THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT AND HOW IT APPLIES TO GOVERNMENT DRUG TESTING OF PREGNANT WOMEN: THE SUPREME COURT CLARIFIES WHERE THE LINES ARE DRAWN IN FERGUSON V. CITY OF CHARLESTON

INTRODUCTION

Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.1

In Ferguson v. City of Charleston,2 the government asserted a well-meaning “special need” in protecting the health of women and children to justify a drug testing policy used to gather evidence of drug abuse by pregnant women.3 The special needs exception to the Fourth Amendment search and seizure requirements allows the government to conduct a search without a warrant or probable cause.4 The United States Supreme Court has applied this special needs exception to the government’s drug testing of individuals.5 When the Court finds a special need, it determines the reasonableness of the search by balancing the government’s interest against the individual’s expectation of privacy.6 However, when employees of a state hospital test a woman’s bodily fluids for drugs, and then use those tests to criminally prosecute the woman, the government encroaches on a high expectation of privacy which the government’s interest cannot outbalance.7

In Ferguson, the United States Supreme Court determined that a state hospital drug testing policy developed to deter pregnant patients from drug use must comply with the Fourth Amendment prohibitions

6. Id. at 78-79.
7. See infra notes 23-86, 512-91 and accompanying text.
against warrantless, suspicionless searches.\textsuperscript{8} The hospital adopted this drug testing policy to "identify/assist pregnant patients suspected of drug abuse."\textsuperscript{9} Charleston police and prosecutors assisted in developing and administering this policy.\textsuperscript{10} The policy provided that those patients testing positive for cocaine while pregnant could avoid arrest in certain circumstances.\textsuperscript{11} However, if the patient tested positive a second time or failed to comply with the drug treatment program, police arrested the patient.\textsuperscript{12} Patients who were tested under the drug testing policy claimed the policy violated their Fourth Amendment rights because the hospital tested the women without a warrant or probable cause.\textsuperscript{13} The Court determined the search did not fall within the category of special needs.\textsuperscript{14} Under the special needs exception, the government could conduct a search without a warrant or probable cause when the government presented special, non-law-enforcement needs and the government's interest outweighed the individual's privacy interests.\textsuperscript{15} The Court stated that because the drug testing policy's primary purpose was to coerce patients into treatment, and because the policy extensively involved law enforcement at all stages, it must comply with Fourth Amendment requirements.\textsuperscript{16}

This Note will discuss the Supreme Court's holding in \textit{Ferguson} that the state actors did not have a special need beyond normal law enforcement.\textsuperscript{17} First, this Note will explore the Supreme Court's development of a test for determining whether a search falls within the category of special needs and how the special needs exception applies to government conducted warrantless drug testing.\textsuperscript{18} Second, this Note will discuss the Court's determination in \textit{Ferguson} that the government did not have a special need beyond normal law enforcement justifying the conducting of warrantless drug testing.\textsuperscript{19} Third, this Note will address the balancing of the government's interest against a patient's expectation of privacy in her relationship with her doctor.\textsuperscript{20} This Note will discuss how the hospital's drug testing policy in \textit{Ferguson} could not survive such a balancing test because the government's testing deters drug-using pregnant women from obtaining treatment

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\item \textsuperscript{8} \textit{Ferguson}, 532 U.S. at 67, 70, 86.
\item \textsuperscript{9} \textit{Id.} at 70-71 (quoting App. to Pet. for Cert. A-53 to A-56).
\item \textsuperscript{10} \textit{Id.} at 70, 82.
\item \textsuperscript{11} \textit{Id.} at 71-72.
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} \textit{Id.} at 69-70, 73, 86.
\item \textsuperscript{14} \textit{Id.} at 74 n.7, 84 (quoting \textit{T.L.O.}, 469 U.S. at 351 (Blackmun, J., concurring)).
\item \textsuperscript{15} \textit{Id.} (quoting \textit{T.L.O.}, 469 U.S. at 351 (Blackmun, J., concurring)).
\item \textsuperscript{16} \textit{Id.} at 84, 86.
\item \textsuperscript{17} \textit{See infra} notes 23-86, 347-56, 363-511 and accompanying text.
\item \textsuperscript{18} \textit{See infra} notes 87-346 and accompanying text.
\item \textsuperscript{19} \textit{See infra} notes 347-511 and accompanying text.
\item \textsuperscript{20} \textit{See infra} notes 512-91 and accompanying text.
\end{itemize}
and because of the strength of a patient's high expectation of privacy in her doctor-patient relationship. Finally, this Note will conclude by discussing how the Court's decision in Ferguson recognized the substantiality of a doctor-patient relationship and as such, will result in needed restrictions on law enforcement's ability to use such a relationship to achieve law enforcement goals.

FACTS AND HOLDING

In Ferguson v. City of Charleston, the Medical University of South Carolina ("MUSC") had developed a drug testing policy in 1989, which set forth procedures allegedly for identifying and assisting pregnant patients suspected of abusing drugs. Under the drug testing policy, MUSC tested a patient for cocaine if that patient showed "certain indicia of cocaine use" specified in the policy. The drug testing policy provided a chain of custody for the drug testing, presumably to insure the use of the test results in later criminal proceedings. In addition, the policy provided patients testing positive for cocaine with education, as well as referrals for treatment. In order to keep the patients in treatment, the policy provisions were enforced by the threat of intervention by law enforcement. Finally, the policy included forms for the patient to sign, arrest procedures for the police, and details of the possible criminal charges against the woman based on her stage of pregnancy.

Prior to 1990, if a woman tested positive for cocaine, the hospital reported the test result to the City of Charleston Police Department ("CCPD") or to the Solicitor's office, and the police consequently ar-

21. See infra notes 512-91 and accompanying text.
22. See infra Conclusion.
25. Ferguson v. City of Charleston, 186 F.3d 469, 474 (4th Cir. 1999), rev'd, 532 U.S. 67 (2001). The drug testing policy contained the following nine criteria:
(1) separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care (beginning after 24 weeks); (5) incomplete prenatal care (fewer than five visits); (6) preterm labor without an obvious cause; (7) a history of cocaine use; (8) unexplained birth defects; or (9) intrauterine growth retardation without an obvious cause.
26. Id.
27. Id. at 72.
28. Id.
29. Id. If the woman tested positive for drugs while twenty-seven or fewer weeks pregnant, the police charged her with possession. Id. If the woman tested positive for drugs while twenty-eight or more weeks pregnant, the police charged her with distribution to a minor and possession. Id. If the woman tested positive for drugs at the time of delivery, police charged her with child neglect, distribution to a minor, and possession. Id. at 72-73 (quoting App. to Pet. for Cert. A-62).
rested the patient for distributing to a minor. The drug testing policy was later amended in early 1990 to provide a positive-testing patient the choice to undergo drug treatment in lieu of arrest. If the patient elected drug treatment, MUSC did not forward her test results to CCPD and thus, CCPD did not arrest her. However, if the patient did not comply with the requirements of the drug treatment program or tested positive a second time, CCPD would then arrest her. Even if CCPD had arrested a patient, that patient could avoid prosecution by completing drug treatment; upon completion, CCPD would dismiss the charges against the patient. The drug testing policy also provided that MUSC maintain records on patients testing positive for cocaine in order to track them and ensure their compliance with the drug testing policy's requirements.

Ten women arrested under the drug testing policy ("the Patients"), filed suit against the defendants, including the city of Charleston, MUSC representatives, and law enforcement officials responsible for developing and enforcing the policy ("the Officials"). The Patients asserted several claims, including that the Officials violated the Patients' Fourth Amendment right against unreasonable searches and seizures. Chief Judge C. Weston Houck of the United States District Court for the District of South Carolina rejected the Officials' first defense that because the searches furthered a "non-law-enforcement" purpose, the searches were reasonable as a matter of law. Chief Judge Houck stated MUSC did not conduct the searches for independent purposes, but rather, MUSC conducted the searches pursuant to an agreement with police. However, Chief Judge Houck submitted the Officials' second defense, that the Patients consented to the searches, to the jury. Chief Judge Houck instructed the jury to find in favor of the Patients unless the jurors found the Patients had

30. Ferguson, 186 F.3d at 473-74. The Ninth Circuit Solicitor, David Schwacke, was the chief prosecuting attorney. Id. at 474 & n.1.
31. Ferguson, 186 F.3d at 474.
32. Id. at 474-75, 475 n.3.
33. Id. at 474.
34. Id. at 474-75.
35. Id. at 475.
36. Ferguson, 532 U.S. at 73.
37. Ferguson, 186 F.3d at 475.
38. Id. at 469 (establishing that C. Weston Houck for the United States District Court for the District of South Carolina entered judgment for the defendants); Ferguson, 532 U.S. at 73 (establishing that the district court rejected the Officials' defense that the searches furthered a non-law-enforcement purpose and were reasonable as a matter of law).
39. Ferguson, 532 U.S. at 73-74 (citation omitted).
40. Id. at 74.
consented to the searches. The jury found in favor of the Officials, determining the Patients had consented to the searches.

The Patients appealed to the United States Court of Appeals for the Fourth Circuit, arguing the district court should not have submitted the issue of consent to the jury and the evidence did not support the jury's finding. The Fourth Circuit affirmed the district court's ruling, but on the grounds that the searches were reasonable because they were special needs searches. The court recognized "there are situations in which 'a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement.'" The court determined MUSC's interest in reducing pregnant women's cocaine use was a substantial interest important enough to justify the search. The court also stated the MUSC-performed searches were effective in advancing the public interest. Finally, the court determined MUSC's searches minimally intruded on the Patients' privacy.

In coming to this determination, the court balanced MUSC's interest in reducing pregnant women's cocaine use and the effectiveness of the searches with the Patients' expectations of privacy. After balancing these factors, the court determined the searches were reasonable and thus did not violate the Patients' Fourth Amendment rights.

The Patients petitioned the United States Supreme Court for writ of

41. Id.
42. Id.
43. Ferguson, 186 F.3d at 469, 476.
44. Id.
45. Id. at 476 (quoting Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989)).
46. Id. at 477-79.
47. Id. at 478-79.
48. Id. at 477-79.
49. Id.
50. Id. at 476-79. The court also ruled that the searches did not violate the patients' rights under Title VI, did not violate the patients' constitutional right to privacy, and did not constitute an abuse of process under state tort law. Id. at 473-74. Under Title VI, the patients failed to establish that a protected group experienced a disproportionately adverse effect; that even if a protected group had experienced a disproportionately adverse effect, MUSC justified its policy legitimately; and that the patients failed to show a practice that would be equally effective with less of a disparate impact. Id. at 480. Regarding the Patients' constitutional right to privacy, the court determined the drug testing policy did not violate the Patients' rights because the state possessed an outweighing compelling interest to deter future misconduct and identify law breakers. Id. at 482-83. Furthermore, the Patients did not indicate that their medical records were disclosed publicly, to others in the solicitor's office, or to others in CCPD. Id. at 483. Finally, the court rejected the Patients' claim of abuse of process because MUSC's acts were authorized under the process. Id.
The Court granted certiorari to review the Fourth Circuit's holding based on the special needs exception. The United States Supreme Court reversed and remanded the decision of the United States Court of Appeals for the Fourth Circuit, stating Fourth Amendment requirements of a warrant or probable cause applied to the drug testing policy. Justice John Paul Stevens, writing for the majority, began by defining MUSC employees as state actors subject to Fourth Amendment strictures and by declaring the drug tests as indisputable searches under the Fourth Amendment. The Court distinguished *Ferguson* from other cases where the Court had applied the special needs exception justifying warrantless, suspicionless drug testing. The Court noted MUSC performed drug tests on the Patients and subsequently turned the test results over to police without the Patients' knowledge or consent. The Court also noted that in prior special needs cases, the searches involved little or no entanglement with law enforcement. Therefore, the Court determined *Ferguson* did not fit into the special needs category because the drug testing policy involved law enforcement officials extensively throughout all stages of the policy.

The Court also determined the drug testing policy did not fit into the special needs category because the primary purpose of the policy was to coerce patients, with law enforcement, into treatment for substance abuse. Specifically, the Court distinguished the Officials' ultimate purpose, protecting the mother's and child's health, from the purpose actually served, gathering evidence of crimes committed by patients. The Court recognized a special need would exist if the drug testing policy had a "proper governmental purpose other than law enforcement." The Court recognized the drug testing policy's immediate purpose was specifically to gather evidence for law enforcement. Accordingly, the Court stated MUSC's searches did not fit into the category of special needs and thus, determined the Fourth Amendment requirements applied.

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52. *Ferguson*, 532 U.S. at 67, 76.
53. *Id.* at 67, 86.
54. *Id.* at 69, 76 (citing *Skinner* v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617 (1989); *New Jersey* v. T.L.O., 469 U.S. 325, 335-57 (1985)).
55. *Id.* at 77, 79.
56. *Id.* at 77.
58. *Id.* at 84.
59. *Id.* at 80, 82-84.
60. *Id.* at 82-84, 83 n.21.
61. *Id.* at 80 n.17.
62. *Id.* at 82-84, 83 n.21.
Amendment prohibitions against warrantless, suspicionless searches applied to the drug testing policy.\textsuperscript{63}

Justice Anthony M. Kennedy concurred in judgment, stating the issue of consent likely would have changed the outcome in \textit{Ferguson}.\textsuperscript{64} Justice Kennedy began by criticizing the majority's distinction between a drug testing policy's ultimate purpose and its immediate purpose.\textsuperscript{65} Justice Kennedy stated all drug testing policies have an immediate purpose of collecting evidence to further the ultimate purpose.\textsuperscript{66} However, Justice Kennedy agreed with the Court's determination that the drug testing in \textit{Ferguson} could not be sustained because the policy had "a penal character with a far greater connection to law enforcement than other searches sustained under [the] special needs rationale."\textsuperscript{67} While recognizing a legitimate state interest in protecting the health and life of an unborn child, Justice Kennedy stated "the use of handcuffs, arrests, prosecutions, and police assistance in designing and implementing the testing and rehabilitation policy cannot be sustained under [the] previous cases concerning mandatory testing."\textsuperscript{68}

Justice Kennedy also noted that a crucial, distinct characteristic of special needs cases was that the individual searched had consented to the search in order to avoid adverse consequences.\textsuperscript{69} Justice Kennedy stated that part of the consideration of a search's reasonableness under the special needs exception is the consent given and the circumstances under which the consent was given.\textsuperscript{70} However, Justice Kennedy recognized the Court left the issue of consent to be determined on remand in \textit{Ferguson}.\textsuperscript{71} Specifically, Justice Kennedy noted that had the Court determined the Patients consented to the drug testing, "the case might have been quite a different one."\textsuperscript{72}

