
NOTE

Preemployment Drug Testing in *Lanier v. City of Woodburn:* Balancing Individual Liberties with a Drug-Free Workplace

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INTRODUCTION

In 2004, Harriet Papermaster submitted an application for a position as a library page at the Booklyn Public Library.¹ The head of the library department gave Ms. Papermaster an offer of employment on the condition that she successfully complete a preemployment drug test.² Ms. Papermaster refused to take the drug test, and in response, the City of Booklyn terminated her offer of employment.³ Ms. Papermaster then sued the City of Booklyn, alleging that the drug test violated her Fourth Amendment right to be free from unreasonable searches.⁴ In 2008, the Ninth Circuit Court of Appeals adjudicated a case with a similar fact pattern in *Lanier v. City of Woodburn*.⁵ The *Lanier* court held that the City of Woodburn (“Woodburn”) violated Janet Lynn Lanier’s (“Lanier”) Fourth Amendment right because her privacy interests outweighed Woodburn’s interest in protecting citizens from potentially dangerous employees.⁶

This Note argues that the *Lanier* court incorrectly held that Woodburn’s preemployment drug test was an unreasonable search as applied to Lanier.⁷ Part I discusses the state of the law regarding urine testing as a Fourth Amendment search and whether such searches are reasonable under the Fourth Amendment.⁸ Part II describes *Lanier*’s facts, holding, and rationale.⁹ Part III argues that *Lanier* erroneously held that Woodburn’s requested preemployment drug test was an unconstitutional search.¹⁰ First, the court incorrectly held that a

¹ This hypothetical presents a variation on the facts in *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008). See discussion *infra* Part II (discussing *Lanier*’s facts, holding, and rationale).

² See *Lanier*, 518 F.3d at 1149 (presenting similar situation whereby city gave applicant job offer for library page position on condition that she complete preemployment drug screening).

³ See *id.* (denying employment to library page applicant because of her refusal to take drug test).

⁴ U.S. CONST. amend. IV. See generally *Lanier*, 518 F.3d 1147 (involving job applicant who sued City of Woodburn based on alleged Fourth Amendment violation).

⁵ *Lanier*, 518 F.3d at 1149.

⁶ *Id.* at 1148-49; see U.S. CONST. amend. IV.

⁷ *Lanier*, 518 F.3d at 1148.

⁸ See *infra* Part I (describing urinalysis as Fourth Amendment search and explaining reasonableness standard for Fourth Amendment searches).

⁹ See discussion *infra* Part II (discussing *Lanier* decision).

¹⁰ See discussion *infra* Part III (noting *Lanier*’s erroneous holding that Woodburn’s drug testing policy was unconstitutional).

preemployment drug test would violate Lanier's substantial privacy interests.¹¹ Second, the court failed to recognize Woodburn's special need to conduct suspicionless searches.¹² Finally, the court erred by not considering that Woodburn's preemployment drug testing requirement accords with reducing widespread drug abuse in the workplace.¹³ Thus, the court should have upheld Woodburn's preemployment drug testing policy because administering drug tests to potential employees constitutes a reasonable search.¹⁴

I. BACKGROUND

United States citizens can invoke the Fourth Amendment prohibition against unreasonable searches and seizures to protect themselves from unwarranted governmental intrusion.¹⁵ This fundamental constitutional right preserves individual privacy interests because governmental searches are not reasonable if they significantly infringe upon privacy interests.¹⁶ However, the Fourth Amendment only applies to searches of tangible things, such as a person, a house, or an individual's papers or effects.¹⁷ When assessing Fourth Amendment claims, courts must first consider whether a

¹¹ See discussion *infra* Part III.A (explaining how Woodburn's drug testing procedures involved only minimal intrusion into applicants' privacy).

¹² See discussion *infra* Part III.B (describing Woodburn's special need to drug test based on its compelling governmental interests that outweigh individual privacy interests). See generally *Chandler v. Miller*, 520 U.S. 305 (1997) (establishing that employer must have special need to conduct constitutionally permissible suspicionless searches).

¹³ See discussion *infra* Part III.C (describing how public policy favors allowing preemployment drug testing).

¹⁴ See *Chandler*, 520 U.S. at 308-09; *Katz v. United States*, 389 U.S. 347, 351 (1967) (noting that Fourth Amendment does not protect against all searches, but merely those that are unreasonable); Susan Haberberger, *Reasonable Searches Absent Individualized Suspicion: Is There a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After Skinner v. Railway Labor Executives' Association?*, 12 U. HAW. L. REV. 343, 356 (1990).

¹⁵ U.S. CONST. amend. IV; see *Weeks v. United States*, 232 U.S. 383, 390 (1914); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *Boyd v. United States*, 116 U.S. 616, 626-27 (1886).

¹⁶ See *Brown v. Texas*, 443 U.S. 47, 50 (1979); *Carroll v. United States*, 267 U.S. 132, 149 (1925); Stephone K. Addison, *Drug Testing: Avoiding a Prospective Chill on Employees' Rights to Privacy and Fourth Amendment Protection Against Unreasonable Searches and Seizures*, 16 S.U. L. REV. 417, 417 (1989).

¹⁷ U.S. CONST. amend. IV; *Olmstead v. United States*, 277 U.S. 438, 457 (1928) (quoting U.S. CONST. amend. IV); see *Boyd*, 116 U.S. at 621; Addison, *supra* note 16, at 417.

governmental action was a search and then whether the search was reasonable.¹⁸

A. *Classification of Urinalysis as a Fourth Amendment Search*

In the context of drug testing, courts consider urinalysis a Fourth Amendment search because urinalysis involves the collection and analysis of an individual's urine.¹⁹ Urinalysis is a type of drug test where employers chemically analyze an individual's urine to determine whether the individual has recently used illegal drugs.²⁰ When governmental employers collect and analyze urine, the government intrudes upon an individual's reasonable expectation of privacy in urinating.²¹ Applying a similar rationale in the context of blood testing, the Supreme Court held in *Schmerber v. California* that a blood test constituted a search for Fourth Amendment purposes.²² In *Schmerber*, a police officer arrested Armando Schmerber for driving while intoxicated, and the officer drew a blood sample to determine Schmerber's blood alcohol level.²³ The Court held that the blood test was a search because it was a compelled intrusion into Schmerber's body.²⁴

Although urine testing and blood testing are different procedures, courts often treat blood testing and urine testing similarly, and find

¹⁸ See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) (noting that once courts determine that governmental intrusion is search, courts must consider whether search was reasonable); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 614 (1989); see also *Chandler*, 520 U.S. at 313 (determining that urine test was search under Fourth Amendment and then considering whether drug test was reasonable search).

¹⁹ See *Skinner*, 489 U.S. at 616-17; *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 380 (6th Cir. 1998); *Ry. Labor Execs. Ass'n v. Burnley*, 839 F.2d 575, 580 (9th Cir. 1988) (noting that every court that considered matter of urine testing concluded that it was search under Fourth Amendment); *Haberberger*, *supra* note 14, at 357-58; see also *Chandler*, 520 U.S. at 313 (noting that urinalysis is unwarranted intrusion because individuals have expectation of privacy regarding bodily intrusions to obtain personal information).

²⁰ *Definition of URINALYSIS*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/urinalysis> (last visited Mar. 30, 2011).

²¹ See sources cited *supra* note 19.

²² *Schmerber v. California*, 384 U.S. 757, 767 (1966); see *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002) (noting that urinalysis was search under Fourth Amendment); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Von Raab*, 489 U.S. at 665; *Skinner*, 489 U.S. at 616; *Burnley*, 839 F.2d at 580; *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

²³ *Schmerber*, 384 U.S. at 758-59.

²⁴ *Id.* at 767.

that urine testing is a Fourth Amendment search as well.²⁵ In *Skinner v. Railway Labor Executives' Association*, the Supreme Court specifically addressed urine testing as a Fourth Amendment search.²⁶ In *Skinner*, the Federal Railway Administration adopted regulations requiring railway employees to undergo urine testing following accidents.²⁷ Railway employees alleged that these regulations violated their Fourth Amendment rights.²⁸ In determining whether the urine testing was a Fourth Amendment search, the Court noted that both blood and urine drug tests can reveal personal information about individuals.²⁹ The Court also reasoned that although the government does not have to intrude into the body to seize urine, urinalysis invades privacy expectations because individuals do not reasonably expect to discharge urine and have it collected by others.³⁰ Therefore, the Court held that the urine testing qualified as a Fourth Amendment search.³¹

Once the Supreme Court determines that a certain governmental action is a Fourth Amendment search, government agents must obtain a warrant based on probable cause before executing the search.³² The Court has defined probable cause to mean that government agents must have reasonable grounds to suspect that a crime occurred or is occurring.³³ However, urine tests constitute a special type of search because government agents can conduct these tests without a warrant or probable cause in certain circumstances.³⁴ For example,

²⁵ *Von Raab*, 489 U.S. at 665; *Skinner*, 489 U.S. at 617; *Burnley*, 839 F.2d at 580; *Capua*, 643 F. Supp. at 1513.

²⁶ *See Skinner*, 489 U.S. at 617.

²⁷ *Id.* at 606.

²⁸ *Id.* (holding that Federal Railroad Administration promulgated mandatory drug testing of railway employees to improve safety).

²⁹ *Id.*; Haberberger, *supra* note 14, at 357-58.

