

January 2002

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Recommended Citation

Matthew A. Pring, *The Death of a Doctrine: The Tenth Circuit Court of Appeals and Random Suspicionless Urine Drug Tests Eroding the Special Needs Doctrine*, 79 *Denv. U. L. Rev.* 457 (2002).

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The Death of a Doctrine: The Tenth Circuit Court of Appeals and Random Suspicionless Urine Drug Tests Eroding the Special Needs Doctrine

THE DEATH OF A DOCTRINE: THE TENTH CIRCUIT COURT OF APPEALS AND RANDOM SUSPICIONLESS URINE DRUG TESTS ERODING THE “SPECIAL NEEDS DOCTRINE.”

INTRODUCTION

Drug use has infiltrated almost all aspects of modern life.¹ Along with its increase in use, the inherent dangers surrounding the drug culture have also escalated. These inherent safety concerns include robberies, assaults, discipline problems, and violence. The employment sector and school sector are not immune to these problems, where absence, injuries, and work tardiness are affected by drug use.² The question that arises for almost all employers or school superintendents is how to control or contain the drug use and its dangers. Governments, employers, and school superintendents have tried many techniques, including zero tolerance policies, lectures on the evils of drugs, other presentations, and increasing police presence.³ In recent years, another technique surfaced in an effort to try to combat drug use: random urine drug screens.⁴ In the employment sector, the screens come in three forms: (1) pre-employment drug screens; (2) post accident drug screens; and (3) random drug screens. In the school setting, many tests happen during sports physicals, as a disciplinary method, or randomly to a group of students.

Individuals and groups have challenged these drug tests as an unconstitutional search under the protections of the Fourth Amendment, both in the Supreme Court and in the Tenth Circuit Court of Appeals.⁵ Although only one Supreme Court case concerning random suspicionless drug testing has held the policy as unconstitutional,⁶ almost the exact opposite result has happened in the Tenth Circuit Court of Appeals.⁷ Drastically different results have been reached among the circuit courts using similar logic and the same tests.⁸

Part one of this article discusses the general background of Fourth Amendment law limited to the decreased requirement of probable cause in administrative searches and the judicially created “special needs” doctrine that eliminates a warrant requirement under certain circumstances. Part two discusses cases from both the Supreme Court and the

1. See Alex J. Barker, *Vernonia School District 47J v. Action: Defining the Constitutional Scope of Random Suspicionless Drug Testing in Interscholastic Athletics and Beyond*, 5 WIDENER J. PUB. L. 445, 446 (1996).

2. *Id.*

3. See *Vernonia Sch. Dist. 47J v. Action*, 115 S. Ct. 2386 (1995).

4. See Alex Barker, *supra* note 1, at 446.

5. See discussion *infra* Part II.

6. See discussion *infra* note 199 and accompanying text.

7. See discussion *infra* Part III.

8. See discussion *infra* part III.

Tenth Circuit concerning random suspicionless drug testing. Part three discusses the inconsistencies in the reasoning the Tenth Circuit has used to hold the policies unconstitutional; determining that the special needs doctrine has been effectively eliminated in the Tenth Circuit. Part four concludes that only drug testing based on individualized suspicion, akin to the decreased probable cause for administrative searches, will pass constitutional muster in the Tenth Circuit.

I. SEARCH AND SEIZURE BACKGROUND

A. *General Warrant Requirement*

This section presents a brief contextual overview surrounding the debate about the constitutionality of random suspicionless drug testing protocols. The Fourth Amendment to the United States Constitution states: "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"⁹ The Fourth Amendment only protects individuals from governmental intrusion, not from private party actions.¹⁰ A court must address three questions when analyzing a claimed violation of the Fourth Amendment: (1) was there government action; (2) did the activity amount to a search; and (3) was the search reasonable.¹¹ If there was no governmental action, the Constitution does not apply.¹² If the activity was not a search, the Fourth Amendment does not apply.¹³ And if the search was reasonable, the search was not unconstitutional.¹⁴

1. Defining a Search and Reasonableness

If a court determines that the activity is a search, a rebuttable presumption exists that a warrantless search is unreasonable, unless there is an exception to the warrant requirement.¹⁵ Consequently, defining what actions constitute a search is very important to the outcome of the case.

9. See U.S. CONST. amend. IV.

10. See *Katz v. United States*, 389 U.S. 347, 350 (1967) ("[The Fourth Amendment] protects individual privacy against certain kinds of governmental intrusion, but the protections go further, and often have nothing to do with privacy at all.").

11. See Amanda E. Bishop, *Students, Urinalysis & Extracurricular activities: How Vernonia's Aftermath is Trampling Fourth Amendment Rights*, 10 HEALTH MATRIX 217, 233-34 (2000).

12. See Rachel L. Diehl, *Constitutional Law – Search and Seizure – Random, Warrantless, and Suspicionless Searches of Student Athletes Through Urinalysis Drug Testing by Public School Officials Does Not Violate Fourth Amendment – Vernonia Sch. Dist. V. Action*, 115 S. Ct 2386 (1995), 27 SETON HALL L. REV. 230, 230-31 n.6 (1996) (describing the "state action doctrine").

13. *Id.*

14. See Bishop, *supra* note 11, at 233-34.

15. See *United States v. Munoz-Guerra*, 788 F.2d 295, 297 (5th Cir. 1986) (Warrantless searches are per se unreasonable unless they fall within a carefully defined exception to the warrant requirement.).

In *Katz v. United States*,¹⁶ the Supreme Court described the balancing test that courts should use to determine whether or not a search took place.¹⁷ The test weighs the individual's reasonable expectation of privacy from governmental intrusion against the government's interest in controlling the activity.¹⁸

To determine the level of the expectation of privacy, courts look to actions by the individual displaying a subjective belief of an expectation of privacy.¹⁹ If the individual lacks a subjective expectation of privacy, the inquiry ends and the activity does not amount to a search.²⁰ If the individual displays a subjective expectation of privacy, then the court must determine whether a reasonable law-abiding person would expect privacy in the same situation.²¹

After confirming a reasonable expectation of privacy, courts determine the rationale of the specific governmental action.²² Courts consider many factors: the need or interest for governmental intrusion, the rationale behind the action, the actions of the individual governmental actor, and other possible methods the government could have employed.²³

After determining the expectation of privacy and the governmental interest, the court employs a balancing test to determine the extent of the invasion of the expected privacy to determine if the activity should be defined as a search.²⁴ The court balances the intrusiveness of the action against whether or not the area deserves protection from government intrusion.²⁵

If the court considers the governmental activity a search, it is presumptively unreasonable without a warrant established on probable cause.²⁶ This presumption can be overcome by any of the numerous exceptions to the warrant requirement.²⁷ Essential to the discussion of urine drug testing are two exceptions, the administrative search exception and the special needs doctrine.²⁸ Both of these exceptions are discussed later in this article.

16. 389 U.S. 347 (1967).

17. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)

¹⁸ See *Katz*, 389 U.S. at 361.

19. See Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 317 (1981) (concluding that a more objective definition of privacy is needed for an effective yet fair application of the Fourth Amendment in the privacy context).

20. See *id.* at 327.

21. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

22. See *id.* at 362.

23. Keith S. Berets, *The Boiling Frog: Privacy Rights Hang in the Balance in Vernonia School District v. Action*, 1996 WIS. L. REV. 1101, 1101 (1996).

24. *Id.*

25. See *id.* at 1102.

26. See *Munoz-Guerra*, 788 F.2d at 297.

27. *Id.*

28. See discussion *infra* Parts II.A, II.B.

2. Probable Cause and Warrant Requirements

As noted above, the Fourth Amendment requires probable cause in order to issue a warrant.²⁹ For police to obtain a search, seizure, or arrest warrant, they must appear before a neutral judge or magistrate and establish probable cause based on the facts of the case.³⁰ Probable cause does not require proof beyond a reasonable doubt, the level of proof required at a criminal trial; rather, it only requires evidence of probability of wrongdoing.³¹ In addition, proof of probable cause allows use of evidence not normally admissible at trial, including hearsay and prior bad acts.³² Because probable cause represents a probability rather than an absolute, a good faith exception exists for warrants issued on faulty probable cause.³³

Probable cause to search differs from probable cause to seize or probable cause to arrest.³⁴ Probable cause to search requires evidence that the items the police seek relate to the criminal activity.³⁵ Furthermore, these items must be in the place the police intend to search.³⁶ Probable cause to seize only requires evidence that the items the police seek to seize relate to the criminal activity.³⁷ Probable cause to arrest requires evidence of a criminal offense and that the individual the police intend to arrest committed that offense.³⁸

If no initial ruling on probable cause exists prior to the search, seizure, or arrest, and if a judge rules against probable cause after the fact, and if none of the various exceptions apply, the search, seizure, or arrest violates the Fourth Amendment rights of the individual.³⁹ The exclusionary rule bars the admittance of evidence gained through an illegal search or seizure and serves as a deterrent to illegal police activity.⁴⁰

29. See U.S. CONST. amend. IV.

30. See Peter J. Kocaras, *Proper Appellate Standard of Review for Probable Cause to Issue a Search Warrant*, 42 DEPAUL L. REV. 1413, 1418 (1993).

