11-15258

IN THE

United States Court of Appeals for the Eleventh Circuit

LUIS W. LEBRON, on behalf of himself and others similarly situated,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF *AMICI CURIAE* OF THE CENTER FOR LAW AND SOCIAL POLICY, CENTER ON BUDGET AND POLICY PRIORITIES, MICHIGAN LEAGUE FOR HUMAN SERVICES, NATIONAL ASSOCIATION OF SOCIAL WORKERS, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, and ALABAMA ARISE IN SUPPORT OF PLAINTIFF-APPELLEE LUIS W. LEBRON

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Rules of the Court of Appeals for the Eleventh Circuit, *Amici Curiae* The Center for Law and Social Policy, Center on Budget and Policy Priorities, Michigan League for Human Services, National Association of Social Workers, Sargent Shriver National Center of Poverty Law, and Alabama Arise ("*Amici*") hereby certify that:

(1) None of the *Amici* has a parent corporation;

(2) None of the *Amici* issues stock; and

(3) Upon belief, the certificates contained in the first brief filed in this case on January 18, 2012 by Defendant-Appellant David Wilkins, the brief *amici curiae* filed in this case on January 25, 2012, and the Answer Brief filed by Plaintiff-Appellee Luis W. Lebron on February 28, 2012 are complete with the exception of the following interested persons and parties:

a) Center for Law and Social Policy (*Amicus Curiae*)

b) Center on Budget and Policy Priorities (*Amicus Curiae*)

c) Michigan League for Human Services (*Amicus Curiae*)

d) National Association of Social Workers (*Amicus Curiae*)

e) Sargent Shriver National Center of Poverty Law (*Amicus Curiae*)

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STATEMENT OF INTEREST

Amici curiae are national and regional policy organizations and professional membership organizations that develop and advocate for policies at the federal, state, and local levels to improve the lives of low-income Americans. These *Amici* organizations commit themselves to researching and understanding the needs of

low-income Americans, including those with substance abuse problems; to evaluating the services provided to them in a fair and balanced way; and to giving low-income Americans a voice in significant legal and policy debates.

Founded in 1969, the Center for Law and Social Policy ("CLASP") is one of the oldest public interest law firms in the country. CLASP conducts policy analysis and provides technical assistance on Temporary Assistance for Needy Families ("TANF") to state and federal officials and administrators, advocacy organizations, grassroots groups, and research entities. For 40 years, CLASP has been a trusted resource, a creative architect for systems change, and an effective voice for low-income people.

The Center on Budget and Policy Priorities is one of the nation's premier policy organizations working at the federal and state levels on fiscal policy and public programs that affect low- and moderate-income families and individuals. Over the past 30 years, the Center has gained a reputation for producing materials that are balanced, authoritative, accessible to non-specialists, and responsive to issues facing the country.

The Michigan League for Human Services, established in 1912, is a nonprofit, nonpartisan policy and advocacy organization dedicated to ensuring that low-income and vulnerable individuals in Michigan achieve economic security. Through research, analysis, public education and advocacy efforts, the League

brings credible and accessible information to the public policy discussion of critical issues affecting the lives of low-income people.

With nearly 145,000 members in 56 chapters, the National Association of Social Workers ("NASW") is the largest membership organization of professional social workers in the world. To develop and disseminate standards of social work practice while strengthening and unifying the social work profession, NASW is devoted to advancing sound public policy for social work consumers, supporting working families, promoting economic security, increasing access to health and mental health care, and combating child abuse and neglect.

The Sargent Shriver National Center on Poverty Law ("Shriver Center") champions social justice through fair laws and policies so that people can permanently escape poverty. Using methods that blend advocacy, communication, and strategic leadership on issues affecting low-income people, the Shriver Center helps advocates and states interpret federal laws in ways that are fair and helpful to people seeking self-sufficiency.