³⁰ *Skinner*, 489 U.S. at 616; *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa 1985).

³¹ *See sources cited supra* note 30.

³² U.S. CONST. amend. IV (stating that government agents must obtain warrant before conducting searches and they can only get warrant if they have probable cause to search); *Skinner*, 489 U.S. at 619; *Schmerber v. California*, 384 U.S. 757, 770 (1966).

³³ *See generally* *Illinois v. Gates*, 462 U.S. 213 (1983) (holding that probable cause is common sense, practical question of whether officer thinks contraband exists in particular place); *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (announcing that probable cause standard requires that government agents reasonably believe there is probability of criminal activity before searching); BLACK'S LAW DICTIONARY 1321 (9th ed. 2009) (defining probable cause as more than bare suspicion, but less than evidence that would justify conviction).

³⁴ *See generally* *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (holding that school could conduct warrantless urine testing of students in extracurricular

government agents can dispense with the warrant requirement when obtaining a warrant would frustrate a legitimate governmental purpose or lead to the loss of evidence and when the privacy interests implicated by the search are minimal.³⁵

Although courts permit searches without probable cause in certain circumstances, they often still require some level of individualized suspicion, such as a reasonable suspicion that an individual violated the law.³⁶ However, the Supreme Court concluded in *Skinner* that urine testing was constitutional even though the government lacked individualized suspicion of drug use among employees.³⁷ The *Skinner* Court deemed urinalysis a constitutionally permissible search based on the compelling governmental interest in preventing drug-related railway accidents, coupled with the minimal privacy interests implicated by the search.³⁸ Therefore, the Court held that government

activities); *Skinner*, 489 U.S. at 624 (allowing employer to conduct urine testing of railway employees without warrant); *Schmerber*, 384 U.S. at 669-70 (noting that police officers can dispense with warrant requirement when obtaining warrant could cause destruction of evidence).

³⁵ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 532-33 (1967)); Steve M. Fogel et al., *Survey of the Law of Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 574-76 (1988); see also *Willner v. Thornburgh*, 928 F.2d 1185, 1188 (D.C. Cir. 1991) (permitting urine testing of Department of Justice employees without warrant or individualized suspicion). See generally *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)) (noting existence of exceptions to warrant requirement); *Earls*, 536 U.S. 822 (allowing drug testing of schoolchildren despite lack of warrant or probable cause); *Skinner*, 489 U.S. 602 (permitting drug test of railway employees without warrant or probable cause); *Schmerber*, 384 U.S. 757 (allowing blood test of drunk driver absent warrant); *Schoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986) (permitting warrantless and suspicionless urine testing within New Jersey horse racing industry).

³⁶ See *Chandler v. Miller*, 520 U.S. 305, 308 (1997); *Skinner*, 489 U.S. at 624 (Blackmun, J., concurring); *T.L.O.*, 469 U.S. at 341-42 (noting that Fourth Amendment normally requires some level of individualized suspicion for constitutional searches); BLACK'S LAW DICTIONARY, *supra* note 33, at 1585 (defining individualized suspicion); Haberberger, *supra* note 14, at 359 (noting that government normally requires some level of individualized suspicion in searches without warrant).

³⁷ See *Skinner*, 489 U.S. at 624 (indicating that urine testing of employees presented limited circumstance where Court allowed warrantless testing without individualized suspicion); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

³⁸ See *Skinner*, 489 U.S. at 620, 624 (holding that government's interest in regulating conduct of railroad employees to ensure public safety justified search despite lack of usual warrant and probable cause requirements).

agents can dispense with the individual suspicion requirement in certain limited situations.³⁹

B. Fourth Amendment Reasonable Search Standard Applied to Urinalysis

Assuming a search has occurred, courts determine whether the search was constitutionally permissible under the Fourth Amendment by assessing whether the search was reasonable.⁴⁰ In *O'Connor v. Ortega*, the Supreme Court attempted to clarify the Fourth Amendment reasonableness standard.⁴¹ In *O'Connor*, management suspected an employee of misconduct and conducted an investigation of the employee's office while he was not present.⁴² The employee alleged that the search violated his Fourth Amendment right to be free from unreasonable searches.⁴³ However, the Supreme Court deemed the search reasonable based on the operational realities of the workplace that make public employees' expectations of privacy unreasonable.⁴⁴ The Court reasoned that some government offices are so open to fellow employees or the public that expectations of privacy are minimal.⁴⁵ The Court stated that the reasonableness of the search depends on the context in which the search takes place.⁴⁶ Therefore, in determining reasonableness, courts must balance the governmental

³⁹ *Id.*

⁴⁰ See U.S. CONST. amend. IV; *Chandler*, 520 U.S. at 313 (describing how courts must always determine whether particular search is reasonable when assessing Fourth Amendment claims); *Skinner*, 489 U.S. at 619; *Schmerber*, 384 U.S. at 768.

⁴¹ See *O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987). See generally *Chandler*, 520 U.S. 305 (establishing that employer must have special need to conduct constitutionally permissible suspicionless search); *Katz v. United States*, 389 U.S. 347 (1967) (holding that individual's reasonable expectation of privacy was essential to any Fourth Amendment analysis); *Loder v. City of Glendale*, 927 P.2d 1200 (Cal. 1997) (holding that public employer's drug and alcohol tests for job applicants as part of preemployment screening was reasonable).

⁴² *O'Connor*, 480 U.S. at 712-13 (describing how employer required plaintiff to take administrative leave, and employer searched his office during investigation).

⁴³ *Id.* at 714-15 (noting that searches and seizures by government employers of employees' private property are subject to Fourth Amendment restraints); see U.S. CONST. amend. IV.

⁴⁴ *O'Connor*, 480 U.S. at 717 (mentioning that office practices and procedures can create reduced expectation of privacy with regard to supervisor intrusions).

⁴⁵ *Id.* at 717-18 (describing how office is seldom private enclave that is free from entry by supervisors, other employees, and business guests).

⁴⁶ *Id.* at 718 (noting that courts must analyze whether particular employee has reasonable expectation of privacy on case-by-case basis).

interests in conducting a search against the extent of employees' privacy expectations.⁴⁷

Courts often find that where an individual has a diminished expectation of privacy, the government's interest in conducting a search outweighs individual privacy interests, thereby satisfying the reasonableness requirement.⁴⁸ Courts routinely apply this "expectation of privacy" standard based on the Supreme Court's decision in *Katz v. United States*.⁴⁹ In *Katz*, Charles Katz was convicted of gambling based on information the government obtained through wiretapping a public phone booth.⁵⁰ The Court found the wiretapping unconstitutional because the Fourth Amendment protects an individual's expectation of privacy, irrespective of where the individual is located.⁵¹ The *Katz* Court rejected the notion that individuals only have a right to privacy in certain areas.⁵² Instead, the Court stated that a reasonableness determination requires assessing whether the individual had a justifiable expectation of privacy that the government violated.⁵³ The Court found that Charles Katz had a justifiable expectation of privacy because he entered the phone booth, shut the door behind him, and paid the toll.⁵⁴ In doing so, he justifiably assumed that no one else

⁴⁷ *Id.* at 719-20 (noting government's interest in supervision, control, and efficiency in workplace); see *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 664 (1989) (describing potential governmental interests in drug testing of employees); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976); *Haberberger*, *supra* note 14, at 358.

⁴⁸ See *Baughman v. Wal-Mart Stores, Inc.*, 592 S.E.2d 824, 827 (W. Va. 2003); see also *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 370 (6th Cir. 1998); *Willner v. Thornburgh*, 928 F.2d 1185, 1188 (D.C. Cir. 1991); *Fogel et al.*, *supra* note 35, at 574-75. See generally *Von Raab*, 489 U.S. 656 (stating that governmental interest in drug testing outweighed minimal privacy interests); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that governmental interest in maintaining discipline in school outweighed children's unreasonable expectation of privacy and, therefore, search was reasonable).

⁴⁹ *Katz v. United States*, 389 U.S. 347, 360 (1967) (although Justice Harlan explicitly stated words "reasonable expectation of privacy" in concurrence, courts routinely apply this standard).

⁵⁰ *Id.* at 348 (noting that lower court held search constitutional because there was no physical penetration of phone booth).

⁵¹ *Id.* at 350-51 (stating how Supreme Court held search unconstitutional under Fourth Amendment because plaintiff had general right to privacy for what he wanted kept private).

⁵² *Id.* (reasoning that privacy rights only in certain areas causes debate over whether given area is constitutionally protected area and shifts attention away from determining whether search violates individual's privacy).

⁵³ *Id.* at 353.

⁵⁴ *Id.* at 352.

would hear his conversation and, therefore, the Court held that the search was unreasonable.⁵⁵

In other circumstances, such as preemployment drug testing, courts hold that individuals have a reduced expectation of privacy.⁵⁶ In *Willner v. Thornburgh*, the D.C. Circuit Court of Appeals addressed the reasonableness of a Department of Justice policy requiring that job applicants complete a urine test prior to employment.⁵⁷ The court found that job applicants must reasonably expect to disclose personal information.⁵⁸ The *Willner* court stated that job applicants often submit to extensive background checks, which could reasonably include requests for information regarding drug usage.⁵⁹ Therefore, the court found that the government's urine testing policy was a reasonable Fourth Amendment search based on the diminished expectation of privacy for job applicants.⁶⁰

When examining urine testing procedures, courts must balance individual privacy expectations with governmental interests in searching to determine whether the government conducted a reasonable, warrantless, and suspicionless search.⁶¹ If the governmental interests outweigh privacy concerns, courts often hold that the government had a special need to search and the search was reasonable.⁶² The Supreme Court set the standard for special

⁵⁵ *Id.*

⁵⁶ See generally *O'Connor v. Ortega*, 480 U.S. 709 (1987) (stating that sometimes employees cannot reasonably expect privacy in workplace); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (holding that certain individuals in employment setting, such as job applicants, have reduced expectation of privacy); *Loder v. City of Glendale*, 927 P.2d 1200 (Cal. 1997) (noting that there is lesser expectation of privacy for drug testing of job applicants as opposed to current employees).