31. See *Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts.").

32. See *Spinelli v. United States*, 393 U.S. 410, 412 (1969) ("the constitutional requirements of probable cause can be satisfied by hearsay information.") (*overruled on other grounds*).

33. See *United States v. Leon*, 468 U.S. 897 (1984) (establishing a "good faith" exception to faulty warrants).

34. See Frederick Alexander & John L. Amsden, *Scope of the Fourth Amendment*, 75 GEO. L.J. 713, 725 (1987).

35. See *id.*

36. See *id.*

37. See *id.*

38. *Id.*

39. *Id.* at 725.

40. See Edward R. Glady, Jr., *The Exclusionary Rule*, 71 GEO. L.J. 434, 435 (1982).

B. *Relevant Exceptions to the Warrant Requirement for Suspicionless Urine Drug Tests*

1. Administrative Search's Relaxed Probable Cause

Administrative searches are conducted by administrative agencies, whose actions rise to the level of the definition of a search in *Katz*.⁴¹ These searches typically originate as non-criminal in nature, but the fruits of the search can be used in a criminal trial.⁴² In themselves, administrative searches are not outside of the warrant requirement.⁴³ However, the Supreme Court has relaxed the probable cause standard in administrative searches to a point well below the level required to establish probable cause in the criminal context.⁴⁴

The leading case, *Camara v. Municipal Ct. of the City and County of San Francisco*,⁴⁵ established this relaxed standard.⁴⁶

a. Facts

Municipal building inspectors were going from house to house conducting inspections of apartments for building code violations that could pose safety concerns, including residential occupancy in areas forbidden by permit.⁴⁷ An individual refused the inspector entry into his residence.⁴⁸ After repeatedly refusing subsequent searches, he was fined and criminally punished for his refusal to abide by the building inspector's requests to search pursuant to the inspector's authority under the housing code.⁴⁹ The individual filed a writ of prohibition based on a violation of his Fourth Amendment rights.⁵⁰

The City argued that the inspections were narrowly tailored for the least possible demand on individuals.⁵¹ The City also argued that at all times the inspectors acted reasonably, satisfying the reasonableness requirement of the Fourth Amendment.⁵² The City argued that a warrant requirement was an impossible obstacle in these particular inspections

41. See Sunil H. Mansukhani, *School Searches after New Jersey v. T.L.O.: Are There any Limits?*, 34 U. LOUISVILLE J. FAM. L. 345, 352 (1996).

42. *Id.*

43. *Id.* at 353.

44. *See id.*

45. 387 U.S. 523 (1967).

46. *Camara v. Municipal Ct. of the City and County of San Francisco*, 387 U.S. 523, 535 (1967).

47. *Camara*, 387 U.S. at 526.

48. *Id.*

49. *Id.* at 527.

50. *Id.*

51. *Id.* at 531.

52. *Id.*

because they were inspecting large areas based on legislative assessment of various factors.⁵³

b. Analysis

Initially, the Court ruled that it was overruling previous precedent,⁵⁴ which held that regulatory searches that are essentially civil, limited in scope, and not exercised under unreasonable conditions were constitutionally valid.⁵⁵ The Court ruled that routine inspections for health and safety were not as intrusive as a search by a policeman, but that the Fourth Amendment's protections still applied.⁵⁶ Part of the ruling relied on the fact that criminal charges could come from the civil inspection, including code violations and criminal penalties for non-compliance with the search.⁵⁷ Secondly, the individual had no way of knowing if the inspector's demands to search were valid, and to what extent the search had been administratively authorized.⁵⁸ This meant that there was a large amount of government discretion, the type of discretion the Fourth Amendment was meant to curtail.⁵⁹

The Court next considered the argument that public safety justified the search under the reasonableness requirement even absent a warrant.⁶⁰ The Court dismissed this argument, stating that the question is whether the authority to search should be supported by a warrant, not whether the public interest justifies the search.⁶¹ In addition, the warrant requirement should be concerned with whether obtaining a warrant would frustrate the purpose behind the search.⁶²

After concluding that the Fourth Amendment bound the search in question, the Court next looked to the level of suspicion required in order for the government to obtain a warrant, probable cause or something less.⁶³ This was in turn an analysis of reasonableness, balancing the governmental interest and the privacy intrusion.⁶⁴

The Court held that the agency would have to get a warrant, but not a warrant based on the probable cause standard traditionally used in law enforcement.⁶⁵ Officials would not have to "show the same kind of proof

53. *Camara*, 387 U.S. at 532.

54. *Id.* at 528.

55. *See Frank v. Maryland*, 359 U.S. 360 (1959).

56. *Camara*, 387 U.S. at 530.

57. *Id.* at 531.

58. *Id.* at 532.

59. *Id.*

60. *Id.* at 533.

61. *Id.*

62. *Camara*, 387 U.S. at 533.

63. *Id.* at 534.

64. *Id.* at 534-35.

65. *Id.* at 532-33.

to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime."⁶⁶ The Court concluded that the ultimate standard was reasonableness,⁶⁷ balancing the governmental interest that allegedly justifies the intrusion with the scope of the intrusion on individual's privacy.⁶⁸ This relaxed standard of probable cause also applied to the determination of reasonableness of warrantless searches, thus providing both a relaxed definition of probable cause to get a warrant, and relaxing the standard of reasonableness applied to warrantless searches.⁶⁹

c. Holding

Administrative searches are typically broad, suspicionless searches, searching broader areas than a typical criminal, for example the building code compliance in a block, and this type of search has a decreased standard of probable cause – the standard of reasonableness.⁷⁰

2. Special Needs Doctrine as an Exception to Warrant Requirement

*New Jersey v. T.L.O.*⁷¹ has been cited as the birth of the "special needs" doctrine.⁷² The Supreme Court established an exception to the warrant requirement when there is a special need beyond that of law enforcement that justified warrantless searches.⁷³ The special needs analysis balances the legitimate expectation of privacy with the interest of the government to establish an exception to the warrant requirement.⁷⁴

a. Facts

A high school teacher found a 14-year-old student smoking on school property, which violated local school rules.⁷⁵ The teacher took the student to the vice principal, and the student denied ever smoking.⁷⁶ Then the vice principal opened the student's purse and discovered a pack of cigarettes and some cigarette rolling paper.⁷⁷ This prompted him to search her purse more thoroughly.⁷⁸ His search revealed substantial evidence that the student was involved in dealing marijuana to other stu-

66. *Id.* at 538.

67. *Id.*

68. *Camara*, 387 U.S. at 538.

69. *Id.* at 539.

70. *Id.* at 539.

71. 469 U.S. 325 (1985).

72. See Michael S. Vaughn & Rolando V. del Carmen, "Special Needs" in Criminal Justice: An evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements, 3 GEO. MASON U. CIV. RTS. L.J. 203, 209 (Spring 1993).

73. *New Jersey v. T.L.O.*, 469 U.S. 325, 347 (1985).

74. See Vaughn, *supra* note 72, at 209.

75. *T.L.O.*, 469 U.S. at 328.

76. *Id.*

77. *Id.*

78. *Id.*

dents.⁷⁹ At no time did the school obtain a warrant for the search.⁸⁰ Criminal delinquent charges were filed against the student and she moved to suppress the evidence found in her purse as violating the Fourth Amendment.⁸¹

b. Analysis

Initially, the Court determined that school officials had to comport with the Constitution,⁸² and in particular the Fourth Amendment,⁸³ and that the actions of the school principal or administrators were government action.⁸⁴ In addition, it was beyond dispute that the opening and removing the contents of the purse was a search because of the high expectation of privacy in a closed purse.⁸⁵ The case then turned to the question of the reasonableness of the warrantless search.⁸⁶

The Court ruled that students had an expectation of privacy and had not waived their right to privacy by being on school property.⁸⁷ However, the Court stated that school officials had a legitimate need to maintain an atmosphere promoting learning and this required easing the restrictions of search and seizure law applying to law enforcement.⁸⁸

The Court concluded that school officials did not need to obtain warrants to search for drugs because of the particular circumstances of the school environment,⁸⁹ and that relaxed standards applied to probable cause for administrative searches.⁹⁰ The Court only required an establishment of individualized suspicion, suspicion that the individual has violated a school rule or the law.⁹¹ Since there was reasonable individualized suspicion, the school official did not have to obtain a warrant to make the search reasonable.⁹²

The constitutionality of the search of a student, the Court ruled, should depend simply on the reasonableness of the search, considering the totality of the circumstances.⁹³ This includes whether the search was

79. *Id.*

80. *Id.* at 328-29.

