

Get Clean or Get Out: Landlords Drug-Testing Tenants

David Lang*

I. INTRODUCTION

The Anti-Drug Abuse Act of 1988 states, "It is the declared policy of the United States Government to create a Drug-Free America by 1995."¹ Analysis of the *Status Report on Missouri's Alcohol and Drug Abuse Problems* reveals, however, that this country still suffers from a drug abuse problem.² The number of drug-related crimes committed annually is even more alarming than the number of drug users.³ Although these crimes are not limited to a particular type of neighborhood, congressional findings reveal that drug-related crimes pervade low-income housing.⁴

Community leaders, frustrated by the inability to control drug use through traditional law enforcement efforts, have begun to focus their attention on "absentee landlord[s]," stating that landlords may be held liable for criminal activities that occur on their properties.⁵ Courts

* J.D. 2000, B.S.B.A. 1996, Washington University. The author would like to thank Carl and Gail Lang, Agelo Reppas, and Cherie Faulkner for their invaluable comments and suggestions on various aspects of this Note.

1. Abuse Act of 1988 Pub. L. 100-690, Title V, § 5251, Nov. 18, 1988, 102 Stat. 4309.

2. Randall C. Smith, Christie J. Lundy, & Michael S. Givel, *STATUS REPORT ON MISSOURI'S ALCOHOL AND DRUG ABUSE PROBLEMS* (Mo. Dept. of Mental Health/Division of Alcohol and Drug Abuse) (4th ed. 1998). This report presents substance abuse data at the national, state, regional, county, and at some city levels. The county data includes information on driving while intoxicated, arrests, types of reported drug problems, health statistics of abusers, and other related information.

3. *Id.*

4. 42 U.S.C. § 11901(2)-(3) (1994). "Congress finds that . . . public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime . . . [and that] drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants." *Id.*

5. Lawrence Shoffner & George Sumnik, *Controlling Drug-Related Activity in Residential Leaseholds*, 70 MICH. B.J. 168, 168 (1991). *See, e.g., Landowners' Liability for Criminal Acts Committed by Third Parties: Recent Developments*, 10 NO. 1 VERDICTS,

have held landlords liable for damages to crime victims upon a finding that either the condition of the landlord's property contributed to the crime, or there was a failure to warn the victim of the risk of crime.⁶ Courts also use public nuisance statutes to hold landlords liable for the illegal acts of their tenants.⁷ These laws may require a landlord to pay fines, evict tenants, or even close the property for up to one year.⁸

Forfeiture statutes are even worse than nuisance statutes for landlords and building owners.⁹ Under these statutes the illegal activities of a tenant create the risk of civil forfeiture of the landlord's property.¹⁰ For example, even if law enforcement officials find only one tenant using drugs illegally in an isolated part of a building, they

SETTLEMENTS & TACTICS, Jan. 1990, at 2 (discussing the varying degrees of liability which different types of landowners face).

6. B. A. Glesner, *Landlords As Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 708 (1992).

7. *See, e.g.*, FLA. STAT. ANN. § 823.01 (West 1994); MICH. COMP. LAWS ANN. § 600.3820 (West 1987); S.C. CODE ANN. § 15-43-10 (Law. Co-op. 1977); TENN. CODE ANN. § 29-3-101 (1998); UTAH CODE ANN. § 47-1-1 (1998). *See also* 58 AM. JUR. 2D *Nuisances* §§ 229-232 (1989). A landlord may also be liable for a tenant's conduct in a private nuisance action. *See* RESTATEMENT (SECOND) OF TORTS §§ 357-58, 837 (1977).

8. *Id.*

9. At the federal level section 881 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 addresses the forfeiture of property used in connection with illegal drugs. 21 U.S.C. § 881(a)(9) (1997). At the state level the structure of forfeiture statutes follows the Controlled Substances Act of 1970. *Id.*

10. A criminal conviction of the tenant or landlord is not necessary to invoke a civil forfeiture action. *See* *United States v. \$152,160.00 United States Currency*, 680 F. Supp. 354, 356, 358 (D. Colo. 1988) (holding that a criminal indictment is not necessary to commence a civil forfeiture hearing). In a civil forfeiture action, the government need only show probable cause existed to link the property to drugs. *See* *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625, 628 (11th Cir. 1986) (stating that under § 881(a)(6) "the United States must establish probable cause to believe that a substantial connection exists between the property to be forfeited and an illegal exchange of a controlled substance . . . the government is not required to show that the property is owned by a drug trafficker, but rather that it has a substantial connection to a drug transaction") (internal citation omitted); *See also* *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). Thereafter, the burden shifts to the landlord to prove either that the property was not used to facilitate a drug violation or that the tenant's illegal use was without the landlord's knowledge or consent. *See* *United States v. 5 Bell Rock Road*, 896 F.2d 605, 610-12 (1st Cir. 1990) (internal citations omitted) (upholding summary judgment for government because landowners did not meet their burden); *United States v. 526 Liscum Drive*, 866 F.2d 213, 216 (6th Cir. 1989) (stating that once the government shows probable cause, "the burden then shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture") (internal citations omitted).

may seize the entire building.¹¹

Therefore, the question is whether landlords must police their tenants to ensure that drug related problems do not exist on their property. An expectation exists that landlords should know what occurs on their property and exercise control over it.¹² Of course, meeting this expectation is not easy given that laws protect tenants' privacy and enjoyment of their homes from landlord interference.¹³ In order to maintain control over property without infringing on tenants' rights, landlords need better screening techniques to keep out troublesome tenants.¹⁴ For this reason landlords should be able to impose drug testing on tenants as a precondition of entering into a lease agreement.

Part II of this Note provides a background of drug testing in housing situations and identifies current laws and statutes that deal with screening tenants and discrimination. Part III discusses the Supreme Court's views on suspicionless drug testing. Part IV applies the Supreme Court's views on suspicionless drug testing to the housing situation and discusses the constitutionality of drug testing tenants. Part V outlines considerations and problems that may arise when the landlords decide to implement a drug testing program.

II. THE PRESENT STATE OF DRUG TESTING IN HOUSING AND ANTI-DISCRIMINATION LAWS

The use of drug tests in the United States is increasing because the testing methods are becoming less expensive and more reliable.¹⁵

11. *United States v. 141st Street*, 911 F.2d 870, 880 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (holding that an entire parcel of land may be subject to forfeiture even if only part of it is directly connected to drug activity); *United States v. 16 Clinton Street*, 730 F. Supp. 1265, 1267-68 (S.D.N.Y. 1990) (stating that the police could seize an entire building after a drug arrest occurred on the first floor).

12. *Shoffner & Sumnik*, *supra* note 5, at 168.

13. *Id.*

14. Tenant screening agencies are available to landlords but are controversial and often ineffective. For a discussion on Tenant Screening Agencies, see David J. D'Urso, *Tenant Screening Agencies: Implications For Landlords And Tenants*, 26 REAL EST. L.J. 44 (1997).

15. It is important to note that although the testing methods are becoming more reliable, the accuracy may not improve due to intense competition and laboratory imperfections. See *infra* note 181 and accompanying text.

Drug testing is already imposed on employees in the workplace,¹⁶ athletes in schools,¹⁷ and candidates for public programs.¹⁸ Additionally, landlords are beginning to require that tenants submit to drug testing as a condition of entering into a lease.¹⁹

Although current laws do not expressly forbid landlords from drug testing tenants, a number of acts and statutes regulate what landlords may require of their tenants. These acts regulate inquiries made of drug users and curtail discrimination against people with disabilities.²⁰

16. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 609-10 (1989) (discussing how the Federal Railroad Administration requires railroads to conduct blood and urine tests of covered employees following certain major train accidents or incidents); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660-61 (1989) (stating that the United States Customs Service implemented a program mandating urinalysis tests for Service employees seeking placement in positions that require direct involvement in drug interdiction, that the incumbent carry firearms, or the handling of "classified" material); *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221, 1226 (10th Cir. 1997) (describing an employer's policy which required all employees to report their use of prescription drugs and submit to random drug testing); *Bluestein v. Skinner*, 908 F.2d 451, 453 (9th Cir. 1990) (stating that the Federal Aviation Administration requires random drug testing of certain groups of employees); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 205-06 (Cal. Ct. App. 1989) (holding that a private employer could ask all job applicants to consent to a urinalysis which tests for alcohol and other drugs as a condition for an offer of employment).

17. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 665 (1995) (finding that a school district may conduct random drug testing of students who participate in its athletic programs).

18. *Hunsaker v. Contra Costa County*, 149 F.3d 1041, 1042-44 (9th Cir. 1998) (finding that a county may administer a substance abuse screening inventory and a pen-and-paper screening test to recovering or recovered drug and alcohol addicts who are applying for the County's general assistance program without violating the Americans with Disabilities Act). *See also* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 902, 21 U.S.C. § 862(b) (1997) (giving states the power to drug test welfare recipients and sanction those who test positive).

19. Lane Kelley, *Wanted: Drug-Free Tenants, Landlords of Formerly Crime-Ridden Complex Require Urine Tests*, SUN-SENTINEL, Apr. 4, 1998, at 1A (reporting that Silent Apartments in Fort Lauderdale now requires drug tests of their tenants); Faye Bowers, *Wanted: Drug-Free Tenant, Must Pass Test: Florida housing complex screens residents for drugs*, CHRISTIAN SCIENCE MONITOR, Nov. 19, 1996, at 3 (reporting that the Congress Park complex in Lake Worth, Florida is a tax credit project which drug tests prospective tenants and current tenants upon lease renewal); Angela D. Chatman, *Drug Testing of Renters Draws Mixed Reactions*, THE PLAIN DEALER, Oct. 1, 1994, at 9 (reporting that Summerwood Commons in Cleveland requires applicants to submit to drug tests).

20. Certain people who have a history of drug abuse may fall under the definition of "individual with a disability." *See infra* notes 26, 33, 44 and accompanying text.

A. The Rehabilitation Act of 1973 § 504

Section 504 of the Rehabilitation Act of 1973²¹ prohibits discrimination against individuals with disabilities participating in programs or activities that receive federal assistance.²² Many apartment buildings receive federal assistance in the form of rent subsidies or tax credits for developers;²³ thus, these buildings fall within the scope of this Act.²⁴

Section 504 defines “individual with a disability”²⁵ to include individuals with a past history of drug abuse.²⁶ Section 504, however,

21. Rehabilitation Act of 1973, 29 U.S.C. § 701 (1999).

22. *Id.* § 794(a).

23. Referring in particular to the low-income housing credit. I.R.C. § 42 (1998). This credit is offered to developers who build income geared towards low-income residents. *Id.*

24. “Program or activity” covered under this act includes operations of a private organization that receives government aid or is primarily engaged in the business of providing services such as housing. 29 U.S.C. § 794(b)(3)(A).

25. *Id.* § 705(20)(A):

Except as otherwise provided . . . the term “individual with a disability” means any individual who . . .

(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and

(ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I [29 U.S.C. § 720 et seq.], III [29 U.S.C. § 771 et seq.], or VI [29 U.S.C. § 795 et seq.] of this chapter.

Id.

26. *Id.* § 705(20)(C)(ii):

Nothing . . . shall be construed to exclude as an individual with a disability an individual who—

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter [29 U.S.C. § 701 et seq.] for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

Id.

does not protect individuals who are presently using drugs.²⁷ Therefore, entities may drug test individuals to determine whether or not they are presently using drugs.²⁸

B. *The Fair Housing Act*

The Fair Housing Act (FHA)²⁹ prohibits disability discrimination with respect to rental housing.³⁰ The FHA uses a slightly different definition of a disability than the Rehabilitation Act,³¹ but the FHA still specifically prohibits current illegal drug use³² and recognizes past drug use as a disability.³³

Three exceptions to the FHA's prohibition against disability discrimination exist. First, the FHA specifically excludes current illegal use of a controlled substance from the definition of "disability."³⁴ Second, the FHA does not require that a dwelling be

27. 29 U.S.C. § 794(a) refers to the definition in § 706(20) (current version at 29 U.S.C. § 705(20) (1999)). "For purposes of subchapter V of this chapter [29 U.S.C. § 790 et seq.], the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use." 29 U.S.C. § 705(20)(C)(i).

28. *Id.* § 705(20)(C)(ii).

29. Fair Housing Act (FHA), 42 U.S.C. § 3601 (1994). In 1988, Congress passed the Fair Housing Amendments Act (FHAA), which expanded the coverage of the Fair Housing Act to include people with disabilities.

30. *Id.* § 3604. The FHA is applicable to all dwellings receiving federal assistance except, under limited circumstances, a single family house that is sold or rented by an owner who is not in the business of selling or renting dwellings. *Id.* § 3603.

31. *Id.* § 3602(h):

"Handicap" means, with respect to a person –

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

Id.

32. *Id.*

33. *See* United States v. Southern Mgmt. Corp., 955 F.2d 914, 922-23 (4th Cir. 1992) (holding that "recovering addicts" with a one year record of sobriety qualify as disabled under the FHA).

34. 42 U.S.C. § 3602(h): "[B]ut such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21)." *See also* Southern

made available to an individual who may be a risk to other tenants or their property.³⁵ Third, nothing in the FHA prohibits conduct against a person who has been convicted of manufacturing or distributing a controlled substance.³⁶

C. Anti-Drug Abuse Act of 1988

The Anti-Drug Abuse Act of 1988³⁷ expands the ability to deny benefits to drug users. The Act seeks to prohibit the manufacture, distribution, and illegal use of drugs.³⁸ Accordingly, the Act denies federal benefits to convicted drug possessors for up to one year, to first-time drug traffickers for up to five years, and to third-time traffickers permanently.³⁹ Deniable benefits include grants, contracts, loans, and professional or commercial licenses but exclude welfare and public housing.⁴⁰ A public housing tenant, however, is eligible for eviction if the tenant, a member of the tenant's household, or "a guest or other person under the tenant's control" is involved in "drug-related criminal activity."⁴¹

D. The Americans With Disabilities Act of 1990

Congress enacted the Americans with Disabilities Act (ADA)⁴² to provide broad protection for individuals with disabilities.⁴³ The Act prohibits discrimination against a qualified individual with a disability because of that disability. The term "disability" includes past drug use⁴⁴ but excludes current drug use.⁴⁵ The ADA protects

Mgmt., 955 F.2d at 922-23.

35. 42 U.S.C. § 3604(f)(9).

36. *Id.* § 3607(b)(4).

37. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of U.S.C.).

38. Anti-Drug Abuse Act of 1988 preamble, Pub. L. No. 100-690, 102 Stat. 4181.

39. 21 U.S.C. § 862 (1997).

40. *Id.*

41. 42 U.S.C. § 1437(d)(1)(5) (1994).

42. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 (1997).

43. *Id.* § 12101(b).

44. *Id.* § 12210(b):

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who-

those who either participate in or have successfully completed a supervised drug rehabilitation program and who no longer engage in illegal drug use.⁴⁶

Although the ADA does not specifically discuss inquiries made regarding housing tenants, it does discuss inquiries made regarding employees. The ADA prohibits disability-related inquiries regarding employees,⁴⁷ for example, inquiries into past drug use. The ADA does not prohibit, however, inquiry into current drug use.⁴⁸ Inquiries must be made in a manner that does not require an individual to provide information that is likely to reveal a disability.⁴⁹

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

Id.

45. *Id.* § 12210(a). “[T]he term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs. . . .” *Id.*

46. *Id.* § 12210(b).

47. *Id.* § 12112(d)(4)(A). A covered entity may inquire into the nature or severity of a disability if it is shown to be job-related and consistent with business necessity. *Id.*

48. The ADA allows for the “adopt[ion] or administ[r]ation of] reasonable policies or procedures, including but not limited to drug testing.” *Id.* § 12114(b). The ADA also does not prohibit requiring those with a history of addiction to submit to more frequent testing than other employees. *See Buckley v. Consolidated Edison*, 155 F.3d 150, 155 (2d Cir. 1998) (stating that the employer administered generally accepted substance-abuse urine tests to employees identified as “former substance abusers” more frequently than it did to other employees).