Alabama Arise is an Alabama statewide nonprofit, nonpartisan coalition of 150 congregations, community groups, and individuals united in their conviction that low-income people suffer because of state policy decisions. To promote fairer policies, Alabama Arise analyzes the way that state policies impact low-income Alabamians and engages in citizen advocacy.

Amici envision an America where children grow up safe, healthy, nurtured, and prepared to succeed; where young people and adults have the skills and supports they need to fulfill their potential; and where poverty is rare and temporary. Drug abuse and its attendant harms may threaten this vision. But so, too, do state practices that rely on unfounded prejudices and stereotypes; that impose onerous financial burdens on poor people seeking short-term financial assistance; and that strip low-income people of their constitutional rights.

Based on their missions to assist America's poor, *Amici* have access to and are familiar with relevant, current, and authoritative peer-reviewed research on the issues on appeal. That research underscores Florida's inability to demonstrate a special need that might justify circumventing the Fourth Amendment's individual suspicion requirement. It also demonstrates that allowing Florida to enforce its unconstitutional policy would harm the very population Florida's TANF program is designed to help.[1]

SUMMARY OF THE ARGUMENT

Florida's suspicionless drug-testing regime increases the burden placed on the State's most needy while failing to accomplish the goals animating the Temporary Assistance for Needy Families (TANF) program. These goals include

[1] All parties have consented to this brief's filing. *See* Fed. R. App. P. 29(a). This brief was authored entirely by counsel for *Amici Curiae*, not in any part by counsel for the parties. *See* Fed. R. App. P. 29(c)(5). *Amici Curiae* and their counsel alone contributed money to fund preparing and submitting the brief. *See id.*

providing "assistance to needy families so that children may be cared for in their own homes or in the homes of relatives," "preserv[ing] the integrity of the family free of impediments to self-reliance," and promoting self-sufficiency. Florida Dep't of Children & Families, ACCESS Program Office, *Temporary Assistance for Needy Families State Plan Renewal, October 1, 2008 – September 30, 2011*, at 8.[2] The established drug-testing regime fails to advance these goals because it poorly identifies drug abuse and does not collect information relevant to an applicant's employability or ability to care for his or her family. Florida's chosen test measures only recent use of particular drugs; it does not even aim to identify problems of drug abuse or addiction. Nor does any evidence support the theory that these drug-testing programs save states any money: analyses of twelve states' proposed drug testing programs reviewed between 2007 and 2011 estimated that all of them would actually *cost* those states money—up to $20 million, in one instance—and not a single one would achieve net savings. ASPE Issue Brief, *Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies* 7-8, 25 (Oct. 2011).[3]

As America's poor continue to get poorer, government agencies implementing TANF programs should resolve the issues that prevent families from

[2] *Available at* http://www.dcf.state.fl.us/programs/access/docs/TANF-Plan.pdf.

[3] *Available at* http://aspe.hhs.gov/hsp/11/DrugTesting/ib.shtml.

attaining stability, not punish poor families for their struggles.[4] Yet Florida's drug-screening program does just that. It erects significant barriers to access, requiring applicants to front the cost of drug testing and pay for their own rehabilitation. Applicants in dire straits who are seeking approximately $10 per day to care for two children through TANF must pay three or four times that much out of pocket just to apply for benefits, not accounting for the added costs of transportation and time for testing. *See* RE-29. Even putting aside these practical barriers, suspicionless drug testing runs counter to TANF's stated goals by creating a culture of mutual suspicion that discourages needy people from applying for benefits and erodes trust between benefit workers and aid recipients. And these harms are not visited only upon would-be applicants; studies repeatedly show that children suffer when their parents do not receive the short-term aid they need. *See, e.g.*, Children's Sentinel Nutritional Assessment Program, *The Impact of Welfare Sanctions on the Health of Infants and Toddlers* 12 (2002).