81. *T.L.O.*, 469 U.S. at 329.

82. *Id.* at 333.

83. *Id.*

84. *Id.*

85. *Id.* at 337-38.

86. *Id.* at 337.

87. *T.L.O.*, 469 U.S. at 334.

88. *Id.* at 341.

89. *Id.* at 343.

90. *Id.* at 340.

91. *Id.* at 341.

92. *Id.* at 343.

93. *T.L.O.*, 469 U.S. at 341.

justified at its inception,⁹⁴ and whether the search relates in scope to the justification for the search.⁹⁵

The Court defined justification at the inception as reasonable grounds to suspect that the search would reveal evidence that the student had violated either the law or the school rules.⁹⁶ This individualized suspicion was a relaxed standard compared to probable cause.⁹⁷

Justice Blackmun stated, "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."⁹⁸ Accordingly, many credit this as the birth of the "special needs doctrine."⁹⁹

c. Holding

A search of a student's purse was constitutional because there was a special need, beyond law enforcement, that justified the warrantless search as reasonable.¹⁰⁰

II. SUSPICIONLESS DRUG TESTS IN THE COURTS

A. *The Supreme Court's Approach to Suspicionless Drug Testing*

1. *Skinner v. Railway Labor Executives*¹⁰¹

The first case in which the Supreme Court addressed random suspicionless urine drug testing of employees was *Skinner v. Railway Labor Executives' Association*.¹⁰² *Skinner* established the precedent that urine collection for drug testing was a search and demanded the protections of the Fourth Amendment.¹⁰³ It also began the development of the "special needs" doctrine as it applied to drug tests, beyond the search of purses in *T.L.O.*¹⁰⁴

94. *Id.* at 341-42.

95. *Id.* at 342.

96. *Id.*

97. *Id.* at 333.

98. *See id.* at 351-52.

99. *See* Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 B.Y.U. EDUC. & L.J. 71, 75 (1999).

100. *T.L.O.*, 469 U.S. at 347-48.

101. 489 U.S. 602 (1989).

102. *See Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989).

103. *Skinner*, 489 U.S. at 617.

104. *Id.* at 619.

a. Facts

Labor union representatives brought an action challenging random suspicionless drug testing done by the Federal Railroad Administration ("FRA").¹⁰⁵ The FRA promulgated a rule requiring that after certain types of railroad accidents, employees had to consent to either blood or urine drug and alcohol testing.¹⁰⁶ In addition, another rule authorized, but did not require, urine or breath alcohol and drug tests after individuals violated certain safety rules.¹⁰⁷

Testing was completed by an outside agency using "state of the art equipment and techniques."¹⁰⁸ Both blood and urine were collected after major accidents.¹⁰⁹ Employees were notified of the test results and given an opportunity to respond.¹¹⁰ Urine and breath tests could also be conducted after accidents when there was reasonable individualized suspicion, or where certain rules were violated.¹¹¹

The FRA pointed to numerous accidents caused by drug or alcohol impairment of employees, and described the type of workers covered under the rules as safety sensitive.¹¹² In addition, they stated that the reason for the testing was deterrence from drug and alcohol use during work and that test results would not be divulged to criminal authorities without the employee's consent.¹¹³

The labor union countered that the collection of blood, urine, or breath constituted a violation of the Fourth Amendment and employees' right to be free from governmental intrusion.¹¹⁴ In addition, they argued that the policy was not an effective deterrent and therefore did not adequately fulfill its stated purpose.¹¹⁵

b. Analysis

The Court first had to decide whether there was state action implicating the protections of the Fourth Amendment.¹¹⁶ The FRA argued that because an outside private company collected and tested the urine or blood, there was no state action.¹¹⁷ Consequently, because private actors

105. *Id.* at 612.

106. *Id.* at 606.

107. *Id.*

108. *Id.* at 610.

109. *Skinner*, 489 U.S. at 609.

110. *Id.* at 610.

111. *Id.* at 611.

112. *Id.* at 607.

113. *Id.* at 620-21 n.5.

114. *Id.* at 612.

115. *Skinner*, 489 U.S. at 630 (inferred for Court's discussion of deterrent effect of policy).

116. *Id.* at 614.

117. *Id.* at 615.

are not bound by the Constitution, there could not be a violation of the Constitution.¹¹⁸

The Court rejected this argument.¹¹⁹ They applied the state action doctrine,¹²⁰ stating that private party action can amount to state action under certain situations.¹²¹ Because the FRA was a governmental agency, and required the tests, and the private medical company acted on behalf of the governmental agency, state action existed.¹²²

The next question the Court had to answer was whether collecting and testing urine amounted to a search that should be protected under the Fourth Amendment.¹²³ In previous decisions, the Court had stated that the collection of blood using a surgical technique (using a needle to withdraw blood from a person's body) was a search under the Fourth Amendment,¹²⁴ but the Court had not previously decided on the collection of urine using non-surgical techniques.¹²⁵ The Court determined that there was a very high expectation of privacy in bodily functions,¹²⁶ and the collection of such violated that expectation.¹²⁷ In addition, the Court stated that this expectation was reasonable.¹²⁸ Balancing this with the government's interest, the Court concluded that the collection of urine for urine drug tests was a search within the protections of the Fourth Amendment.¹²⁹

The Court also considered whether the search was reasonable without a warrant based on probable cause or individualized suspicion.¹³⁰ The Court applied the special needs doctrine, developed in *T.L.O.*, to conclude that the FRA did not need a warrant.¹³¹ The search was beyond normal law enforcement and justified a departure from the usual warrant and probable cause requirements because: (1) a warrant would do little to further the protections of the Fourth Amendment;¹³² (2) the burden of obtaining a warrant was likely to frustrate the purpose behind the search;¹³³ and (3) the FRA had little occasion to become familiar with the

118. *Id.* at 614.

119. *Id.* at 615.

120. See Diehl, *supra* note 12, at 230-31 n.6 (1996) (describing the "state action doctrine").

121. *Skinner*, 489 U.S. at 616.

122. *Id.*

123. *Id.* at 617.

124. *Id.* at 616. See also *Schmerber v. California*, 384 U.S. 757, 767-68 (1966) (holding blood collection as a search).

125. *Skinner*, 489 U.S. at 617.

126. *Id.*

127. *Id.* at 617.

128. *Id.* (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

129. *Id.*

130. *Id.* at 621.

131. *Skinner*, 489 U.S. at 620.

132. *Id.* at 622.

133. *Id.* at 623.

subtle nuances of Fourth Amendment jurisprudence.¹³⁴ In addition, the special need for safety while operating trains was demonstrated by the dramatic figures that the FRA provided.¹³⁵

The Court then balanced governmental interest with the privacy intrusion to determine reasonableness and justification for the suspicionless search.¹³⁶ Because of the number of accidents detailed by the FRA, and the safety sensitive nature of the position of the railroad workers, the government's interest was compelling.¹³⁷ In addition, because the railroad workers worked in a highly regulated industry, they had a decreased expectation of privacy.¹³⁸ The Court held that the balance decidedly tipped in favor of the FRA conducting drug testing without a warrant.¹³⁹

c. Holding

Urine alcohol and drug tests are searches within the Fourth Amendment's reasonableness requirement.¹⁴⁰ It is reasonable to conduct such tests for drug use in the absence of a warrant or individualized suspicion of a particular employee because of the "special needs" balancing in favor of the FRA.¹⁴¹ Consequently, the alcohol and drug tests contemplated by the FRA's regulations are reasonable within the meaning of the Fourth Amendment.¹⁴²

2. National Treasury Employees Union v. Von Raab¹⁴³

In a companion case decided the same day as *Skinner*, the Court upheld another suspicionless drug test without any showing of a drug problem or the concrete showing of danger that had been emphasized in *Skinner*.¹⁴⁴

a. Facts

The United States Custom Service implemented a random suspicionless drug testing policy.¹⁴⁵ The policy covered three categories of employees: (1) those who had direct involvement in drug interdiction or

134. *Id.* at 623.

135. *Id.* at 630.

136. *Id.* at 626-30.

137. *Skinner*, 489 U.S. at 633.

138. *Id.* at 627.

139. *Id.* at 633.

140. *Id.* at 617.

141. *Id.* at 633.

142. *Id.* at 633.

143. 489 U.S. 656 (1989).

144. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

145. *Von Raab*, 489 U.S. at 660.

enforcement; (2) those who carried firearms; and (3) those who handled classified information.¹⁴⁶

Testing was strictly completed with a same sex individual standing outside a closed bathroom stall, dye in the toilet to assure water is not put in the sample, listening for normal sounds of urination, measuring the temperature of the sample, and sealing the sample.¹⁴⁷ Analysis of the urine was done confidentially, and results were not released to anyone outside of the agency without the individual's consent, including law enforcement personnel.¹⁴⁸

The Custom Service stated that there were no known significant drug problems to date,¹⁴⁹ but that the positions were very safety sensitive,¹⁵⁰ highly susceptible to illegal influence,¹⁵¹ and employees could be dangerous to the public if the employees used drugs because they carried firearms and were the first line of defense in drug trafficking for the United States.¹⁵² In addition, there was minimal, if any, day to day supervision that would enable the Service to establish individualized suspicion.¹⁵³

b. Analysis

The Court noted that this case had been decided on the same day as *Skinner*, and as such, they quickly concluded that there was government action and that it did amount to a search.¹⁵⁴ The Court also noted that it was not disputed that this testing policy was not for law enforcement purposes and thus possibly fell within the special needs doctrine.¹⁵⁵ The Court then looked to exceptions for the warrant requirement to determine the reasonableness of the search.¹⁵⁶

The Court concluded that the Customs agents were probably more familiar with Fourth Amendment jurisprudence,¹⁵⁷ as opposed to the FRA in *Skinner*, but that a warrant requirement in the instant case would divert valuable resources away from the Service's primary mission.¹⁵⁸ Secondly, a warrant requirement would do little to increase the protections required by the Fourth Amendment's reasonableness requirement.¹⁵⁹

146. *Id.* at 660-61.

147. *Id.* at 661.

148. *Id.* at 661-62.

149. *Id.* at 660, 673.

150. *Id.* at 660-61.

151. *Von Raab*, 489 U.S. at 661.

152. *Id.* at 670-71.

153. *Id.* at 674.

154. *Id.* at 665.

155. *Id.* at 665-66.

156. *Id.* at 666.

157. *Von Raab*, 489 U.S. at 666.

158. *Id.* at 666-67.

159. *Id.* at 667.

The Court briefly referred to the point that the testing was not random, per se, because the employees knew when the testing would occur, who was covered, and there was no discretion on the part of the agency in who was tested.¹⁶⁰ This increased the government's interest and decreased the individual's expectation of privacy.¹⁶¹

The Court extolled the virtues of the testing program's stated purposes, and how important it was to have drug free agents doing the valuable job of the Custom Service.¹⁶² This indicated a very important governmental interest.¹⁶³ In addition, there was great public interest in instituting effective measures to prevent individuals who carry firearms from using drugs.¹⁶⁴

In contrast to these interests was the employee's expectation of privacy.¹⁶⁵ The Court noted that occasionally there were reasonable searches in the workplace where in other contexts it would not be considered reasonable, and that this lowered the individual's expectation of privacy in the workplace.¹⁶⁶ The Court concluded that agents could not reasonably expect to keep the Service from gaining personal information that bears directly on job fitness, and urine drug tests provided this type of information.¹⁶⁷ Finally, the employees had notice about the tests decreasing their expectation of privacy.¹⁶⁸ Consequently, the individuals' privacy interest did not outweigh the governmental interest.¹⁶⁹

Next, the Court looked to the scope of the drug testing protocol.¹⁷⁰ They concluded that despite evidence that there was a minimal drug problem at the Service, the deterrent effect was very important.¹⁷¹ The Court concluded that American workplaces were not immune from "one of the most serious problems confronting our society today," drug abuse.¹⁷² Therefore, the Service did not have to establish a real special need; the deterrent effect and the possibility of harm to the public were sufficient.¹⁷³

Consequently, *Von Raab* did not require the same showing as required in *Skinner*, that there was a drug problem causing accidents and

160. *Id.*

161. *Id.*

162. *Id.* at 668-70.

163. *Von Raab*, 489 U.S. at 670.

164. *Id.* at 670-71.

165. *Id.* at 671.

166. *Id.*

167. *Id.* at 672

168. *Id.* at 672, fn. 2.

169. *Von Raab*, 489 U.S. at 672.

170. *Id.* at 674.

171. *Id.*

172. *Id.* at 674.

173. *Id.* at 674-75.

serious injuries, but instead merely that there was a possible serious public harm.¹⁷⁴

c. Holding

Suspicionless testing of Custom Service agents who carried firearms or who were directly involved in drug enforcement was reasonable within the Fourth Amendment and did not require a warrant, probable cause, or individualized suspicion, because of the application of the special needs doctrine.¹⁷⁵ In light of this holding, the remainder of the case was remanded to the lower court to determine if individuals who were in contact with confidential communications were also in a position that required the application of the special needs doctrine.¹⁷⁶

3. *Vernonia School District 471 v. Acton*¹⁷⁷

Several years later, the Court again had an opportunity to evaluate random suspicionless urine drug testing, this time in the context of schools, and again upheld the policy as constitutional.¹⁷⁸

a. Facts

Vernonia School District 47J (the "District") required random urine drug testing for all students involved in after school athletics.¹⁷⁹ Urine samples were tested for a variety of drugs, including stimulants, cocaine, and THC.¹⁸⁰ Other drugs, including alcohol and LSD, could be tested for on request, but the identity of the student did not determine which tests were conducted.¹⁸¹ School officials rigidly conducted the tests, with the administrator outside of the stall while the person being tested was inside the stall.¹⁸² The specimen was sent to an outside agency for anonymous testing.¹⁸³ Results were mailed only to the superintendent and not divulged to the police.¹⁸⁴

The District detailed how drugs had created disciplinary problems, and that other efforts, including special classes, guest speakers, the presence of drug sniffing dogs, and various other presentations, had not stemmed the drug problem.¹⁸⁵ The District's showing had the same pur-

174. *See id.*

175. *Von Raab*, 489 U.S. at 677.

176. *Id.* at 678 (The district court held that the testing of employees who had access to top secret information was reasonable. *See* 756 F.Supp. 947 (E.D.La. 1991)).

177. 515 U.S. 646 (1995).

178. *Vernonia Sch. Dist. 471 v. Acton*, 515 U.S. 646, 664-65 (1995).

179. *Vernonia*, 515 U.S. at 648.

180. *Id.* at 650.

181. *Id.* at 651.

182. *Id.* at 650.

183. *Id.*

184. *Id.* at 651.

185. *Vernonia*, 515 U.S. at 649.

pose as the showing used by the FRA in *Skinner*, to establish a special need.

The District had determined that the athletes were the core of the drug culture, and that drugs negatively affected the athletes' abilities by decreasing motivation, memory, judgment, reaction time, and coordination.¹⁸⁶ Because of these effects, athletes were a threat to themselves and others as injuries were more likely during athletic competitions and practices when athletes were on drugs.¹⁸⁷ As a result, the drug testing program was narrowly tailored to test only athletes, not the entire student body, to affect the core of the drug culture, thus affecting all of the drug culture.¹⁸⁸

If the superintendent received a positive drug test result, a second test was conducted to confirm the results.¹⁸⁹ If the second test was positive, the parents of the student were notified for a meeting with the principal.¹⁹⁰ During that meeting, the student had the option to enter counseling or to be removed from the athletic team for the current year and the following year.¹⁹¹ If the second test was negative, the first test was dismissed.¹⁹²

b. Analysis

There was minimal discussion, or real question, about whether the school actions amounted to government action, or whether the action constituted a search.¹⁹³ *Skinner* and *T.L.O.* had decidedly answered both of these questions. The only question remaining was the reasonableness of the warrantless search.¹⁹⁴

The Court held that the student athletes had a much lower expectation of privacy because they were students.¹⁹⁵ In addition, they showered and changed clothes together in the locker room,¹⁹⁶ they were subject to physical exams prior to the start of the season,¹⁹⁷ and they knew that, as students, they had a decreased expectation of privacy because they had to comport with strict regulations for after school athletics.¹⁹⁸

186. *Id.*

187. *Id.*

188. *Id.* at 649-50.

189. *Id.* at 651.

190. *Id.*

191. *Vernonia*, 515 U.S. at 651.

192. *Id.* at 651.

193. *Id.* at 652.

194. *Id.* at 652-53.

195. *Id.* at 657.

196. *Id.*

197. *Vernonia*, 515 U.S. at 657.