49. 42 U.S.C. § 12112(d)(4)(A). An applicant can be subjected to a drug test, but the employer cannot be provided information regarding the employee’s current medications absent business necessity and job-related reasons. *See Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153, 1155 (D. Colo. 1996) (citing 42 U.S.C. § 12112(d)(4)(A)), *modified*, 124 F.3d 1221, 1237 (10th Cir. 1997) (holding that the employer could not require employees to disclose the legal prescription medication that they use absent a showing of business necessity).

E. Housing And Urban Development Regulations

The Department of Housing and Urban Development (HUD) established regulations regarding the type of inquiries that a public housing authority can make of prospective tenants.⁵⁰ Although these regulations specifically exclude certain landlords,⁵¹ such as those who provide Section 8 housing to the elderly,⁵² these regulations do give landlords guidance as to the elements of a permissible inquiry.

These regulations prohibit any inquiry into the existence or degree of a disability of an applicant for a dwelling or any person intending to reside in the dwelling.⁵³ However, landlords may inquire as to whether an applicant is a current illegal drug user⁵⁴ or has been convicted of manufacturing or distributing an illegal controlled substance if they ask all applicants, regardless of whether or not they have a disability.⁵⁵

The HUD regulations also require that “[a]dequate procedures” be developed to verify applicant information.⁵⁶ Suggested sources of information include drug treatment centers, clinics, and physicians, if warranted.⁵⁷

F. Housing Opportunity Program Extension Act of 1996

The Housing Opportunity Program Extension Act of 1996 (“Extension Act”)⁵⁸ provides guidelines for determining eligibility for assisted housing.⁵⁹ The Extension Act requires that public-housing authorities take steps to prevent individuals from receiving public housing assistance if their past drug use or alcohol abuse may interfere with the health, safety, or peaceful enjoyment of the

50. 24 C.F.R. § 100.202(c) (1993).

51. *Id.* § 100.10(a).

52. *Id.* § 100.10(b).

53. *Id.* § 100.202(c).

54. *Id.* § 100.202(c)(4).

55. *Id.* § 100.202(c)(5).

56. *Id.* § 960.206(a).

57. *Id.* § 960.206(b).

58. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codified as amended in scattered sections of U.S.C.).

59. 42 U.S.C. § 1437n(a)-(d) (1998).

property by other residents.⁶⁰

The United States Court of Appeals for the Eighth Circuit recently reviewed a case in which a public-housing authority rejected an applicant because of his past drug use. In *Campbell v. Minneapolis Public Housing Authority*, the Minneapolis Public Housing Authority (MPHA) denied Campbell's application for housing⁶¹ based upon his answers to the application questions, a letter of reference that mentioned his past drug use, and medical information obtained pursuant to a release form.⁶² Campbell challenged the denial, claiming that his past drug addiction is a protected disability.⁶³

The court held that the Housing Opportunity Program Extension Act of 1996 supersedes the federal, state, and local statutes and regulations upon which Campbell relies.⁶⁴ The court concluded that the phrase, "[n]otwithstanding any other provision of law," signals that the Extension Act supersedes other statutes that might conflict with the Act.⁶⁵ Therefore, the court reasoned that it did not need to

60. *Id.* § 1437n(e)(1)(A). This statute was repealed Pub. L. 105-276, tit. V, § 576(a)(2) (Oct. 21, 1998).

61. *Campbell v. Minneapolis Public Housing Authority*, 168 F.3d 1069, 1071 (8th Cir. 1999).

62. The MPHA's application included the following question (Question 7): "Have you or any member of your family intending to live with you in public housing EVER been in a detoxification center or a chemical dependency treatment program? . . . If yes, where?" *Id.* at 1071 (citing Appellants' App. at 48, *Campbell v. MPHA*, 175 F.R.D. 531 (D. Minn. 1997). The MPHA also required applicants to sign a release form, allowing the MPHA to obtain "[t]reatment summaries, program involvements, case plans, and detox admissions" from the Hennepin County community Services Chemical Health Division. *Id.*

63. *Id.* at 1072. The MPHA argued that its inquiries were permissible under the Housing Opportunity Program Extension Act of 1996 ("Extension Act"), 110 Stat. 834, 837-38 (1996) (codified at U.S.C. § 1437n(1)(e) (West Supp. 1998)). *Id.* This Act "requires public-housing authorities to take steps to prevent persons with a history of illegal drug use or alcohol abuse from receiving public housing assistance if the drug use or alcohol abuse 'may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents of the project.'" *Id.* at 1073 (citing 42 U.S.C. § 1437n(e)(1)(A) (West Supp. 1998)).

64. *Id.* at 1074. The court referred to Section 9 of the Extension Act (codified as 42 U.S.C. § 1437n(e)(1)(A) (West Supp. 1998)). *Id.* at 1074-75. Campbell claimed that his disability was protected under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1994); § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994); the Americans with Disabilities Act of 1990(ADA), 42 U.S.C. §§ 12131-12134 (1994); the United States Housing Act, 42 U.S.C. § 1437-1437ff (1994); federal regulations implementing these statutory provisions; the Minnesota Human Rights Act, Minn. Stat. § 363.03 subd. 4 (1996); and the Minneapolis Civil Rights Ordinance, Minneapolis, Minn., Code of Ordinances tit. 7, § 139 (1991). *Id.* at 1072.

65. *Id.* at 1075 (quoting *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("As we

consider the interaction between section 9 of the Extension Act and the various anti-discrimination provisions that Campbell claims the MPHA violated.⁶⁶ This case was decided by a court of appeals; therefore, there is a possibility that the Supreme Court may rule that the Extension Act does not supersede the various anti-discrimination provisions.

G. Quality Housing And Work Responsibility Act of 1998

Congress amended section 1437n of the Extension Act on October 21, 1998.⁶⁷ The new Quality Housing and Work Responsibility Act of 1998 became effective October 1, 1999.⁶⁸ The Act allows public housing agencies to require that public housing applicants sign a written consent.⁶⁹ The consent authorizes the agency to inquire whether a drug abuse treatment facility has reasonable cause to believe that an applicant is currently using a controlled substance illegally.⁷⁰ In addition, tenants who have been evicted from public housing will not be eligible for federally assisted housing for three years from the eviction date.⁷¹

have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override the conflicting provisions of any other section.""); *Schneider v. United States*, 27 F.3d 1327, 1331-32 (8th Cir. 1994) (enforcing the plain language of a similar "notwithstanding" clause), *cert. denied*, 513 U.S. 1077 (1995). The Extension Act seeks to free public housing from the scourge of illegal drug use and alcohol abuse. According to the Act, the MPHA may pursue this congressional mandate without regard to whether its actions comply with other state or federal statutes. *Id.*

66. *Id.*

67. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 501, 1998 U.S.C.C.A.N. (112 Stat.) 2518 (1998), amended by 42 U.S.C. § 1437 (1998).

68. *Id.* § 503.

69. *Id.* § 575(u)(1)-(2).

70. *Id.*

71. *Id.* § 576(a). This provision may be waived if the tenant has successfully completed a rehabilitation program approved by the public housing agency. *Id.*

III. THE SUPREME COURT'S VIEW OF SUSPICIONLESS DRUG TESTING

Suspicionless drug testing of tenants prior to signing a lease enables landlords to protect themselves, as well as their tenants, from drug related problems.⁷² However, drug testing gives rise to a number of constitutional issues. For example, the Fourth Amendment guarantees the right to be secure against unreasonable searches and seizures.⁷³ A search is “unreasonable” if it is conducted without a warrant that is based on probable cause.⁷⁴ In recent years the Court has carved out numerous exceptions to this requirement⁷⁵ and has

72. Suspicionless drug testing of all tenants necessitates screening out the problem-tenants before they have an opportunity to move into the building. Drug testing tenants after they have entered into a lease will not solve the problem. Once a problem tenant has entered the building, everybody may be at risk. Other tenants may face dangerous criminal activity, and the landlord may face costly sanctions and liability.