⁵⁷ *Willner*, 928 F.2d at 1187 (noting that city gave applicant conditional offer of employment, and passing urine test was necessary for employment).

⁵⁸ See *id.* at 1193-94; see also *Baughman v. Wal-Mart Stores, Inc.*, 592 S.E.2d 824, 827-28 (W. Va. 2003) (noting that job applicants have lower expectation of privacy because of preemployment background checks, reference disclosures, and preemployment medical examinations).

⁵⁹ *Willner*, 928 F.2d at 1193.

⁶⁰ *Id.* (noting that manner in which government conducted urinalysis minimized intrusion into job applicants' privacy); see also *Skinner v. Ry. Labor Excs. Ass'n*, 489 U.S. 602, 624 (1989) (describing minimally invasive nature of modern urine testing).

⁶¹ *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (quoting *Skinner*, 489 U.S. at 619); see *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666 (1989); *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 373 (6th Cir. 1998).

⁶² *Chandler*, 520 U.S. 305 at 313; *Von Raab*, 489 U.S. at 656-66.

governmental needs in *Chandler v. Miller*.⁶³ In *Chandler*, Georgia required that candidates for state office submit to urine testing to qualify for nomination or election.⁶⁴ The Court found that the government lacked a special need to drug test because the government did not allege a compelling interest in drug testing.⁶⁵ However, the Court stated that if the government had a compelling interest in testing that outweighed the candidates' individual privacy interests, a special need would exist.⁶⁶ The Court defined special need as an important governmental interest in conducting drug testing even when there is no suspicion of a crime.⁶⁷ *Chandler* held that courts must engage in a contextual analysis of the governmental interests and privacy interests in each particular case.⁶⁸ The *Chandler* Court delineated examples of special governmental needs in the employment context, such as halting a demonstrated problem of drug abuse and ensuring public safety.⁶⁹

The Supreme Court's decision in *Skinner* demonstrates the special governmental need to drug test individuals to ensure public safety.⁷⁰ In *Skinner*, the Court found that the safety-sensitive duties of railway

⁶³ See *Chandler*, 520 U.S. at 314 (noting that courts must examine competing private and public interests advanced by parties); see also *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002); *Von Raab*, 489 U.S. at 665-66 (describing how courts must undertake contextual inquiry of competing public and private interests to determine special need); *Skinner*, 489 U.S. at 633; Fogel et al., *supra* note 35, at 574-75.

⁶⁴ See GA. CODE ANN. § 21-2-140 (1999) (requiring candidates for high office to have negative result on drug test in order to receive nomination or election to state office); *Chandler*, 520 U.S. at 309.

⁶⁵ *Chandler*, 520 U.S. at 318.

⁶⁶ See *id.* at 313-14 (noting that courts must engage in contextual inquiry of competing interests to determine whether suspicionless search is constitutional); *Von Raab*, 489 U.S. at 665-66.

⁶⁷ *Chandler*, 520 U.S. at 313-14. See generally *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (permitting drug testing of student athletes absent suspicion of criminal activity); *Von Raab*, 489 U.S. 656 (allowing drug testing of customs employees absent suspicion of criminal wrongdoing); *Skinner*, 489 U.S. 602 (stating government had special need to drug test railway employees even without suspicion they had committed crime).

⁶⁸ *Chandler*, 520 U.S. at 314.

⁶⁹ *Id.* at 319. See generally *Acton*, 515 U.S. 646 (holding that school administrators had special responsibility to ensure drug-free school environments); *Von Raab*, 489 U.S. 656 (stating that workers' proximity to drug smuggling provided special need to drug test employees); *Skinner*, 489 U.S. 602 (stating employees' position as railway operators and guardians of public safety created special need for employer to drug test).

⁷⁰ *Skinner*, 489 U.S. at 628; see, e.g., *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (allowing random drug testing for all personnel in safety-sensitive positions); *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147 (1999) (permitting random drug testing of state employees engaged in safety-sensitive jobs).

employees created a compelling governmental interest in drug testing that outweighed the minimal privacy concerns, and the Court held the search reasonable.⁷¹ The railway positions in *Skinner* were safety-sensitive because a momentary lapse of attention could have disastrous consequences and pose serious risk of injury to others.⁷² The *Skinner* Court stated that positions are safety-sensitive if there is a high magnitude of harm that could result from illicit drug use on the job.⁷³ For example, jobs involving the operation of heavy machinery or jobs located in a nuclear power plant fit under the definition of safety-sensitive.⁷⁴ In *Lanier*, however, the court held that the library page position did not qualify as a safety-sensitive position and, thus, Woodburn did not have a special need to drug test.⁷⁵

II. LANIER V. CITY OF WOODBURN

On February 5, 2004, Lanier submitted an application for a part-time library page position at the Woodburn Public Library.⁷⁶ On February 23, 2004, the head of the library department gave Lanier a conditional offer of employment.⁷⁷ The City of Woodburn had a policy requiring that all potential employees successfully complete a drug and alcohol screening as a condition of employment.⁷⁸ The presence of any illegal drug in a urine sample meant that the applicant failed the test, and Woodburn could rescind the job offer.⁷⁹ Lanier refused to

⁷¹ *Skinner*, 489 U.S. at 628.

⁷² *Id.* (describing inherent danger in operating heavy machinery, such as railroad cars).

⁷³ *Id.* at 620-21; see Monika D. Cornell, *A Survey of Federal Cases Involving the Constitutionality of Suspicionless Drug Testing*, 8 B.U. PUB. INT. L.J. 387, 391 (1999). See generally *Krieg*, 481 F.3d 512 (describing how sanitation workers hold safety-sensitive positions because they operate large commercial vehicles); *Fresno Irrigation Dist.*, 72 Cal. App. 4th 147 (holding that sanitation and maintenance workers have safety-sensitive positions because they operate power tools and heavy equipment).

⁷⁴ See generally *Skinner*, 489 U.S. 602 (finding that railway positions were safety-sensitive positions); *Int'l Bhd. of Elec. Workers, Local 1245 v. U.S. Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir. 1992) (describing how employees who worked in nuclear power facility held safety-sensitive positions); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990) (noting that various airline employees held safety-sensitive positions).

⁷⁵ *Lanier v. City of Woodburn*, 518 F.3d 1147, 1152 (9th Cir. 2008).

⁷⁶ *Id.*

⁷⁷ *Lanier v. City of Woodburn*, No. 04-1865-KI, 2005 WL 3050470, at *1 (D. Or. Nov. 14, 2005).

⁷⁸ *Id.*

⁷⁹ *Id.*

participate in the drug and alcohol screen and, thus, Woodburn rescinded the employment offer.⁸⁰

Lanier sued Woodburn, alleging that the drug test requirement violated her Fourth Amendment right against unreasonable searches and seizures.⁸¹ The federal district court for the District of Oregon held that Woodburn's drug policy was unconstitutional, but the court did not specify whether the policy was facially unconstitutional or unconstitutional as applied to Lanier.⁸² The court stated that Woodburn's alleged interests in preemployment drug testing did not outweigh Lanier's legitimate privacy concerns and, consequently, there was no special need to drug test.⁸³

On appeal, the Ninth Circuit held that Woodburn's policy was unconstitutional under the Fourth Amendment as applied to Lanier, but was not facially unconstitutional.⁸⁴ The Ninth Circuit therefore affirmed the district court's holding to the extent that it held Woodburn's policy unconstitutional as applied to Lanier.⁸⁵ The Ninth Circuit clarified that a policy is facially unconstitutional if no circumstances exist under which the policy would be valid.⁸⁶ The court reasoned that because Woodburn's drug testing policy could be constitutional under some circumstances, such as if the policy were applied to safety-sensitive positions, the policy was not facially invalid.⁸⁷ However, the Ninth Circuit found that the library page position was not safety-sensitive and, therefore, the policy was unconstitutional as applied to Lanier.⁸⁸

Largely based on its finding that the library page position was not a safety-sensitive position, the Ninth Circuit held that Woodburn did not have a special need to drug test Lanier without a warrant or individualized suspicion.⁸⁹ Woodburn contended that drug abuse

⁸⁰ *Lanier*, 518 F.3d at 1149.

⁸¹ *Id.*

⁸² *Id.* at 1150 (noting that policies are facially unconstitutional when there are no set of circumstances under which policy would be valid); *Lanier*, 2005 WL 3050470, at *7.

⁸³ *Lanier*, 2005 WL 3050470, at *5 (stating that governmental entity must have special need to engage in suspicionless preemployment drug testing).

⁸⁴ *Lanier*, 518 F.3d at 1148.

⁸⁵ *Id.* at 1152 (stating that Ninth Circuit remanded case for district court to specify that Woodburn's policy was not facially unconstitutional).

