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SOME TOUGH QUESTIONS FOR CHALLENGES TO PREEMPLOYMENT DRUG TESTING

Stefan Jan Marculewicz*

In response to widespread illegal drug use in the United States, on September 15, 1986, President Ronald Reagan issued Executive Order No. 12,564, which outlined what has become the current policy on drug use by employees of the federal government. President Reagan ordered all executive agencies of the federal government to implement programs to test employees and employment applicants for the use of illegal drugs. The federal agencies complied by implementing testing programs for their own employees, as well as for employees in regulated industries.

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2. Id. President Reagan's Order set guidelines for a comprehensive drug testing policy for federal government employees. Of particular importance is § 3 of the Order, which sets forth the following guidelines for drug testing programs:
   (a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.
   (b) The head of each Executive agency shall establish a program for voluntary employee drug testing.
   (c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:
      (1) When there is a reasonable suspicion that any employee uses illegal drugs;
      (2) In an examination authorized by the agency regarding an accident or unsafe practice; or
      (3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.
   (d) The head of each Executive agency is authorized to test any applicant for illegal drug use.
Id. at 32,890 (emphasis added).
3. See, e.g., U.S. Dep't Agric., Personnel Manual 5792-93 (1988) (Drug Free Workplace Plan testing for drugs in six categories of employees); Dep't of Just. Drug-Free
and local governments also reacted to the drug problem by instituting their own testing programs. A flurry of litigation ensued when government employees and organizations representing their interests challenged the constitutionality of the testing programs. In 1989, the Supreme Court attempted to resolve the constitutional issues raised by parties challenging government-mandated drug testing. In *National Treasury Employees Union v. Von Raab* and *Skinner v. Railway Labor Executives' Ass'n*, the Court provided some guidance for implementation of testing programs. Uncertainty remains, however, and litigation over the issues continues.

One area where courts have essentially resolved the constitutional implications of drug testing is preemployment testing. On July 6, 1992, the United States Court of Appeals for the First Circuit held in *American Postal Workers Union v. Frank* that a labor union lacked standing to seek an injunction against preemployment drug testing, where members of the union, who by definition were already employees of the Postal Service, did not risk exposure to such testing. Analyzed alone, the decision is not surprising. In the context of other preemployment testing challenges by employees and prospective employees, however, the complex implications of this case are apparent. The *American Postal Workers Union v. Frank* decision removes one of the few remaining means for job applicants to protect their constitutional rights in the context of employment drug testing.

This Comment provides a detailed analysis of the available challenges to preemployment drug testing. Section I examines employment drug testing programs in the context of *American Postal Workers Union v. Frank*. Section II discusses the constitutional issues associated with

*Workplace Plan* (as amended Dec. 17, 1987) (testing five categories of employees working in "sensitive positions").


8. 968 F.2d 1373 (1st Cir. 1992).

9. *Id.* at 1377.

10. The court decided the case using a straightforward analysis of standing requirements for injunctive relief without "frills" or controversial conclusions of law. *Id.* at 1376-78.
mandatory drug testing. Section III discusses remedies available for parties who prevail against preemployment drug testing programs, and the effect of the First Circuit's holding in *American Postal Workers Union v. Frank* on such remedies. Finally, Section IV analyzes the implications of *American Postal Workers Union v. Frank* on the general ability to challenge drug testing. This Comment concludes that although grounds exist to challenge preemployment drug testing, the holding in *American Postal Workers Union v. Frank* limits challenges against the potentially unreasonable intrusion of preemployment drug testing.

I. THE POSTAL SERVICE TESTING PROGRAM AS A SOURCE OF CONTROVERSY

The United States Postal Service (USPS) and other government agencies screened job applicants for drugs long before President Reagan issued the 1986 Executive Order. The USPS first tested applicants for employment for the presence of illegal drugs in a Boston post office on September 24, 1986. The USPS implemented the testing as part of a controversial research program on the job performance of employees who use drugs. Although the results were touted as revolutionary, the


The USPS has tested for indicators of disease through a program of urinalysis since 1981. *Job Performance Study Drug Tests Were Unconstitutional, Judge Rules, 27 Gov't Empl. Rel. Rep. (BNA) 1582 (Dec. 11, 1989).* In addition, although the USPS had no national policy of testing applicants for drugs until 1987, the USPS had been conducting drug testing of job applicants on a regional level for several years before the issuance of Executive Order No. 12,564. See, e.g., Some Federal Agencies Given Broad New Powers to Screen Employees For Suspected Drug Use, 23 Gov't Empl. Rel. Rep. (BNA) 615 (Apr. 29, 1985); Matthew J. Doherty, *Drug Tests By Employers Are on the Rise, N.Y. Times, Apr. 27, 1986, at L1.*