73. U.S. CONST. amend. IV:

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

Id. The guarantees of the Fourth Amendment apply to the federal government and government employers. *See O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (holding that searches and seizures by government employers or supervisors of the private property of their employees are subject to the Fourth Amendment). The guarantees do not apply to a private party who initiates a search or seizure. *See United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984) (holding that the Fourth Amendment applies to searches conducted by a private party only if the party acted as an instrument of the Government). *See also Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 205-06 (Cal. Ct. App. 1989) (holding that Matthew Bender, a private employer, did not violate Article I, Section 1 of the California Constitution, which declares that privacy is among the people's “inalienable rights,” by requiring pre-employment drug testing because the applicants had notice of the drug testing policy, the samples were collected during a regular pre-employment physical examination under conditions designed to minimize intrusiveness, and access to the test results were restricted).

74. *See Katz v. United States*, 389 U.S. 347, 357 (1967) (internal citations omitted). “Searches conducted without warrants have been held unlawful . . . [and] per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Id.* (internal citations omitted).

75. “Exceptions have been made for investigatory detention, warrantless arrests, seizure of items in plain view, consent searches, exigent circumstances, searches of containers, inventory searches, border searches, administrative searches, searches at sea, and special needs.” Nathan A. Brown, Recent Development, *Reining in the National Drug Testing Epidemic Chandler v. Miller*, 33 HARV. C.R.-C.L. L. REV. 253, 255 n.14 (1998) (citing to Greg Knopp et al., Project, *Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1993-1994*, 83 GEO. L.J. 665, 692 (1995)); *see also* Silas J. Wasserstrom, *The Incredible Shrinking of the Fourth Amendment*, 21 AM. CRIM. L. REV. 257

adopted a more flexible standard. This new standard of reasonableness balances individual interests against governmental interests.⁷⁶

The Fourteenth Amendment also protects against deprivation of “life, liberty, or property” without due process of law.⁷⁷ The Supreme Court has held that the Fourteenth Amendment due process guarantee extends to searches and seizures by state officers⁷⁸ and public school officials.⁷⁹ The current trend, however, is to use a balancing-of-interests approach similar to the one applied in “reasonableness” inquiries.

A. *Skinner v. Railway Labor Executives’ Association*

In *Skinner v. Railway Labor Executives’ Association*, the Supreme Court upheld the constitutionality of drug testing railroad personnel involved in train accidents, regardless of suspected drug use.⁸⁰ The Court first decided that the Fourth Amendment applied because government endorsement and participation were extensive enough to

(1984) (analyzing the movement away from the requirements of a warrant and probable cause in favor of a general standard of reasonableness).

76. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). See also, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (applying a balancing test to validate frisking a person suspected of being armed and dangerous) (citing *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 534-37 (1967)). In *Camara*, the Court validated the issuance of search warrants for civil inspections by balancing the government’s need for the search against the invasion of privacy that the search entails. *Id.*

77. U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

78. See *Elkins v. United States*, 364 U.S. 206, 223-24 (1960) (extending the Fourth Amendment’s guarantees against unreasonable searches and seizures to searches conducted by state law enforcement officers) (internal citations omitted).

79. See *New Jersey v. T.L.O.*, 469 U.S. 325, 333-36 (1985) (holding that the Fourth Amendment applies to public school officials because they are representatives of the State).

80. *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 633-34 (1989). The respondents’ claims for an injunction were denied and the Court held that the regulations did not violate the Fourth Amendment ban against unreasonable searches. *Id.* at 634.

make any private actor who complied with the Federal Railroad Administration's (FRA's) regulations an agent or instrument of the government.⁸¹ Furthermore, the Court considered the FRA's tests "searches" under the Fourth Amendment.⁸²

The Court then discussed the reasonableness of the search. In determining "reasonableness," the Court balanced the burden of infringing upon employees Fourth Amendment rights against the Government's interest in conducting the search. The Court held that the importance of the Government's interest in ensuring railroad safety outweighed the intrusion on employees' privacy.⁸³ The majority dispensed with the usual Fourth Amendment requirements of warrant, probable cause, and reasonable suspicion.⁸⁴ The Court reasoned that no warrant was necessary because a "special needs"⁸⁵ circumstance was present.⁸⁶

Although courts generally continue to require reasonable suspicion even when a warrant is not required,⁸⁷ the Court circumvented the probable cause or reasonable suspicion requirement⁸⁸ in this case because the employees worked in a highly regulated industry⁸⁹ and the procedures for collecting urine were nonintrusive.⁹⁰ According to the Court, these factors diminish the

81. *Id.* at 614.

82. The Court found that blood and breath tests clearly constituted searches. *Id.* at 616-17. Urine tests, although lacking the invasiveness of surgical procedures, were also deemed searches that intruded upon reasonable societal expectations of privacy. *Id.* at 617.

83. *Id.* at 631-32.

84. *Skinner*, 489 U.S. at 633-34. The requirement of a warrant has been frequently waived where the intrusion was narrowly limited in its objective and scope. *Id.* at 621-22. The Government will also waive the warrant requirement when "the burden of obtaining a warrant [was] likely to frustrate the governmental purpose behind the search." *Id.* at 623 (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 533 (1967)). The *Skinner* Court was concerned that the delay caused by having to procure a warrant would result in the destruction of valuable evidence because alcohol and drugs might be eliminated from the bloodstream before a warrant is obtained. *Skinner*, 489 U.S. at 623.

85. *Id.* at 620. For a discussion of the evolution of "special needs" exceptions, see *id.* at 637-41 (Marshall, J., dissenting).

86. *Id.* at 634.

87. *Id.* at 624.

88. *Id.*

89. The privacy expectations of the tested employees were diminished by the fact that they worked in an industry that is highly regulated by the federal and state governments to ensure safety. *Skinner*, 489 U.S. at 627-28.

90. The regulations governing the collection of the urine necessary for the drug tests

employees' expectations of privacy, especially where the concern is industry safety.⁹¹ The Court relied on the FRA's argument that an employee's drug impairment may not be otherwise detectable; therefore, a drug test affords the only effective method of discovering drug use.⁹²

B. National Treasury Employees Union v. Von Raab

In *National Treasury Employees Union v. Von Raab*, the Supreme Court upheld the constitutionality of the random drug testing of federal customs officers who carry firearms or who are involved in drug interdiction.⁹³ After applying the Fourth Amendment's balancing test, the Court held that the government's need to conduct suspicionless searches outweighed the privacy interests of employees engaged directly in drug interdiction or employees required to carry firearms.⁹⁴

Like *Skinner*, the Court found only a slight intrusion upon employees' privacy interests.⁹⁵ The *Von Raab* Court reasoned that the employees should have an increased expectation of inquiries into their fitness and probity because of the nature of their job.⁹⁶

further reduced the intrusiveness of the collection process by requiring that the samples be furnished in a medical environment without direct observation. *Id.* at 626-27. However, Justice Marshall, in his dissent, suggested that compelling a person to produce a urine sample on demand intrudes deeply on both privacy and bodily integrity. *Id.* at 645-47.

91. *Id.* at 627.

92. *Id.* at 628-30.

93. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989).

94. *Id.* at 668. The Court stressed the important role that the Customs Service provides in fighting the national drug problem. *Id.* The government has a "compelling interest" to ensure that these employees are "physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. The public should not be put at risk by employees who are impaired by drug use and are in positions where deadly force is sometimes utilized. *Id.* at 670-71.

95. The employees were given advance notice of the urinalysis test. *Id.* at 661. Upon reporting for the test, which was conducted by an independent contractor, the employees were asked to remove only outer garments and personal belongings. *Id.* The employees had the choice of producing the sample behind a partition or in a bathroom stall while monitors, who were the same sex as the employees, remained within close proximity to listen for the normal sounds of urination. *Id.* In addition, "dye [was] added to the toilet water to prevent the employee[s] from using the water to adulterate the sample." *Id.* By only testing certain groups of employees and giving those employees advance notice of the drug test, government officials ensured that the intrusion upon an individual's privacy was minimized. *Id.* at 672 n.2.

96. *Id.* at 672.