Justice Antonin Scalia, joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas, dissented and stated MUSC did not perform a search on the Patients without consent, but even if they had, the special needs doctrine validated the search.\textsuperscript{73} First, the dissent defined the search in \textit{Ferguson} as when the Officials took the

\begin{thebibliography}{9}
\bibitem{63} Id. at 84, 86.
\bibitem{64} Id. at 86, 91 (Kennedy, J., concurring).
\bibitem{65} Id. at 86-87 (Kennedy, J., concurring).
\bibitem{66} Id. at 87-88 (Kennedy, J., concurring) (citing \textit{Vernonia}, 515 U.S. at 661-62; \textit{Skinner}, 489 U.S. at 620; \textit{Von Raab}, 489 U.S. at 666).
\bibitem{67} Id. at 88-89 (Kennedy, J., concurring).
\bibitem{68} Id. at 89-90 (Kennedy, J., concurring).
\bibitem{69} Id. at 90-91 (Kennedy, J., concurring) (citing \textit{Vernonia}, 515 U.S. at 650-51; \textit{Skinner}, 489 U.S. at 615; \textit{Von Raab}, 489 U.S. at 660-61).
\bibitem{70} Id. at 91 (Kennedy, J., concurring).
\bibitem{71} Id. (Kennedy, J., concurring).
\bibitem{72} Id. (Kennedy, J., concurring).
\bibitem{73} Id. at 91, 104 (Scalia, J., dissenting).
\end{thebibliography}
urine sample from the Patients rather than when the urine was tested for drugs.\textsuperscript{74} The dissent stated that even if the testing of the urine was a search, it was not a Fourth Amendment search if the urine samples were lawfully obtained.\textsuperscript{75} The dissent then argued that because the Patients did not contend MUSC forcibly extracted the urine samples, the only possible way the searches performed could be nonconsensual was if the Officials coerced the Patients to give the urine samples.\textsuperscript{76}

The dissent stated MUSC did not coerce the Patients, even though the Patients might have had a need to receive medical care.\textsuperscript{77} Instead, the dissent stated the Patients voluntarily provided the urine samples to MUSC.\textsuperscript{78} Thus, the dissent determined MUSC obtained the evidence lawfully, even if through deception, and consequently could provide it to the police to be used as evidence.\textsuperscript{79} Further, the dissent stated that preventing such use would confuse law enforcement officials on when incriminating evidence can be used if obtained from trusted sources.\textsuperscript{80}

Finally, the dissent determined that even if MUSC conducted the searches without consent, the special needs doctrine validated the searches.\textsuperscript{81} Specifically, the dissent criticized the majority's distinction between the drug testing policy's "ultimate" purpose of improving infant and maternal health, and its "immediate" purpose of obtaining evidence to incriminate the Patients.\textsuperscript{82} The dissent stated the "immediate" purpose was a means of obtaining the desired health benefit, meaning the "ultimate" purpose.\textsuperscript{83} Justice Scalia noted that adding a law enforcement purpose to a medical purpose could not prevent the application of the special needs doctrine.\textsuperscript{84} The dissent stated the special needs doctrine was created specifically to allow law enforcement officials, who normally possess a law enforcement objective, to employ searches in certain circumstances.\textsuperscript{85} Thus, the dissent concluded the special needs doctrine should apply because a doctor does not normally conduct searches and has the welfare of the mother and baby in

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  \item \textsuperscript{74} Id. at 92-93 (Scalia, J., dissenting).
  \item \textsuperscript{75} Id. at 93 (Scalia, J., dissenting).
  \item \textsuperscript{76} Id. at 93-94, 96 n.4 (Scalia, J., dissenting).
  \item \textsuperscript{77} Id. at 96 n.4, 97 (Scalia, J., dissenting).
  \item \textsuperscript{78} Id. at 94 (Scalia, J., dissenting).
  \item \textsuperscript{79} Id. (Scalia, J., dissenting).
  \item \textsuperscript{80} Id. at 94-95 (Scalia, J., dissenting).
  \item \textsuperscript{81} Id. at 98 (Scalia, J., dissenting).
  \item \textsuperscript{82} Id. at 98-100 (Scalia, J., dissenting).
  \item \textsuperscript{83} Id. at 99-100 (Scalia, J., dissenting).
  \item \textsuperscript{84} Id. at 100 (Scalia, J., dissenting).
  \item \textsuperscript{85} Id. at 100-01 (Scalia, J., dissenting).
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mind, even if the doctor intends to provide evidence from the search to the police.\textsuperscript{86}

BACKGROUND

The Fourth Amendment of the United States Constitution provides a right of persons to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."\textsuperscript{87} Further, the Fourth Amendment requires probable cause for a warrant to be issued.\textsuperscript{88} In certain cases, however, courts have declared that special circumstances excuse the Fourth Amendment's warrant and probable cause requirements.\textsuperscript{89}

In \textit{New Jersey v. T.L.O.},\textsuperscript{90} the United States Supreme Court held school officials did not need to obtain a search warrant to search a student if the student was under their authority.\textsuperscript{91} In \textit{T.L.O.}, the state of New Jersey charged a 14-year-old high-school freshman ("T.L.O.") with delinquency in the Juvenile and Domestic Relations Court of Middlesex County.\textsuperscript{92} A Piscataway High School teacher caught T.L.O. smoking in a school restroom and took her to meet with the Assistant Vice-Principal, Theodore Choplick ("Choplick").\textsuperscript{93} T.L.O. denied she smoked at all and specifically denied she smoked in

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\item \textsuperscript{86} \textit{Id.} at 101 (Scalia, J., dissenting).
\item \textsuperscript{87} U.S. CONST. amend. IV.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{90} 469 U.S. 325 (1985).
\item \textsuperscript{92} \textit{T.L.O.}, 469 U.S. at 325, 328-29.
the restroom. Choplick subsequently searched T.L.O.'s purse, where he found a pack of cigarettes, along with evidence suggesting drug use and drug dealing. Choplick notified the police and T.L.O.'s mother, and after T.L.O.'s mother took T.L.O. to the police station, T.L.O. confessed to selling drugs at school.

T.L.O. moved to suppress the evidence obtained by Choplick, arguing Choplick had violated her Fourth Amendment rights by conducting an unlawful search and seizure. The court denied T.L.O.'s motion. The court found a school official could search a student's person if the school official reasonably suspected the student committed a crime or was going to commit a crime. In addition, the court determined a school official could search a student's person if the school official reasonably believed the search was necessary for enforcing school policies or maintaining school discipline. The court stated that because the teacher caught T.L.O. smoking in the bathroom, Choplick had a duty to determine whether T.L.O. violated the school's no-smoking rule. Further, the court stated that this duty justified Choplick's opening of T.L.O.'s purse. After Choplick rightfully opened the purse, the plain view doctrine permitted Choplick to seize the drug evidence which was in plain view within the purse. The court subsequently found T.L.O. delinquent at trial.

T.L.O. appealed the Juvenile and Domestic Relations Court's denial of her motion to the Appellate Division of the Superior Court of New Jersey. The appellate court upheld the trial court's ruling that Choplick did not violate T.L.O.'s Fourth Amendment rights. However, the court vacated the ruling of delinquency and remanded the case for the lower court to determine whether T.L.O. knowingly waived her constitutional rights prior to her confession.
T.L.O. appealed the appellate division's ruling to the Supreme Court of New Jersey.\textsuperscript{108} The New Jersey Supreme Court reversed the Appellate Division's ruling, determining the school officials could only search students' persons if the officials had reasonable grounds to suggest illegal conduct.\textsuperscript{109} The court stated that if the school official reasonably believed maintaining safety, order, and discipline necessitated the search, the official could conduct a warrantless search without violating the students' Fourth Amendment rights.\textsuperscript{110} Further, the court stated a school official could rightfully conduct such a search upon reasonable grounds that suggested the student possessed evidence of illegal conduct or conduct that interfered with school order and discipline.\textsuperscript{111}

However, the court determined Choplick failed to have reasonable grounds to suggest T.L.O. concealed in her purse evidence of criminal conduct or of conduct that caused substantial interference in school order or discipline.\textsuperscript{112} The court distinguished between possession of cigarettes and the actual prohibited conduct of smoking in certain school areas, the latter of which Choplick accused T.L.O. of doing.\textsuperscript{113} The court stated mere possession of cigarettes had no bearing on whether T.L.O. violated the school rule against smoking in school restrooms.\textsuperscript{114} The court also stated Choplick did not have reasonable grounds to believe the purse contained cigarettes because no one provided him with such information.\textsuperscript{115} As such, the court concluded T.L.O.'s Fourth Amendment rights were violated.\textsuperscript{116} The State of New Jersey petitioned the United States Supreme Court for writ of certiorari.\textsuperscript{117} The Court granted certiorari to determine whether the school's search of T.L.O.'s purse violated the Fourth Amendment.\textsuperscript{118}

The Supreme Court reversed the decision of the New Jersey Supreme Court, holding "the search of T.L.O.'s purse did not violate the Fourth Amendment."\textsuperscript{119} Justice Byron Raymond White, writing for the majority, stated Fourth Amendment searches and seizures must be reasonable.\textsuperscript{120} Next, the Court stated that to determine whether a search is reasonable, the Court must balance the intrusion of the

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\item \textsuperscript{108} \textit{Id.} at 934, 937.
\item \textsuperscript{109} \textit{Id.} at 941-42.
\item \textsuperscript{110} \textit{Id.} at 941.
\item \textsuperscript{111} \textit{Id.} at 941-42.
\item \textsuperscript{112} \textit{Id.} at 942.
\item \textsuperscript{113} \textit{T.L.O.}, 469 U.S. at 331.
\item \textsuperscript{114} \textit{T.L.O.}, 463 A.2d at 942.
\item \textsuperscript{115} \textit{Id.} at 942-43.
\item \textsuperscript{116} \textit{Id.} at 936, 943-44.
\item \textsuperscript{117} \textit{T.L.O.}, 469 U.S. at 331.
\item \textsuperscript{118} \textit{Id.} at 331-33.
\item \textsuperscript{119} \textit{Id.} at 333 n.3, 347-48.
\item \textsuperscript{120} \textit{Id.} at 327, 337.
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search against the need for the government to conduct the search.\textsuperscript{121} In striking a balance between these interests, the Court examined the government's need for dealing with public disturbances and the individual's expectation of personal security and privacy.\textsuperscript{122}

The Court recognized the Fourth Amendment does not protect unreasonable, subjective expectations of privacy.\textsuperscript{123} Further, the Court stated that a reasonable expectation of privacy is an expectation that society would recognize as legitimate.\textsuperscript{124} The Court determined students maintained some expectation of privacy for personal items brought with them to school.\textsuperscript{125} However, the Court also determined teachers and administrators had a substantial interest in maintaining order and discipline at school, which required certain levels of procedural flexibility.\textsuperscript{126} In balancing the students' interest against the school's interest, the Court examined whether the burden to obtain a warrant would frustrate the purpose of the search.\textsuperscript{127} The Court held school officials did not need to acquire a warrant prior to searching students under their authority because such a requirement would interfere with school officials' need to swiftly and informally discipline students.\textsuperscript{128}

After determining school officials did not need to obtain a search warrant before searching a student, the Court stated a school official's search must still be reasonable under the circumstances.\textsuperscript{129} The Court stated determining reasonableness involved a two-part test.\textsuperscript{130} First, the Court stated the search must be justified at its inception, meaning the school official must reasonably suspect the search would uncover evidence that the student violated a law or school rule.\textsuperscript{131} Second, the Court stated the scope of the search must reasonably relate to what justified the search, meaning the search could not be overly intrusive considering the nature of the infraction and the student's age and sex.\textsuperscript{132}

Applying this test, the Court determined T.L.O.'s possession of cigarettes was relevant to the teacher's accusation that T.L.O. had smoked because T.L.O. defended against the teacher's accusation by

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  \item \textsuperscript{121} Id. (quoting Camara v. Mun. Court, 387 U.S. 523, 537 (1967)).
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id. at 338.
  \item \textsuperscript{124} Id. (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)).
  \item \textsuperscript{125} Id. at 338-39.
  \item \textsuperscript{126} Id. at 339-40.
  \item \textsuperscript{127} Id. at 340.
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} Id. at 340-41.
  \item \textsuperscript{130} Id. at 341.
  \item \textsuperscript{131} Id. at 341-42 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
  \item \textsuperscript{132} Id. (quoting Terry, 392 U.S. at 20).
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stating "she did not smoke at all." In addition, the Court determined Choplick reasonably suspected T.L.O. possessed cigarettes in her purse because a teacher reported T.L.O. had been smoking in the restroom. Finally, the Court concluded that once Choplick reasonably searched T.L.O.'s purse for cigarettes, Choplick's discovery of rolling papers justified the extended search for other drug-related evidence. As such, the Court deemed Choplick's search of T.L.O.'s purse reasonable and reversed the decision of the New Jersey Supreme Court.

Justice Harry A. Blackmun concurred in judgment with the majority, declaring the Court "omit[ted] a crucial step of its analysis." Justice Blackmun agreed with the Court's balancing of the government's interest against the students' expectations of privacy. However, Justice Blackmun stated the Fourth Amendment permitted such balancing only in exceptional circumstances. Justice Blackmun noted special circumstances exist when a state actor has a special need, which is a need beyond normal law enforcement. Further, Justice Blackmun noted special needs render a warrant or probable cause requirement impracticable.

Justice Blackmun determined a special need beyond normal law enforcement existed in a teacher's responsibility to respond quickly to student misbehavior. Specifically, Justice Blackmun stated a teacher must be able to immediately respond to behavior that threatened other children's or teachers' safety without the delay of obtaining a warrant. In addition, Justice Blackmun stated the educational process justified permitting a balancing standard instead of a warrant or probable cause requirement.

In O'Connor v. Ortega, the United States Supreme Court adopted the special needs reasoning employed in Justice Blackmun's concurring opinion in T.L.O. In O'Connor, Dr. Ortega filed suit in the United States District Court for the Northern District of Califor-

133. Id. at 345.
134. Id. at 345-46.
135. Id. at 347.
136. Id. at 347-48.
137. Id. at 351 (Blackmun, J., concurring).
138. Id. (Blackmun, J., concurring) (quoting T.L.O., 469 U.S. at 341).
139. Id. at 351 (Blackmun, J., concurring) (quoting United States v. Place, 462 U.S. 696, 722 (1983)).
140. Id. (Blackmun, J., concurring).
141. Id. (Blackmun, J., concurring).
142. Id. at 352-53 (Blackmun, J., concurring).
143. Id. (Blackmun, J., concurring).
144. Id. at 353 (Blackmun, J., concurring).
nia alleging a search performed by his employer, a state hospital, violated his Fourth Amendment rights. The executive director of the hospital, Dr. O'Connor, placed Dr. Ortega on administrative leave while investigating Dr. Ortega for suspicions of improperly managing the residency program and allegations of sexual harassment. As part of the investigation, hospital personnel entered Dr. Ortega's office and seized several items, including some personal items, which were used later in a hearing before the California State Personnel Board. The investigators did not separate state property from Dr. Ortega's property because it was too difficult a task, but rather boxed all of it up and stored it for Dr. Ortega to collect.