American Postal Workers Union (Union) challenged the program in court and obtained an injunction to stop the research testing.\textsuperscript{15}

Although the USPS ceased testing for research purposes, it continued to screen applicants for drug use. The Union again brought suit before the same court to enjoin the applicant testing program;\textsuperscript{16} however, the suit's outcome did not mirror the court's earlier decision. In a short memorandum, the district court denied the Union's motion for a preliminary injunction on two grounds,\textsuperscript{17} the first of which was standing.\textsuperscript{18} Although the same judge had granted the Union standing to challenge preemployment testing for research purposes in the earlier case, he questioned whether the Union had standing to challenge the testing policy where testing was conducted for purposes other than research.\textsuperscript{19} His analysis was based on a National Labor Relations Board (NLRB) decision concluding that the national branch of the American Postal Workers Union had waived its right to collective bargaining on the issue of preemployment drug testing.\textsuperscript{20} The court reasoned that because drug testing was not subject to a collective bargaining agreement, the Union could not act in its representative capacity to challenge the drug testing policy un-

\textsuperscript{14} The research was claimed to be one of the first legitimate studies on the effects of drug use on job performance. \textit{Efficacy of Screening, supra} note 12, at 2642. The researchers concluded that previous estimates of the adverse effect of drug use in the workplace were somewhat exaggerated. \textit{Id.} at 2643. When compared to non-drug users, the study "found that those with marijuana-positive urine samples have 55% more industrial accidents, 85% more injuries, and a 78% increase in absenteeism. For those with cocaine-positive urine samples, there was a 145% increase in absenteeism and an 85% increase in injuries." \textit{Id.} The researchers suggested that their findings could apply to a re-evaluation of the cost-effectiveness of preemployment drug testing programs, as well as to the evaluation of employee assistance programs. \textit{Id.}

\textsuperscript{15} \textit{See} American Postal Workers Union v. Frank, 725 F. Supp. 87 (D. Mass. 1989); \textit{see also} Applicants, \textit{supra} note 13, at 1487.


\textsuperscript{17} \textit{Id.} at 41.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.}
less union members were directly affected by it. The court concluded that because job applicants were not members of the Union, direct confrontation by union members was lacking, and thus it was doubtful that the Union had standing to challenge the drug testing policy.

The second ground advanced by the court to deny the Union’s motion for a preliminary injunction was one of the four factors traditionally considered for such emergency relief. The court concluded that the Union had failed to show a reasonable likelihood of success on the merits on its Fourth Amendment challenge. The court weighed the privacy interests of the individual applicants against the interest of the USPS in maintaining a drug-free workplace, and denied the Union injunctive relief on the basis that testing applicants for drugs constituted a reasonable search under the Fourth Amendment.

The Union appealed to the United States Court of Appeals for the First Circuit. The court of appeals vacated the district court’s decision and remanded the case without reaching the substantive Fourth Amendment issues. The court of appeals quietly criticized the lower court for reaching the merits of the case, and proceeded to complete the lower court’s standing analysis. The First Circuit held that the Union lacked standing to seek an injunction against the USPS to stop preemployment drug testing because members of the Union did not face a realistic risk of future exposure to the testing.

21. Id.
22. Id.
23. Id. In the First Circuit, a plaintiff must satisfy four criteria in order to be entitled to a preliminary injunction. The court must find: 1) that the plaintiff will suffer irreparable injury if the injunction is not granted; 2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; 3) that the plaintiff has exhibited a likelihood of success on the merits; and 4) that the public interest will not be adversely affected by granting the injunction. Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981).
25. See discussion infra part II.B.2. (discussing Supreme Court’s balancing test applied to Fourth Amendment challenges to drug testing).
26. American Postal Workers Union v. Frank, 968 F.2d at 1374 (summarizing the lower court’s holding).
27. Id.
28. Id. The Court of Appeals stated in its opinion that “[a]lthough the [district] court referred to ‘a problem with standing,’ it nevertheless reached the merits to conclude that the balance of interests weighed in favor of the Postal Service’s need to exclude drug-using individuals from employment.” Id.
29. Id. at 1378.
30. Id. at 1376.
A comparison between the First Circuit's decision that applied to unions and existing legal theories that allow challenges to mandatory pre-employment drug testing by employment applicants reveals there is little chance for an applicant to overcome testing as a condition of employment. Constitutional challenges to preemployment drug testing are difficult, and even should a party succeed with such a challenge, the remedies available are so negligible that the wisdom of such a challenge is suspect.