Moreover, the intrusion was slight because the urine samples could be examined only for specified drugs, not other substances.⁹⁷ Furthermore, the employees were not required to disclose personal medical information to the government unless their test results were positive.⁹⁸ In this situation the Court determined that a warrant was not required under the Fourth Amendment.⁹⁹ A warrant would provide little, if any, additional protection of an employee's privacy interest because the program was narrowly defined and well known to affected employees.¹⁰⁰

In *Skinner* and *Von Raab*, the Court developed the "compelling need" test for balancing privacy interests against governmental interests. According to this test, if the government has a "compelling need" to conduct drug tests, and that need outweighs a person's privacy interests, then the drug test is constitutional under the Fourth Amendment.

However, it is important to note a major difference between *Skinner* and *Von Raab*.¹⁰¹ The holding in *Skinner* was based, at least in part, on the fact that the FRA produced data linking drug and alcohol use to serious train accidents.¹⁰² The testing scheme in *Skinner* addressed a substantiated menace to public safety. In contrast, *Von Raab* dealt with only slight evidence of both drug use and harmful incidents resulting from employee drug use.¹⁰³ The compelling governmental interest identified by the Court in *Von Raab* was not to rid the United States Customs Service of drug users

97. *Von Raab*, 489 U.S. at 673 n.2.

98. *Id.* at 673 n.2.

99. *Id.* at 666.

100. *Id.* at 667.

101. This difference was addressed in Justice Scalia's dissenting opinion. *Id.* at 680. Scalia, with whom Stevens joined, dissented because neither frequency of drug use nor the connection of drugs to the harm was demonstrated. *Id.* at 681.

102. The opinion begins with a discussion of the proven incidence of alcohol and drug abuse among railroad employees involved in serious accidents. *Skinner*, 489 U.S. at 606-08. In addition, Justice Scalia admitted that he joined the majority because the FRA data linked substance abuse to train accidents. *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting).

103. *Von Raab*, 489 U.S. at 673. The majority admitted that only five of 3,600 customs employees tested positive for drugs. *Id.* The dissent also mentioned the paucity of this data and the nonexistent connection between drug use and harm. *Id.* at 682-84 (Scalia, J., dissenting). The majority answered this objection by comparing the Customs Service testing program to suspicionless searches of passengers and carry-on luggage at airports, where searches are justifiably undertaken to prevent possible harm. *Id.* at 675 n.3.

who caused serious problems in the past.¹⁰⁴ The Government's interest was to prevent the United States Customs Service from promoting drug users to positions where they might endanger the lives of citizens or the integrity of our National borders.¹⁰⁵ The Court seemed to only require a showing that the drug testing program was instituted not to cure a pre-existing harm but to avoid potential, serious, drug-related harms.

C. Vernonia School District 47J v. Acton—The Liberal Approach to Drug Testing

Based on *Skinner* and *Von Raab*, a “compelling need” for a suspicionless drug testing policy existed only when the government established that public safety or national security were in danger.¹⁰⁶ In its next case dealing with suspicionless drug testing, the Court moved away from the “compelling need” test and encouraged more suspicionless drug testing programs.

In *Vernonia School District 47J v. Acton*, the Supreme Court upheld the constitutionality of a school district's policy of randomly drug testing student athletes.¹⁰⁷ In determining the “reasonableness” of a search under the Fourth Amendment, the Court balanced the intrusion on the student's Fourth Amendment interests with the promotion of legitimate governmental interests.¹⁰⁸

The Court first looked at the nature of the privacy interest involved.¹⁰⁹ The drug testing policy was aimed at children who were temporarily in the custody of the “State as schoolmaster.”¹¹⁰ The

104. The testing program that was challenged did not drug test all Customs Service employees. The program only tested those “employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring the incumbent to carry firearms or to handle ‘classified’ material.” *Id.* at 656.

105. *Id.* at 679.

106. *See supra* notes 80-105 and accompanying text (discussing the *Skinner* and *Von Raab* decisions).

107. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 664-65 (1995).

108. *Id.* at 652-64 (internal citations omitted).

109. *Vernonia*, 515 U.S. at 654. “The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as ‘legitimate.’” *Id.* What constitutes “legitimate” expectations varies with the context and depends upon whether the individual asserts the privacy interest at home, at work, in a car, or in a public place. *Id.*

110. *Id.* Children who are subject to the guardianship of the school have a diminished

Court stated that the children's expectation of privacy was diminished because they were routinely required to submit to various physical examinations and vaccinations.¹¹¹ The student athletes who were tested had an even lower expectation of privacy than students who were not athletes because they chose to play sports,¹¹² subjecting themselves to changing and showering in public school locker rooms that lack privacy.¹¹³

The Court then examined the extent of the intrusion on privacy interests.¹¹⁴ They concluded that the privacy interest involved in obtaining the urine samples was "negligible" because the conditions were similar to those typically found in public restrooms.¹¹⁵

The Court also noted that the drug tests only screened for drug use and not for other conditions such as epilepsy, pregnancy, or diabetes.¹¹⁶ Positive test results were disclosed only to a limited number of school personnel, not law enforcement officials.¹¹⁷ The Court also followed its decision in *Skinner*, finding that disclosing

expectation of privacy. *Id.* at 655-57.

111. *Vernonia*, 515 U.S. at 656-57.

112. *Id.* at 657. The Court suggested that, by voluntarily becoming student athletes, these students "have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.* (internal citations omitted). For example, student athletes must submit to a physical examination prior to their participation in sports. *Id.* The Court analogized students who "choose" to participate in sports with adults who "choose" to work in a highly regulated industry. *Id.* (internal citations omitted). *See also supra* notes 87-92 and accompanying text (noting the *Skinner* Court's reasoning that privacy expectations of railroad employees are diminished by the fact that they work in an industry that is regulated by federal and state governments); *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (noting that when a firearms dealer chooses to engage in a highly regulated business, he or she does so with the knowledge that, where specifically authorized by statute, business records, firearms, and ammunition will be subject to inspection without a warrant).

113. *Vernonia*, 515 U.S. at 657. The locker rooms lacked individual dressing rooms, shower heads were "lined up" along one wall with no partitions or curtains, and some toilet stalls did not have doors. *Id.*

114. *Id.* at 658. The extent of intrusion "depends upon the manner in which production of the urine sample is monitored." *Id.* In addition to giving the urine samples, prior to the test student athletes were required to identify any prescription medications they were taking. *Id.* at 659.

115. *Vernonia*, 515 U.S. at 658. Male students produced urine samples at urinals, which were located along a wall. *Id.* The students remained fully clothed and were only observed from behind. *Id.* Female students produced urine samples in enclosed stalls while a female monitor stood outside to listen for "sounds of tampering." *Id.*

116. *Vernonia*, 515 U.S. at 658.

117. *Id.* (emphasis in original).

medications before the urine test was not “a significant invasion of privacy.”¹¹⁸

The privacy interests of the student athletes were then balanced against the governmental interest involved.¹¹⁹ In this case the Court moved away from the “compelling need” test used in *Skinner* and *Von Raab*, adopting a more liberal “important interest” test.¹²⁰ The Court stated that the Government’s interest was “important,” if not “compelling.”¹²¹ The Government has an interest in deterring schoolchildren from using drugs.¹²²

Despite the Court’s decision that drug testing student athletes was constitutional, the justices warned that in other contexts suspicionless drug testing may not be constitutional.¹²³ They stressed that the most significant element of this case was the government’s responsibility as guardian and tutor of children entrusted to the public school system.¹²⁴ The Court had to determine whether a reasonable guardian and tutor would conduct this search.¹²⁵ They found that, in this situation, the searches were reasonable.¹²⁶ The three dissenting judges,¹²⁷ however, found the lack of a “special need” detrimental to

118. *Id.* at 659 (quoting *Skinner*, 489 U.S. at 626, n.7). The *Vernonia* Court noted that it has “never indicated that requiring advance disclosure of medications is per se unreasonable.” *Id.* Furthermore, the school’s policy did not prohibit students from providing the requested information in a confidential manner. *Id.* at 660.

119. *Id.* at 660-61.

120. *Id.* at 661:

It is a mistake . . . to think that the phrase “compelling state interest,” in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.

Id. (emphasis in original).

121. *Vernonia*, 515 U.S. at 661. In both *Skinner* and *Von Raab*, the Court characterized the governmental interest as “compelling.” *Id.* at 660. In *Skinner*, the “compelling” interest was in preventing railroad accidents. *Id.* In *Von Raab*, the “compelling” interest was ensuring the fitness of customs officials who interdict the drug trade and/or carry firearms. *Id.* at 660-61.