⁸⁶ *Id.* at 1150 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (stating standard for which courts deem policies facially unconstitutional).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1150-51.

⁸⁹ *Id.*; see *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (noting that courts uphold

problems in society, lower job performance for drug users, and the safety of juveniles created a compelling governmental interest that outweighed privacy concerns and justified its preemployment drug screening policy.⁹⁰ However, the Ninth Circuit rejected Woodburn's assertion of a compelling interest in generalized preemployment drug testing absent individualized suspicion.⁹¹ Without discussing Lanier's individual privacy concerns, the court determined that there was a lack of evidence to warrant a special governmental need to test Lanier.⁹² The court relied on *Chandler* to reject Woodburn's special need claim, but did not balance all potential governmental interests against all potential privacy concerns.⁹³ Therefore, although it determined that the drug testing was a search under the Fourth Amendment, the Ninth Circuit held that the testing was an unreasonable search.⁹⁴

III. ANALYSIS

The balancing test between individual privacy and governmental purpose is central to a Fourth Amendment analysis.⁹⁵ In its reasonableness determination, the *Lanier* court insufficiently balanced Lanier's privacy concerns against Woodburn's interest in drug testing to ensure a drug-free workplace.⁹⁶ The *Lanier* court erred in finding

searches without individualized suspicion only in certain limited circumstances).

⁹⁰ *Lanier*, 518 F.3d at 1150.

⁹¹ *Id.* at 1150-51.

⁹² *See id.* at 1149, 1152 (declining to analyze effectively minimal invasion of Lanier's privacy); *Lanier v. City of Woodburn*, No. 04-1865-KI, 2005 WL 3050470, at *3 (D. Or. Nov. 14, 2005) (noting that case law mandates that courts analyze intrusiveness of search against advancement of legitimate government interests); *see also* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989) (describing need to balance individual's privacy interests against state interests when determining reasonableness of drug test).

⁹³ *See Lanier*, 518 F.3d at 1151-52 (describing how library page position is not safety-sensitive, but not analyzing totality of circumstances regarding Woodburn's special need and minimal privacy invasion of Lanier); *see Lanier*, 2005 WL 3050470, at *3 (stating balancing test as balancing intrusiveness of search against advancement of legitimate government interest). *See generally Chandler*, 520 U.S. 305 (describing how government officials can have special need to conduct warrantless searches).

⁹⁴ *Lanier*, 518 F.3d at 1148-50; *see also Chandler*, 520 U.S. at 308-09 (describing closely guarded category of constitutionally permissible suspicionless searches, which includes drug testing programs for student athletes, customs employees, and railway employees).

⁹⁵ *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002); *Chandler*, 520 U.S. at 314; *Von Raab*, 489 U.S. at 665.

⁹⁶ *See generally Lanier*, 518 F.3d 1147 (declaring drug testing policy of Woodburn

that the drug test unreasonably intruded into the applicant's reasonable expectation of privacy.⁹⁷ The *Lanier* court also improperly discounted Woodburn's special need to conduct warrantless and suspicionless searches through the city's preemployment drug testing policy.⁹⁸ Finally, the *Lanier* court failed to recognize that public policy favors allowing preemployment drug testing.⁹⁹ The Ninth Circuit should have recognized that Woodburn's interests outweighed Lanier's privacy concerns due to the minimally invasive nature of urine testing.¹⁰⁰

A. *The City's Intrusion into the Applicant's Individual Privacy Was Minimal*

Woodburn's preemployment drug testing policy clearly constituted a reasonable Fourth Amendment search because Woodburn's compelling interest in drug testing outweighed Lanier's minor privacy invasion.¹⁰¹ Government officials have a special need to conduct warrantless searches absent individualized suspicion when the government demonstrates a compelling interest in searching that outweighs the individual's minimal privacy concerns.¹⁰² Because job applicants already have a diminished expectation of privacy, minor governmental

unconstitutional and failing adequately to balance competing private and public interests).

⁹⁷ See discussion *infra* Part III.A (noting that Woodburn's drug testing procedures only implicated minimal privacy interests for Lanier).

⁹⁸ See discussion *infra* Part III.B (describing Woodburn's special need to drug test based on compelling government interests that outweighed Lanier's privacy interests).

⁹⁹ See *infra* Part III.C (describing society's interest in allowing preemployment drug testing).

¹⁰⁰ Cf. *Von Raab*, 489 U.S. at 672 & n.2 (noting how government interests outweighed privacy concerns because of minimally invasive drug test); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 633 (1989) (holding that because drug test was not undue infringement on privacy interests, government's compelling interests made search reasonable); *Willner v. Thornburgh*, 928 F.2d 1185, 1193 (D.C. Cir. 1991) (stating how urine testing procedure was minimally invasive and, therefore, government's strong interests outweighed privacy concerns).

¹⁰¹ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002); *Skinner*, 489 U.S. at 619-20; *Lanier v. City of Woodburn*, No. 04-1865-KI, 2005 WL 3050470, at *4 (D. Or. Nov. 14, 2005); Fogel et al., *supra* note 35, at 575.

¹⁰² See *Skinner*, 489 U.S. at 624; *Willner*, 928 F.2d at 1189 (describing how urine testing procedure only minimally infringes on privacy interests); Fogel et al., *supra* note 35, at 576. See generally *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (allowing searches of schoolchildren without individualized suspicion if search is not excessively intrusive).

intrusions do not unreasonably invade an individual's privacy.¹⁰³ Courts hold that urine testing is relatively noninvasive because government officials conduct these tests in conditions nearly identical to those encountered in public restrooms.¹⁰⁴ The district court in *Lanier* even conceded that Woodburn's urine testing was relatively noninvasive.¹⁰⁵ Therefore, preemployment drug testing implicates only a negligible privacy interest for potential employees, and Woodburn appropriately requested that Lanier submit to a urine test.¹⁰⁶

Furthermore, urine testing is so common in the workplace that employees expect to be tested and are often familiar with the procedures used.¹⁰⁷ In *Skinner*, the Supreme Court explained that a urine test is commonplace because it is similar to procedures encountered in a routine medical examination.¹⁰⁸ Thus, based on the commonplace, noninvasive nature of urine testing, Lanier's privacy concerns were minimal and, therefore, insufficient to counteract the compelling governmental interest in testing.¹⁰⁹

However, some courts hold that employment drug testing is inherently invasive and that individuals have a justifiable privacy concern regarding governmental intrusion into their bodies.¹¹⁰ In *Skinner*, the Supreme Court noted that urinating is personal because

¹⁰³ See *Willner*, 928 F.2d at 1193 (noting diminished expectation of privacy for job applicants); *Loder v. City of Glendale*, 927 P.2d 1200, 1216 (Cal. 1997); *Baughman v. Wal-Mart Stores, Inc.*, 592 S.E.2d 824, 827-28 (W. Va. 2003).

¹⁰⁴ See *Earls*, 536 U.S. at 847-48; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995).

¹⁰⁵ *Lanier*, 2005 WL 3050470, at *6 (quoting *Chandler v. Miller*, 520 U.S. 305, 318 (1997)).

¹⁰⁶ See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989) (noting there is no grave potential for arbitrary and oppressive interference with individual's privacy in urine testing); *Skinner*, 489 U.S. at 625 (describing standardized nature of drug tests in employment setting); *Baughman*, 592 S.E.2d at 827-28 (describing drug tests as standard component of preemployment background checks and medical evaluations); see also *Earls*, 536 U.S. at 833-34; *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

¹⁰⁷ See *Von Raab*, 489 U.S. at 672 n.2; *Skinner*, 489 U.S. at 622; *Baughman*, 592 S.E.2d at 827-28.

¹⁰⁸ See *Skinner*, 489 U.S. at 626-27.

¹⁰⁹ See *Von Raab*, 489 U.S. at 672 n.2; *Skinner*, 489 U.S. at 633 (noting that because drug testing was not undue infringement on privacy interests, government interests outweighed these privacy concerns); *Willner v. Thornburgh*, 928 F.2d 1185, 1193 (D.C. Cir. 1991).

¹¹⁰ See *Skinner*, 489 U.S. at 617; *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 380 (6th Cir. 1998) (noting that urinating is intensely private and personal act); *Nat'l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987).

people traditionally urinate in private and generally do not discuss urination in public.¹¹¹ Based on this reasoning, Woodburn's drug testing could be invasive because Lanier has an expectation of privacy regarding her basic bodily functions.¹¹² While Woodburn's urine testing procedures were relatively noninvasive, this type of test intrudes on an individual's reasonable expectation of privacy regarding bodily fluids.¹¹³ Furthermore, some courts note that urine testing intrudes on privacy because individuals do not reasonably expect that when discharging urine, others will collect and analyze it.¹¹⁴ Therefore, Woodburn's urine testing policy intrudes on an individual's expectation of bodily privacy.¹¹⁵

This argument fails, however, because job applicants have a diminished expectation of privacy.¹¹⁶ In *Willner*, the court held that job applicants possess a lesser expectation of privacy because they regularly disclose confidential information to employers during hiring.¹¹⁷ Employers routinely require background checks, medical examinations, and references from prospective employees.¹¹⁸

¹¹¹ *Skinner*, 489 U.S. at 617.