The district court granted summary judgment to Dr. O'Connor and the hospital, concluding the hospital properly searched Dr. Ortega's office. The court stated the hospital officials needed to secure state property in Dr. Ortega's office and as such, could properly search the office under the Fourth Amendment. Dr. Ortega appealed the district court's order to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the district court's grant of summary judgment to the defendants, concluding the defendants' search of Dr. Ortega's office was unreasonable under the Fourth Amendment. The court stated Dr. Ortega had an expectation of privacy that society would recognize as reasonable. In addition, the court noted the hospital entered Dr. Ortega's office merely to secure evidence for the investigation. The Ninth Circuit concluded the search of Dr. Ortega's office violated the Fourth Amendment "without explanation." Dr. O'Connor petitioned the United States Supreme Court for writ of certiorari. The Court granted certiorari to determine whether Dr. Ortega had a reasonable privacy expectation in his work.
office, desk, or filing cabinets and if so, what standard a public employee's search must meet to satisfy the Fourth Amendment.159

The Supreme Court reversed the decision of the Ninth Circuit, determining "Dr. Ortega had a reasonable expectation of privacy in his office" but remanded the case for a determination of whether the hospital justifiably searched Dr. Ortega's office on other grounds.160 Justice Sandra Day O'Connor, writing for the majority, reasoned that while "Dr. Ortega had a reasonable expectation of privacy in his office," the search could still be reasonable under the Fourth Amendment.161 The Court recognized that in exceptional circumstances, where special needs beyond normal law enforcement exist, imposing a probable cause or search warrant requirement was impracticable.162

The Court stated requiring an employer to obtain a search warrant before entering an employee's office for work related purposes would seriously hinder the business, would unduly burden the employer, and would be unreasonable.163 Specifically, the Court noted public employers have an interest greatly different than normal law enforcement in running their agencies effectively and efficiently, even when conducting a work related investigation.164 However, the Court did not rule on the reasonableness of the hospital officials' search of Dr. Ortega's office because the district court had not held an evidentiary hearing and the parties disputed the actual justification for the search.165

Justice Antonin Scalia concurred with the majority, stating the Court must reverse and remand the case because the evidence conflicted, was incomplete, and could not support a summary judgment.166 Justice Scalia declared a government employer has special needs, beyond those of normal law enforcement, to investigate workplace rule violations and to retrieve work-related materials from the employer's "desks, offices, and filing cabinets."167 Further, Justice Scalia noted he would hold such government searches were "reasonable and normal," similar to those in the private-employer context and thus would not violate the Fourth Amendment.168

159. Id. at 711-12, 714.
160. Id. at 709, 718-19, 728-29.
161. Id. at 709, 719.
162. Id. at 720 (quoting T.L.O., 469 U.S. at 351 (Blackmun, J., concurring)).
163. Id. at 722.
164. Id. at 724.
165. Id. at 712, 726-27.
166. Id. at 729, 732 (Scalia, J., concurring).
167. Id. at 732 (Scalia, J., concurring).
168. Id. (Scalia, J., concurring).
In *Griffin v. Wisconsin*, the United States Supreme Court recognized the special needs exception, determining a state had a special need in operating its probation system. Police had arrested Joseph Griffin for possession of a firearm by a felon after probation officers had searched Griffin’s home and found a handgun. Wisconsin’s State Department of Health and Social Services enacted a regulation specifically permitting a probation officer to search the home of a probationer without a warrant upon certain conditions. The regulation provided a probation officer must reasonably believe the probationer possessed contraband prohibited under the terms of the probationer’s probation. Further, the probation officer must obtain approval from the probation officer’s supervisor.

The supervisor of Griffin’s probation officer, Michael Lew (“Lew”), received a tip from a detective that Griffin was or might have been in possession of guns in his apartment. Lew conducted a search of Griffin’s apartment, accompanied by another probation officer. Police dressed in plain clothing also accompanied the probation officers to Griffin’s apartment, but only the probation officers conducted the search. Lew discovered a handgun during the search and gave it to the police. Consequently, the police officers arrested Griffin and charged him with possession of a firearm.

In the Circuit Court for Rock County, Griffin moved to suppress the evidence obtained in the search, claiming the probation officers’ search was illegal. The trial court denied Griffin’s motion to suppress, determining the probation officers reasonably searched Griffin’s apartment without a search warrant. The court reasoned that the probation officers had a duty to find out if Griffin was violating his probation. The court further reasoned the probation officers acted

172. Id. at 870-71.
173. Id.
174. Id.
175. Id. at 871.
176. Id.
177. Id.
179. *Griffin*, 388 N.W.2d at 536.
180. Id. at 535 (identifying the trial court as the Circuit Court for Rock County); Wisconsin v. Griffin, 376 N.W.2d 62, 63-64 (Wis. Ct. App. 1985), aff’d, 388 N.W.2d 535 (Wis. 1986), and aff’d, 483 U.S. 868 (1987) (establishing the basis for Griffin’s motion to suppress).
181. *Griffin*, 376 N.W.2d at 63-64.
182. Id. at 64.
on a tip from a detective that Griffin possessed firearms. A jury subsequently convicted Griffin of illegally possessing a firearm as a convicted felon.

Griffin appealed the trial court's denial of his motion to suppress to the Court of Appeals of Wisconsin. The Wisconsin Court of Appeals affirmed the trial court's conviction, stating most federal and state courts allow warrantless searches by probation or parole officers of a probationer's or parolee's home. The court noted the Wisconsin Supreme Court permitted such searches, so long as the searches were reasonable. Regarding Griffin, the court held a probation officer's reliance on a police officer's information created reasonable grounds to search the probationer's home. Accordingly, the court determined the search of Griffin's home did not violate his Fourth Amendment rights.

Griffin petitioned the Supreme Court of Wisconsin for review of the Wisconsin Court of Appeals' affirmation of the trial court's ruling. The Supreme Court of Wisconsin affirmed the trial court's conviction, holding the probation officers' search of Griffin's home was reasonable. First, the court noted a probation officer could conduct a search without a warrant if he reasonably believed the probationer was violating his probation terms. Second, the court stated evidence obtained in such a search was admissible in seeking another conviction against the probationer. Third, the court determined the probation officers' search of Griffin's home was reasonable because the information the probation officer received was detailed and came from an accurate source. Finally, the court reasoned a probation officer has a duty to ensure probationers comply with their probation terms. Thus, the court concluded the probation officers constitutionally searched Griffin's home. Griffin filed a petition for writ of certiorari with the United States Supreme Court, which granted certi-

183. Id.
184. Griffin, 483 U.S. at 872.
185. Griffin, 376 N.W.2d at 62, 64.
186. Id. at 62, 65, 71 (citations omitted).
187. Id. at 65-66 (citing Wisconsin v. Tarrell, 247 N.W.2d 696, 701 (Wis. 1976)).
188. Id. at 70.
189. Id. at 63, 71.
190. Griffin, 388 N.W.2d at 535, 537.
191. Id. at 536.
192. Id. at 541.
193. Id.
194. Id. at 536, 544.
195. Id. at 544.
196. Id. at 536, 544.
orari to consider whether the probation officers' search violated Griffin's Fourth Amendment rights.\textsuperscript{197}

The United States Supreme Court affirmed the decision of the Wisconsin Supreme Court, determining the search conducted without a warrant did not violate the Fourth Amendment.\textsuperscript{198} Justice Antonin Scalia, writing for the majority, reasoned the search did not violate the Fourth Amendment because the probation officers conducted the search following a regulation that satisfied the reasonableness requirement under the Fourth Amendment.\textsuperscript{199} First, the Court analyzed the state's interest.\textsuperscript{200} The Court stated Wisconsin's probation system had special needs that made a search warrant requirement impracticable and justified a search if reasonable grounds existed.\textsuperscript{201} The Court determined that requiring a search warrant would interfere with the probation system by transferring the decision of how closely a probationer needs to be supervised from the probation officer to a judge.\textsuperscript{202} Further, a warrant requirement would prevent probation officers from responding quickly to potential misconduct because of the delay in obtaining a search warrant.\textsuperscript{203}

Second, the Court analyzed the privacy interests of the probationer.\textsuperscript{204} Because probation is a form of punishment, the Court recognized probationers do not enjoy the same liberties as other citizens.\textsuperscript{205} The Court stated that probation restrictions ensure the rehabilitative nature of probation and protect the community during the rehabilitation.\textsuperscript{206} The Court determined that supervision was an important aspect of the probation system, which necessitated a certain level of privacy infringement that would not be permissible for the general public.\textsuperscript{207} The Court did not hold that any search by a probation officer of a probationer's home would be lawful.\textsuperscript{208} Rather, the Court determined that because of the nature of the probation system and the reduced expectations of privacy by probationers, the search of Griffin's home was reasonable under the Fourth Amendment.\textsuperscript{209}

\begin{itemize}
\item \textsuperscript{197} Griffin, 483 U.S. at 870.
\item \textsuperscript{198} Id. at 868, 872, 880.
\item \textsuperscript{199} Id. at 869, 871, 873.
\item \textsuperscript{200} Id. at 873-76.
\item \textsuperscript{201} Id. at 875-76.
\item \textsuperscript{202} Id. at 876.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 874-75.
\item \textsuperscript{205} Id. at 874.
\item \textsuperscript{206} Id. at 875.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Id. at 880.
\item \textsuperscript{209} Id. at 875-80.
\end{itemize}
In *Skinner v. Railway Labor Executives’ Ass’n*, the United States Supreme Court held regulations requiring drug testing of railway employees involved in train accidents, even without a warrant or reasonable suspicion, did not violate the Fourth Amendment. In *Skinner*, the Railway Labor Executives’ Association (“RLEA”) brought suit in the United States District Court for the Northern District of California, attempting to enjoin the Federal Railroad Administration (“FRA”) from instituting regulations regarding alcohol and drug use problems on railroads. The FRA passed regulations mandating toxicological testing of employees directly involved in train accidents and permitting toxicological testing of employees in certain other circumstances. Those circumstances included the following: 1) a reportable accident or incident if a supervisor reasonably suspected the employee contributed to the occurrence or severity of the event; 2) an employee violated certain rules; or 3) a supervisor reasonably suspecting an employee of working while intoxicated.

The district court granted summary judgment in favor of the FRA, holding the public and governmental interest in promoting railroad safety outweighed the interest of railroad employees under the Fourth Amendment. The court reasoned that because the government closely regulated railroads and railroad employees in order to promote public safety, a balance between the two interests must favor the regulatory scheme. RLEA appealed the grant of summary judgment to the Court of Appeals for the Ninth Circuit, arguing the district court erred in granting summary judgment because the searches authorized by the FRA’s regulations violated the Constitution.

The Ninth Circuit reversed the district court’s decision, stating the case did not fit into any of the defined classes of cases permitting warrantless searches. The court further determined the searches did not meet the reasonableness test because they were not justified at their inception. The Ninth Circuit concluded the FRA could require or authorize drug testing only when specific, identifiable facts created

214. *Id.* at 611 (citing 49 C.F.R. § 219.301).
215. *Id.* at 612.
218. *Id.* at 583-86, 592 (citations omitted).
219. *Id.* at 587-88.
a reasonable suspicion of current alcohol or drug impairment.\textsuperscript{220} In addition, the court concluded such a requirement would not overwhelmingly burden the government and would confine tests given to detecting only current impairment rather than drugs that might remain in the system for weeks after the actual ingestion of the drug by the employee.\textsuperscript{221} The FRA filed a petition for writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether the FRA regulations violated the Fourth Amendment.\textsuperscript{222}

The Supreme Court reversed the decision of the Ninth Circuit, holding the authorized drug testing was reasonable under the Fourth Amendment despite the lack of a warrant or reasonable suspicion of an employee's impairment.\textsuperscript{223} Justice Anthony M. Kennedy, writing for the majority, applied the special needs exception to the warrant requirement because "special needs' beyond normal law enforcement" existed.\textsuperscript{224} The Court determined that when special needs exist, it should balance the governmental interests against the privacy interests to establish the practicality of requiring a warrant or probable cause.\textsuperscript{225}

The Court stated a government interest existed in improving and providing safe railroad travel by prohibiting employees from using drugs or alcohol while on duty.\textsuperscript{226} The Court noted this interest was strongest when obtaining a warrant would likely frustrate the purpose of the search.\textsuperscript{227} The Court stated the delay that would occur while obtaining a warrant could result in the destruction of valuable evidence because the body eliminates drug and alcohol traces at a constant rate.\textsuperscript{228} The Court explained authorities should gather evidence as soon as possible after an accident to avoid the loss of valuable evidence.\textsuperscript{229} Further, the Court recognized the FRA did not use the samples to assist in prosecuting the employee, but rather used the drug testing to prevent casualties and accidents from drug or alcohol impairment of employees while operating railroads.\textsuperscript{230} In addition, the Court concluded that requiring the railroad to show a reasonable sus-

\begin{itemize}
\item \textsuperscript{220} Id. at 592.
\item \textsuperscript{221} \textit{Skinner}, 489 U.S. at 613 (quoting \textit{Burnley}, 839 F.2d at 588-89).
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id. at 602, 634.
\item \textsuperscript{224} Id. at 605, 619-20 (quoting \textit{Griffin}, 483 U.S. at 873-74).
\item \textsuperscript{225} Id. at 619.
\item \textsuperscript{226} Id. at 620-21.
\item \textsuperscript{227} Id. at 623 (quoting \textit{Camara v. Mun. Court}, 387 U.S. 523, 533 (1967)).
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Id. at 620-21 (quoting 49 C.F.R. § 219.1(a) (1987)).
\end{itemize}
picion of an employee's impairment before giving a drug test to that employee would significantly hinder the government's interests.\textsuperscript{231}

Regarding the employees' privacy interests, the Court stated the drug tests did not overly infringe on the employees' expectations of privacy.\textsuperscript{232} First, the Court noted that the procuring of the samples for drug testing was minimally intrusive because they were taken in the context of employment.\textsuperscript{233} Next, the Court acknowledged that all employees consent to a level of restriction on their privacy from their employer when it is necessary for employment.\textsuperscript{234} The Court stated that the time it would take for a railroad employee to provide the necessary samples for drug testing did not alone significantly infringe on the employees' privacy.\textsuperscript{235} When considered in conjunction with the important safety interests served; the Court held the FRA regulations did not violate the railroad employees' rights under the Fourth Amendment.\textsuperscript{236}

In \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{237} the United States Supreme Court held suspicionless drug testing of employees applying for positions requiring the employee to carry a firearm or directly involving drug interdiction was reasonable under the Fourth Amendment.\textsuperscript{238} The National Treasury Employees Union ("the Union"), along with a union official, sued William Von Raab, the Commissioner of the United States Customs Service ("Customs Service") in the United States District Court for the Eastern District of Louisiana.\textsuperscript{239} The Union sued on behalf of Customs Service employees subjected to drug testing by the Customs Service.\textsuperscript{240}