122. *Id.* at 661-62. Drugs can potentially disrupt the entire educational process. *Id.* at 662. Drugs also pose substantial psychological and physical risks to athletes. *Id.*

123. *Id.* at 665.

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

125. *Id.* (citing *O’Connor v. Ortega*, 480 U.S. 709 (1987)).

126. *Id.*

127. Justice O’Connor, Justice Stevens, and Justice Souter dissented. *Id.* at 666.

this case.¹²⁸

D. Chandler v. Miller—*A Return to the “Special Need” Requirement*

In the spring of 1997, the Supreme Court handed down its first decision opposed to suspicionless drug testing. In *Chandler v. Miller*,¹²⁹ candidates for high office in Georgia challenged the constitutionality of a statute requiring candidates to submit to and pass a urinalysis drug test in order to qualify for state office.¹³⁰ The Supreme Court held that the required drug test amounted to an unconstitutional suspicionless search.¹³¹

The Court once again balanced the governmental interest against the individual’s expectation of privacy.¹³² The search was found to be relatively noninvasive; furthermore, the testing scheme may have been upheld if a special need had existed.¹³³ However, based upon *Skinner* and *Von Raab*, the Court found that the Georgia statute did not meet the “special need” requirement.¹³⁴

First, the Court did not find any “concrete danger” present to justify a departure from the Fourth Amendment.¹³⁵ Second, the Court

128. *Id.* at 676:

One searches today’s majority opinion in vain for recognition that history and precedent establish that individualized suspicion is “usually required” under the Fourth Amendment (regardless of whether a warrant and probable cause are also required) and that, in the area of intrusive personal searches, the only recognized exception is for situations in which a suspicion-based scheme would be likely ineffectual. . . Far from acknowledging anything special about individualized suspicion, the Court treats a suspicion-based regime as if it were just any run-of-the-mill, less intrusive alternative—that is, an alternative that officials may bypass if the lesser intrusion, in their reasonable estimation, is outweighed by policy concerns unrelated to practicability.

Id.

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

130. *Id.* at 310.

131. *Id.* at 309.

132. *Id.* at 313-22.

133. *Id.* at 318. Because the State permitted the candidate to provide a urine specimen in the office of her private physician and the candidate controlled dissemination of the results, the Court found that “the State has effectively limited the invasiveness of the testing procedure.” *Id.*

134. *Chandler*, 520 U.S. 305, 318.

135. *Id.* at 318-19. Georgia attempted to justify the statute by stating that it “serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office.” *Id.* The Court found no reason why ordinary law enforcement methods would not be sufficient to apprehend any illicit drug users running for office. *Id.* at 320. In distinguishing this

concluded that the governmental need was not “special,” but merely symbolic.¹³⁶ The Court emphasized Georgia’s failure to present evidence of an illicit drug use problem among politicians.¹³⁷ The Court contrasted *Skinner* and *Von Raab* with *Vernonia*, where the demonstrated problem of drug abuse substantiated an assertion of a “special need” to implement a suspicionless general search program.¹³⁸ Third, the Court found that the testing scheme in *Chandler* was insufficient to meet its intended objectives.¹³⁹ The Court concluded that the Fourth Amendment precludes suspicionless searches when public safety is not in jeopardy, even if the searches are conveniently arranged.¹⁴⁰

IV. APPLYING THE SUPREME COURT’S ANALYSIS TO HOUSING SITUATIONS

The present laws regulating landlords do not prohibit the drug testing of tenants; they merely prohibit discrimination against people with disabilities.¹⁴¹ “Disability” includes past drug use and addiction but specifically excludes present drug use.¹⁴²

Besides excluding the present drug user from protection under the acts, some of the laws specifically allow drug testing to determine whether an individual is using drugs.¹⁴³ The HUD Regulations allow

case from *Von Raab*, Justice Ginsberg reasoned that Customs Service agents cannot be subject to day-to-day scrutiny, whereas candidates for elective office “are subject to relentless scrutiny—by their peers, the public, and the press.” *Id.* at 321.

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

137. *Id.* at 318.

138. *Id.* (citing *Vernonia School District v. Acton*, 515 U.S. 646, 662-63 (1995); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 606-08 (1989)).

139. *Chandler*, 520 U.S. at 319-22. “In contrast to the effective testing regimes upheld in *Skinner*, *Von Raab*, and *Vernonia*, Georgia’s certification requirement is not well designed to identify candidates who violate antidrug laws.” *Id.* at 319. Under the statute, a candidate could schedule the test date any time within thirty days of qualifying for a spot on the ballot. *Id.* at 319-20. Hence, the Court believed that “users of illegal drugs . . . could abstain for a pretest period sufficient to avoid detection.” *Id.* at 320.

140. *Id.* at 323.

141. *See supra* notes 22-71 and accompanying text (discussing the present state of drug testing in the housing situation).

142. *See supra* notes 27, 31, 34, and 45 (defining an individual with a disability and excluding present drug users from that definition).

143. *See supra* notes 25-28 and accompanying text (defining “individual with a disability” under the Rehabilitation Act of 1973). *See supra* note 48 and accompanying text (discussing the

inquiries into tenants' present drug use.¹⁴⁴ Additionally, recent Housing Acts give public-housing authorities the broad power to "take steps" necessary to rid housing of drugs.¹⁴⁵ The common theme among these laws is that present illegal drug use is not allowed nor protected under the law. The Anti-Drug Abuse Act¹⁴⁶ allows for the denial of benefits and eviction of tenants if they, their family, or their guests are "involved in drug related activity."¹⁴⁷

A landlord has the right to inquire into a tenant's drug use; however, the manner of doing so must be constitutional.¹⁴⁸ To determine the constitutionality of drug testing tenants, the court must apply a balancing test similar to those applied in the Supreme Court cases. Drug tests, similar to those in *Skinner*,¹⁴⁹ *Von Raab*,¹⁵⁰ *Vernonia*,¹⁵¹ and *Chandler*,¹⁵² are searches that intrude upon

Americans With Disabilities Act of 1990).

144. See *supra* notes 53-55 and accompanying text. Any inquiries under the HUD regulations must be asked of everyone indiscriminately.

145. See *supra* notes 58-71 and accompanying text (discussing the Housing Opportunity Program Extension Act of 1996 and the Quality Housing and Work Responsibility Act of 1998).

146. See *supra* notes 37-41 and accompanying text (discussing the Anti-Drug Abuse Act of 1988).

147. See *supra* note 41 and accompanying text.

148. As stated by the Supreme Court, the Fourth Amendment applies only to drug testing conducted by government officers or those acting at their discretion. See *Chandler*, 520 U.S. at 308; *Vernonia*, 515 U.S. at 652; *Von Raab*, 489 U.S. at 665; *Skinner*, 489 U.S. at 614. Therefore, some landlords are free to conduct drug testing without regard for tenants' constitutional rights. As private entities, these landlords operate housing funded entirely by private monies without governmental assistance. As decided in *Skinner*, Fourth Amendment considerations apply where government endorsement and participation is extensive enough to make any private actor who complies with regulations an agent or instrument of the government. *Skinner*, 489 U.S. at 633-34. The issue of whether or not the housing and landlords are acting as agents of the government is complex. To determine whether or not State action and the Fourteenth Amendment applies, a court must investigate the type of governmental assistance being provided to the housing project as well as the degree of governmental involvement. Based upon *Rendell-Baker v. Kohn*, a court would likely find that even housing funded by the government does not fall under State action claims. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (finding publicly funded private school does not fall under state action). Furthermore, state regulation of housing, even if extensive and detailed, will not make a landlord's actions state action. See *Blum v. Yaretsky*, 457 U.S. 991 (1982). For purposes of the discussion of drug testing in this article, I assume all entities were acting as agents of the government.

149. See *supra* note 82 (blood and breath tests clearly constitute searches).

150. See *supra* note 95 (urinalysis test constitutes a search).

151. See *supra* note 114 (urinalysis test constitutes a search).

152. See *supra* note 133 (urinalysis test constitutes a search).

reasonable societal expectations of privacy; therefore, the Fourth Amendment applies.