Given the blunt, counterproductive instrument Florida has chosen and the lack of provision for treatment, one could be forgiven for wondering whether Florida's true goal was not to further the stated objectives of the TANF program,

[4] *See* Jason DeParle *et al.*, *Poor Are Still Getting Poorer, but Downturn's Punch Varies, Census Data Show*, N.Y. Times, Sept. 15, 2011 (census data shows that "[a]mong the poor, the share in deep poverty (defined as having less than half the income to escape poverty) rose to the highest level in 36 years: 44.3 percent").

but instead to trim Florida's welfare rolls by intimidating would-be enrollees away from applying. Whether its purposes are well-meaning or something short of that, Florida can only attempt to achieve its goals within the confines of the Constitution. The District Court correctly concluded that Florida failed to establish a special need sufficient to circumvent Fourth Amendment protections. It reasonably found that the three studies Florida introduced below lacked probative value because their data was outdated and nationally, rather than locally, focused. Even if probative, moreover, all three studies demonstrated that drug use or abuse among TANF applicants did not confirm the stereotypes underlying the drug testing policy and therefore undermined Florida's asserted "special need."

On appeal, Florida now seeks to introduce myriad social science data that, it claims, provide better support for suspicionless searches. Its effort is both too late and too little. This Court as a rule does not consider evidence introduced for the first time on appeal, and it should hew to that rule here. And even if this Court were to evaluate the State's new evidence, it would find that estimates of drug use and employability vary widely depending upon sample populations and demographic factors, rendering the vast majority of the studies newly cited by the State of Florida irrelevant anyway. What is more, recently-collected *Florida-specific* data negates any so-called "special need." The mixed bag of evidence Florida seeks to introduce here for the first time does not change that reality.

ARGUMENT

I. FLORIDA'S MANDATORY SUSPICIONLESS DRUG TESTING OF TEMPORARY ASSISTANCE APPLICANTS UNDERMINES FLORDIA'S GOAL OF PROMOTING SELF-SUFFICIENCY AND SUPPORTING CHILDREN.

A. Florida's Drug-Testing Program Erects Significant Financial Barriers That Would Prevent The Neediest From Accessing Benefits.

Over the last decade, potential TANF applicants have become poorer and more "disadvantaged along a number of characteristics related to health and mental health." Rukmalie Jayakody *et al.*, *Substance Abuse and Welfare Reform*, Nat'l Poverty Ctr., Policy Brief Ser. No. 2, at 3 (Apr. 2004) (hereinafter "Jayakody, *Substance Abuse*"); *see also* Jack P. Shonkoff and Deborah A. Phillips, *From Neurons to Neighborhoods*, National Academy Press 9 (2000); DeParle, *supra* n.4. At the same time, states have made it more difficult for those in temporary need to access TANF funds to achieve long-term security and stability, erecting barriers premised not on data, but on negative stereotypes about the poor. Kaaryn Gustafson, *The Criminalization of Poverty*, J. of Criminal Law & Criminology 643, 661-663 (2009**).** Adding barriers to the TANF process by definition makes it more difficult for struggling families to access those benefits. *See id.* at 643. And overcoming these barriers is all the more daunting when doing so requires money that many TANF applicants simply do not have.

Florida requires TANF applicants to front the costs of the drug test, which it estimates at $28.50 to $40. RE-29. The State promises to reimburse this cost if the test comes back "negative," RE-30, but nonetheless requires families to essentially make a loan to the government to be tested for a TANF-disqualifying factor. Needy families applying for TANF assistance—which provides, at most, $303 per month for a family of three, *See* Florida Dep't of Children and Families, *Temporary Cash Assistance Fact Sheet*[5]—are unlikely to have such spare funds on hand. *See Goldberg v. Kelly*, 397 US 254 (1970).[6] The requirement to pay upfront thus will act as a total barrier to participation for some needy families and will impose significant hardships on many others.

A positive drug test means that an applicant cannot reapply for benefits for one year. Fla. Stat. § 414.0652(1)(b). Applicants can shorten the disqualification period to six months by completing State-approved drug rehabilitation. *Id.* at § 414.0652(2)(j). But applicants who wish to pursue the rehabilitation option must

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[5] *Available at* http://www.dcf.state.fl.us/programs/access/docs/tcafactsheet.pdf.