¹¹² See *id.* (quoting *Von Raab*, 816 F.2d at 175); *Baughman*, 592 S.E.2d at 828 n.3 (quoting *Loder v. City of Glendale*, 927 P.2d 1200, 1249 (Cal. 1997)); see also *Lanier v. City of Woodburn*, No. 04-1865-KI, 2005 WL 3050470, at *6 (D. Or. Nov. 14, 2005) (noting that Woodburn placed burden on Lanier's privacy interests and nothing indicated that Lanier's privacy interests were diminished or minimal). See generally *Haberberger*, *supra* note 14, at 357 (describing how urine is normally disposed of in private circumstances and how medical analysis of urine can reveal personal information about donor).

¹¹³ See *McDonell v. Hunter*, 809 F.2d 1302, 1311 (8th Cir. 1987) (placing heavy emphasis on expectation of privacy regarding search of bodily fluids); *Fogel et al.*, *supra* note 35, at 573-74.

¹¹⁴ See *Von Raab*, 816 F.2d at 175; *McDonell*, 809 F.2d at 1131; *Fogel et al.*, *supra* note 35, at 573-74.

¹¹⁵ See generally *Skinner*, 489 U.S. at 617 (describing how urine collection and testing intrudes on reasonable expectations of privacy); *Haberberger*, *supra* note 14, at 357 (stating that urine is normally disposed of privately and, thus, medical analysis of urine violates expectations of privacy).

¹¹⁶ See *Willner v. Thornburgh*, 928 F.2d 1185, 1193 (D.C. Cir. 1991); *Loder v. City of Glendale*, 927 P.2d 1200, 1216 (Cal. 1997); *Baughman*, 592 S.E.2d at 827-28.

¹¹⁷ See, e.g., *Willner*, 928 F.2d 1185 (noting job applicants have reduced expectation of privacy because they already submit extensive background information); *Loder*, 927 P.2d 1200 (stating that employer's preemployment drug testing program only minimally violated applicants' privacy because applicants were also submitting other personal information during application process); *Baughman*, 592 S.E.2d 824 (holding that prospective employees have lower expectation of privacy than current employees because they already submit references and undergo background checks and medical examinations).

¹¹⁸ See *Willner*, 928 F.2d at 1193; *Loder*, 927 P.2d at 1203; *Baughman*, 592 S.E.2d at

Accordingly, the *Willner* court concluded that the hiring process presents a unique context where disclosing information is customary and commonplace.¹¹⁹ Therefore, Lanier had a diminished expectation of privacy because of the job hiring context, which requires applicants to submit personal information.¹²⁰

Lanier further had a diminished expectation of privacy because Woodburn gave Lanier advance notice that the offer of employment required passing a drug test.¹²¹ In *Willner*, the court noted that advance notice of a drug test lowers expectations of privacy because the applicant knows of the future intrusion.¹²² The purpose of the Fourth Amendment is to prevent unexpected and oppressive interference with individuals' privacy.¹²³ Woodburn's interference with Lanier's privacy was neither unexpected nor oppressive because Lanier received advance notice of the testing date and type of procedure required.¹²⁴ Woodburn's drug testing policy also did not involve an

827-28.

¹¹⁹ See *Willner*, 928 F.2d at 1193; see, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 830-31 (2002) (noting that search was reasonable because disclosure of information was commonplace for school athletes); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654, 657 (1995) (noting that student athletes are also in unique situation where they frequently compromise their individual privacy); *Skinner*, 489 U.S. at 624 (noting that employees ordinarily consent to significant restrictions on their freedom during working hours); see also *Chandler v. Miller*, 520 U.S. 305, 325-26 (1997) (Rehnquist, C.J., dissenting) (describing how political candidates already relinquish significant amount of privacy by running for office, that drug tests do not infringe upon privacy expectations).

¹²⁰ See *Willner*, 928 F.2d at 1193; *Loder*, 927 P.2d at 1216; *Baughman*, 592 S.E.2d at 827-28.

¹²¹ See *Lanier v. City of Woodburn*, 518 F.3d 1147, 1149 (9th Cir. 2008) (stating that Woodburn notified Lanier that offer of employment depended on successful completion of background check and preemployment drug screening); see also *Willner*, 928 F.2d at 1189; *Loder*, 927 P.2d at 1225 n.19 (quoting Nat'l Fed'n of Fed. Emps. v. Weinberger, 818 F.2d 935, 943 (D.C. Cir. 1987)).

¹²² *Willner*, 928 F.2d at 1189-90.

¹²³ See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)); *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967) (noting that purpose of Fourth Amendment is to safeguard individual privacy against arbitrary invasions by government officials); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (stating that purpose of Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by state).

¹²⁴ See *Von Raab*, 489 U.S. at 672 n.2; *Willner*, 928 F.2d at 1189-90; Carita Zimmerman, *Urine Testing, Testing-Based Employment Decisions and the Rehabilitation Act of 1973*, 22 COLUM. J.L. & SOC. PROBS. 219, 241 n.129 (1989); see also *Lanier v. City of Woodburn*, No. 04-1865-KI, 2005 WL 3050470, at *1 (D. Or. Nov. 14, 2005) (describing that Lanier had prior knowledge of drug test because she had time to write formal complaint to library supervisor).

unexpected intrusion because Lanier did not need to apply for a position that required drug testing.¹²⁵ Lanier subjected herself to drug testing when she voluntarily applied for a position at the Woodburn library.¹²⁶ The *Willner* court concluded that job applicants have diminished expectations of privacy because they maintain control over which positions they apply for.¹²⁷ Therefore, Lanier's personal choice to apply for the library page position diminished her expectation of privacy and strengthened Woodburn's interests in searching.¹²⁸

B. The City of Woodburn Has a Special Need to Conduct Warrantless and Suspicionless Searches Through Preemployment Drug Testing

Woodburn's requirement that Lanier submit to a drug test was reasonable because Woodburn had compelling interests in preemployment drug testing that outweighed Lanier's privacy concerns and created a special need.¹²⁹ In *Chandler*, the Court noted

¹²⁵ See *Lanier*, 2005 WL 3050470, at *1 (describing how Lanier voluntarily applied for page position); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (noting that students who participate in sports voluntarily subject themselves to high degree of regulation); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 627 (1989) (stating that employees who enter certain industries know they might be subject to drug testing and have choice not to apply for position); *Willner*, 928 F.2d at 1190 (noting that individuals who are opposed to drug testing can refrain from applying for job).

¹²⁶ See *Lanier*, 2005 WL 3050470, at *1 (noting how Lanier applied for page position voluntarily); see also *Bd. of Educ. v. Earls*, 536 U.S. 822, 831-32 (2002) (noting how students subjected themselves to special regulations by voluntarily participating in athletic programs); *Skinner*, 489 U.S. at 627 (describing how railway employees have diminished expectation of privacy based on their participation in heavily regulated industry); Lynn Crossett, Note, *Do Public School Athletes Shed Their Constitutional Rights at the Locker Room Door? The Supreme Court Upholds Random Urinalysis Testing of Public School Athletes: Vernonia School District 47J v. Acton*, 27 TEX. TECH L. REV. 327, 338 (1996).

¹²⁷ *Willner*, 928 F.2d at 1190.

¹²⁸ See generally *New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 (1985) (noting that Fourth Amendment does not protect unreasonable expectations of privacy, such as complete privacy expectations in certain inherently invasive settings); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (holding that drug test was unreasonable invasion of privacy because employer did not give firefighters advance notice of test); Cornell, *supra* note 73, at 392-93 (noting that in cases with advance notice, legitimate state interest easily overrides individual's diminished privacy concerns).

¹²⁹ See *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (noting that courts must examine closely competing private and public interests advanced by parties to determine reasonableness of search); *Acton*, 515 U.S. at 653 (supporting case-by-case analysis of special need by explaining that legitimate expectations of privacy vary in different contexts); *Willner*, 928 F.2d at 1192 (noting that employer has legitimate interest in ascertaining information about job applicant); see also *Earls*, 536 U.S. at 829; *Von Raab*, 489 U.S. at 665-66 (describing how courts must undertake contextual

that the government sometimes has a special need to conduct drug testing even when there is no warrant or suspicion of a crime.¹³⁰ In *Lanier*, Woodburn's desire to drug test was not based on suspicion of a crime.¹³¹ However, Woodburn's interests in excluding drug abusers from the workforce and screening applicants created a special need because these interests outweighed Lanier's minimal privacy concerns.¹³²

In determining a special need, courts must undertake a context-specific inquiry that examines the competing public and private interests.¹³³ Supreme Court precedent indicates that governments have a compelling interest in conducting searches at sobriety checkpoints and schools to prevent future harm.¹³⁴ Woodburn similarly had a

inquiry of competing public and private interests to determine special need). *See generally Skinner*, 489 U.S. at 619 (noting how government can dispense with warrant requirement and still effectuate reasonable search if government has special need to search); Cornell, *supra* note 73, at 392 (describing how governmental interests can override privacy interests because urine tests are relatively unintrusive).

¹³⁰ *See Chandler*, 520 U.S. at 313-14. *See generally Acton*, 515 U.S. 646 (permitting drug testing of student athletes absent suspicion of criminal activity); *Von Raab*, 489 U.S. 656 (allowing drug testing of customs employees absent suspicion of criminal wrongdoing); *Skinner*, 489 U.S. at 634 (stating government had special need to drug test railway employees absent suspicion they committed crime); *Willner*, 928 F.2d at 1187 (quoting *Von Raab*, 489 U.S. at 664) (defining special need as need beyond normal law enforcement need).