198. *Id.*

On the other hand, the school had a great interest in controlling the drug problem because the problem was "epidemic,"¹⁹⁹ drug use led to drastic discipline problems,²⁰⁰ the athletes could hurt themselves or others when playing sports on drugs,²⁰¹ and the athletes were role models for other students.²⁰² The District had established a real need that was beyond normal law enforcement purposes, and accordingly, the Court applied the special needs doctrine.²⁰³

Next, the Court looked to the intrusiveness of the test and the scope of the drug testing policy.²⁰⁴ The Court held that the test was relatively unobtrusive.²⁰⁵ In addition, because the policy only covered athletes who appeared to be role models and the core of the drug culture the Court held that the policy was not overbroad.²⁰⁶

Applying the special needs doctrine, the Court balanced the expectation and nature of the privacy interest, the type of intrusion, and the governmental concern.²⁰⁷ The Court concluded that the governmental purpose severely outweighed the students' expectation of privacy.²⁰⁸

c. Holding

Random suspicionless drug testing of students participating in after school athletics as a condition of participation is constitutional and does not violate the Fourth Amendment's protections against unreasonable searches and seizures.²⁰⁹

4. *Chandler v. Miller*²¹⁰

Chandler v. Miller is the most recent application of the special needs doctrine to random suspicionless drug testing policies by the Supreme Court. This case differs from the previous three because it held the drug testing policy unconstitutional.²¹¹ The Court chose not to apply the special needs balancing test because the City had not established the elements of the doctrine.²¹²

199. *Id.* at 649.

200. *Id.*

201. *Id.*

202. *Id.* at 663.

203. *Vernonia*, 515 U.S. at 653.

204. *Id.* at 663.

205. *Id.* at 664-65.

206. *Id.* at 663.

207. *Id.*

208. *Id.*

209. *Vernonia*, 515 U.S. at 665.

210. 520 U.S. 305 (1997).

211. *Chandler v. Miller*, 520 U.S. 305, 319 (1997).

212. *Chandler*, 520 U.S. at 319.

a. Facts

The Georgia State Legislature passed a law requiring any individual who was running for a high office to submit to and pass a urine drug screen.²¹³ High office positions consisted of the Governor, Lieutenant Governor, Secretary of State, Attorney General and District Attorneys, School Superintendent, Commissioner of Insurance, Agriculture, and Labor, Justices and Judges, and members of the General Assembly and Public Service Commission.²¹⁴

Results of urine drug screens were to be provided by the candidate 30 days prior to qualifying for nomination or election.²¹⁵ The tests were arranged by the candidates and could be taken at a number of medical facilities, including the candidate's private physician.²¹⁶ Release of results was in the sole discretion of the candidate, and criminal authorities did not receive positive results.²¹⁷ Procedures of the tests were to be regulated by federal statute.²¹⁸

The State argued that it had a significant interest in assuring that candidates were drug free because of the position the candidates could hold, public impression of a drug free government, and that the individuals needed to be clear headed in the performance of their job duties.²¹⁹

Three candidates from the Libertarian party challenged the statute as violating the Fourth Amendment right to be free from unreasonable searches and seizures.²²⁰

b. Analysis

It was beyond doubt by this point in precedent that there was state action, and that the collection of urine for drug testing constituted a search.²²¹ So the remaining issue was whether the search was reasonable without a warrant and without individualized suspicion.²²²

Initially, the State argued that the Tenth Amendment allowed them, under their sovereign power, to establish qualifications for holding a state office.²²³ However, the Court dismissed this argument, stating that

213. *Id.* at 308.

214. *Id.* at 309-10.

215. *Id.* at 309.

216. *Id.* at 310.

217. *Id.* at 312.

218. *Chandler*, 520 U.S. at 310.

219. *Id.* at 318.

220. *Id.* at 310.

221. *Id.* at 313.

222. *Id.*

223. *Id.* at 317.

sovereign power did not release the requirements of the Fourth Amendment²²⁴ and thus the case turned on the reasonableness of the search.²²⁵

The Court next looked to the special needs doctrine.²²⁶ After evaluating the precedents of *Skinner*, *Von Raab*, and *Vernonia*, the Court analyzed whether there was a special need demonstrated in the instant case to relax the warrant requirement.²²⁷

The Court noted that there was no known or demonstrated drug problem for the group being tested.²²⁸ In addition, there was no demonstration that there was a concrete danger demanding the application of relaxed Fourth Amendment jurisprudence.²²⁹ Also, the scope of the statute was not well designed to identify individual drug users.²³⁰ Because the candidates could arrange the test themselves, could only release negative results without disclosing any positive results, and could circumvent the protections by abstaining from drugs, the policy would not work to fulfill its stated purpose.²³¹

The Court distinguished the present case from *Von Raab*, where there was a showing of a real need, because the individuals in that case carried weapons and were the front line defense for the United States.²³² In the instant case, there was no similar danger.²³³ In addition, the Customs Officers in *Von Raab* were not subject to day-to-day scrutiny, whereas public officials, or candidates, were subject to heavy scrutiny from both their coworkers and the public, which could establish reasonable individualized suspicion.²³⁴

Consequently, the State had not shown a real need that required loosening the protections of the Fourth Amendment to necessitate that the state could conduct suspicionless, warrantless searches.²³⁵

c. Holding

As a threshold matter, the special needs doctrine would only apply if a real need or a severe public threat was demonstrated.²³⁶ Because the state had not established a real need, the special needs doctrine did not apply.²³⁷ Random suspicionless urine drug testing of state office candi-

224. *Chandler*, 520 U.S. at 317.

225. *Id.*

226. *Id.* at 318.

227. *Id.* at 321.

228. *Id.* at 318-19.

229. *Id.*

230. *Chandler*, 520 U.S. at 319.

231. *Id.* at 320.

232. *Id.* at 320-21.

233. *Id.* at 321.

234. *Id.*

235. *Id.* at 322.

236. *Chandler*, 520 U.S. at 322.

237. *Id.*

dates was an unconstitutional search under the Fourth Amendment because the state had not shown a special need to allow warrantless searches without suspicion.²³⁸

B. Tenth Circuit Court of Appeals Approach to Suspicionless Drug Testing

1. *Rutherford v. Albuquerque*²³⁹

Rutherford was one of the first Tenth Circuit Court of Appeals decisions concerning random suspicionless drug testing. This case was prior to *Chandler*, and relied heavily on *Skinner*, *Von Raab*, and *Vernonia* to establish the requirements of the special needs doctrine as it applied to random suspicionless drug testing.²⁴⁰

a. Facts

Rutherford, the plaintiff, had been on physical layoff status as a bus driver²⁴¹ from a work related back injury and a heart attack.²⁴² During his absence, the City had initiated a drug testing policy that provided for drug testing as a prerequisite to obtaining a city operator's permit, and/or as a condition of beginning employment with the City.²⁴³

Rutherford was unaware of this policy when he was cleared to go back to work.²⁴⁴ He went back to work with the City as a truck driver for the public works department, a position that requires a city operator's permit.²⁴⁵ Rutherford's city operator's permit had not expired from his previous job.²⁴⁶

When he arrived for work, the City sent him to the employee health center for a drug test.²⁴⁷ The drug test was positive for marijuana, and Rutherford admitted to smoking marijuana.²⁴⁸ As a result of the positive test, the admission, and other no tolerance policies, the city terminated his employment.²⁴⁹ He brought this action claiming a violation of his Fourth Amendment right to be free from unreasonable searches and seizures.²⁵⁰

238. *Id.* at 323.

239. 77 F.3d 1258 (1996).

240. *Rutherford v. Albuquerque*, 77 F.3d 1258, 1259 (1996).

241. *Rutherford*, 77 F.3d at 1259.

242. *Id.*

243. *Id.*

244. *Id.* at 1261.

245. *Id.* at 1259.

246. *Id.*

247. *Rutherford*, 77 F.3d at 1259.

248. *Id.*

249. *Id.*

250. *Id.*

b. Analysis

First, the Tenth Circuit quickly concluded that there was state action, as the government acting as an employer is bound by the constitution,²⁵¹ and that the collection of urine was a search that implicated the protections of the Fourth Amendment.²⁵² Then, without considerable discussion, the court assumed the position of the City that Rutherford's position was safety sensitive.²⁵³ Consequently, the court looked to the special needs doctrine to determine if it applied, possibly making the search reasonable in the instant case.²⁵⁴

The Tenth Circuit determined that the nature of the intrusiveness of the testing procedure was not in line with the testing procedures in *Skinner* and *Von Raab*.²⁵⁵ The court concluded that the testing procedure at issue was much more intrusive because the plaintiff was unaware of the procedure and had no warning or advance notice.²⁵⁶ Intrusiveness was magnified because Rutherford was not in an industry heavily regulated for safety purposes, such as the railroad workers in *Skinner*.²⁵⁷ The court seemed to overlook the size of the vehicle and danger of it on the road.²⁵⁸ Finally, the court noted that the government's interest to ensure safety was decidedly low in the instant case.²⁵⁹

Furthermore, because Rutherford had not been at work in over a year, the test was not a reflection of his activities at work, actions that would increase the government's interest.²⁶⁰ Because there was no notice, and there were no public safety concerns akin to *Von Raab*, Rutherford had a high expectation of privacy that was violated by the test.²⁶¹

Another distinguishing factor that the court noted was a wide exercise of discretion by city officials in testing Rutherford.²⁶² He was not a new employee and he maintained his operator's license for the City.²⁶³ Consequently, he was tested based on significant official discretion, not under the rules of the City.²⁶⁴ The court emphasized that this discretion was lacking in both *Skinner* and *Von Raab*.²⁶⁵

251. *Id.* at 1260.