The Customs Service implemented a drug testing policy as a condition of employment for positions directly involved in drug interdiction, positions requiring the employee to carry a firearm, and positions requiring the employee to handle classified material.\textsuperscript{241} The Customs Service could dismiss an employee who tested positive for drugs; however, the Customs Service could not turn the test results over to a criminal prosecutor or any other agency without written consent from

\begin{itemize}
\item \textsuperscript{231} \textit{Id.} at 633.
\item \textsuperscript{232} \textit{Id.}
\item \textsuperscript{233} \textit{Id.} at 624.
\item \textsuperscript{234} \textit{Id.} at 624-25.
\item \textsuperscript{235} \textit{Id.} at 625.
\item \textsuperscript{236} \textit{Id.} at 633-34.
\item \textsuperscript{237} 489 U.S. 656 (1989).
\item \textsuperscript{238} Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989).
\item \textsuperscript{239} Von Raab, 489 U.S. at 656, 663.
\item \textsuperscript{240} \textit{Id.} at 663.
\item \textsuperscript{241} \textit{Id.} at 660-61.
\end{itemize}
The Union alleged the drug testing violated the employees' Fourth Amendment rights.\textsuperscript{243} The district court agreed with the Union and the Customs Service employees, prohibiting the Customs Service from requiring drug tests for applicants of the specified positions.\textsuperscript{244} The court determined that while the government had a legitimate interest in eliminating drugs in the workplace, the drug testing policy overly intruded on the employees' expectations of privacy.\textsuperscript{245} The court concluded that absent probable cause or reasonable suspicion, the policy violated the employees' Fourth Amendment rights.\textsuperscript{246}

The Customs Service appealed to the United States Court of Appeals for the Fifth Circuit, arguing the drug testing did not violate the Fourth Amendment.\textsuperscript{247} The Fifth Circuit vacated the district court's injunction, determining the drug test searches were "reasonable under the Fourth Amendment."\textsuperscript{248} The court recognized the testing program did not involve prosecution of the employees and emphasized that the Customs Service tried to limit the intrusiveness of the search.\textsuperscript{249} In addition, the court acknowledged the use of drugs by Customs Service employees could seriously frustrate the agency's enforcement of drug laws or endanger others if the employee carried a firearm.\textsuperscript{250} Finally, the court noted the Customs Service limited the policy in scope, which prevented discretion in determining who would be tested.\textsuperscript{251} The Customs Service only required drug testing by employees that chose to seek a sensitive position; such employees knew of the drug testing requirement beforehand.\textsuperscript{252}

After considering all of these factors, the Fifth Circuit concluded the Customs Service reasonably tested the employees for drugs.\textsuperscript{253} The Customs Service employees petitioned the United States Supreme Court for writ of certiorari.\textsuperscript{254} The Court granted certiorari to

\textsuperscript{242} Id. at 663.  
\textsuperscript{243} Id.  
\textsuperscript{244} Id.  
\textsuperscript{246} Von Raab, 649 F. Supp. at 387.  
\textsuperscript{248} Von Raab, 489 U.S. at 663.  
\textsuperscript{249} Von Raab, 816 F.2d at 177.  
\textsuperscript{250} Id. at 178.  
\textsuperscript{251} Id. at 177.  
\textsuperscript{252} Id. (stating the Customs Service only required drug testing by employees choosing to seek sensitive positions); Von Raab, 489 U.S. at 672 n.2 (stating that employees knew of the drug testing requirement "at the outset").  
\textsuperscript{253} Von Raab, 816 F.2d at 180.  
determine whether the Customs Service's drug testing requirements violated the Fourth Amendment.\textsuperscript{255}

The Supreme Court affirmed the decision of the Fifth Circuit, upholding drug testing for positions directly involved in interdiction of drugs and positions requiring an employee to carry a firearm.\textsuperscript{256} However, the Supreme Court vacated and remanded the decision of the Fifth Circuit, which upheld drug testing for positions requiring an employee to handle classified materials.\textsuperscript{257} Justice Anthony M. Kennedy, writing for the majority, first acknowledged the special needs exception to the warrant requirement.\textsuperscript{258} The Court stated no warrant is required when "special governmental needs, beyond the normal need for law enforcement," would make a warrant requirement impractical.\textsuperscript{259} The Court therefore rejected requiring a warrant for sensitive and routine employment decisions made by the Customs Service.\textsuperscript{260} Further, the Court acknowledged that the Customs Service drug testing policy did not allow the Customs Service to use any discretion in determining which employees to search, and as such, there would be no facts for a judge to consider when getting a search warrant.\textsuperscript{261}

The Court determined the Customs Service's needs to conduct searches, even without any suspicion, trumped the privacy interests of employees interested in positions directly engaged in drug interdiction or positions requiring the employee to carry a firearm.\textsuperscript{262} In addition, the Court determined Customs Service employees in such positions should expect diminished privacy because of the types of employment positions they occupied.\textsuperscript{263} The Court stated promoting drug users to positions that interdict drugs and positions requiring an employee to carry a firearm involved extraordinary national security and safety hazards.\textsuperscript{264} According to the Court, the national security and safety hazards made the Customs Service's drug testing policy reasonable.\textsuperscript{265} Regarding the positions requiring the employee to handle classified information, the Court recognized similar government interests and limited expectations of privacy; however, the Court remanded the

\textsuperscript{255} Von Raab, 489 U.S. at 656, 659.
\textsuperscript{256} Id. at 656, 664.
\textsuperscript{257} Id. at 656, 664-65.
\textsuperscript{258} Id. at 658, 665-66.
\textsuperscript{259} Id. at 665-66.
\textsuperscript{260} Id. at 666-67.
\textsuperscript{261} Id. at 667 (quoting South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring)).
\textsuperscript{262} Id. at 668.
\textsuperscript{263} Id. at 672.
\textsuperscript{264} Id. at 674.
\textsuperscript{265} Id.
issue to clarify which Customs Service employees the policy would subject to drug testing.\textsuperscript{266}

In \textit{Vernonia School District 47J v. Acton} ("Vernonia"),\textsuperscript{267} the United States Supreme Court determined random drug testing of student athletes did not violate the students' Fourth Amendment rights.\textsuperscript{268} In \textit{Vernonia}, a student's parents ("the Actons") brought suit against Vernonia School District 47J ("the District") in the United States District Court for the District of Oregon.\textsuperscript{269} The District claimed it implemented a drug testing policy because of severe disciplinary problems, particularly with student athletes, and staff observations of students "using drugs or glamorizing drug and alcohol use."\textsuperscript{270}

The District's drug testing policy required all students wishing to participate in school athletics to sign a form authorizing a drug test before the student could participate in the athletic program.\textsuperscript{271} In addition, the student had to consent to random weekly drug tests throughout the season.\textsuperscript{272} Should a student test positive for drugs, a second test would be given to confirm the results.\textsuperscript{273} If the student tested positive again, the school would notify the student's parents and the student would have to choose between entering a six week assistance program with weekly drug testing or being suspended from school athletics for the rest of the current season and the following season.\textsuperscript{274} One student, James Acton, and his parents refused to consent to the drug testing.\textsuperscript{275} Consequently, the school principal and the district superintendent each refused to allow James to participate in school athletics until his parents signed the consent form.\textsuperscript{276} The Actons alleged the District's drug testing program violated their son's Fourth Amendment rights.\textsuperscript{277}

The district court found for the District, holding the drug testing program was constitutional because the District was justified in initiating the program to address alleged disciplinary problems in the school.\textsuperscript{278} Further, the court determined the program's scope was rea-

\textsuperscript{266} \textit{Id.} at 677-78.
\textsuperscript{267} 515 U.S. 646 (1995).
\textsuperscript{270} \textit{Vernonia}, 796 F. Supp. at 1357-58.
\textsuperscript{271} \textit{Id.} at 1358.
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} \textit{Id.} at 1358-59.
\textsuperscript{275} \textit{Id.} at 1359.
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textit{Id.} at 1356.
\textsuperscript{278} \textit{Id.} at 1354, 1357-58, 1365.
reasonably related to the circumstances justifying it. The court stated that if the government could show a compelling need implicating security or safety interests, the government did not need to get a warrant or show individualized suspicion. The court first determined the District had a compelling need to protect its students from injury and to maintain order. In addition, the court determined the District narrowly tailored the policy to achieve its objectives, took significant steps to contain the policy's intrusion, and limited the discretion coaches and school administrators could exercise. The court stated that although James had legitimate expectations of privacy, the government's interest outweighed the student's privacy interests. Thus, the court found that the District could reasonably test the students for drugs under the Fourth Amendment.

The Actons appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing the district court erred in holding that the District's drug testing policy did not violate the Fourth Amendment. The Ninth Circuit reversed the district court's opinion, determining the District's drug problem did not justify testing students randomly for drugs. The court acknowledged that in order to conduct a reasonable search, the government should conduct a search after obtaining a search warrant or should premise the search on individualized suspicion. The court then stated the government could avoid obtaining a search warrant or having individualized suspicion if the government's interest outweighed the search's intrusion. The court considered four factors in determining whether the government's interest outweighed the search's intrusion: 1) how important the government's interests were; 2) how intrusive the search was on the citizen's rights; 3) how much discretion the officials had over the procedure; and 4) how effective the procedure was in reaching its goals.

Applying those factors, the court determined the policy contributed to reaching its goals and was completely random, which eliminated any discretion by officials. However, the court determined
high school students, particularly student athletes, did not have significantly diminished privacy expectations and voluntary participation in athletic programs did not reduce a student’s privacy expectations.291 Further, the school’s interests did not rise to the level of dangers existing in prior cases approving random testing, such as preventing train wrecks or large disasters.292 After weighing all of the factors, the court decided the District’s drug testing policy violated the Fourth Amendment.293 The District petitioned the United States Supreme Court for writ of certiorari.294 The Court granted certiorari to determine whether the District’s random drug testing policy violated the Fourth Amendment.295

The Supreme Court vacated and remanded the decision of the Ninth Circuit, determining the District’s policy was reasonable and thus, it did not violate the Fourth Amendment.296 Justice Antonin Scalia, writing for the majority, reasoned the athletes had a decreased expectation of privacy, the search was relatively unobtrusive, and the search met serious needs of the school.297 The Court recognized that when law enforcement undertakes a search to find evidence of criminal actions, officials must obtain a search warrant to meet the reasonable requirements of the Fourth Amendment.298 However, the Court noted special needs could make a search constitutional, even without probable cause, if the special needs were “beyond the normal need for law enforcement.”299

In a public school circumstance, the Court stated special needs exist because requiring a warrant would unduly interfere with informal and swift disciplinary procedures.300 The Court also stated requiring probable cause undercut teachers’ and administrators’ need to maintain order in the school.301 In determining whether the District’s policy was reasonable, the court considered three factors.302 First, the Court examined the privacy interests of student athletes upon which the search intruded.303 The Court stated the student athletes had reason to expect such intrusions because they voluntarily participated

\[\text{References}\]

291. Id. at 1525.
292. Id. at 1525-26.
293. Id. at 1516, 1526.
296. Id. at 646, 665-66.
297. Id. at 647, 664-65.
298. Id. at 652-53 (citing Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 619 (1989)).
299. Id. at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
300. Id. (quoting New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985)).
301. Id.
302. Id. at 664-65.
303. Id. at 654.
in an activity more highly regulated and commonly known to have limited privacy. 304

Second, the Court considered the character of the complained of intrusion when evaluating the reasonableness of the District’s drug testing. 305 The Court recognized the drugs tested for did not vary based on the identity of the student. 306 In addition, the Court recognized the District disclosed the test results only to a limited number of school personnel, but not to law enforcement or for the use in disciplinary functions. 307 As such, the Court determined the drug testing negligibly intruded on the student athletes’ privacy. 308

Finally, the Court considered the governmental concern and its immediacy. 309 The Court determined that, even in light of the search’s intrusiveness, the government’s concern of deterring drug use by student athletes was important enough to justify the search. 310 In considering immediacy, the Court declined to question the district court’s conclusions as to the gravity of the students’ drug use and specifically stated the conclusions were not clearly erroneous. 311 Further, the Court declared the drug use by students was an “immediate crisis of greater proportions” than railroad employees’ or customs employees’ drug use. 312

Because of the students’ diminished expectations of privacy, the unobtrusive nature of the drug testing, and the District’s serious needs, the Court concluded the drug testing was reasonable under the Fourth Amendment. 313 However, the Court specifically cautioned against assuming drug testing without suspicion would be constitutional. 314 The Court emphasized that it found significance in the fact that the school developed the policy to further its responsibility for the children in its care. 315 In addition, the Court noted that no other parents objected to the drug testing program. 316

In Chandler v. Miller, 317 the United States Supreme Court held that requiring an individual to pass a drug test as a prerequisite to holding a state office position did not fit into the “closely guarded cate-

304. Id. at 657.
305. Id. at 658, 664-65.
306. Id. at 658.
307. Id.
308. Id.
309. Id. at 660.
310. Id. at 650, 661.
311. Id. at 662-63.
312. Id. (citing Skinner, 489 U.S. at 607; Von Raab, 489 U.S. at 673).
313. Id. at 664-65.
314. Id. at 665.
315. Id.
316. Id.
gory" where searching without suspicion would be constitutional. In Chandler, several Libertarian Party nominees filed suit against state officials, including the Governor, in the United States District Court for the Northern District of Georgia. Georgia law required candidates for state offices to submit to a drug test, of which they had to present a certificate reporting a negative result. The Libertarian candidates objected to the drug testing requirement and sought an injunction to bar enforcement of the statute because it violated their Fourth Amendment rights.

The district court denied the Libertarians' preliminary injunction motion. The district court subsequently entered final judgment in favor of the government. The district court stated that if the government’s search "served special governmental needs, beyond the normal need for law enforcement," the court must balance the government’s interests against the individual’s expectations of privacy to determine whether the government is excused from obtaining a warrant or having individualized suspicion. The court determined Georgia had a compelling interest in ensuring that those seeking elective offices were not drug abusers because those positions influence efforts of drug interdiction and societal attitudes. Further, the district court determined compliance with the law only minimally intruded on the candidate’s privacy because the candidate could choose not to file the results, though the candidate would not be eligible to run for office. Consequently, the court denied the preliminary injunction requested by the Libertarians.

The Libertarians appealed the decision of the district court to the United States Court of Appeals for the Eleventh Circuit, arguing the Georgia statute was unconstitutional. The Eleventh Circuit affirmed the district court’s decision, holding the statute did not violate

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319. Chandler, 520 U.S. at 310.
321. Id. at 310. At the district court level, the court stated the Libertarians alleged Georgia’s statute violated both the United States Constitution and the Georgia Constitution, but that both sides narrowed their arguments to the violation of the Fourth Amendment to the United States Constitution. Chandler v. Miller, 952 F. Supp. 804, 805 (N.D. Ga. 1994), aff’d, 73 F.3d 1543 (11th Cir. 1996), rev’d, 520 U.S. 305 (1997).
323. Chandler, 520 U.S. at 305, 311.
325. Id.
326. Id. at 807.
327. Id. at 805, 808.
any constitutional provision. The court recognized that Georgia's interest was substantial, emphasizing the importance of state officials refraining from drug use because of the officials' involvement in drug interdiction. Further, the court emphasized state officials have responsibilities requiring integrity, truthfulness, clear-thinking, and clear-sightedness. Regarding the candidates' privacy interests, the Eleventh Circuit determined the intrusion was less than that found in Von Raab, where the Supreme Court held suspicionless drug testing was reasonable. Specifically, the court acknowledged that taking the test at the individual's own doctor's office was significant, as well as that the results were not disclosed to law enforcement officers. Because no party contended the drug testing was for normal law enforcement needs, and because the court was reluctant to interfere with a state's governance, the Eleventh Circuit affirmed the district court's judgment.