¹³¹ *See Lanier v. City of Woodburn*, 518 F.3d 1147, 1149-50 (9th Cir. 2008) (noting that Woodburn's desire to drug test was based on desire to prevent drug usage in workplace).

¹³² *See id.* at 1149 (describing Woodburn's Personnel Policies and Procedures Manual, which explains Woodburn's interest in deterring substance abuse among future employees); *Willner*, 928 F.2d at 1192 (noting that employers want drug-free employees because employers invest considerable time and money in hiring and training new employees); *see, e.g., Earls*, 536 U.S. 822 (noting special needs of government make requirement of individualized suspicion impractical); *Chandler*, 520 U.S. at 314 (stating that compelling governmental interests in drug testing can override privacy interests of individual); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (holding that special need to drug test employees made warrantless search reasonable); *T.L.O.*, 469 U.S. at 340 (noting how special needs of school environment make school's interest in drug testing legitimate and minimize privacy concerns).

¹³³ *Earls*, 536 U.S. at 829; *Chandler*, 520 U.S. at 314; *see Von Raab*, 489 U.S. at 665-66; *see also Acton*, 515 U.S. at 653 (noting importance of contextual analysis of special need based on differing expectations of privacy in different circumstances).

¹³⁴ *See Earls*, 536 U.S. at 825 (noting that school had important interest in drug testing to detect and prevent drug use among students); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (noting that government had compelling interest in conducting sobriety checkpoints to prevent harm caused by drunk driving); *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 374-75 (6th Cir. 1998) (permitting drug testing of teachers to ensure students' safety).

compelling interest in drug testing applicants to prevent drug abusers from entering the library's workforce and causing harm.¹³⁵ Drug abusers often have higher absenteeism, diminished productivity, and more workplace accidents.¹³⁶ Woodburn's drug testing was an attempt to prevent this type of harm.¹³⁷ Woodburn tried to prevent drug users from entering the library's workforce by denying employment to applicants who failed a drug test.¹³⁸ Courts recognize that government employers often have a compelling interest in not hiring employees who are likely to cause harm.¹³⁹ Accordingly, Woodburn's compelling interest in preventing drug users from causing workplace harm outweighed Lanier's minimal privacy concerns.¹⁴⁰

¹³⁵ See *Willner*, 928 F.2d at 1192 (noting substantial governmental interest in preventing drug users from entering workforce); see also *Chandler*, 520 U.S. at 324 (Rehnquist, C.J., dissenting) (discussing major problem of drug abuse in workplace); Edward S. Adams, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. CHI. L. REV. 1335, 1360-61 (1987) (noting that government had legitimate interest in regulating employee's job performance). See generally *O'Connor v. Ortega*, 480 U.S. 709 (1987) (stating that governmental interest in having efficient workplace justified search of employee).

¹³⁶ *Loder v. City of Glendale*, 927 P.2d 1200, 1222-23 (Cal. 1997); Fogel et al., *supra* note 35, at 558 (stating how illicit drug users often cause workplace accidents); Haberberger, *supra* note 14, at 348 (noting that illicit drug use accounts for \$76.5 billion in lost productivity).

¹³⁷ See *Lanier*, 518 F.3d at 1149. See generally *Willner*, 928 F.2d at 1191 (noting that drug testing is increasingly common way for employers to prevent workplace drug abuse); *Loder*, 927 P.2d at 1222-23 (describing why employers would try to prevent drug abuse in workplace); Haberberger, *supra* note 14, at 348-49 (stating how many employers now use drug testing to prevent undeniable epidemic of workplace drug abuse).

¹³⁸ See *Lanier*, 518 F.3d at 1149 (describing Woodburn's Personnel Policies and Procedures, which permits Woodburn to hire applicants only after they successfully pass drug test). See generally *Willner*, 928 F.2d at 1192-93 (noting employer's interest in drug testing because drug abusers often cause harm and other problems in workplace); Fogel et al., *supra* note 35, at 559-60 (describing how drug testing is common way for employers to create drug-free workplace).

¹³⁹ See *Willner*, 928 F.2d at 1191-92 (noting employers had interest in not hiring drug user who could cause future harm in workforce); *Loder*, 927 P.2d at 1222-23 (stating that employer has interest in drug testing to ascertain whether job applicant is abusing drugs); Fogel et al., *supra* note 35, at 559-60; see, e.g., *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (permitting city to drug test sanitation employees randomly to avoid workplace harm resulting from drug usage); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (allowing city to drug test employees randomly at Department of Corrections to prevent harm).

¹⁴⁰ See *Lanier*, 518 F.3d at 1149 (noting Woodburn's compelling interest in drug testing based on poor job performance for drug users); *Lanier v. City of Woodburn*, No. 04-1865-K1, 2005 WL 3050470, at *6 (D. Or. Nov. 14, 2005) (describing Woodburn's urine testing procedures as fairly non-invasive and, thus, implying that

Woodburn also had a compelling interest in conducting warrantless and suspicionless preemployment drug tests because obtaining a warrant based on individualized suspicion would jeopardize the effectiveness of Woodburn's drug testing.¹⁴¹ The delay necessary to obtain a search warrant would enable drugs to leave a job applicant's body and, thus, destroy the evidence of drug use.¹⁴² Woodburn's interest in preserving evidence strengthens Woodburn's compelling governmental interests against Lanier's privacy concerns and reinforces that the court should have found a special need.¹⁴³

In assessing competing interests to determine special need, Woodburn further had a compelling interest in drug testing because the city wanted to gather information about job applicants.¹⁴⁴ In

Lanier's privacy interests were minimal); *see, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (noting that drug testing is permissible when special governmental needs make requirement of individualized suspicion impractical); *Chandler*, 520 U.S. 305 (stating that if governmental has compelling interest in drug testing, this interest can override privacy interests of individual and create special need); *see also Willner*, 928 F.2d at 1192 (stating that government has substantial interest in preventing drug abusing individuals from entering workforce and also noting increasing societal acceptance of preemployment drug testing); Dalia Fahmy, *Aiming for a Drug-Free Workplace*, N.Y. TIMES, May 10, 2007, <http://www.nytimes.com/2007/05/10/business/10sbiz.html?ref=business>.

¹⁴¹ *See Chandler*, 520 U.S. at 315 (describing that governments can conduct searches absent individualized suspicion in certain circumstances); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (noting that Court has upheld suspicionless searches in context of drug testing); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 624 (1989) (noting that employer can reasonably search without suspicion if individualized suspicion requirement jeopardized substantial governmental interest); Harvard Law Review Ass'n, *Suspicionless Drug Testing*, 111 HARV. L. REV. 289, 298 (1997) (noting that government can dispense with individualized suspicion requirement if delay in obtaining warrant frustrates legitimate governmental interest).

¹⁴² *See Skinner*, 489 U.S. at 623; *see also Schmerber v. California*, 384 U.S. 757, 770 (1966) (holding that drug test was necessary to prevent dissipation of alcohol from drunk driver); *see, e.g., Preston v. United States*, 376 U.S. 364, 367 (1964) (describing how warrantless search can be reasonable when obtaining warrant could lead to destruction of evidence).

¹⁴³ *See Skinner*, 489 U.S. at 623 (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 533 (1967) (stating that government can dispense with warrant requirement when burden of obtaining warrant would frustrate governmental purpose for searching)); *Schmerber*, 384 U.S. at 770; *Willner*, 928 F.2d at 1187 (describing how government can have special need to conduct suspicionless searches under Fourth Amendment when it would be impractical for government to have individualized suspicion).

¹⁴⁴ *See Willner*, 928 F.2d at 1193; *Loder*, 927 P.2d at 1223 (describing employer's special need to gather information regarding job applicants as opposed to current employees because employer already knows about work ethic of current employees). *See generally Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674 (1989) (noting that because employees were not regularly supervised, government had

Willner, the court held that employers can only make predictions about a job applicant's work ethic without observing the individual in the workplace.¹⁴⁵ Woodburn sought to learn more information regarding Lanier's work ethic by conducting a preemployment drug test.¹⁴⁶ Furthermore, the *Willner* court noted that urine testing is a reasonable manner for employers to discover relevant information about a job applicant regarding drug usage.¹⁴⁷ Therefore, Woodburn established a special need because the city's compelling interest in discovering the habits of job applicants outweighed the minimal intrusion on Lanier's privacy expectation.¹⁴⁸

Some courts only find a compelling governmental interest in drug testing for safety-sensitive positions.¹⁴⁹ In *Skinner*, the Supreme Court defined safety-sensitive positions primarily as those that pose a great danger to the public.¹⁵⁰ In *Lanier*, the court found that Lanier's position was not safety-sensitive because the work involved did not pose a high risk to public safety.¹⁵¹ The Ninth Circuit reasoned that some positions, such as railway operators or customs employees, can cause a greater magnitude of harm to others than library pages.¹⁵² The *Lanier* court stated that the government had a reduced interest in drug

legitimate interest in drug testing to discover pertinent information).

¹⁴⁵ See *Willner*, 928 F.2d at 1193; see also *Chandler*, 520 U.S. at 324 (Rehnquist, C.J., dissenting) (describing how government officials should be able to conduct prophylactic drug testing, without waiting for drug addict to appear in work force before taking action); *Loder*, 927 P.2d at 1223.