[6] In *Goldberg v. Kelly*, the Supreme Court mandated that states provide hearings to welfare recipients before terminating their welfare benefits, lest the eligible recipient be "condemned to suffer [a] grievous loss," deprived of "the very means by which to live while he waits." *Id.* at 263, 264. By requiring applicants to front the money for drug testing, Florida's testing program, like the post-termination hearings struck down on due process grounds in *Goldberg*, ignores reality: those eligible for this type of public benefit likely do not have the resources to forgo benefits or money while the state makes eligibility determinations.

first find a qualifying treatment program accepting patients,[7] and then foot the bill for the program (and a second drug test six months down the line, to boot). RE-29. In 2002, the average cost of treatment for drug addiction in outpatient facilities was $1,433 per admission, not including childcare service or transportation costs. Substance Abuse and Mental Health Services Administration, *The DASIS Report, Alcohol and Drug Services Study (ADDS) Cost Study*.[8] The clear implication is that without temporary support funds, like TANF, individuals willing to seek treatment will be unable to do so. Such a system plainly belies Florida's asserted goal to "meet[] the transitional needs of [TANF] program participants." ACCESS Program Office, *Temporary Assistance for Needy Families State Plan Renewal, October 1, 2008 – September 30, 2011*, at 8.

B. Florida's Drug-Testing Policy Will Discourage Poor Floridians From Applying For Needed Benefits.

Even if these vulnerable individuals could pay for drug testing, Florida's policy of suspicionless drug testing will likely deter many drug users and non-drug

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[7] The National Survey on Drug Use and Health estimates that only one out of every three adults seeking substance abuse treatment services in Florida is able to access such services. In fiscal year 2009-2010, the Florida Department of Children and Families could not provide treatment to approximately 277,851 adults, all ready and willing to participate in treatment programs. The waiting list hovers at around 1,300 adults per month. Florida Dep't of Children & Families, *Substance Abuse and Mental Health Statistics*, available at http://www.dcf.state.fl.us/programs/samh/SubstanceAbuse/budget.shtml.

[8] *Available at* http://www.drugpolicy.org/docUploads/samhsa_dasis_adss.pdf.

users alike from seeking the very aid that could get them off public assistance for good.

Despite their dire straits, many would-be TANF applicants struggling with substance-abuse problems are reluctant to apply for TANF funds, for fear that the State will act retributively. "Women may distrust the social service system and may believe that if they seek treatment, they will face prosecution, or more frightening, may lose custody of their children during and possibly after treatment." Gretchen Kirby *et al.*, *Addressing Substance Abuse Problems among TANF Recipients: A Guide for Program Administrators: Final Report*. Mathematica Policy Research Inc. 17 (July 19, 2000). Indeed, the last few decades have seen steep increases in the number of states that consider a positive drug test sufficient grounds for reporting a pregnant woman to state child welfare or criminal justice authorities. Legal Action Center, *Steps to Success: Helping Women with Alcohol and Drug Problems Move from Welfare to Work* 14 (1999). Recent media coverage of Florida parents losing custody for drug-related reasons makes such fears understandable. *See e.g.*, Leonora LaPeter Anton, *Mom's Problems With Prescription Drugs Make Her Kids Court's Concern*, Tampa Bay Times (June 3, 2011) (mother's addiction to prescription pain medication led state to take custody of children and seek termination of parental rights). To respond to these concerns, "TANF program staff [should] ease the entry into treatment by

dispelling fears of 'the system' and by creating a supportive environment." Kirby, *supra*, at 18. Florida's suspicionless drug-testing regime does just the opposite.