Judge Rosemary Barkett dissented, declaring the government had no special need beyond normal law enforcement because there was no direct or immediate threat to the public's safety; those being tested were not directly involved in drug interdiction; and there was no institutional setting requiring informal and swift discipline. Further, Judge Barkett stated the court should only balance the individual's privacy expectations against the government's interests after establishing a special need making it impractical to require individualized suspicion or a warrant. Following the Eleventh Circuit's opinion, the Libertarians petitioned the United States Supreme Court for writ of certiorari, which the Court granted.

The Supreme Court reversed the decision of the Eleventh Circuit, determining the Fourth Amendment prohibited the suspicionless search involved in Chandler. Justice Ruth Bader Ginsburg, writing for the majority, reasoned that because public safety was not in jeopardy, the convenience of the testing was irrelevant. The Court acknowledged Georgia's drug testing procedures were relatively non-

329. Chandler, 73 F.3d at 1543-44.
330. Id. at 1546.
331. Id.
332. Id. at 1547 (determining the candidates' privacy interests intruded upon in Chandler were less than those intruded upon in Von Raab); Von Raab, 489 U.S. at 679 (holding suspicionless drug testing was reasonable).
333. Chandler, 73 F.3d at 1547.
334. Id. at 1543, 1549.
335. Id. at 1549-50 (Barkett, J., dissenting).
336. Id. (Barkett, J., dissenting).
337. Chandler, 520 U.S. at 305, 313.
338. Id. at 323.
339. Id. at 307, 323.
invasive and not excessively intrusive. However, the Court then examined whether Georgia had a special need substantial enough and important enough to override the individualized suspicion requirements of the Fourth Amendment. The Court determined Georgia did not have such special needs, emphasizing that the government lacked "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." The Court stated Georgia improperly designed the statute for identifying candidates violating drug laws and further, the statute failed to effectively deter drug users from seeking election to state offices. The Court declared the government failed to offer a reason why standard law enforcement efforts would not suffice to identify drug users seeking state office. According to the Court, the statute was "not needed and cannot work to ferret out lawbreakers." The Court stated that absent a substantial and real risk to public safety, blanket suspicionless searches are not reasonable.

ANALYSIS

In Ferguson v. City of Charleston, the United States Supreme Court determined the Fourth Amendment prohibition against suspicionless, warrantless searches applied to Medical University of South Carolina's ("MUSC") drug testing policy. Justice John Paul Stevens, writing for the majority, focused on the policy's immediate objective, which the Court stated was to collect evidence for law enforcement use. Specifically, the Court determined the case did not fit within the category of special needs because the drug testing policy's primary purpose was to force women into drug treatment by threatening them with arrest and prosecution. The Court also emphasized that the drug testing policy extensively involved law enforcement throughout every stage of the policy's execution. Further, the Court determined it could not distinguish the purpose of the drug testing policy from a general interest in crime control.

340. Id. at 318.
341. Id.
342. Id. at 318-19.
343. Id. at 309, 319.
344. Id. at 320.
345. Id.
346. Id. at 323.
349. Ferguson, 532 U.S. at 68, 82-84.
350. Id. at 84.
351. Id.
352. Id. at 81 (quoting Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).
The Court recognized the drug testing policy did not discuss medical treatment for the mother or child, but rather, focused on involving police and prosecutors in developing and administering the policy. In addition, the Court distinguished Ferguson from other special needs cases involving drug testing without a warrant, stating the prior cases entailed special needs separated from the state’s general law enforcement interests. The Court stated that when state hospital employees obtain evidence specifically to incriminate a patient, the employee has a special obligation to fully inform that patient of her constitutional rights. Finally, the Court recognized that a benign motive of protecting the mother and child did not justify departing from Fourth Amendment requirements when law enforcement was pervasively involved in developing and applying the drug testing policy.

In Ferguson, the United States Supreme Court correctly held MUSC’s drug testing policy violated the Fourth Amendment rights against unreasonable searches of the women tested under the policy (“the Patients”). The Court correctly denied the special needs claim by those responsible for developing and enforcing the policy, namely MUSC representatives and law enforcement officials (“the Officials”). This Analysis will discuss how the Supreme Court has developed a test for determining whether a special need exists and how the special needs doctrine is applied to drug testing policies. In addition, this Analysis will discuss the Court’s determination in Ferguson that the Officials did not have a special need beyond normal law enforcement that justified conducting a search without a warrant or probable cause. Further, this Analysis will discuss that even if a special need could be found, the Officials could not pass a balance test of the government’s interest against the Patients’ privacy interests to justify departing from Fourth Amendment requirements. Finally, this Analysis will explain how the Patients’ expectations of privacy in medical treatment outweigh a government interest in gathering evidence for prosecuting drug abusers.
A. SPECIAL NEEDS BEYOND NORMAL LAW ENFORCEMENT

The Fourth Amendment 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^{363}\)

Generally, the Fourth Amendment guarantees the government cannot conduct unreasonable searches and seizures.\(^{364}\) In addition, the Fourth Amendment provides the government cannot obtain a search warrant without probable cause.\(^{365}\) To have probable cause, a magistrate must have "a substantial basis for concluding that the search would uncover evidence of wrongdoing" with a "nexus between the alleged criminal activity and the place to be searched."\(^{366}\)

Despite the warrant and probable cause requirements of the Fourth Amendment, the United States Supreme Court has allowed exceptions to these requirements.\(^{367}\) The Court developed these exceptions in cases with exigent or emergency-like circumstances where obtaining a warrant was impractical and where the searcher's interests outweighed the privacy expectations of those individuals searched.\(^{368}\) The Court has established that a special need must make obtaining a warrant impracticable, cannot intricately involve law enforcement, nor can it have an immediate purpose of achieving law enforcement goals.\(^{369}\) In addition, the Court has discouraged the use of law enforcement to achieve a special need's purpose by coercion, either by actually arresting or threatening to arrest.\(^{370}\) The Court has applied this special needs exception to cases involving warrantless drug testing on individuals.\(^{371}\)

\(^{363}\) U.S. Const. amend. IV.

\(^{364}\) Wayne R. LaFave et al., Criminal Procedure § 2.1-2.2 (3d ed. 2000) (citing Barron v. Baltimore, 32 U.S. 243 (1833)).

\(^{365}\) Id.


\(^{368}\) Id.

\(^{369}\) See infra notes 372-490 and accompanying text.

\(^{370}\) See infra notes 459-90 and accompanying text.

\(^{371}\) Bourdeau, supra note 367, at 341-42, 345-50.
I. Special Needs Necessitate a Showing that Requiring a Warrant Would Be Impracticable

The special needs doctrine first appeared in New Jersey v. T.L.O.\textsuperscript{372} in Justice Harry A. Blackmun's concurring opinion.\textsuperscript{373} Justice Blackmun stated that certain exceptional circumstances exist "where special needs, beyond the normal need for law enforcement," make a warrant requirement impracticable.\textsuperscript{374} Justice Blackmun identified a "stop and frisk" circumstance as a special need.\textsuperscript{375} In a "stop and frisk" circumstance, a police officer has a special need beyond normal law enforcement in assuring his safety.\textsuperscript{376} The police officer's safety interest is different than crime control because he must be allowed to assure himself that the individual he stopped does not have a weapon that could be used to injure the officer.\textsuperscript{377} Justice Blackmun recognized it would be impracticable to require the police officer to obtain a warrant or have probable cause before assuring his safety.\textsuperscript{378}

Justice Blackmun also identified policing the border as a special need, stating a warrant or probable cause requirement would be impracticable because a border patrol has no other reasonable alternative for guarding the border other than stopping a car to question the occupants briefly.\textsuperscript{379} Further, Justice Blackmun identified school officials as having a special need to conduct searches without a warrant or probable cause to immediately respond to students' misbehavior.\textsuperscript{380} In all of these circumstances, Justice Blackmun emphasized how the searcher could not practically obtain a warrant or have probable cause and still achieve the objective of the search.\textsuperscript{381}

In O'Connor v. Ortega,\textsuperscript{382} the United States Supreme Court adopted the special needs exception set forth in Justice Blackmun's concurring opinion in T.L.O.\textsuperscript{383} The Court extended Justice Blackmun's specified circumstances where requiring a warrant would be

\textsuperscript{372} 469 U.S. 325 (1985).
\textsuperscript{374} T.L.O., 469 U.S. at 351 (Blackmun, J., concurring).
\textsuperscript{375} Id. at 351-52 (Blackmun, J., concurring) (citing Terry v. Ohio, 392 U.S. 1, 20-21, 23-24 (1968)).
\textsuperscript{376} Id. (Blackmun, J., concurring) (citing Terry, 392 U.S. at 20-21, 23-24).
\textsuperscript{377} Id. at 352 (Blackmun, J., concurring) (citing Terry, 392 U.S. at 20-21, 23-24).
\textsuperscript{378} Id. at 351-52 (Blackmun, J., concurring).
\textsuperscript{379} Id. (Blackmun, J., concurring) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)).
\textsuperscript{380} Id. at 353 (Blackmun, J., concurring).
\textsuperscript{381} Id. at 352-53 (Blackmun, J., concurring).
\textsuperscript{382} 480 U.S. 709 (1987).
\textsuperscript{383} O'Connor v. Ortega, 480 U.S. 709, 719-20 (1987) (quoting T.L.O., 469 U.S. at 351 (Blackmun, J., concurring)).
impracticable to the work place. In Griffin v. Wisconsin, less than three months after O'Connor, the Court employed the special needs exception when reviewing the search of a probationer's home by a probation officer without a search warrant. In Griffin, the Court determined a warrant requirement interfered with a probation officer's duties and made it difficult for them to quickly respond to probationers' misconduct.

From T.L.O., O'Connor, and Griffin, the Supreme Court developed a test for determining whether a special need exists. First, the Court should examine whether the government had a special need that was more than mere law enforcement. Second, the Court should determine whether the special need beyond normal law enforcement made obtaining a warrant impracticable. A search meeting both tests will justify a balancing of the government's interests against the individual's privacy interests in place of the Fourth Amendment warrant and probable cause requirements. If the Court should find the government's interests outweighed the individual's privacy interests, it should permit the government's warrantless search. However, the Court should balance these interests only

387. Griffin, 483 U.S. at 875-76.
388. See infra notes 389-93 and accompanying text.
389. Griffin, 483 U.S. at 873-75 (stating a state had a special need in operating its probation system that was beyond normal law enforcement); O'Connor, 480 U.S. at 724 (citations omitted) (stating employers had a special need beyond normal law enforcement in entering employees' work spaces for work related purposes); T.L.O., 469 U.S. at 351-53 (Blackmun, J., concurring) (stating teachers had a special need beyond normal law enforcement in responding immediately and effectively to student misbehavior).
390. Griffin, 483 U.S. at 875-76 (stating a warrant requirement on a state's probation system would be impracticable); O'Connor, 480 U.S. at 719-20, 723-25 (citations omitted) (stating a warrant requirement on legitimate work-related intrusions, whether or not for investigating an employee, would be impracticable); T.L.O., 469 U.S. at 353 (Blackmun, J., concurring) (stating a warrant requirement would be impossible for teachers needing to take immediate action).
391. O'Connor, 480 U.S. at 719-20 (stating the Court must balance the invasion on the employee's privacy interests against the government's needs for searches conducted by a public employer); T.L.O., 469 U.S. at 351, 353 (Blackmun, J., concurring) (stating the educational process justified applying a balancing of interests rather than a probable cause or warrant requirement). See also Griffin, 483 U.S. at 873-79 (recognizing a probationer had a reduced expectation of privacy; a state had a special need in operating its probation system; and a warrant requirement would substantially interfere in a state's operation of its probation system).
392. O'Connor, 480 U.S. at 721-22 (stating the government's interests outweighed the individual's interests and as such, requiring a warrant would be unreasonable); T.L.O., 469 U.S. at 328, 340-41 (stating that when a public school's interests outweigh a student's privacy interests, probable cause is not required). See also Griffin, 483 U.S. at
when there is a special need making the requirement of obtaining of a warrant impracticable.\textsuperscript{393}

In \textit{Ferguson}, unlike in \textit{T.L.O.}, \textit{O'Connor}, and \textit{Griffin}, the government actor did not have a special need beyond normal law enforcement that made the warrant or probable cause requirement impracticable.\textsuperscript{394} The Officials could have obtained a warrant and still have achieved the objective of the search.\textsuperscript{395} As the Court stated, the immediate objective of the search was to collect evidence for law enforcement purposes.\textsuperscript{396} In fact, a warrant would have furthered this law enforcement purpose because had the Officials obtained a warrant, they would not have violated the Patients' Fourth Amendment rights.\textsuperscript{397}

In addition to a warrant requirement that frustrated the objective of a search, a warrant requirement that unduly interfered or burdened the government would be impracticable.\textsuperscript{398} The majority in \textit{T.L.O.} stated a warrant requirement was unsuited for a school environment because it would "unduly interfere" with a teacher's need to swiftly and informally discipline students when necessary.\textsuperscript{399} In \textit{O'Connor}, the Court stated a warrant requirement for entering an employee's work space would "seriously disrupt" the business, would be "unduly burdensome," and would be "simply unreasonable."\textsuperscript{400} Finally, in \textit{Griffin}, the Court stated a warrant requirement would "inter-
fere to an appreciable degree” with Wisconsin’s probation system.401 The Court noted a warrant requirement would delay the probation officer’s response to misconduct and make a magistrate, instead of the probation officer, determine the amount of supervision needed for the probationer.402

In Ferguson, however, a warrant requirement would not have unduly interfered, disrupted, or burdened the hospital employees’ medical treatment of the pregnant women.403 The hospital employees could have tested the Patients for drugs without a warrant in order to treat the mother’s drug addiction if the drug testing policy had not set out to collect evidence for law enforcement use.404 The Court recognized that certain circumstances would require hospital employees to report criminal conduct discovered during routine treatment, but distinguished hospital employees “intentionally set[ting] out to obtain incriminating evidence from their patients for law enforcement purposes.”405

Not only does the special needs exception require that a warrant requirement be impracticable, but a drug testing policy cannot be used to merely discover possible violations of the law.406 In Chandler v. Miller,407 the Court rejected a special needs claim for warrantless drug testing as a prerequisite to seeking a state official position, determining such a requirement was unconstitutional.408 In Chandler, the government claimed a special need in ensuring state officials were not drug abusers.409 The Court rejected the government’s claim, emphasizing that the government did not offer any reasons why normal law enforcement procedures would not have achieved the goals of the statute.410 The Court stated that the government could not use the statute to “ferret out lawbreakers.”411