¹⁴⁶ See *Lanier v. City of Woodburn*, 518 F.3d 1147, 1149 (9th Cir. 2008) (describing that Woodburn conducted background checks and preemployment drug testing to discover further information about job applicants).

¹⁴⁷ See *Willner*, 928 F.2d at 1193.

¹⁴⁸ See *Lanier*, 518 F.3d at 1149-50 (noting Woodburn's stated interest in conducting preemployment drug tests); *Willner*, 928 F.2d at 1193; see also *Bd. of Educ. v. Earls*, 536 U.S. 822, 848 (2002) (describing minimally invasive nature of urine tests); *Chandler*, 520 U.S. at 324 (Rehnquist, C.J., dissenting) (stating governmental interest in prophylactic drug testing in workplace); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (noting how drug tests are relatively non-invasive).

¹⁴⁹ *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 628-29 (1989) (noting special government need to drug test because railway employees hold safety-sensitive positions); see *Chandler*, 520 U.S. at 321-22. See generally *Von Raab*, 489 U.S. 656 (describing special need to drug test for safety-sensitive position of customs employees); *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998) (stating special need to drug test teachers due to safety-sensitive nature of positions).

¹⁵⁰ See *Skinner*, 489 U.S. at 628-29.

¹⁵¹ *Lanier*, 518 F.3d at 1151-52 (reasoning that Lanier's position does not pose same threat of harm to public as railway workers or aviation employees).

¹⁵² See *id.* (citing *Skinner*, 489 U.S. at 628-29; *Von Raab*, 489 U.S. at 677-78).

testing because the library page position was not a safety-sensitive position.¹⁵³ Therefore, Woodburn did not have a compelling governmental interest in conducting a search because the library page position was not a safety-sensitive position.¹⁵⁴

However, this argument fails because government officials can have a compelling interest in drug testing potential employees even if those employees do not hold safety-sensitive positions.¹⁵⁵ The presence of a safety-sensitive position is one factor for courts to consider, but it is not an absolute requirement for finding a compelling governmental interest in drug testing.¹⁵⁶ Courts should consider the totality of circumstances when determining compelling governmental interests.¹⁵⁷ Although the library page position may not be safety-sensitive, Woodburn had other compelling interests in preemployment drug testing.¹⁵⁸ Thus, the lack of a safety-sensitive position is not determinative in assessing competing interests to determine special

¹⁵³ See *id.* (noting that Woodburn did not have special need because library page position was not safety-sensitive position).

¹⁵⁴ See *Chandler*, 520 U.S. at 321-22; *Skinner*, 489 U.S. at 628-29 (noting special government need to drug test because railway employees have safety-sensitive position). See generally *Von Raab*, 489 U.S. at 668-69 (describing special need to drug test for safety-sensitive position of customs employees); *Knox Cnty. Educ. Ass'n*, 158 F.3d at 378-79 (stating special need to drug test teachers out of concern for health and safety of students).

¹⁵⁵ See generally *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (noting that drug testing of job applicants for attorney position was reasonable, yet not describing attorney position as safety-sensitive); *Loder v. City of Glendale*, 927 P.2d 1200 (Cal. 1997) (permitting suspicionless drug testing of all city job applicants, regardless of safety-sensitive nature of position); *Baughman v. Wal-Mart Stores, Inc.*, 592 S.E.2d 824 (W. Va. 2003) (stating that Wal-Mart could give preemployment drug tests to prospective employees, but not defining Wal-Mart employees as safety-sensitive positions).

¹⁵⁶ See *Willner*, 928 F.2d at 1192 (upholding suspicionless drug testing for positions not classified as safety-sensitive based on governmental interest in maintaining public confidence and trust); Cornell, *supra* note 73, at 390 (noting that Supreme Court generally focuses on certain factors in determining governmental interest in suspicionless testing, but not stating that these factors are strict guidelines); Fogel et al., *supra* note 35, at 578-79 (describing totality of circumstances approach).

¹⁵⁷ See *Loder*, 927 P.2d at 1222-23 (stating that employers have compelling interest in preventing drug abusers from entering workforce because of well-documented problems associated with drug and alcohol abuse); Fogel et al., *supra* note 35, at 578-79.

¹⁵⁸ See *Lanier*, 518 F.3d at 1149, 1151-52 (noting that library page position was not safety-sensitive, but describing how Woodburn had interest in drug testing to discover further information about job applicants); see also *Willner*, 928 F.2d at 1193 (also noting compelling governmental interests in drug testing job applicants to uncover information).

need.¹⁵⁹ Woodburn's desire to screen applicants and deny drug abusers from the workforce represented a compelling governmental interest, even though Lanier's position was not safety-sensitive.¹⁶⁰ Therefore, Woodburn had compelling governmental interests in drug testing that outweighed Lanier's minor privacy interests and created a special governmental need.¹⁶¹

C. *Widespread Drug Usage Favors Allowing Employers To Administer Preemployment Drug Tests*

When analyzing the competing interests, public policy supports the governmental interest in drug testing and, thus, minimizes the individual privacy interests at stake.¹⁶² Employers should have the ability to conduct preemployment drug testing because illicit drug usage is widespread and has a negative impact on the workplace.¹⁶³ Approximately seventy-five percent of illicit drug users have jobs, and

¹⁵⁹ See *Chandler*, 520 U.S. at 314; see also *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (describing special needs standard, but not mentioning safety-sensitive positions); *Von Raab*, 489 U.S. at 665-66 (noting that courts should undertake contextual analysis of whether special governmental needs make warrant requirement impractical).

¹⁶⁰ See discussion *supra* Part III.B (discussing Woodburn's interests in gaining knowledge about future employees and preventing future harm by denying employment to drug abusers).

¹⁶¹ See *Willner*, 928 F.2d at 1192 (describing how government employer has compelling interest in drug testing job applicants before spending time and money training hired employee who may cause harm based on drug abuse). See generally *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989) (noting that urine testing procedures pose only limited threats to privacy interests and finding that compelling state interest can override this minor privacy invasion); Cornell, *supra* note 73, at 392 (describing how governmental interests can outweigh privacy interests because urine testing is circumscribed and unintrusive).

¹⁶² See discussion *supra* Part III.A (describing Lanier's minimal privacy interests); see also *Von Raab*, 489 U.S. at 673-74 (demonstrating compelling governmental interests in detecting and preventing drug abuse); *Willner*, 928 F.2d at 1192-93 (noting problems associated with workplace drug abuse and need for government to drug test); *Loder*, 927 P.2d at 1222 (stating governmental need to drug test and noting drug test's minimal intrusion on job applicant's reasonable expectation of privacy); Haberberger, *supra* note 14, at 348.

¹⁶³ See *Von Raab*, 489 U.S. at 674 (noting drug abuse is one of most serious problems confronting United States society today); *Doe v. City & Cnty. of Honolulu*, 816 P.2d 306, 312 (Haw. Ct. App. 1991); Haberberger, *supra* note 14, at 345; *Safety and Health Topics: Workplace Substance Abuse*, U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Sept. 30, 2009), <http://www.osha.gov/SLTC/substanceabuse/index.html> (noting that vast majority of drug users are employed and that drug users cause avoidable workplace hazards).

drug use inhibits their workplace performance.¹⁶⁴ Illicit drug users are more likely to miss work, cause accidents, and file workers' compensation claims.¹⁶⁵ In addition, illicit drug use costs United States employers billions of dollars annually in lost productivity.¹⁶⁶ The United States has an economic interest in promoting drug-free workplaces because the public benefits from increased business productivity.¹⁶⁷ Drug testing makes the workplace safer, increases worker productivity, and saves employers money by prohibiting drug users from entering the workforce.¹⁶⁸

Generally, common urine testing procedures correctly identify drug-using applicants.¹⁶⁹ Therefore, preemployment drug testing would have enabled Woodburn to reduce the hazards and liabilities of employing Lanier, who was potentially an illicit drug user.¹⁷⁰ Woodburn's desire to search was reasonable because United States citizens have an interest in preventing worker absenteeism, workplace accidents, and future health care costs.¹⁷¹

¹⁶⁴ Fahmy, *supra* note 140; *see* Fogel et al., *supra* note 35, at 559-60 (noting that illicit drug uses causes demonstrable decrease in productivity and safety); *Substance Abuse Basics*, U.S. DEPT LABOR, <http://www.dol.gov/asp/programs/drugs/workingpartners/sab/sab.asp> (last visited Nov. 29, 2009) (noting that workplace substance abuse can result in lower employee productivity).

¹⁶⁵ *Loder*, 927 P.2d at 1222-23; Fahmy, *supra* note 140. *See generally* Fogel et al., *supra* note 35, at 558-59 (describing enhanced likelihood of poor job performance and additional employer expenditures for illicit drug users).

¹⁶⁶ *Robinson v. City of Seattle*, 10 P.3d 452, 455-56 (Wash. Ct. App. 2000); Fogel et al., *supra* note 35, at 558; Fahmy, *supra* note 140.

¹⁶⁷ *See* Fogel et al., *supra* note 35, at 558; Haberberger, *supra* note 14, at 348; Fahmy, *supra* note 140.

¹⁶⁸ *See Loder*, 927 P.2d at 1253; Adams, *supra* note 135, at 1336-37; Haberberger, *supra* note 14, at 348 (noting increasing use of drug testing by employers to prevent problems associated with drug usage); Marianne Heal, *Drug Testing in the Workplace: The Need for Quality Assurance Legislation*, 48 OHIO ST. L.J. 877, 877 (1987).