In addition to deterring individuals from applying for benefits, Florida's suspicionless drug testing regime assumes TANF applicants are substance abusers, thereby striking a blow at a central element of successful welfare-to-work programs: trust between benefit workers and benefit recipients. Michael Spencer *et al.*, *Conditional Welfare: A Family Social Work Perspective on Mandatory Drug Testing* (2000). Drug-testing regimes—unsurprisingly—foster suspicion between the testers and the tested. U.S. Dep't of Health, Admin. for Children and Families, Office of Planning, *Research & Evaluation Screening and Assessment in TANF/Welfare to Work* 82 (Mar. 2001) (hereinafter "U.S. Dep't of Health, *Screening and Assessment*"). And testing *all* individuals applying for temporary public assistance for drug use communicates a clear and negative judgment about the TANF applicant population as a whole. Establishing relationships of trust enables TANF recipients to work with benefit workers cooperatively to overcome barriers to self-sufficiency and address TANF recipients' needs. Scott Brawley, *Research Notes, TANF Client Assessments: Program Philosophies and Goals, Sequencing of Process, Uses of Information and State Changes or Modifications, Promising Practices, and Lessons Learned* (2000). The U.S. Department of Health, Administration for Children and Families identifies the lack of a cooperative

relationship between benefits workers and TANF recipients as a barrier to success of the TANF program, explaining that "drug testing can * * * create an environment of confrontation or suspicion that prohibits the development of a positive relationship between case managers and TANF clients, thus inhibiting other barrier identification and constructive service planning." U.S. Dep't of Health, *Screening and Assessment*, *supra* at 82.

The fact that test results are not kept strictly confidential exacerbates the culture of mistrust among potential TANF applicants. Florida's ACCESS Policy and Procedure for Drug Testing TCA Applicants states that "Applicants who test positive and have minor children will be referred to the DCF Florida Abuse Hotline." RE-29. As the District Court correctly noted, these test results are memorialized in a database that law enforcement can access (even if direct referral of this information may have been halted by administrative Rule). RE-70.[9] And as potential TANF applicants get the message that, by virtue of being needy, the government considers them potentially criminally suspect, they may shy away from applying for other government benefits they need as well.

[9] Because the fear of negative consequences, like loss of child custody, prevents some parents from applying for TANF funds under the current regime, a proposed policy to change these confidentiality requirements does little to assuage applicant concern. Even the perception that records will not be kept private keeps would-be applicants away.

C. Florida's Punitive Policy Disproportionately Harms Children.

In Florida, more than 80% of TANF recipients are children.[10] TANF has a special interest in protecting these children. U.S. Department of Health and Human Services, Administration for Children and Families, *About TANF*.[11] Yet, Florida appears to have overlooked this young population when crafting its new drug testing policy. According to a 2002 report, the "unintended consequences of welfare reform may jeopardize the health of an increasing number of America's children as the current economic downturn, welfare sanctions, and welfare time limits simultaneously decrease families' resources." Children's Sentinel Nutritional Assessment Program, *The Impact of Welfare Sanctions on the Health of Infants and Toddlers* 12 (2002). The same report concludes that as welfare sanctions increase and benefits decrease, young children are hospitalized at a

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[10] For each state, the U.S. Department of Health and Human Services tracks the number of individuals who receive TANF benefits each month and calculates a monthly average for each fiscal year. For Florida in 2011, an average of 82,160 children received TANF benefits each month compared to 19,284 adults. *See* U.S. Dep't of Health and Human Servs., Administration for Children and Families, *TANF: Total Number of Adult Recipients, Fiscal and Calendar Year 2011* (*available at* http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/2011/2011_children_tan.htm); U.S. Dep't of Health and Human Servs., Administration for Children and Families, *TANF: Total Number of Child Recipients, Fiscal and Calendar Year 2011* (*available at* http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/2011/2011_children_tan.htm).

