar to the Missouri law.¹⁸⁶ This provision that requires recipients to enter a substance abuse treatment program in order to reapply for benefits¹⁸⁷ increases the Florida statute's likelihood of withstanding a special needs determination. However, since the *Marchwinski* courts did not address the sufficiency of a provision which requires a substance abuse treatment program to satisfy the special needs test, it is unclear whether the existence of this provision here would prove to be a state safety interest sufficient to satisfy the special needs test. Therefore, it is doubtful that the Florida statute would withstand a challenge.

Although both the Missouri law and the Florida statute call for the administration of drug tests of welfare recipients as a condition of receiving state aid, the differences between the laws ultimately could have important consequences regarding the outcome of challenges to each law. Since the Missouri law requires a finding of reasonable suspicion of drug use before a drug test is required, unlike the Florida statute, it has a much better chance of surviving constitutional scrutiny. The Florida statute, however, is very simi-

180. *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1139 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

181. *Marchwinski*, 309 F.3d at 334.

182. H.R. 73, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2011).

183. See FLA. STAT. ANN. § 414.0652 (West Supp. 2012).

184. Haughney, *supra* note 144.

185. FLA. STAT. ANN. § 414.0652(2)(j).

186. See Mo. H.R. 73.

187. FLA. STAT. ANN. § 414.0652(2)(j).

lar to the law authorizing suspicionless drug testing that was struck down in *Marchwinski*. Thus, the Florida law will have a much more difficult time withstanding a constitutional challenge. A failure of the Florida statute to survive a constitutional challenge does not necessarily mean that the Missouri law would share a similar fate. Commentators on Missouri's law express the viewpoint that, even though Missouri's law requires reasonable suspicion in order to drug test welfare recipients, it is as foolish a measure as Florida's suspicionless testing.¹⁸⁸ However, this alone does not discount the constitutionality of the law.

V. CONCLUSION

As demonstrated by the above analysis, a challenge to the Missouri law, and especially the ongoing challenge to the Florida statute, will force courts to address the question left largely undefined by the Sixth Circuit in *Marchwinski*. The split decision of the Sixth Circuit, reinstating the determination of the district court, did not state a definitive stance on which courts can confidently rely. Whether states can place drug-testing requirements as a condition to welfare recipients receiving state aid remains largely an open question. However, challenges to state drug testing requirements for welfare recipients, such as those in Missouri or Florida, would provide much-needed guidance on whether these laws pass constitutional scrutiny generally. A constitutional challenge would also give guidance as to whether there are certain variations of these laws, namely those that require some form of reasonable suspicion in order to administer a drug test, which would withstand constitutional scrutiny. Until the courts make a strong statement against laws placing drug testing requirements on welfare recipients, it is likely that such laws will continue to be proposed and passed in the near future.

188. *Florida Judge*, *supra* note 165 (“That modification, however, doesn’t make the law any less idiotic.”).