252. *Id.*

253. *Rutherford*, 77 F.3d at 1261.

254. *Id.* at 1261.

255. *Id.*

256. *Id.* at 1262.

257. *Id.*

258. *See International Broth. of Teamsters v. Dept. of Transp.*, 932 F.2d 1292, 1304 (9th Cir. 1991) (discussing safety sensitive position of heavy truck drivers).

259. *Rutherford*, 77 F.3d at 1262.

260. *Id.* at 1263.

261. *Id.*

262. *Id.* at 1261.

263. *Id.* at 1259.

264. *Id.* at 1261.

265. *Rutherford*, 77 F.3d at 1261.

After distinguishing Supreme Court precedent, the court applied the special needs balancing test.²⁶⁶ When the court balanced the interest of the government and the level of intrusiveness, under the special needs doctrine, the scales tipped decidedly for the individual.²⁶⁷

c. Holding

Rutherford's expectation of privacy outweighed the governmental interest under the special needs doctrine.²⁶⁸ Consequently the City had violated his constitutional right to be free from unreasonable searches because the City had not established probable cause or individualized suspicion.²⁶⁹

2. *19 Solid Waste Mechanics v. Albuquerque*²⁷⁰

19 Solid Waste Mechanics was decided after *Chandler*, and the decision relied heavily on the analysis of *Chandler* to hold that a random suspicionless testing policy did not warrant the application of the special needs doctrine because the policy did nothing to deter behavior.²⁷¹

a. Facts

City mechanics commenced this action to claiming random suspicionless drug testing of city employees was unconstitutional.²⁷² Testing policy required urine drug testing for all employees whose jobs required a commercial driver's license to be conducted when they renewed their licenses.²⁷³ Another policy required mechanics who worked on city vehicles to have a commercial driver's license, which brought the employees under the drug testing policy.²⁷⁴

The City asserted that the mechanics were safety sensitive personnel because the performance of their jobs could put others at risk, as they worked on the brakes, steering, and other safety issues with city vehicles.²⁷⁵ Then the City asserted that the special needs doctrine applied, and that under previous Supreme Court precedent, governmental interest outweighed privacy intrusion.²⁷⁶

266. *Id.* at 1262.

267. *Id.* at 1263.

268. *Id.*

269. *Id.*

270. 156 F.3d 1068 (1998).

271. *19 Solid Waste Mechanics v. Albuquerque*, 156 F.3d 1069, 1074 (1998).

272. *19 Solid Waste Mechanics*, 156 F.3d at 1070.

273. *Id.* at 1071.

274. *Id.*

275. *Id.* at 1074.

276. *Id.* at 1071.

b. Analysis

The Tenth Circuit first concluded that there was state action by a government employer, and that collecting urine for drug testing was a search within the confines of the Fourth Amendment.²⁷⁷ The remaining questions were the reasonableness of the search and the application of the special needs doctrine.²⁷⁸

Prior to completing the balancing test of the special needs doctrine, the court ruled that the government was required to establish a special need based on precedent in *Chandler*.²⁷⁹ There were two issues to determine if the government had shown a special need.²⁸⁰ First, did the government provide evidence of a real need that warranted the application of the special needs doctrine?²⁸¹ Types of evidence accepted by the court were the government showing that the testing program was adopted in response to a documented drug problem or showing that the group being tested would pose a danger or threat to the public.²⁸² Second, was the testing policy reasonably related to the goals of detection and deterrence outside of law enforcement purposes allowing relaxation of the warrant requirement?²⁸³

If either of these factors is not established, the special needs doctrine would not apply, and there would have to be another exception to the warrant and probable cause requirement to make the search reasonable.²⁸⁴

The court concluded that the City had failed to satisfy the second factor, the deterrent effect, for the application of the special needs doctrine.²⁸⁵ The policy lacked a capacity to address drug problems in the workplace because the drivers would know when the test was coming and could prepare for it, and tests were given very infrequently – only once every four years.²⁸⁶ For the Tenth Circuit, advance notice and frequency were fatal to the policy.²⁸⁷ This sharply contrasts with the holding of *Rutherford* a few years earlier where the court ruled that no advance notice was fatal to a random suspicionless drug testing policy.²⁸⁸

277. *Id.* at 1072.

278. *19 Solid Waste Mechanics*, 156 F.3d at 1072.

279. *Id.*

280. *Id.* at 1073.

281. *Id.*

282. *Id.*

283. *Id.* at 1073.

284. *19 Solid Waste Mechanics*, 156 F.3d at 1073.

285. *Id.* at 1074.

286. *Id.*

287. *Id.*

288. *Rutherford*, 77 F.3d at 1263.

The court noted that the rationale for the program – safety – was legitimate, despite not having documented evidence of the problem.²⁸⁹ Therefore, the government had great interest in performing the drug tests to assure safety.²⁹⁰ The court did not require that this be shown by documented evidence, but merely accepted it as fact.²⁹¹ The court stated that the mechanics held a safety sensitive position and that safety was clearly a concern, even without documentation.²⁹² This satisfied the first factor for the application of the special needs doctrine.²⁹³

Consequently, because the City had not established a special need, the special needs doctrine could not be applied.²⁹⁴

c. Holding

Random urine drug testing of city employees unconstitutionally violated the Fourth Amendment's protections against unreasonable searches and seizures because the government had not established a special need.²⁹⁵

3. *Earls v. Board of Education*²⁹⁶

Earls is the most recent of the Tenth Circuit Court of Appeals decisions concerning random suspicionless drug testing. This case differs from the previous Tenth Circuit cases discussed because it is in the context of a school, not employment. The court applied the precedent of *Vernonia* in conjunction with *19 Solid Waste Mechanics*, to hold that the special needs doctrine did not apply because there was no real need shown and the policy was both over and under broad.²⁹⁷

a. Facts

The school district implemented a random urine drug-testing program for all students involved in extracurricular competitive activities to help combat drug use at the schools.²⁹⁸ Activities covered under the policy included athletics (like *Vernonia*), but also included student choir, band, color guard, Future Farmers of America, Future Homemakers of America, academic team, debate team, cheerleading, and pom pom.²⁹⁹

289. *19 Solid Waste Mechanics*, 156 F.3d at 1074.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 1074-75.

295. *19 Solid Waste Mechanics*, 156 F.3d at 1074-75.

296. 242 F.3d 1264 (10th Cir. 2001).

297. *Earls v. Bd. Of Educ. Of Tecumseh Public Sch. No. 92*, 242 F.3d 1264, 1278 (10th Cir. 2001).

298. *Earls*, 242 F.3d at 1266.

299. *Id.* at 1267.

Each student participating had to agree to the testing or she was not allowed to participate.³⁰⁰

Procedures of the test were almost identical to the intrusiveness of the test in *Vernonia*.³⁰¹ Tests only detected amphetamines, marijuana, cocaine, opiates, barbiturates, and benzodiazepines, without testing for alcohol and nicotine.³⁰² Urine was collected behind closed stall doors (similar to *Vernonia*), but in groups of two or three students.³⁰³

There was no mention of what happened to students with a positive result, as opposed to *Vernonia* where a second test was completed. Results were put in a confidential file separate from the students' academic record, and would only be released to school officials who had a need to know test results, and would not be given to the police.³⁰⁴

The District spent little time establishing the drug problems within their specific district, and did not demonstrate that the policy was geared toward the core of the drug culture.³⁰⁵

Parents, on behalf of their children, brought suit claiming a violation of the Fourth Amendment.³⁰⁶

b. Analysis

The Tenth Circuit determined that *Vernonia* compelled the decision that there was state action and that those actions constituted a search.³⁰⁷ In addition, *Vernonia* compelled the application of the special needs doctrine.³⁰⁸ Although the court held that it was applying *Vernonia*, not *19 Solid Waste Mechanics*, and holding that the school had established a special need,³⁰⁹ their decision rested heavily on a lack of deterrence because of the lack of a documented problem, very similar to the analysis in *19 Solid Waste Mechanics*.³¹⁰

The court examined the privacy interest of the students and the level of intrusion on that interest.³¹¹ The court concluded that the students tested had a decreased expectation of privacy compared to other students and adults, but departed from *Vernonia* by stating that the students in the instant case did not have as low an expectation of privacy as the students

300. *Id.* at 1268.