[11] *Available at* http://www.acf.hhs.gov/programs/ofa/tanf/about.html (listing among its goals "assisting needy families so that children can be cared for in their own homes").

significantly higher rate. *Id*. It further warns that "sanctioning welfare recipients jeopardizes the health and food security of infants and toddlers at the most critical period in their growth and development," detrimentally impacting children's learning abilities. *Id.* at 12-13. Malnutrition also weakens a child's immune system, creating a cycle of recurrent infections and other serious health threats. *Id.* And because TANF provides such a modest amount of funding—less than one-third of the median state's poverty level—loss of even the "adult portion" of the aid harms children; families are unable to meet their core needs without it. The Center for Law and Social Policy, *TANF Policy Brief* 3 (Feb. 3, 2011).[12] Therefore, even the "protective payee remedy" Florida has set forth—providing funds for only the child when an adult tests positive for drugs—deprives the child of critical support.

There are also child abuse and neglect consequences. Shortly after the welfare system overhaul in 1996, one scholar explained that " '[w]hen these mothers' benefits are reduced, and they can't feed and house their kids, that's neglect. The implications are enormous for the child welfare system.' " Rukaiyah Adams *et al.*, Center on Juvenile and Criminal Justice, *Double Jeopardy: An Assessment of the Felony Drug Provision of the Welfare Reform Act* 5 (1998) (citation omitted). The Center on Juvenile and Criminal Justice concluded that

[12] *Available at* http://www.clasp.org/admin/site/publications/files/0520.pdf.

"children who are placed with a mother who does not receive adequate benefits will be at increased risk of neglect or abuse." *Id.*

If Florida truly wishes to prevent these social ills, as it now claims (at Br. 8), it is moving in exactly the wrong direction.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT NO SPECIAL NEED JUSTIFIES FLORIDA'S CIRCUMVENTION OF FOURTH AMENDMENT PROTECTIONS.

Regardless of whether Florida's suspicionless drug-testing regime squares with its stated policy goals, the State cannot circumvent Fourth Amendment protections without demonstrating a special need. *Chandler v. Miller*, 520 U.S. 305, 313 (1997). Concluding that Florida TANF applicants do not use or abuse drugs at a higher rate than the general population, and that such use or tendency toward abuse does not, in any event, affect employability, the District Court properly entered a preliminary injunction preventing Florida from enforcing its suspicionless drug-testing policy.

A. The District Court Correctly Concluded That Florida Failed To Establish A Special Need Sufficient To Justify Suspicionless Searches.

Florida suggests that four interests justify its suspicionless drug-testing program: (1) ensuring that TANF recipients are employable, Br. 35-37; (2) promoting child welfare in stable and healthy homes, *id.* at 37-41; (3) ensuring that beneficiaries use TANF funds for their dedicated purpose, *id.* at 41; and

(4) protecting public health generally by refusing to fund drug use, *id.* at 42. *See also* RE-76.

In ostensible support, Florida provided the District Court with three studies regarding drug use and abuse in individuals receiving government benefits. All three relied on now-stale data collected from national, not Florida-specific, populations. *See* Jayakody, *Substance Abuse*, *supra*; Bridget F. Grant *et al.*, *Alcohol and Drug Use, Abuse, and Dependency Among Welfare Recipients*, 86 Am. J. Pub. Health 1450 (1996); Harold Pollack *et al.*, *Drug Testing Welfare Recipients—False Positives, False Negatives, Unanticipated Opportunities* (2001). Given their age and lack of specificity, the District Court reasonably concluded that the State's proffered data lacked probative value. But even if probative, all three studies reached conclusions at odds with Florida's asserted "special need." The National Poverty Center study, for example, found that "only a small minority of recipients (about 4 percent) satisfied the diagnostic screening for illicit drug dependence (*i.e.*, their drug use impairs their functioning in significant ways)." Jayakody, *Substance Abuse*, *supra*, at 2. The second study found that "contrary to common characterizations" only "small percentages" of welfare recipients use drugs (3.8% to 9.8%)—a rate comparable to drug use in the national population. *See* Grant, *supra*, at 1453. And the third study similarly determined that drug dependency among welfare recipients hovered between 3.2 and 4.4 percent.