Similar to Chandler, the Officials in Ferguson did not offer any reason why warrants or probable cause could not be obtained to arrest

401. Griffin, 483 U.S. at 876.
402. Id.
403. See infra notes 404-05 and accompanying text.
404. Ferguson, 532 U.S. at 90 (Kennedy, J., concurring).
405. Id. at 78 n.13.
406. See supra notes 372-405 and accompanying text (establishing that the special needs exception requires that a warrant requirement be impracticable); see infra notes 407-17 and accompanying text (establishing that a drug testing policy cannot be used to merely discover possible violations of the law).
409. Chandler, 520 U.S. at 318.
410. Id. at 309, 320.
411. Id.
and prosecute drug users.\textsuperscript{412} In fact, in \textit{Ferguson}, the Officials did not even claim obtaining a warrant was impracticable.\textsuperscript{413} The Officials claimed the drug tests were medically necessary; the drug testing policy effectively treated the medical needs; and the drug testing minimally intruded on the Patients' privacy interests.\textsuperscript{414} As the Court stated, the Officials designed the drug testing policy to gather evidence of the Patients' criminal conduct.\textsuperscript{415} According to \textit{Chandler}, using the drug testing policy to "ferret out lawbreakers," or seek out those pregnant women abusing drugs, was impermissible.\textsuperscript{416} Thus, MUSC did not have a special need that made the warrant or probable cause requirement impracticable.\textsuperscript{417}

2. \textit{Special Needs Cannot Intricately Involve Law Enforcement}

In order to fit within the special needs exception, a drug testing policy cannot intricately involve law enforcement.\textsuperscript{418} In \textit{Skinner v. Railway Labor Executives' Ass'n},\textsuperscript{419} the Federal Railroad Administration ("FRA") adopted federal regulations requiring drug and alcohol testing for railroad employees involved in certain train accidents and permitting such testing for employees violating certain safety rules.\textsuperscript{420} After the occurrence of a train accident, the railroad tested the employees involved for drugs and shipped the results to the FRA for analysis.\textsuperscript{421} The drug test samples were not to assist in the prosecution of the employees.\textsuperscript{422} The express purpose of the regulations was "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."\textsuperscript{423} The Court determined the special need of preventing accidents and casual-

\textsuperscript{412} \textit{Compare Chandler,} 520 U.S. at 320 (stating the government failed to offer any reasons why ordinarily law enforcement procedures could not apprehend addicted individuals), \textit{with} Brief of Respondents at 18-41, \textit{Ferguson} (No. 99-936) (failing to assert why the Officials could not or should not have to obtain a warrant or have probable cause), and \textit{Ferguson,} 532 U.S. at 67 (failing to address why the Officials could not or should not have to obtain a warrant or have probable cause).

\textsuperscript{413} Brief of Respondents at 18-41, \textit{Ferguson} (No. 99-936) (showing the Officials never claimed obtaining a search warrant was impracticable); \textit{Ferguson,} 532 U.S. at 67 (establishing the Respondents were the Officials).

\textsuperscript{414} Brief of Respondents at 24-34, \textit{Ferguson} (No. 99-936).

\textsuperscript{415} \textit{Ferguson,} 532 U.S. at 86.

\textsuperscript{416} \textit{See supra} notes 406-15 and accompanying text.

\textsuperscript{417} \textit{See supra} notes 372-416 and accompanying text.

\textsuperscript{418} \textit{See infra} notes 419-58 and accompanying text.

\textsuperscript{419} 489 U.S. 602 (1989).


\textsuperscript{421} \textit{Skinner,} 489 U.S. at 609-10 (citing 49 C.F.R. § 219.205(d) (1987)).

\textsuperscript{422} \textit{Id.} at 620-21 (citing 49 C.F.R. § 219.1(a) (1987)).

\textsuperscript{423} \textit{Id.} (quoting 49 C.F.R. § 219.1(a)).
ties caused by drug or alcohol use justified, and in fact required drug
testing to ensure covered employees observed the regulations.424

Similar to Skinner, which contained government created regulations, Ferguson involved a policy developed and implemented by police, prosecutors, and state hospital employees.425 In Ferguson, the Chief Prosecutor developed the drug testing policy by organizing meetings, choosing the participants, and planning to prosecute women testing positive for cocaine.426 Further, the policy specifically contained police operational guidelines for the chain of custody, possible criminal charges, police notification logistics, and arrest logistics.427 The drug testing policy extensively involved police and prosecutors in administering the policy's terms through determining reporting requirements, accessing the hospital's medical files of the women testing positive, and coordinating arrests with the hospital staff.428 Finally, the policy required MUSC to notify police, who subsequently arrested a patient, if that patient violated the terms of the drug testing policy.429

However, unlike Skinner, in Ferguson, the Court determined the government interest did not justify such pervasive law enforcement involvement.430 In Ferguson, the Court specifically stated the pervasive law enforcement involvement with the drug testing policy overshadowed the ultimate purpose of the government.431 Though the ultimate goal of the policy was to treat the drug abuse of pregnant women, the Court determined the immediate objective was nothing more than collecting evidence for law enforcement needs.432 The Court stated it tolerated suspension of the probable cause and warrant requirement in prior cases only because there was not a law en-

424. Id.

425. Compare Skinner, 489 U.S. at 606 (stating that the Federal Railroad Administration adopted regulations mandating drug testing for employees involved in train accidents and permitting drug testing for employees violating specified safety rules), with Ferguson, 532 U.S. at 82 (stating police and prosecutors were involved in the development, adoption, implementation, and day-to-day administration of the state hospital's drug testing policy).

426. Ferguson, 532 U.S. at 71.

427. Id. at 82.

428. Id.

429. Id. at 70-72.

430. Compare Skinner, 489 U.S. at 621 (stating the government interest required and justified supervision to assure the observance of the restrictions), with Ferguson, 532 U.S. at 82-84 (stating the possibility of law enforcement involvement may have been a means to achieving the end of protecting the health of the mother and child, but that the direct purpose of the policy was to secure the use of the means).

431. Ferguson, 532 U.S. at 82-84.

432. Id. at 73, 82-83.
References objective behind the searches. Justice Kennedy premised his concurring opinion on the substantial involvement of law enforcement in designing and implementing the policy, stating the hospital acted "as an institutional arm of law enforcement for purposes of the policy."

A critical difference between 

Skinner and Ferguson exists in the requirement of law enforcement involvement after the government actor tested an individual for drugs and the individual tested positive.

The drug testing policy in Ferguson specifically provided for the threat of law enforcement against patients who violated the drug testing policy.

Further, the policy detailed the exact offenses police were to charge the patient with based on her stage of pregnancy. In Skinner, however, the Court noted that although the regulations could be read broadly so as to authorize the release of the test results to law enforcement officials, the record did not reflect that test results had been or were intended to be released. The Court also stated that the government did not seriously contend the regulations were designed to allow law enforcement officials to collect evidence of legal infractions.

The Court determined that the purpose of the drug testing in Ferguson was to obtain evidence for the general law enforcement purpose of arresting patients using drugs while pregnant. However, in Skinner, the Court determined the purpose of the drug testing was to discover whether an employee used drugs or alcohol while working, a direct violation of the regulations designed to protect the public and the railroad employees. In Ferguson, the Court stated it permitted suspension of the probable cause or warrant requirement in prior cases when there was little or no law enforcement entanglement.

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434. Id. at 88 (Kennedy, J., concurring).
435. Compare Skinner, 489 U.S. at 620 (stating the drug tests were not for assisting in employee prosecution), with Ferguson, 532 U.S. at 83 n.21 (stating the policy was "specifically designed to gather evidence of violations of penal laws").
436. Ferguson, 532 U.S. at 71-72.
437. Id. at 72.
439. Skinner, 489 U.S. at 621 n.5.
440. Ferguson, 532 U.S. at 72, 82-84, 83 n.21.
442. Ferguson, 532 U.S. at 79 n.15.
Unlike *Skinner*, where the special needs of protecting public safety by preventing train accidents caused by employees under the influence of drugs and alcohol were beyond normal law enforcement, the Officials in *Ferguson* advanced nothing more than normal law enforcement needs.443

Both Justice Kennedy and Justice Scalia criticized the majority’s distinction of the drug testing policy’s ultimate purpose and its immediate purpose.444 Justice Kennedy stated the distinction lacked foundation because almost every search has an immediate purpose of obtaining evidence.445 Justice Scalia stated the drug testing policy had an immediate purpose of protecting the health of women and children at its inception, without suggestions from or involvement of police.446 Justice Scalia noted it was the hospital that sought to assist local police in arresting pregnant drug users.447 In summation, Justice Scalia stated that adding law enforcement to a “legitimate medical purpose” should not invalidate the purpose as a special need beyond normal law enforcement.448

However, as the majority recognized, “law enforcement involvement always serves some broader social purpose or objective.”449 The majority noted that the drug testing involved in prior cases where special needs were applied did not entail the gathering of evidence for enforcing criminal laws.450 In *National Treasury Employees Union v. Von Raab*,451 and in *Vernonia School District 47J v. Acton* (“*Vernonia*”),452 the Court stated the drug testing policies prohibited the test results from being turned over to law enforcement.453 In

443. Compare *Ferguson*, 532 U.S. at 80-81 (stating the “central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment”), with *Skinner*, 489 U.S. at 620 (stating the Government’s need to regulate railroad employees’ conduct to ensure public safety presents “special needs beyond normal law enforcement”). 444. *Ferguson*, 532 U.S. at 86-88 (Kennedy, J., concurring); *Id.* at 98-100 (Scalia, J., dissenting).

445. *Id.* at 87-88 (Kennedy, J., concurring).

446. *Id.* at 99 (Scalia, J., dissenting).

447. *Id.* (Scalia, J., dissenting).

448. *Id.* at 100 (Scalia, J., dissenting).

449. *Id.* at 84.

450. *Id.* at 83 n.20. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (stating the drug testing results were “not turned over to law enforcement authorities”); *Skinner*, 489 U.S. at 621 n.5 (stating the record did not reflect that test results had been released to law enforcement officials or were intended to be released to law enforcement officials); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 663 (stating the test results could not be turned over to criminal prosecutors, or any other agency, without the written consent of the employee).


453. *Vernonia*, 515 U.S. at 658 (stating the test results were not to be turned over to police or used for school disciplinary functions); *Von Raab*, 489 U.S. at 666 (stating the
Skinner, the express purpose of the policy was to prevent employees impaired by alcohol or drugs from causing railroad accidents or casualties. Conversely, in Ferguson, the Officials set out to obtain evidence to be turned over to police, as opposed to inadvertently discovering such evidence and reporting it to police. The Court stated that because the Officials set out to obtain evidence for the police, the Officials had an obligation to inform the Patients of their constitutional rights. Further, the policy in Ferguson did not address courses for medically treating the mother or child for the adverse effects of the mother's drug use. According to the Court, the "benign motive" proffered by the Officials did not justify the pervasive law enforcement involvement in a policy designed to collect evidence for criminal prosecutions.

3. Law Enforcement Must Not Be the Immediate Goal of the Drug Testing Premised on Special Needs

The Supreme Court has stated that in order to satisfy the special needs exception, the immediate goal of the drug testing must not be law enforcement. In Von Raab and Vernonia, the drug testing policies furthered health and safety. In Von Raab, the Commissioner of Customs implemented a drug testing program for United States Customs Service ("Customs Service") employees applying for positions involved directly in drug interdiction or requiring the employee to carry a firearm. If an employee's drug test returned positive, the Customs Service could dismiss that employee. The Customs Service could not, however, report the employee's test to criminal prosecutors without the employee's consent. The Court stated the Customs Service did not design the drug testing program to serve ordinary law enforcement needs because the Customs Service could not turn the

test results could not be used to criminally prosecute the employee without consent from the employee).

455. Ferguson, 532 U.S. at 84-85.
456. Id.
457. Id. at 82.
458. Id. at 85-86.
459. See infra notes 460-90 and accompanying text.
460. Vernonia, 515 U.S. at 650 (stating the express purpose of the drug testing policy was to prevent drug use by student athletes, protect the health and safety of the student athletes, and to provide assistance programs to drug users); Von Raab, 489 U.S. at 666, 674-75 (stating the purpose of the drug testing program was to deter and prevent drug use by those individuals applying to sensitive positions in order to protect against substantial harm).
462. Id. at 663.
463. Id.
results over to law enforcement. In addition, the Court stated the Customs Service had a special need in deterring drug use by employees in sensitive employment positions.

In Vernonia, the Vernonia School District 47J ("the District") required a student wishing to participate in the school athletic program to submit to drug testing. If a student tested positive, the school would re-test the student to confirm the original test results. Upon confirmation, the school notified the student's parents and suspended the student from the program for the rest of the current season and the entire next season unless the student participated in a six-week treatment program and consented to weekly drug testing. The District did not turn the results of the drug test over to law enforcement or even use them for internal disciplinary functions.