In the both *Skinner* and *Von Raab*, the Courts utilized the “compelling need” test to determine whether drug tests were constitutional under the Fourth Amendment.¹⁵³ As these cases note, the court only needs a showing that the testing program is instituted to avoid some serious harm that could be drug-related.¹⁵⁴ In the housing situation, this harm exists; therefore, the drug testing of housing tenants would be upheld under the “compelling need” test.¹⁵⁵

In *Vernonia* the Court moved towards a more liberal balancing test using “important interests.”¹⁵⁶ The Court heavily emphasized, however, the fact that the individuals drug tested in *Vernonia* were schoolchildren, who were subject to the custody of the school.¹⁵⁷ The court cautioned against the assumption that suspicionless drug testing would be constitutional in other contexts.¹⁵⁸

In *Chandler* the Court held that drug testing will not be upheld in any case where there is merely an important interest.¹⁵⁹ The *Chandler*

153. See *supra* notes 80-105 and accompanying text (discussing how the *Skinner* and *Von Raab* Courts developed the “compelling need” test).

154. *Id.*

155. See *supra* note 4 and accompanying text (discussing congressional findings of drug problems in housing). The extent of the harm caused by drugs in housing may be a topic of debate. The seriousness of the harm caused by drugs varies from city to city and not all drug problems may constitute a serious enough threat to warrant drug testing tenants all over the country. However, a problem does not need to be shown everywhere there is testing. For example, in *Skinner*, the Court noted that the Federal Railroad Administration “pointed to evidence indicative that on-the-job intoxication was a significant problem in the railroad industry.” *Skinner*, 489 U.S. at 607. “The FRA also found . . . that from 1972 to 1983 ‘the nation’s railroads experienced at least 21 significant train accidents involving alcohol or drug use’ as a probable cause or contributing factor.” *Id.* In *Skinner*, the evidence did not point to a problem with every train company, merely a problem with the industry as a whole.

156. See *supra* notes 107-28 and accompanying text (discussing *Vernonia* and the “important interests” test). If drug testing tenants would be upheld under the “compelling need” test, certainly it would withstand the more liberal “important interests” test. The government has an “important interest” in keeping drugs out of housing and away from peoples’ homes.

157. See *supra* note 110 and accompanying text.

158. See *supra* note 123 and accompanying text.

159. The State argued “that unlawful drug use is incompatible with holding high office because drug use draws into question an official’s judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials.” *Chandler*, 520 U.S. at 306. While these may be legitimate reasons to keep drug users out of political office, the Court did not uphold the testing of candidates. See *supra* note 135 and accompanying text.

Court, emphasizing the lack of evidence of a proven drug problem,¹⁶⁰ could not rationalize upholding the drug testing of political candidates.¹⁶¹ In housing situations, however, published congressional findings illustrate that landlords face drug-related problems.¹⁶² Another issue noted by the *Chandler* court was that the proposed testing scheme was insufficient to meet its intended objectives.¹⁶³ This problem can arise in the housing context and is addressed in the next section.

After determining the constitutionality of implementing a drug testing program, courts look to the program itself by first analyzing the invasiveness of the search to determine if it is reasonable.¹⁶⁴ Although this will be discussed more in the following section, it is important to note that the testing schemes in all the Supreme Court cases were found to be reasonable.¹⁶⁵ Even in *Chandler*, where the drug testing was found to be unconstitutional, the testing scheme was determined to be reasonable.¹⁶⁶

Next, courts determine whether a “special need” warrants the search. There must be a concrete danger that justifies drug testing. In many areas, public and other federally assisted low-income housing suffer from rampant drug related crime.¹⁶⁷ This crime not only leads to violence against tenants, but also to a deterioration of the physical environment in which the government has a significant financial investment.¹⁶⁸ The Government’s interest in protecting its citizens

160. *See supra* note 135 and accompanying text.

161. *Chandler*, 520 U.S. at 318.

162. *See supra* note 4 and accompanying text.

163. *See supra* note 139 and accompanying text (discussing *Chandler*).

164. Some may argue that drug testing invades a more substantial privacy interest in this case than in the employment context because it occurs within the home and not the workplace. The invasion of the privacy interest would not occur within the home, but more likely within a controlled medical environment. Furthermore, tenants voluntarily choose where they will live and whether or not to apply for housing assistance programs. This is similar to the individuals in *Skinner*, *Von Raab*, and *Vernonia*, who all chose to work in a heavily regulated industry or chose to play for a team. *See supra* notes 89, 96, 112 (discussing the employees diminished expectations of privacy due to working in a highly regulated industry, and the students diminished expectation of privacy because they chose to be involved with school sports).

165. *Vernonia*, 515 U.S. at 664-65; *Von Raab*, 489 U.S. at 679; *Skinner*, 489 U.S. at 634.

166. *Chandler*, 520 U.S. at 323.

167. *See supra* note 4 and accompanying text (discussing the congressional findings relating to crime in public housing).

168. “[T]he increase in drug-related crime not only leads to murders, muggings, and other

and federally subsidized housing should outweigh the interests of those being tested.

V. IMPLEMENTING A DRUG TESTING PLAN AND THE PROBLEMS A LANDLORD WILL FACE

It is not necessary for the government to enact a law requiring landlords to drug test their tenants.¹⁶⁹ The government has made it clear that it will hold landlords liable for the actions of their tenants.¹⁷⁰ Because the Fourth Amendment only prohibits “unreasonable” searches and seizures,¹⁷¹ landlords should be free to choose which projects they will drug test and the level of inquiry necessary.¹⁷²

Government agencies and their agents must incorporate due process procedures when implementing drug testing programs.¹⁷³ Although this requirement does not extend to the private sector, incorporating these procedures will help to ensure that the program identifies only current drug-related offenders and does not discriminate against any protected individuals.¹⁷⁴ As discussed in the *Von Raab* decision, samples should be tested only for specified drugs

forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; . . .” 42 U.S.C. § 11901(4). “[T]he inventory of public housing units owned, assisted, or operated by public housing agencies, an asset in which the Federal Government has invested over \$90,000,000,000, has traditionally provided rental housing that is affordable to low-income persons.” See Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 502(a)(2), 1998 U.S.C.C.A.N. (112 Stat.) 2518, 2520.

169. Landlords’ interests may be better protected if the Government does *not* enact a law requiring drug testing because landlords will be less likely to become agents of the government, who are bound by the U.S. Constitution. See *supra* note 148 (discussing state action).

170. See *supra* notes 6-11 and accompanying text (discussing the sanctions and penalties that landlords may face resulting from the actions of their tenants).

171. See *Skinner*, 489 U.S. at 619 (internal citations omitted). See also *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Schmerber v. California*, 384 U.S. 757, 768 (1966). “What is reasonable, depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985)).

172. “What is reasonable . . . depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *Skinner*, 489 U.S. at 619 (citing to *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

173. See *supra* note 77 and accompanying text (discussing the Fourteenth Amendment).

174. See *supra* note 73 and accompanying text (discussing that private parties are not restricted by Fourth Amendment guarantees).

and not other substances.¹⁷⁵ The testing program should be designed narrowly to discover only present drug use, not medical conditions that are protected as a disability under the law.

Tenants or prospective tenants must not be required to disclose personal medical information unless their test result comes back positive.¹⁷⁶ Information regarding legally prescribed medications taken by the individual tested cannot be provided to the entity requiring the test.¹⁷⁷ Therefore, the testing scheme must not disclose tenants' medical conditions. For this reason, certain drug screens are violative of the ADA.¹⁷⁸

Although numerous methods exist for detecting illegal drug use, these methods vary widely in cost and reliability.¹⁷⁹ The method chosen for drug testing tenants should be aimed at revealing present drug use, while minimizing privacy intrusion. Unfortunately, drug tests lack 100% accuracy.¹⁸⁰ As the popularity of drug testing increases and the drug testing industry becomes more competitive, test accuracy declines.¹⁸¹ Furthermore, numerous foods and legal medications can produce "false positives."¹⁸² If tenants test positive

175. See *supra* note 95 and accompanying text (discussing the testing of urine samples in *Von Raab*).

176. See *supra* note 98 and accompanying text (discussing the disclosure of personal medical information). See also note 49 and accompanying text (discussing the *Roe v. Cheyenne Mountain* decision).