Pollack, *supra*, at 4, 10. Not only did the three studies fail to capture relevant data, but all three reached conclusions that flatly contradict the State's purported "special need." *C.f. Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346, 1355 (11th Cir.) (affirming that political subdivision cannot rely on "shoddy data or reasoning" to justify policy), *cert. denied,* 131 S. Ct. 2973 (2011) (internal quotations omitted).

The data procured in Florida's own Demonstration Project, which was aimed at gathering information specific to the TANF population at issue, likewise completely contradicts the State's purported "special need." The Demonstration Project found rates of drug use and abuse to be *lower* than those present in the Florida population in general and found no correlation between drug use/abuse and employability. Indeed, the rate of drug use revealed by the Demonstration Project amounted to 5.2%, while the rate of drug use in the Florida population at large was recently estimated at 8.3%. *See* Doc. No. 32-1, 10-12. The researchers confidently reached two conclusions: (1) the estimates capable of being derived from drug-testing programs were "suitable only for planning purposes and not for sanctioning"; and (2) there existed "very little difference between drug users and non-users on a variety of dimensions." Robert E. Crew *et al., Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits*, 17 J. of Health and Soc. Pol'y 39, 52 (2003). In fact, "[u]sers were employed at about the same rate as

were non-users, earned approximately the same amount of money as those who were drug free and did not require substantially different levels of governmental assistance." *Id.* The data produced during the first month in which Florida enforced its suspicionless drug testing policy (before the District Court preliminarily enjoined its enforcement as unconstitutional) confirm the predictions made by Demonstration Project researchers: during that time, only 2.1% of TANF applicants tested positive for drugs.[13]

Presented with this information, the District Court undertook a detailed examination of precedent and determined that "the State's commissioned study undercut[] each of [the State's four proffered] rationales" for instituting its suspicionless testing regime. RE-76.[14] As the court explained, the data revealed

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[13] As the District Court noted, Florida's contention that 9.8% of TANF applicants were denied benefits for drug-related reasons conflated the 7.6% of individuals who did not submit drug testing results at all—attributable to a number of factors not indicative of drug use, such as inability to pay for the test or access a qualifying laboratory—with the 2% who tested positive. *See* RE-65 n.4. (These data also confirm the point that Florida's mandatory drug-testing regime scares away many would-be applicants in need.)

[14] The District Court did not announce a rule of law or decline to confirm the rationality of a legislative decision, so its factual determinations do not qualify as legislative facts subject to plenary review. *Cf. Free* v. *Peters*, 12 F.3d 700, 706 (7th Cir. 1993) ("The district judge announced a rule; and appellate review of rules, and therefore (it follows) of the social scientific or other data on which the rules are based, is plenary."); *see also Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty.* v. *Earls*, 536 U.S. 822, 835 (2002) (declining "to second-guess the finding of the District Court" that there was an actual drug problem). The District Court's findings therefore remain subject to usual appellate standards for

"that TANF funds are no more likely to be diverted to drug use or used in a manner that would expose children to drugs or fund the 'drug epidemic' than funds provided to any other recipient of government benefits." *Id.* Nor was there "evidence that TANF recipients who screened and tested positive for the use of illicit substances were any less likely to find work than those who screened and tested negative." *Id.*

After finding Florida's rationales devoid of evidentiary support, the District Court rejected the State's contention that it could nonetheless demonstrate a "special need" *without* evidence of heightened drug use or detrimental effects of drug use on the TANF population. RE-79. The District Court properly recognized that extending suspicionless searches to those in need of temporary government assistance could not be squared with precedent. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), presented markedly different facts, as the threat to border security resulting from drug use by border patrol agents justified preventative measures. *Id.* at 668. And the custodial and tutelary responsibilities exercised by the State over school children, which justified finding a special need in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,

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factual findings, reversible only if clearly erroneous. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).