¹⁶⁹ *See Nat'l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987) (stating that common urine testing procedures utilized by employer were very accurate); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 877 (E.D. Tenn. 1986) (noting high accuracy of Enzyme Multiple Immunoassay Technique ("EMIT") urine testing); Adams, *supra* note 135, at 1338 (describing that EMIT is most popular drug screening test and noting how EMIT urine testing is ninety-five percent effective in identifying applicants who use illegal substances).

¹⁷⁰ *See* Haberberger, *supra* note 14, at 348; *see also* Addison, *supra* note 16, at 417; Fahmy, *supra* note 140.

¹⁷¹ *See Willner v. Thornburgh*, 928 F.2d 1185, 1192 (D.C. Cir. 1991) (noting increased frequency of drug testing, especially in private sector); *Loder*, 927 P.2d at 1222-23 (describing how employers clearly have need to drug test because of well-documented problems resulting from drug abuse); Fahmy, *supra* note 140; *see also* Michael R. O'Donnell, *Employee Drug Testing — Balancing the Interests in the*

Media attention, governmental action, and an increasing number of private employers that drug test potential employees further demonstrate public support for preemployment drug testing policies.¹⁷² Successful anti-drug advertising campaigns reveal the public's interest in creating drug-free environments, such as the drug-free workplace that Woodburn attempted to create.¹⁷³ The government has also demonstrated support for employment drug testing by requiring drug testing for many federal employees.¹⁷⁴ In addition, the increase in preemployment drug testing by private employers indicates that society views these policies as reasonable and commonplace.¹⁷⁵ Public acceptance of preemployment drug testing supports a finding that Woodburn's preemployment drug testing of Lanier was a reasonable search under the Fourth Amendment.¹⁷⁶ Therefore, public

Workplace: A Reasonable Suspicion Standard, 74 VA. L. REV. 969, 971-72 (1988) (describing public support for drug testing, governmental authorization of random testing in some instances, and also how employers are increasingly implementing drug testing procedures in response to problem of drug use in workplace).

¹⁷² See *Willner*, 928 F.2d at 1192 (noting recent increase in drug testing by private employers); Adams, *supra* note 135, at 1337 (commenting on increasing number of private employers that now drug test); Fogel et al., *supra* note 35, at 559-61 (noting that private employers, some government officials, and media favor drug testing); O'Donnell, *supra* note 171, at 971-72 (mentioning increase of drug testing among private employers and also federal attempts to curb employment drug use); see also 41 U.S.C. § 701 (2006) (requiring drug-free workplace for federal contractors).

¹⁷³ See Philip H. Dougherty, *Advertising; Campaign on Abuse of Drugs*, N.Y. TIMES, Mar. 4, 1987, <http://www.nytimes.com/1987/03/04/business/advertising-campaign-on-abuse-of-drugs.html> (stating that Partnership for Drug-Free America received media donation of \$500 million worth of advertising); see also Fogel et al., *supra* note 35, at 561; David A. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 202 (1986) (describing that media's emphasis on drug testing athletes encourages drug testing in other industries as well).

¹⁷⁴ See Adams, *supra* note 135, at 1335 (describing President Ronald Regan's executive order mandating drug-free federal workplaces); Miller, *supra* note 173, at 202 (noting governmental Commission on Organized Crime's recommendation for drug testing of all federal employees); see also Fogel et al., *supra* note 35, at 559-60.

¹⁷⁵ See Adams, *supra* note 135, at 1337 (describing how many private employers use urinalysis to detect drug abuse); Fogel et al., *supra* note 35, at 559-60 (stating that employers have implemented drug testing to curb problems associated with drug usage); Miller, *supra* note 173, at 202 (noting that growing number of employers conduct urinalysis).

¹⁷⁶ See *Loder*, 927 P.2d at 1222-23 (describing well known problems associated with drug abuse and, therefore, implying public acceptance of drug testing to curb such obvious problems in workplace); Addison, *supra* note 16, at 417 (noting rapid spread of drug testing in recent years, which strengthens governmental interest in drug testing for purposes of Fourth Amendment balancing test). See generally Fahmy, *supra* note 140 (noting that many employers perform preemployment drug testing due

policy provides an additional factor on Woodburn's side of the balancing equation when assessing public and private interests in preemployment drug testing.¹⁷⁷

CONCLUSION

The *Lanier* court erred in finding Woodburn's preemployment drug testing policy unreasonable under the Fourth Amendment.¹⁷⁸ The court erroneously concluded that the search was unconstitutional through its analysis of the competing public and private interests.¹⁷⁹ However, *Lanier* had a diminished expectation of privacy because the drug test was minimally intrusive and expected as a condition of employment.¹⁸⁰ In addition, Woodburn had a special need to conduct preemployment drug testing because the city's compelling governmental interests in testing outweighed *Lanier's* privacy concerns.¹⁸¹ Furthermore, public policy favors allowing preemployment drug testing because drug users in the workplace pose physical risks to coworkers and financial risks to society.¹⁸²

Lanier's holding discourages municipalities from conducting preemployment drug testing despite the evidence that drug usage has

to compelling governmental interest in deterring workplace drug use).

¹⁷⁷ See Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665-66 (1989) (describing balancing test for determining special governmental needs to conduct warrantless and suspicionless searches); Miller, *supra* note 173, at 202 (describing media attention on drug testing and increasingly commonplace nature of drug testing); see also O'Connor v. Ortega, 480 U.S. 709, 724-25 (1987); Haberberger, *supra* note 14, at 358.

¹⁷⁸ See discussion *supra* Part III.B (describing Woodburn's special need to conduct preemployment drug testing); see, e.g., Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (noting that governments may conduct suspicionless searches if they have special needs); see also Chandler v. Miller, 520 U.S. 305, 314 (1997) (quoting Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 624 (1989)). See generally *Lanier v. City of Woodburn*, 518 F.3d 1147, 1148 (9th Cir. 2008) (finding that Woodburn's preemployment drug testing policy was unreasonable).

¹⁷⁹ *Lanier*, 518 F.3d at 1148; see *Earls*, 536 U.S. at 828-29 (describing special needs exception to warrant and individualized suspicion requirements); Willner v. Thornburgh, 928 F.2d 1185, 1188 (D.C. Cir. 1991) (stating that when government's interests are compelling and privacy invasion is minimal, government can conduct suspicionless drug testing); BLACK'S LAW DICTIONARY, *supra* note 33, at 163 (defining "balancing test" as when courts measure competing interests and decide which interest should prevail).

¹⁸⁰ See discussion *supra* Part III.A (describing *Lanier's* minimal privacy interests).

¹⁸¹ See discussion *supra* Part III.B (noting that Woodburn had special need to drug test because of compelling interests that outweighed minimal privacy interests).

¹⁸² See discussion *supra* Part III.C (stating that public policy favors allowing preemployment drug testing).

a negative effect on American workplaces.¹⁸³ In *Lanier*, the court placed an unreasonable burden on the government in its efforts to create a drug-free workplace.¹⁸⁴ If the Supreme Court reviews governmental preemployment drug testing policies, it should consider declaring these policies constitutional given job applicants' minimal privacy concerns compared to the compelling governmental interests at stake.¹⁸⁵ By finding preemployment drug testing a violation of the Fourth Amendment, cities may not be able to prevent drug abusers from entering the workforce.¹⁸⁶ The Court should uphold policies like Woodburn's because of the overwhelming governmental and societal interests in favor of preemployment drug testing.¹⁸⁷

¹⁸³ See *Loder v. City of Glendale*, 927 P.2d 1200, 1222-23 (Cal. 1997); Adams, *supra* note 135, at 1336-37; Heal, *supra* note 168, at 877 (stating that employers have many reasons for wanting to drug test potential employees).

¹⁸⁴ See discussion *supra* Part III (describing how Woodburn's drug testing policy is constitutional because government has compelling interests in drug testing that outweigh Lanier's minimal privacy interests); see also *Lanier*, 518 F.3d at 1149 (noting that goal of Woodburn's drug testing policy was to create drug-free workplace); *Lanier v. City of Woodburn*, No. 04-1865-K1, 2005 WL 3050470, at *6 (D. Or. Nov. 14, 2005) (holding that city's interests in saving hiring costs, ensuring worker productivity, and preventing harm to third parties were not sufficient to outweigh Lanier's privacy intrusion from noninvasive drug test).

¹⁸⁵ See generally *Chandler v. Miller*, 520 U.S. 305 (1997) (noting that legitimate governmental interests may override relatively nonintrusive privacy invasions); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (holding that search was reasonable because governmental interest was compelling and individual privacy concerns were minimal); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (allowing preemployment drug testing because of minimal individual privacy invasion of job applicants and compelling governmental interests).

¹⁸⁶ See *Lanier*, 518 F.3d at 1148 (holding Woodburn's drug testing policy facially unconstitutional); *Loder*, 927 P.2d at 1222 (describing problems associated with drug usage in workforce); Adams, *supra* note 135, at 1336-37.

¹⁸⁷ See generally *Chandler*, 520 U.S. 305 (stating that government officials may drug test when there is special governmental need); *Von Raab*, 489 U.S. 656 (noting governmental need to drug test based on workplace problems presented by drug usage); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989) (noting that urine tests are relatively noninvasive); *Willner*, 928 F.2d 1185 (describing minimal privacy interests of job applicants).