Unlike both Vernonia and Von Raab, Ferguson involved law enforcement consequences for testing positive under the drug testing policy. In Von Raab, the Customs Service sought to provide for public safety by preventing employees that used drugs from carrying firearms or from being directly involved in drug interdiction. In Vernonia, the District sought to protect the safety and health of student athletes by preventing any student athlete testing positive for drugs from participating in the athletic program. Unlike both of these cases, the Officials in Ferguson sought to protect the health and welfare of pregnant women and their children by coercing them with the threat of law enforcement consequences. The drug testing policy in Ferguson did not discuss any further treatment of the mother or

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464. Id. at 666.
465. Id.
466. Vernonia, 515 U.S. at 650.
467. Id. at 651.
468. Id.
469. Id. at 658.
470. Compare Vernonia, 515 U.S. at 658 (stating the drug test results were "not turned over to law enforcement authorities"), and Von Raab, 489 U.S. at 663 (stating the drug test results could not be turned over to criminal prosecutors, or any other agency, without the written consent of the employee), with Ferguson, 532 U.S. at 81-82 (citation omitted) (stating MUSC notified the police if a patient missed a substance abuse appointment or tested positive a second time and the police subsequently arrested the patient).
473. Compare Vernonia, 515 U.S. at 649-50 (stating the express purpose of the District's policy was to prevent drug use by student athletes, to protect the safety and health of student athletes, and to provide assistance programs for drug users), and Von Raab, 489 U.S. at 666 (stating the purpose of the drug testing program was "to deter drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions"), with Ferguson, 532 U.S. at 80, 82-84 (stating the primary purpose of the drug testing policy was to force women into drug treatment by using the threat of arrest and prosecution).
child beyond the mother’s drug addiction.\textsuperscript{474} Rather, the policy codified police operational guidelines, including the chain of custody for the evidence, possible criminal charges, and the logistics for notifying the police and arresting the patients.\textsuperscript{475} According to the Court, the coercion distinguished \textit{Ferguson} from instances where doctors must report information discovered during routine medical examinations under law or ethical requirements.\textsuperscript{476} Thus, the drug testing policy’s warrantless searches violated the Patients’ Fourth Amendment rights.\textsuperscript{477}

Furthermore, while law enforcement must not be the immediate goal of a drug testing policy, the policy must have a goal of protecting health and safety.\textsuperscript{478} In 1997, the Court rejected a special needs claim for warrantless drug testing for the first time in \textit{Chandler}.\textsuperscript{479} In \textit{Chandler}, the Court specifically stated the government failed to indicate any concrete danger mandating a departure from Fourth Amendment requirements.\textsuperscript{480} The Court determined the Fourth Amendment must be complied with absent a genuine concern for public safety.\textsuperscript{481}

In \textit{Ferguson}, the Officials claimed they sought to protect the health and safety of the mother and child.\textsuperscript{482} However, the Court recognized that the medical community is at a near consensus in finding such programs, like the one in \textit{Ferguson}, actually discourage women using drugs from obtaining prenatal care.\textsuperscript{483} According to the American Medical Association, “pregnant women will inevitably avoid medical treatment if their physicians are compelled to report positive urine test results to law enforcement.”\textsuperscript{484} The NARAL Foundation similarly recognized that punitive measures resulting from drug searches deter

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\textsuperscript{474} \textit{Ferguson}, 532 U.S. at 81-82.
\textsuperscript{475} \textit{Id.}
\textsuperscript{476} \textit{Id.} at 80-81.
\textsuperscript{477} See supra notes 363-476 and accompanying text. See also \textit{Ferguson}, 532 U.S. at 81-82 (stating MUSC’s drug testing policy was inconsistent with the Fourth Amendment because its “direct and primary purpose” was to ensure the use of law enforcement threats to achieve its “ultimate goals”).
\textsuperscript{478} See supra notes 459-77 and accompanying text (establishing that law enforcement must not be the immediate goal of a drug testing policy); see infra notes 479-90 and accompanying text (establishing that a drug testing policy must have the goal of protecting health and safety).
\textsuperscript{479} \textit{Ferguson}, 532 U.S. at 77 (citations omitted).
\textsuperscript{480} \textit{Chandler}, 520 U.S. at 310, 318-19.
\textsuperscript{481} \textit{Id.} at 323.
\textsuperscript{482} \textit{Ferguson}, 532 U.S. at 81.
\end{flushleft}
women from obtaining prenatal medical care.\textsuperscript{485} The NARAL Foundation stated that criminalizing drug abuse during pregnancy is detrimental to a woman's and fetus's health because the fear of being arrested or losing a child would deter a pregnant woman from seeking drug treatment or prenatal care.\textsuperscript{486} As the Court stated in \textit{Ferguson}, the failure of a woman to obtain prenatal care ultimately causes greater harm to the health of the mother and child.\textsuperscript{487} Because such programs deter women from obtaining prenatal care, and the failure of obtaining prenatal care endangers the health of the mother and child, the Officials were not in fact protecting the Patients' or the unborn children's health and safety.\textsuperscript{488} Instead of addressing these health and safety issues, the policy in \textit{Ferguson} merely addressed the procedures to arrest drug abusing women.\textsuperscript{489} Therefore, the Court correctly determined the immediate purpose of the drug testing in \textit{Ferguson} was law enforcement.\textsuperscript{490}

4. \textit{Special Needs Where Law Enforcement Consequences Were Permissible}

The Supreme Court has refused to find a warrantless search constitutional when the purpose of the search was to provide evidence for arrest and prosecution.\textsuperscript{491} In \textit{Griffin}, however, the Court allowed a warrantless search despite the resulting arrest of the probationer.\textsuperscript{492} Because of reduced privacy expectations of probationers, the Court in \textit{Ferguson} limited \textit{Griffin} to the warrantless search by a probation of-

\begin{footnotesize}
\textsuperscript{486} Brief of Amici Curiae NARAL Foundation et al. at 18, Ferguson (No. 99-936) (quoting Lawrence J. Nelson & Mary Faith Marshall, \textit{Ethical and Legal Analyses of Three Coercive Policies Aimed at Substance Abuse by Pregnant Women} at 12 (1998)).
\textsuperscript{487} \textit{Ferguson}, 532 U.S. at 84 n.23.
\textsuperscript{488} \textit{See supra} notes 483-87 and accompanying text. \textit{See also} Ferguson, 532 U.S. at 84 n.23 (stating "[i]t is especially difficult to argue that the program here was designed simply to save lives" because, according to the medical community, programs like MUSC's drug testing policy discourage drug using women from seeking prenatal care, which causes harm to prenatal health).
\textsuperscript{489} Ferguson, 532 U.S. at 82.
\textsuperscript{490} \textit{See supra} notes 459-89 and accompanying text; Ferguson, 532 U.S. at 83-84.
\textsuperscript{491} \textit{Compare} Ferguson, 532 U.S. at 82-86 (determining the drug testing policy was unconstitutional and stating "while the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal"), \textit{with} Vernonia, 515 U.S. at 658, 664-65 (determining the drug testing was constitutional and stating the drug test results were "not turned over to law enforcement authorities"), \textit{and} Skinner, 489 U.S. at 620 (determining the drug testing was constitutional and stating the drug tests were "not to assist in the prosecution of employees"), \textit{and} Von Raab, 489 U.S. at 663, 678-79 (determining the drug testing was constitutional and stating the test results could not be turned over to criminal prosecutors, or any other agency, without the consent of the employee).
\textsuperscript{492} Griffin v. Wisconsin, 483 U.S. 868, 872-74 (1987).}
\end{footnotesize}
ficer on a probationer. Thus, absent the specific facts of Griffin, the constitutional prohibitions against warrantless searches to collect evidence for arrest and prosecution still hold.

The Court expanded the special needs exception in Griffin to include a state's probation system, despite the resulting arrest of Griffin, determining "special needs, beyond normal law enforcement existed." The Court replaced the probable cause standard with a "reasonable grounds" standard because of the special needs of the probation system making the warrant requirement impracticable. The Court recognized probation as a type of criminal sanction and as such, probationers do not have the same liberties as every other citizen. Because probation officers searched Griffin's home based on information received from a police officer, the Court decided the search was reasonable and as such, constitutional under the Fourth Amendment.

Like Griffin, the searches involved in Ferguson resulted in the arrest of the individual searched. However, in Griffin, the Court stated that because probation was a type of criminal sanction, probationers had a lower expectation of privacy than other citizens. The Court stated the supervision of probationers justified the special need, permitting a certain degree of privacy infringement that would be unconstitutional if applied to the general public. Comparatively, the Court acknowledged that a typical hospital patient enjoys a reasonable expectation that the hospital will not release the patient's test results to individuals outside the medical profession without the patient's consent. In fact, the Court specifically addressed Griffin within Ferguson, stating Griffin was limited by the lesser expectation of privacy that probationers experience.

Following the precedent set in T.L.O., O'Connor, Griffin, Skinner, Von Raab, Vernonia, and Chandler, the Court correctly held the Offi-

493. Ferguson, 532 U.S. at 79 n.15.
494. See supra notes 491-93 and accompanying text.
495. Griffin, 483 U.S. at 873-74 (citations omitted).
496. Id. at 873-76.
497. Id. at 874.
498. Id. at 879-80 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).
499. Compare Griffin, 483 U.S. at 871-72 (involving the search of a probationer's home by a probation officer without a warrant that resulted in the probationer being charged with possession of a firearm, which the probation officer found in the home of the probationer during the search), with Ferguson, 532 U.S. at 71-72 (involving a drug testing policy that required police to be notified and the patient to be arrested if the patient tested positive for drugs a second time or missed a substance abuse counseling appointment).
500. Griffin, 483 U.S. at 874 (quoting Morrissey, 408 U.S. at 480).
501. Id. at 875.
502. Ferguson, 532 U.S. at 78.
503. Id. at 79 n.15.
cials in *Ferguson* did not have a special need beyond normal law enforcement because the drug testing policy intricately involved police and prosecutors on all levels.\(^{504}\) In developing the test for special needs, the Court has established that a special need beyond normal law enforcement exists when the government shows having probable cause or obtaining a warrant would be impracticable.\(^{505}\) In addition, the government cannot pervasively involve law enforcement.\(^{506}\) Further, the government must advance an ultimate goal of protecting public health, safety, or welfare.\(^{507}\) The government must conduct a search with the immediate purpose of achieving the ultimate goals rather than mere law enforcement purposes.\(^{508}\) Except for the limited circumstance of the operation of a state's probation system, the resulting arrest of the individual searched suggests more of a law enforcement purpose than a special need purpose.\(^{509}\) The Court specifically discouraged using the threat of arrest and prosecution to coerce individuals and achieve the goals of a governmental special need.\(^{510}\) The special needs proffered in *Ferguson* did not meet these standards, and as such, the Court correctly held the drug testing policy violated the Fourth Amendment rights of the Patients tested under the policy.\(^{511}\)

**B. BALANCING INTERESTS TO JUSTIFY DEPARTURE FROM THE FOURTH AMENDMENT**

When a special need is found, the Court must then balance the government's interest against the individual's privacy interest to determine whether the search was reasonable.\(^{512}\) The Court did not balance the governmental interests with the individual privacy interests in *Ferguson* because the Court never found a special need to justify such a balancing analysis.\(^{513}\) However, even if a special need had

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\(^{504}\) *Id.* at 81-85 (establishing that the Court held the Officials in *Ferguson* did not have a special need beyond normal law enforcement because the drug testing policy intricately involved police and prosecutors on all levels). *See supra* notes 418-58 and accompanying text (establishing the Court's holding in *Ferguson* was correct following the precedent set forth in *T.L.O.*, *O'Connor*, *Griffin*, *Skinner*, *Von Raab*, *Vernonia*, and *Chandler*).

\(^{505}\) *See supra* notes 363-417 and accompanying text.

\(^{506}\) *See supra* notes 418-58 and accompanying text.

\(^{507}\) *See supra* notes 459-90 and accompanying text.

\(^{508}\) *See supra* notes 459-90 and accompanying text.

\(^{509}\) *See supra* notes 491-503 and accompanying text.

\(^{510}\) *Ferguson*, 532 U.S. at 84.

\(^{511}\) *See supra* notes 363-510 and accompanying text.

\(^{512}\) *See Skinner*, 489 U.S. at 619 (stating that when a special needs exception exists, the governmental and privacy interests are balanced to assess whether requiring a warrant and probable cause would be impracticable).

\(^{513}\) *Ferguson*, 532 U.S. at 69-86. In *Ferguson*, had the Court found a special need, the Court would then have balanced the Officials' interests against the Patients' expectations of privacy. *See Skinner*, 489 U.S. at 619 (stating that when a special needs ex-
been found in Ferguson, the drug testing policy would still not survive a Fourth Amendment constitutional challenge.\textsuperscript{514} In Ferguson, the governmental interests did not outweigh the privacy interests of those individuals searched.\textsuperscript{515} The government showed no urgency in testing the Patients which would make obtaining a warrant impracticable.\textsuperscript{516} In addition, the drug testing policy would not achieve the goals of the policy.\textsuperscript{517} In regards to individual privacy interests, the Patients had a substantial expectation of privacy in the medical relationship with their doctor, which was not outweighed by the government interest of prosecuting drug abusers.\textsuperscript{518} As such, the Officials failed to set forth a valid justification for their suspicionless, warrantless drug testing.\textsuperscript{519}

1. The Government's Interest

Once a special need is found, the Court must determine if the search is reasonable.\textsuperscript{520} To determine whether a search is reasonable, the Court must assess the government's interest and balance it against the individual's privacy interest.\textsuperscript{521} In Skinner, the Court balanced the privacy interests of railroad employees against the government's interest of supervising railroad employees' compliance with regulations designed to prevent alcohol- or drug-caused accidents or casualties.\textsuperscript{522} Further, the Court recognized that the government's interest is strongest when "the burden of obtaining a [search] warrant is likely to frustrate the governmental purpose behind the search."\textsuperscript{523} Moreover, the Court stated the delay necessary in obtaining a search warrant could result in the loss of valuable evidence because the body eliminates drugs and alcohol from the bloodstream at a constant rate.\textsuperscript{524} In Skinner, determining whether traces of drugs or alcohol existed in the body of the railroad employee at the time of the triggering event was important, and as such, the railroad had to perform the drug test as soon as possible.\textsuperscript{525}
In *Ferguson*, the "triggering event" was the discretionary observance of specified criteria by MUSC employees.\(^5\) The Court stated the Officials failed to show that any of the specified criteria was more likely to result from cocaine use than from indigence, malnutrition, or illness.\(^6\) In addition, instead of claiming the potential loss of valuable evidence made it impracticable for the Officials to obtain a warrant, they focused their argument on the claim that the drug testing was medically necessary, constituting a special need that the policy effectively addressed with only minimal intrusion upon the Patients.\(^7\)

The Officials claimed the government had a special need to protect the health of the pregnant women and their children.\(^8\) Further, the Officials claimed the drug testing policy effectively met those special needs.\(^9\) Specifically, the Officials claimed a 90% effectiveness rate premised on 1) the number of women that successfully completed the drug abuse program; 2) the decline in the number of those testing positive; and 3) the decline in the number of medical complications associated with drug use.\(^10\) In his concurring opinion, Justice Kennedy emphasized a legitimate state interest because of the grave harm to children caused when a woman ingests cocaine while pregnant.\(^11\)

However, the Court in *Ferguson* recognized that the threat of criminal prosecution would likely discourage pregnant, drug-using women from obtaining prenatal care.\(^12\) In fact, "abundant evidence" established that policies and laws like MUSC's drug testing policy deter women from obtaining prenatal care.\(^13\) This fact countered the "success rate" claimed by the Officials in *Ferguson* because while 90% of those women seeking prenatal care may have stopped using cocaine, fewer women may have been seeking prenatal care.\(^14\) Failure

\(^{526}\). *Ferguson*, 532 U.S. at 71-72, 77 n.10.
\(^{527}\). *Id.* at 77 n.10.
\(^{529}\). Brief of Respondents at 24-29, *Ferguson* (No. 99-936).
\(^{530}\). Brief of Respondents at 29-32, *Ferguson* (No. 99-936).
\(^{531}\). Brief of Respondents at 29-30, *Ferguson* (No. 99-936).
\(^{532}\). *Ferguson*, 532 U.S. at 89-90 (Kennedy, J., concurring).
\(^{534}\). Brief of Amici Curiae NARAL Foundation et al. at 18-19, *Ferguson* v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936) (stating "abundant evidence" established that policies and laws like "the search policy at issue in this case" deter women from obtaining prenatal care); *Ferguson*, 532 U.S. at 71-73 (identifying "the search policy at issue in this case" as MUSC's drug testing policy).
\(^{535}\). *See supra* notes 529-34 and accompanying text.
to obtain prenatal care hinders the health of the baby.\textsuperscript{536} Justice Kennedy, in his concurrence, failed to address how criminal prosecution discourages drug abusing women from obtaining prenatal care.\textsuperscript{537} Because women are less likely to obtain prenatal care under the drug testing policy, the Court properly questioned the Officials' claim that they designed the program to save lives.\textsuperscript{538} Therefore, the government's alleged interest of protecting the health of the mother and child was flawed, if not invalid.\textsuperscript{539}

2. The Patients' Privacy Expectations

Even if the government had a valid interest in Ferguson, the Patients' expectations of privacy necessarily outweighed a government interest in protecting the mother and child.\textsuperscript{540} In T.L.O., the Court examined the students' expectations of privacy.\textsuperscript{541} The Court recognized a substantial invasion of privacy could occur with limited searches of a person.\textsuperscript{542} However, the Court stated society must recognize an individual's subjective expectation of privacy as legitimate before the Fourth Amendment will protect that individual's expectation of privacy.\textsuperscript{543} In T.L.O., the Court rejected the state's argument that students had practically no legitimate privacy expectation in personal property.\textsuperscript{544} The Court stated that although the school pervasively supervised students, the students still had a legitimate privacy interest in personal items brought to school, even if the items were "unnecessary."\textsuperscript{545} The Court decided that the difficulty of maintaining order in a school did not rise to a level that justified eliminating all of the students' expectations of privacy.\textsuperscript{546}


\textsuperscript{537} Ferguson, 532 U.S. at 86-91 (Kennedy, J., concurring).