177. This would exceed the level of inquiry required to determine present drug use and expose any potential protected disabilities of the test subject.

178. See *Hunsaker v. Contra Costa County*, 149 F.3d at 1044 (the testing procedures disparately impacted recovering and recovered alcohol and drug addicts).

179. KENT HOLTORF, M.D., UR-INE TROUBLE 58 (1998). "Drug testing price quotes range from \$10 to \$490 per employee tested." *Id.* (citing AJ McBay, *Comparison of Urine and Hair Testing for Drugs of Abuse*, J. ANAL. TOXICOL., 19201-04 (1995)).

180. *Id.* at 59 (internal citations omitted) (discussing the inaccuracies of drug tests).

181. *Id.* at 57 (citing to AJ. McBay, *Drug-Analysis Technology-Pitfalls and Problems of Drug Testing*, 33 CLIN. CHEM. 33B, 33B-40B (1987); M. Caidin, *Risks of Random Drug Testing Aviation Safety*, 6-8 (1993); AJ. McBay, *Comparison of Urine and Hair Testing for Drugs of Abuse*, 19 J. ANAL. TOXIC. 201-04 (1995)). "Because drug testing has become a very competitive industry, laboratories are implementing cost cutting measures and attempting to test increasing numbers of specimens quicker and cheaper, which is causing testing accuracy to worsen even further." *Id.*

182. HOLTORF, *supra* note 179. A "false positive" is a report that a drug or metabolite has been detected when a drug or metabolite is not present in the specimen. The following is a list of illegal drugs and some of the substances which can cause false positives:

1. Marijuana: Advil, Nuprin, Motrin, Bayer Select Pain Relief Formula.

for drugs, they may be unjustly denied housing opportunities.¹⁸³

A few courts have chosen to rely on hair analysis testing, stating that these tests are more reliable than urine and blood tests.¹⁸⁴ In actuality, not only are hair tests poor at identifying current drug use,¹⁸⁵ but they may be racially biased as well.¹⁸⁶

2. Amphetamines: Nyquil, Contact, Sudafed, Tavist-D, Dimetapp, Sinex, Actifed, Afrin.

3. Cocaine: Amoxicillin, tonic water.

4. Opioids: Poppy seeds, Tylenol with codeine, Percocet, Nyquil

5. Barbiturates: Fiorinol for tension headaches, some sleeping pills, Donnatoil for treatment of irritable bowel syndrome and stomach ulcers, antiasthmatic preparations that contain phenobarbitol, Dilantin.

6. Benzodiazepines: Most prescription sleeping pills and anti-anxiety medication.

7. Lyseric acid diethylamide (LSD): Migraine medication, over-the-counter allergy preparations, sleep aids, and antinausea medications that contain promethazine: Phenergan, Promethegan.

Id. at 99-102.

183. If the tenant tests “false positive” and the landlord allows them to move in, this may have adverse effects on the landlord. If the tenant subsequently commits a crime and the landlord had knowledge of the tenant’s prior positive drug test, this may increase the landlords risk for liability. *See supra* note 7 and accompanying text (discussing landlord liability for failing to disclose crime risks).

184. *See Nevada Employment Security Department v. Holmes*, 914 P.2d 611, 615 (Nev. 1996) (concluding that hair testing is now an accepted and reliable scientific methodology for detecting illicit drug use); *United States v. Medina*, 749 F. Supp. 59, 61 (E.D.N.Y. 1990) (stating that hair testing is “an effective and accurate method of detecting the presence of various compounds including narcotics”).

185. HOLTORF, *supra* note 179, at 104. These tests are considered poor at identifying current drug use because “the maximum amount of drug is deposited one to two months after drug use and is often not detectable until weeks after use.” *Id.* (internal citations omitted). Hair may also be contaminated from such substances such as passive, second-hand marijuana smoke found at some parties and concerts. *Id.* at 106.

186. *Id.* at 104. “Most drugs, including cocaine and marijuana, bind and incorporate into the hair of African-Americans 10 to 50 times greater than drugs are incorporated into the hair of caucasians.” (citing to G.L. Henderson et al., *Incorporation of Isotopically Labeled Cocaine and Metabolites into Human Hair: 1. Dose-Response Relationships*, 20 J. ANAL. TOXICOL. 1-11 (1996); R.E. Joseph et al., *In Vitro Binding Studies of Drugs to Hair: Influence of Melanin and Lipids on Cocaine Binding to Causoid and Africoid Hair*, 20 J. ANAL. TOXICOL. 338, 338-44 (1996); S.J. Green & J.F. Wilson, *The Effect of hair Color on the Incorporation of Methadone into Hair in the Rat*, 20 J. ANAL. TOXICOL. 121, 121-23 (1996). *Id.* “Other studies have also demonstrated and confirmed the racial bias in hair testing.” (citing to S.J. Green & J.F. Wilson, *The Effect of Hair Color on the Incorporation of Methadone into Hair in the Rat*, J. ANAL. TOXICOL. 121, 121-23 (1996)); S.P. Gygi et al., *Incorporation of Codeine and Metabolites into Hair: Role of Pigmentation*, DRUG METAB DISPOS 495, 495-501 (1996); N.H. Slawson, et al., *Quantitative Determination of Phencyclidine in Pigmented and Nonpigmented Hair by Ion-*

In addition to the racial problems associated with drug testing, drug users may avoid detection. Assuming drug users know about the impending test, they may choose to abstain from drug use for the minimum time period necessary to cleanse their systems.¹⁸⁷ They may also choose to take cleansing formulae designed to remove traces of drugs from their systems.¹⁸⁸

Finally, to implement a suspicionless drug testing policy, a landlord must test all tenants of a particular building, not just select individuals.¹⁸⁹ This will raise the issue of whether landlords may single out particular buildings and projects, instead of testing all of their buildings and projects. Some tenants in expensive, luxury apartments may not be willing to submit to drug testing, even if they are not drug users. Moreover, landlords are more concerned with testing tenants in high crime areas than those who reside in expensive, luxury apartments. If a landlord tests only buildings in areas where drug use is prevalent, there may be discrimination challenges.¹⁹⁰ Although it is unlikely that discrimination claims would be justified, landlords must consider this issue.¹⁹¹

The drug testing issues also arise in the corporate housing context when a company rents an apartment to one of its employees. When a landlord requires that the tenants undergo drug testing it is essentially the same as a company requiring its employees to undergo drug testing, which may involve a separate balancing test.¹⁹²

Trap Mass Spectrometry, 20 J. ANAL. TOXICOL. 350, 350-54 (1996)). *Id.* at 105.

187. For a discussion of various methods for avoiding detection of drug tests see HOLTORF, *supra* note 178, at 111-24.

188. *Id.*

189. See *supra* note 53-55 and accompanying text (discussing the HUD regulations that govern inquiries made of tenants).

190. Some public housing projects subjected to testing may be predominantly populated by residents of minority races.

191. Although racially disproportionate impact is relevant, it is not the sole factor in a racial discrimination case. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Metropolitan Housing Development*, 429 U.S. at 265.

192. The employer would have to require that the employee undergo drug testing so that they may live in the housing. However, if this employee is the only employee living in the housing, then they are the only employee who is drug tested. An employer cannot require a medical examination or inquire whether the employee has a disability unless it is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). There would have to be a

VI. CONCLUSION

If landlords are expected to take a proactive role in policing their properties, then they must have the power to perform this task. Under the present laws, landlords have the right to drug test tenants. Drug testing enables landlords to provide a safer environment by alleviating several risks. Although the tests are not 100% accurate, the technology will, in all likelihood, improve over time.

However, one of the basic tenets of this country's judicial system is the proposition that a person is "innocent until proven guilty." By allowing suspicionless drug testing, the presumption shifts closer to "guilty until proven innocent." That is, all individuals are assumed to be using drugs until a negative drug test proves that they are not. Perhaps a better solution is to reduce landlords' liability for their tenants' activities and hold everyone accountable for his or her own actions.

determination into whether the living arrangement is a "business necessity."