301. *Id.* at 1276.

302. *Id.* at 1267.

303. *Id.*

304. *Earls*, 242 F.3d at 1268.

305. *Id.* at 1270.

306. *Id.* at 1268.

307. *Id.* at 1270.

308. *Id.*

309. *Id.* at 1270 n.4.

310. *Earls*, 242 F.3d at 1272.

311. *Id.* at 1275.

in *Vernonia*.³¹² The court rejected arguments that the students' voluntary participation in the activities decreased their expectation of privacy and that all the included programs required communal undress and occasional out of town trips decreasing the expectation of privacy.³¹³ It did state, however, that students who participated in after school activities did have a lower expectation of privacy than other students.³¹⁴

Then the court looked at the governmental interest and what the government had established concerning the factors for the application of the special needs doctrine.³¹⁵ The court concluded that the school had not shown a sufficient drug problem that the drug testing policy would combat.³¹⁶ It reviewed the history of the testing results and concluded that a large, epidemic drug problem did not exist in the District as shown in *Vernonia*.³¹⁷ In addition, the policy was not an effective deterrent because it was both over and under broad; it tested students who did not have a safety issue, and tested too few students within the District.³¹⁸

Thus, the factors for the application of the special needs doctrine, a real need and deterrence, were not satisfied.³¹⁹ Without these elements, the expectation of privacy, no matter how slight, outweighed the interests of the government.³²⁰

c. Holding

Random suspicionless urine drug testing policy, as a precursor to participation in any competitive after school activity, was unconstitutional and constituted an unreasonable search because the special needs doctrine did not apply.³²¹

The United States Supreme Court has granted a writ of certiorari for *Earls* but the decision had not been issued at the time this article was written.³²²

312. *Id.* at 1275-76.

313. *Id.*

314. *Id.* at 1276.

315. *Id.* at 1276-77.

316. *Earls*, 242 F.3d at 1277.

317. *Id.* at 1272-75.

318. *Id.* at 1277.

319. *Id.* at 1278.

320. *Id.* at 1277.

321. *Id.* at 1279.

322. Bd. of Edu. of Indep. Sch. Dist. No. 92 v. *Earls*, 122 S. Ct. 509, 2001 WL 1046942 (2001). Oral arguments were heard on March 19, 2002. See Linda Greenhouse, *Court Weighs Expanded Drug Testing for Students*, DENVER POST, March 20, 2002, at A5.

III. THE DEMISE OF THE SPECIAL NEEDS DOCTRINE IN THE TENTH CIRCUIT

A. *Only Reasonable Suspicion Drug Tests Survive*

The Tenth Circuit has upheld urine drug testing policies only twice in the past, and in both of these cases, the court held that there was individualized suspicion, which allowed a warrantless search.³²³

1. *Saaverda v. Albuquerque*³²⁴

a. Facts

Saaverda was a firefighter and emergency technician for the City of Albuquerque.³²⁵ In 1991, Saaverda suffered physical and emotional problems to an extent that he self-referred himself to the city's employee health center.³²⁶ When he was at the center, he provided a urine sample.³²⁷ When tested, the sample was proved to be solely water.³²⁸ A second urine test was completed, and this one tested positive for drugs.³²⁹ After a pre-termination hearing, he was released from employment due to the positive drug test.³³⁰ Saaverda then sought judicial review of his termination arguing, among other challenges, that his Fourth Amendment rights were violated by the random suspicionless drug test.³³¹

The City argued that it was not random, nor suspicionless, but that they had reasonable suspicion because of earlier threats he had made, explosive fighting in public, and the initial urine test being water.³³²

b. Analysis

The court very briefly went over the special needs doctrine, and then dismissed that justification.³³³ The court believed that the City did have reasonable suspicion, and if they had reasonable suspicion, they need not apply the special needs doctrine.³³⁴ Independent of the special needs doctrine, reasonable suspicion in a non-law enforcement context provided an exception from the warrant requirement.³³⁵

323. See discussion *infra* Part III.A.

324. 73 F.3d 1525 (10th Cir. 1996).

325. *Saaverda v. Albuquerque*, 73 F.3d 1525, 1527 (10th Cir. 1996).

326. *Saaverda*, 73 F.3d at 1528.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 1528.

332. *Saaverda*, 73 F.3d at 1528.

333. *Id.* at 1532.

334. *Id.*

335. *Id.*

The court agreed with the City that reasonable suspicion had been justified by Saaverda's previous actions prior to the drug test, and the fact that he gave a sample of water for his first urine test.³³⁶

As a result, there was no need to apply the special needs doctrine, and the court chose not to, merely answering the constitutionality of a drug testing policy as it applied to Saaverda, not addressing the question of whether random drug testing was constitutional.³³⁷

c. Holding

Suspicion based drug testing in the instant case was constitutional because there was individualized suspicion.³³⁸

2. *Benavidez v. Albuquerque*³³⁹

a. Facts

Benavidez was a field service operator for the City's Public Works Department.³⁴⁰ He and his supervisor drove to another employees house in a company vehicle.³⁴¹ He went into the house to buy drugs while his supervisor waited in the car, drinking beer.³⁴² Unfortunately for Benavidez, it was a drug bust.³⁴³ Both he and his supervisor were detained, but not arrested.³⁴⁴

When they were released, the police notified their supervisor and explained that they had been questioned during a drug raid and that Benavidez stated that he was there to purchase cocaine.³⁴⁵ The City then questioned Benavidez and his supervisor at length, but no drug test was conducted because they did not appear to be impaired by alcohol consumption.³⁴⁶ However, 36 hours later, they were tested.³⁴⁷ Benavidez tested negative, but his supervisor tested positive.³⁴⁸

Both were terminated.³⁴⁹ Both filed suit claiming, among other things, a violation of the Fourth Amendment rights against unreasonable search and seizure.³⁵⁰

336. *Id.* at 1531.

337. *Id.* at 1532.

338. *Saaverda*, 73 F.3d at 1532.

339. 101 F.3d 620 (10th Cir. 1996).

340. *Benavidez v. Albuquerque*, 101 F.3d 620, 622 (10th Cir. 1996).

341. *Benavidez*, 101 F.3d at 622.

342. *Id.*

343. *Id.*

344. *Id.* at 623.

345. *Id.*

346. *Id.*

347. *Benavidez*, 101 F.3d at 623.

348. *Id.*

349. *Id.*

b. Analysis

The court addressed the special needs doctrine, but dismissed it as not applicable.³⁵¹ The court looked to whether the City had a reasonable suspicion and an individualized suspicion.³⁵² Based on the amount of information and its reliability, having come from the police, the information the City received about their drug involvements constituted reasonable suspicion.³⁵³ There did not have to be direct observation that an employee's ability to perform their job was impaired.³⁵⁴

The City established reasonable suspicion, so the special needs doctrine did not apply.³⁵⁵ The court refused to inquire further into the drug testing policy of the City, especially the level of suspicion needed by administrative order, because administrative order violations would not give rise to a § 1983 claim, which was the jurisdiction claimed by the plaintiffs.³⁵⁶

c. Holding

There was reasonable suspicion to make a warrantless search reasonable under the Fourth Amendment.³⁵⁷ There was no need to analyze the special needs doctrine.³⁵⁸

B. *No Suspicionless Drug Tests Have Survived Special Needs Analysis*

No case concerning suspicionless drug testing policies presented to the Tenth Circuit has survived their "special needs" analysis. Each of the three cases outlined above that have addressed the issue has invalidated the policy on three different grounds: lack of notice, lack of deterrence because of notice, and lack of proof of a real problem of drug use at a particular school district.³⁵⁹ In each of these cases, the court strayed its precedent and the United States Supreme Court.

1. Lack of Notice

The *Rutherford* court emphasized that Rutherford had no notice of the drug testing policy, and that increased his expectation of privacy making the test over intrusive.³⁶⁰ Since that decision, both the Supreme Court and the Tenth Circuit have essentially overruled *Rutherford*, with-

350. *Id.*

351. *Id.* at 624.

352. *Id.*

353. *Benavidez*, 101 F.3d at 624.

354. *Id.* at 625.

355. *Id.* at 624.

356. *Id.* at 625.

357. *Id.* at 624.

358. *Id.*

359. See discussion *supra* Part II.B.

360. *Rutherford*, 77 F.3d at 1262.

out expressly doing so, by holding that advance notice is fatal to the deterrence of the testing policy.³⁶¹ Relying on the fact that individuals could give a false sample, or a clean sample, if they knew when the test was going to occur, the Tenth Circuit in *19 Solid Waste Mechanics* struck down the policy because it could not effectively deter or ferret out a drug problem.³⁶² The Court in *Chandler* invalidated a policy on similar grounds.³⁶³

However, *Rutherford* still stands as law, having not been overruled.³⁶⁴ Thus, in the Tenth Circuit, notice can be fatal to a testing policy, either because it reduces the deterrent factor or because it elevates the intrusiveness of the test.