\textsuperscript{538} See supra notes 520-38 and accompanying text.

\textsuperscript{539} See supra notes 520-38 and accompanying text.

\textsuperscript{540} See infra notes 541-90 and accompanying text.


\textsuperscript{542} T.L.O., 469 U.S. at 337 (citing Terry v. Ohio, 392 U.S. 1, 24-25 (1967)).

\textsuperscript{543} Id. at 338 (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)).

\textsuperscript{544} Id. at 338-39.

\textsuperscript{545} Id.

\textsuperscript{546} Id.
The Patients in Ferguson also had a valid expectation of privacy, which is recognized by society as legitimate. In Ferguson, the Court acknowledged that a typical patient enjoys a reasonable privacy expectation when undergoing tests in a hospital. In addition, the Court stated the typical patient should reasonably expect the hospital would not share the test results with non-medical personnel unless the patient consented. Finally, the Court noted no other Supreme Court special needs case involved an intrusion upon such a high expectation of privacy.

In Skinner, the Court discounted the privacy interests of railroad employees because of the principal safety focus of regulations on those employees. The Court recognized the railroad industry as pervasively regulated for the purpose of ensuring safety. Further, the Court stated the employees chose to participate in the highly regulated industry. The Court also addressed the intrusiveness of the testing itself. The Court deemed the testing non-invasive and noted that the regulations reduced the intrusiveness by not requiring the employee to be directly observed while producing the samples and by having the employee supply the samples in a medical environment.

In Von Raab, the Court stated Customs Service employees had a reduced expectation of privacy. Specifically, the Court recognized that government employees involved in drug interdiction and carrying firearms should expect inquiry into their fitness and integrity because their performance depends on their dexterity and judgment. The procedures that minimized the program's intrusiveness included the non-discretionary basis for testing only employees applying for such positions. Only employees seeking the covered positions were tested and applicants knew drug testing was a prerequisite to covered positions. Other aspects of the procedures that minimized the program's intrusiveness were that the employees were not directly observed while providing the testing samples, were only examined for

547. See infra notes 548-50 and accompanying text.
548. Ferguson, 532 U.S. at 78.
549. Id.
550. Id. at 78-79.
552. Id. at 627.
553. Id.
554. Id. at 625-27.
555. Id.
557. Von Raab, 489 U.S. at 672.
558. Id. at 672 n.2.
559. Id. at 667, 672 n.2.
specified drugs, and did not have to disclose any personal medical information.\(^{560}\)

In *Vernonia*, the District adopted a drug testing policy for student athletes.\(^{561}\) In evaluating the privacy interests involved in *Vernonia*, the Court recognized a diminished privacy expectation for public school children because of the school’s custodial and guardian-like responsibilities for the children.\(^{562}\) The Court determined student athletes had even fewer privacy expectations because student athletes commonly dress and shower in group locker rooms.\(^{563}\) Further, the Court noted students voluntarily subjected themselves to intrusions upon their privacy rights when choosing to participate in the highly regulated activities of student athletics.\(^{564}\) In addition, the Court determined the degree of intrusion was negligible: the conditions under which the tests were given to the students were relatively private; the determination of which students were tested and what the students were tested for was non-discretionary; and the disclosure of the results was limited, specifically excluding disclosure to law enforcement.\(^{565}\)

Unlike *Skinner*, *Von Raab*, and *Vernonia*, the individuals tested for drugs in *Ferguson* did not have a reduced expectation of privacy.\(^{566}\) In *Ferguson*, the Court specifically stated the Patients experienced a “far more substantial” invasion on their privacy than the individuals tested for drugs in *Skinner*, *Von Raab*, and *Vernonia*.\(^{567}\) First, the Patients in *Ferguson* were not employees in a highly regulated industry being tested for drugs by their employer.\(^{568}\) Second, the Patients

\(^{560}\) *Id.* at 672 n.2.


\(^{562}\) *Vernonia*, 515 U.S. at 656-57 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)).

\(^{563}\) *Id.* at 657.

\(^{564}\) *Id.*

\(^{565}\) *Id.* at 658.

\(^{566}\) Compare *Vernonia*, 515 U.S. at 648, 657 (stating student athletes had a reduced expectation of privacy), and *Skinner*, 489 U.S. at 606, 627-28 (stating the railroad employees had a diminished privacy expectation because of pervasive regulation of the railroad industry), and *Von Raab*, 489 U.S. at 672 (stating government employees involved in drug interdiction and carrying firearms should expect inquiry as to their fitness and integrity because their performance depends on their judgment and dexterity and as such, had a reduced expectation of privacy), with *Ferguson*, 532 U.S. at 78 (stating “[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent” and stating that prior cases did not involve intrusions on a privacy expectation of that kind).

\(^{567}\) *Ferguson*, 532 U.S. at 77-78 (citations omitted).

\(^{568}\) Compare *Skinner*, 489 U.S. at 606, 627-29 (stating the railroad employees had a diminished privacy expectation because of pervasive regulation of the railroad industry), with *Ferguson*, 532 U.S. at 71, 77-78 (involving drug testing of pregnant women meeting “one or more of nine criteria”).
were not employees involved in a job position depending on their judgment or dexterity where they should expect an inquiry into their fitness or integrity.\textsuperscript{569} Third, the Patients were not students in a public school participating in student athletics.\textsuperscript{570} In fact, the Patients had an increased expectation of privacy when seeing a doctor because the doctor was in a "position of trust."\textsuperscript{571} According to the American Medical Association, the core of a successful relationship between a doctor and patient is "trust and openness between the patient and the physician."\textsuperscript{572} Without that trust and openness, patients might refrain from disclosing information that could be necessary for proper diagnosis and treatment.\textsuperscript{573} In Ferguson, the Court specifically acknowledged that the Patients had a substantial expectation of privacy.\textsuperscript{574}

The procedures in Ferguson also did not entail procedures to minimize the intrusiveness of the drug testing.\textsuperscript{575} Unlike Skinner, Von Raab, and Vernonia, the drug testing in Ferguson involved discretionary criteria under which hospital employees determined whether they should test a pregnant woman for drugs.\textsuperscript{576} In Von Raab, the Court acknowledged that the procedure of testing only those employees applying for specified positions reduced the intrusiveness of the drug testing.\textsuperscript{577} In Skinner, the drug testing regulations only permitted discretion in very limited circumstances, and further provided safeguards against any abuse of the limited discretion allowed.\textsuperscript{578} The Court stated the minimal discretion and standardized procedures of

\textsuperscript{569} Compare Von Raab, 489 U.S. at 672 (stating government employees involved in drug interdiction and carrying firearms should expect inquiry as to their fitness and integrity because their performance depends on their judgment and dexterity and as such, had a reduced expectation of privacy), with Ferguson, 532 U.S. at 71, 77-78 (involving drug testing of pregnant women meeting "one or more of nine criteria").

\textsuperscript{570} Compare Vernonia, 515 U.S. at 648, 657 (stating student athletes had a reduced expectation of privacy), with Ferguson, 532 U.S. at 71, 77-78 (involving drug testing of pregnant women meeting "one or more of nine criteria").

\textsuperscript{571} Brody & McMillin, 12 Hastings Women's L.J. at 252.


\textsuperscript{573} Brief of Amici Curiae American Medical Ass'n at 11, Ferguson (No. 99-936).

\textsuperscript{574} Ferguson, 532 U.S. at 78.

\textsuperscript{575} See infra notes 576-86 and accompanying text.

\textsuperscript{576} Compare Vernonia, 515 U.S. at 650 (involving drug testing of all student athletes at the start of the season and randomly throughout the rest of the season), and Skinner, 489 U.S. at 609-11 (involving drug testing required by regulations specifically detailing types of train accidents which would subject a railroad employee to the drug testing), and Von Raab, 489 U.S. at 660-61 (involving drug testing of all Customs Service employees applying for a position that was directly involved in interdiction of drugs or for a position that required the employee to carry a firearm), with Ferguson, 532 U.S. at 71 (involving drug testing of patients when they met "one or more of nine criteria"). See also infra notes 582-86 and accompanying text (establishing that the criteria used by the Officials to determine which women to perform drug tests on was discretionary).

\textsuperscript{577} Von Raab, 489 U.S. at 672 n.2.

\textsuperscript{578} Skinner, 489 U.S. at 622 n.6.
the drug testing overcame the necessity of an independent magistrate's determination of whether a search would be justified.\textsuperscript{579} Finally, in \textit{Vernonia}, all student athletes wishing to participate in school athletics were required to consent to the drug testing, which tested all students for the same drugs regardless of identity.\textsuperscript{580} The Court recognized that the standardized nature of the testing reduced the invasiveness of the tests on the students' privacy.\textsuperscript{581}

Conversely, in \textit{Ferguson}, hospital employees tested a pregnant woman if the pregnant woman met one or more of the following criteria:

(1) separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care (beginning after 24 weeks); (5) incomplete prenatal care (fewer than five visits); (6) preterm labor without an obvious cause; (7) a history of cocaine use; (8) unexplained birth defects; or (9) intrauterine growth retardation without obvious cause.\textsuperscript{582}

The Court stated the Officials did not point to any evidence showing cocaine use was more likely to cause any of these criteria than other causes, such as malnutrition, indigence, or illness.\textsuperscript{583} MUSC hospital employees used their observation of these criteria to determine whether they should test a patient for cocaine under the drug testing policy.\textsuperscript{584} However, according to a study performed by the National Center on Addiction and Substance Abuse at Columbia University, few doctors consider themselves prepared to identify illegal drug use or alcoholism.\textsuperscript{585} Because of the discretionary methods used in \textit{Ferguson}, the Patients' privacy was intruded upon in a way unlike prior drug testing special needs cases.\textsuperscript{586}

Even if a special need existed in \textit{Ferguson}, the government interests still did not outweigh the Patients' expectations of privacy and as such, the drug testing policy could not survive constitutional scru-

\textsuperscript{579} \textit{Id.} at 622.

\textsuperscript{580} \textit{Vernonia}, 515 U.S. at 650, 658.

\textsuperscript{581} \textit{Id.} at 658.


\textsuperscript{583} \textit{Ferguson}, 532 U.S. at 73, 77 n.10.

\textsuperscript{584} \textit{Id.} at 71.

\textsuperscript{585} Brody & McMillin, 12 \textit{HASTINGS WOMEN'S L.J.} at 254 (citing Nat'l Ctr. on Addiction and Substance Abuse at Colum. Univ., \textit{Missed Opportunity: National Survey of Primary Care Physicians and Patients on Substance Abuse} (2000)) (discussing a survey conducted with 614 primary care physicians, where 16.9% stated that they considered themselves "very prepared" to recognize illegal drug use and 19.9% stated that they considered themselves "very prepared" to recognize alcoholism).

\textsuperscript{586} \textit{See supra} notes 576-85 and accompanying text.
The Officials did not show any urgency in obtaining the drug test that would make obtaining a search warrant impracticable. Further, the policy was not effective in accomplishing the special need advanced by the Officials. These factors, balanced against substantial expectations of privacy and a purely discretionary policy, did not justify ignoring the search warrant and probable cause requirements of the Fourth Amendment. As such, the Court correctly found the drug testing policy violated the constitutional rights of the Patients tested for drugs under the policy.

CONCLUSION

In Ferguson v. City of Charleston, the Supreme Court rejected the claim that the state hospital's goal of protecting the health of women and children justified the warrantless and suspicionless drug testing of pregnant patients. The Court examined the primary purpose of the drug testing policy and how the policy extensively involved law enforcement at all stages. The Court distinguished the drug testing policy's ultimate goal, protecting the health and welfare of the woman and child, from the policy's immediate goal, gathering evidence for law enforcement. In Ferguson, the distinction between the drug testing policy's ultimate goal and immediate goal was critical because the Court determined the immediate purpose must be separate from general law enforcement in order to fall under the special needs exception. Further, the Court stated the pervasive law enforcement involvement in developing and applying the policy prevented even a benign motive of protecting the mother and child from justifying the warrantless and suspicionless searches.

The Supreme Court correctly held in Ferguson that those responsible for developing and enforcing the drug testing policy ("the Officials") did not have a special need beyond normal law enforcement. Furthermore, even if the Court had found the Officials had a special need beyond normal law enforcement, the drug testing policy could not survive a balancing of the government's interests against the indi-

587. See supra notes 540-86 and accompanying text.
588. See supra notes 522-28 and accompanying text.
589. See supra notes 529-38 and accompanying text.
590. See supra notes 520-89 and accompanying text.
591. See supra notes 347-590 and accompanying text.
594. Ferguson, 532 U.S. at 81-84.
595. Id. at 82-84, 83 n.21.
596. Id. at 82-84.
597. Id. at 85-86.
598. See supra notes 347-56, 363-511 and accompanying text.
individuals' expectations of privacy.599 Because the drug testing policy in Ferguson was not justified by a special need, or at least could not survive a balancing test, the policy violated the Patients' Fourth Amendment rights when the hospital conducted the drug tests without a warrant or probable cause.600

The Supreme Court drew a line by distinguishing Ferguson from the other special needs cases. The Court determined pervasive law enforcement involvement prevented a special need claim by the government. In addition, the Court suggested the subsequent arrest of a patient prevented a special need claim by the government. Finally, the Court established that patients have a substantial expectation of privacy in their doctor-patient relationship, which prevents doctors from setting out to obtain evidence of a patient's criminal activity. Should a court find a special need for the government, the government must still overcome the patient's substantial expectation of privacy. Such a requirement will help prevent the government from intruding upon a patient's relationship with that patient's doctor. In addition, such a requirement will help prevent the police from creating an arm of law enforcement within the medical community.

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599. See supra notes 512-90 and accompanying text.
600. See supra notes 347-56, 363-591 and accompanying text.