536 U.S. 822 (2002), does not apply to adults not in the custody of the State. RE-80-81 (citing *Earls*). Because nothing in Florida's proffered evidence suggested a need "beyond the normal need for law enforcement," *New Jersey v. T.L.O.*, 469 U.S 324, 351 (1985) (Blackmun, J., concurring), Florida's testing program cannot be upheld on the basis of "special need."

B. Florida's Attempts To Expand The Record On Appeal Are Both Impermissible And Meritless.

Confronted with the District Court's thorough refutation of its "special need" argument, Florida on appeal introduces social science data missing from the District Court record. This Court has repeatedly held that facts outside the record are unavailable for consideration on appeal. *See, e.g.*, *United States v. Diaz*, 630 F.3d 1314, 1334 n.13 (11th Cir. 2011) ("[C]itations to medical journal articles that [the defendant] did not submit as evidence to the district court * * * [are] not part of the record on appeal"); *Turner v. Burnside*, 541 F.3d 1077, 1086 (11th Cir. 2008) ("We do not consider facts outside the record."); *Diversified Numismatics v. City of Orlando*, 949 F.2d 382, 384 (11th Cir. 1991) (per curiam) ("[A]ppellants should not have referenced material not in the record, and we will not consider any non-record evidence or arguments based upon non-record evidence."). Because Florida failed to introduce this evidence in the District Court, this Court should not consider it.

Even if this Court were to consider this newly introduced evidence, moreover, it has precious little bearing on the issues presented by this appeal. The fact that studies have reached different conclusions about the prevalence of drug use in the welfare population establishes that many variables—population, sample size, demographics, time period, and, unsurprisingly, whether sampled individuals have histories of substance abuse, to name a few—affect the results. As a 2000 study concluded, there exists no "documented support for claims of widespread substance abuse among welfare recipients." Rukmalie Jayakody *et al.*, *Welfare Reform, Substance Use, and Mental Health*, 25 J. Health Pol. Pol'y & L. 623, 644 (Aug. 2000). Florida's attempt to extrapolate from the studies it now seeks to introduce, none of which focuses on the TANF applicant or recipient population in Florida during any timeframe, let alone within the last ten to fifteen years, falls far short of establishing a special need capable of circumventing Fourth Amendment protections. Some of these studies were limited to examining only the behavior of *known drug abusers*. For example, to support its conclusion that drug use detrimentally affects employability—a hypothesis that the Demonstration Project discredited in the Florida TANF-recipient population—Florida cites a study focused entirely on individuals capable of being tracked because they had recently been discharged from a residential drug treatment facility. Lisa R. Metsch *et al.*, *Moving Substance-Abusing Women from Welfare to Work*, 20 J. Pub. Health 36, 38

(1999). Naturally those with drug use problems severe enough to land them in rehabilitative facilities may struggle at some point to maintain employment. But such studies provide no basis for drug testing *all* TANF applicants, especially when the most recent Florida-specific study found that drug use in that population did not affect employability. Resting even a portion of its analysis on such studies shows that Florida's program is undergirded by shoddy stereotypes, not legitimate science.

The extreme variance in social science results regarding drug use and abuse rates in populations receiving government benefits—coupled with recent Florida-specific data that fails to reveal heightened drug use or correlated employability issues—does not come close to establishing the exceptional circumstances necessary to justify circumventing the Fourth Amendment in favor of suspicionless searches. Though "[a] demonstrated problem of drug abuse * * * [is] not in all cases necessary to the validity of a testing regime," some showing is required to "shore up an assertion of special need for a suspicionless general search program." *Chandler*, 520 U.S. at 319. Even considering all available social science data, Florida has failed to demonstrate that drug use by TANF recipients surpasses drug use by the population as a whole on the national level or in Florida, and has accordingly failed to demonstrate its "special need" contention.

CONCLUSION

For the foregoing reasons, as well as those in appellees' brief, the District Court's preliminary injunction should be affirmed.

Respectfully submitted,

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March 6, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) , I hereby certify that the foregoing brief was produced using the Times New Roman font and contains 5,265 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

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