2. Societal Drug Problems Are Not Real

In striking down the urine drug testing policy, the *Earls* court found another way to invalidate the special needs doctrine, and in doing so ignored precedent by both the Supreme Court and the Tenth Circuit. In *Earls*, there was minimum notice, the students knew about the testing policy, but not when they were going to be tested.³⁶⁵ This appears to be just enough notice, the midline between *Rutherford's* lack of notice and *19 Solid Waste Mechanics* too much advance notice. Consequently, it was a good deterrent.

The Tenth Circuit revisited the first factor for application of special needs doctrine, the establishment a real need through documented evidence.³⁶⁶ Unfortunately for the school, the government attorneys had not proven any significant drug problem. Inherent in the court's rationale was that if the school could not prove it, there must not be a drug problem. If there was no drug problem, then there was no real need, and the special needs doctrine did not apply.

Fatal to the court's reasoning, and presumably what the school was relying on, was that in *19 Solid Waste Mechanics*, *Rutherford*, and all of the previous Supreme Court cases, drug problems were stated to be major social problems, one that court often assumed needed to be dealt with.³⁶⁷ *19 Solid Waste Mechanics* went almost as far as to say no proof of drug problems was needed to satisfy the real need of the special needs doctrine.³⁶⁸ Consequently, despite prior statements by the court that drug problems were a major societal safety problem that needed to be con-

361. *See id.*

362. *19 Solid Waste Mechanics*, 156 F.3d at 1074.

363. *Chandler*, 520 U.S. at 320.

364. *See Rutherford v. Albuquerque*, 77 F.3d 1258 (1996).

365. *Earls*, 242 F.3d at 1267.

366. *Id.* at 1272. *But see id.* at 1270 n.4.

367. *See 19 Solid Waste Mechanics*, 156 F.3d at 1074; *Chandler*, 520 U.S. at 319; *Von Raab*, 489 U.S. at 674; *T.L.O.*, 469 U.S. at 339.

368. *19 Solid Waste Mechanics*, 156 F.3d at 1074.

trolled, and despite Supreme Court decisions to the same, the court wanted a way to invalidate the policy.

The Tenth Circuit and the Supreme Court had already decided the issue of notice and deterrence; the court needed another "out." The only way the court could dissolve the policy was to eliminate the special needs doctrine by holding that the school did not show a real need. To do this, the court relied on the Supreme Court in *Vernonia* expounding on the major problems drugs had brought to that school as evidence of a major drug problem proved by that District.³⁶⁹

3. Net Effects of the Courts Analysis

It appears that the Tenth Circuit strongly opposes any relaxing of the protections of the Fourth Amendment.³⁷⁰ In fact, the court has only accepted the relaxing of the Fourth Amendment under the special needs doctrine in two circumstances - searches of individuals in prisons with the governmental need of running and operating a prison safely,³⁷¹ and searches of homes and persons of parolees by parole officers.³⁷² It appears that the Tenth Circuit rarely allows suspicionless searches, relying mainly on a minimum benchmark of individualized suspicion for the search to be constitutionally reasonable. This is bolstered by the fact that the only cases concerning urine drug testing to survive the Tenth Circuit have been based on individualized suspicion and no random suspicionless drug testing has been upheld as constitutional.³⁷³

The Tenth Circuit has chosen a rights-based approach, protecting the rights and liberties of individuals, instead of a more utilitarian approach, providing the greatest good for the greatest number of people. In addition, the Tenth Circuit narrowly limits other exceptions to the warrant requirement for administrative searches.³⁷⁴ This shows increased protections for individuals' liberties and rights.

In the context of urine drug searches,³⁷⁵ and other Fourth Amendment contexts,³⁷⁶ the United States Supreme Court has a more utilitarian

369. *Earls*, 242 F.3d at 1270-71.

370. See discussion *supra* Part III.A.

371. See *Romo v. Champion*, 46 F.3d 1013 (10th Cir. 1995) (applying "special needs doctrine" to warrantless search of visitors to prisons).

372. See *United States v. White*, 244 F.3d 1199 (10th Cir. 2001) (applying "special needs doctrine" to waive warrant requirement for probation officer to search probationer's home).

373. See discussion *supra* Part IV.

374. See Jennifer D. Sheehan, *Limiting the Closely Regulated Business Exception to the Warrant Requirement: V-1 Oil Co. v. Wyoming, Department of Environmental Quality*, 902 F.2d 1482 (10th Cir. 1990), 39 WASH. U.J. URB. & CONTEMP. L. 277, 286-88 (1991) (discussing Tenth Circuit limits on administrative searches to closely regulated industries with stringent authorizing statutes).

375. See Kenneth C. Betts, *Fourth Amendment - Suspicionless Urinalysis Testing: A Constitutionally "Reasonable" Weapon in the Nations War on Drugs? National Treasury Union v.*

jurisprudence, relaxing the protections offered to the individual for the benefit of society. This is exemplified by the Supreme Court repeatedly carving out exception after exception to the warrant requirement for the protection and safety of the public at large.³⁷⁷

Since the decision of *Vernonia*, the circuits have split on the constitutionality of similar urine drug testing policies of students. The Seventh Circuit has held virtually all policy as constitutional, relying almost solely on the holding in *Vernonia*.³⁷⁸ The split in the circuits makes this a prime time for the United States Supreme Court to try to clear up the issue, especially the requirements for the application of the special needs doctrine. Presumably, the Supreme Court granted the writ of certiorari for *Earls* to address this split.

Until the Supreme Court affirmatively sets the guidelines for the applicability requirements of the special needs doctrine, and gives more guidance for the balancing weight to be given to each factor in the special needs balancing test, the Tenth Circuit should be more consistent with the philosophy of utilitarianism expressed by the Supreme Court. In order to do this, the Tenth Circuit could adjust the balancing test by giving more weight during the balancing to society's needs and more weight to protecting the people from the dangers of drug use and addiction. This should bring the courts decisions more consistent with the expressed philosophy of the United States Supreme Court.

Although there are factual differences in any case, and courts have ruled that Fourth Amendment challenges should be done on a case-by-case basis,³⁷⁹ the Tenth Circuit should not skirt the importance of precedent. The court should lower students' expectation of privacy and lower the expectation of privacy of individuals employed in highly regulated industries. In recognizing the importance of the government's purpose, as the court did in *19 Solid Waste Mechanics*, and recognizing the decreased expectations of privacy, as the court did in *Earls*, the court should have the same balancing results as the Supreme Court. The court should not look to any factor possible to strike down the policies, espe-

Von Raab, 109 S. Ct. 1384 (1989), 80 J. CRIM. L. & CRIMINOLOGY 1018, 1051 (1990) (discussing United States Supreme Court's relaxing of individual protections for drug testing).

376. See Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 163-65 (1994) (describing the Court's adoption of a utilitarian rationale for the exclusionary rule instead of a rights-based or judicial integrity rationale).

377. See Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 118-19 (1993) (discussing various cases carving out exceptions to the warrant and probable cause requirements).

378. See Jennifer Smiley, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and Narrowing of the Fourth Amendment Protections*, 95 NW. U.L. REV. 811, 827 (2001).

³⁷⁹ See *Vernonia*, 515 U.S. at 665.

cially if prior decisions, either in the Tenth Circuit or the United States Supreme Court, have eliminated or lessened the importance of that factor.

IV. CONCLUSION

The Tenth Circuit Court of Appeals has made its stance on random urine drug testing very clear.³⁸⁰ The court will capitalize on any opportunity to protect individuals from what the court considers an unreasonable search and seizure. The court has found these policies to be unconstitutional for a wide variety of sometimes conflicting reasons – because there was no notice, too much notice, no special need shown, no significant deterrent effect, or an over or under broad policy.³⁸¹ In sum the special needs doctrine will probably not apply, and if it is applied, the balancing test will favor the individual's expectation of privacy.

The court manifests this position by expanding individuals' expectations of privacy which often ignore prior dicta and precedent from both the Tenth Circuit's and the United States Supreme Court's opinions.³⁸² In doing so, the Tenth Circuit has all but eliminated the constitutional suspicionless search aspect of the special needs doctrine, relying only on the individualized suspicion doctrine as an exception to the warrant requirement.³⁸³ The court does this in a rights-basis effort to hold individualized suspicion as the minimum suspicion level required for a warrantless search.

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380. See discussion *supra* Part II.

381. See discussion *supra* Part II.

382. See discussion *supra* Part III.

383. See *id.*