II. THE CONSTITUTIONALITY OF MANDATORY PREEMPLOYMENT DRUG TESTING

A. Drug Testing: A Brief Description

Urinalysis is the most cost-effective and least intrusive method available to determine if an employee uses drugs. The procedure for conducting a urinalysis test is simple. An employer obtains a urine sample from an employee or an applicant for employment by requiring the individual to urinate into a specimen container during a physical examination or a drug testing session. The specimen is sent to a laboratory and ana-

31. Anne M. Rector, Comment, Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening, 35 EMORY L.J. 1011, 1012 (1986). The author notes that other methods available include polygraphs, employment applications, questions about criminal convictions and present drug use, employee surveillance, searches, interrogation, and blood testing. Id.

32. Courts have described in detail methods of taking urine samples for drug testing purposes:

On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.

Upon receiving the specimen, the monitor inspects it to ensure its proper temperature and color, places a tamper-proof custody seal over the container, and affixes an identification label indicating the date and the individual's specimen number. The urine sample is placed in a plastic bag, sealed, and submitted to a laboratory.

lyzed for its chemical makeup, and the test results are returned to the employer. If the results indicate the presence of drugs, the employer may terminate the individual's employment, or reject the employment application.

B. Constitutional Challenges to Preemployment Drug Testing

Plaintiffs have challenged mandatory employee or applicant drug testing under many legal theories. Only challenges asserting denial of due process or unreasonable search and seizure, however, have proven successful.

1. Due Process

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." An individual could assert his constitutional rights to property based on his status as a government employee, because employment with the government arguably may be considered property for constitutional due process purposes. An employment applicant, however, has no basis upon which to assert a similar due process claim, because a property interest in employment only arises if the individual has a

33. For an in-depth discussion of the methods of analyzing urine specimens for the presence of illegal drugs, see Rector, supra note 31.


36. See Yurow, supra note 35, at 178.

37. U.S. Const. amend. V.


39. Id.
legitimate claim of entitlement to employment.\textsuperscript{40}

The Fifth Amendment's protection of an individual's liberty interest may provide a sounder legal basis to challenge the denial of employment based on a positive drug test.\textsuperscript{41} Courts have recognized a liberty interest where an individual has been subject to government disciplinary action.\textsuperscript{42} To demonstrate that government disciplinary action deprives an individual of liberty without due process, an individual must satisfy a three-prong test.\textsuperscript{43} First, the individual must show the government's disciplinary action raised serious questions about his or her integrity in a manner that damaged his standing in the community or that foreclosed job opportunities.\textsuperscript{44} Second, this stigma must arise "in the course" of the disciplinary action.\textsuperscript{45} Finally, the person must demonstrate that public disclosure of the drug test results is likely.\textsuperscript{46}

This three-prong test was applied in \textit{Burka v. New York City Transit Authority},\textsuperscript{47} where applicants for employment and others challenged a mandatory drug testing program.\textsuperscript{48} The applicants easily satisfied the first two requirements.\textsuperscript{49} However, the court questioned whether the applicants had demonstrated that disclosure of the drug test results to the public was likely.\textsuperscript{50} The court analyzed the policies of individual employers to determine whether the employers disclosed the test results.\textsuperscript{51} The

\textsuperscript{40} \textit{Burka}, 680 F. Supp. at 610 (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

\textsuperscript{41} One commentator implies that applicants for government employment might make a case "for relief in the form of procedural due process protection ... [if] they can establish a liberty interest." Yurow, \textit{supra} note 35, at 151-52.


\textsuperscript{44} \textit{Id.} (citing Brandt v. Board of Cooper. Educ. Servs., 820 F.2d 41, 43-44 (2d Cir. 1987)).

\textsuperscript{45} \textit{Id.} (citing Paul v. Davis, 424 U.S. 693, 710 (1976)).

\textsuperscript{46} \textit{Id.} (citing Bishop v. Wood, 426 U.S. 341, 348-49 (1976)).


\textsuperscript{49} \textit{Burka}, 739 F. Supp. at 834.

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} The district court, citing Brandt v. Board of Cooperative Educational Services, 820 F.2d 41 (2d Cir. 1987), recognized that although the employer in \textit{Burka} had a policy against the release of test results, public disclosure of the information could still occur. \textit{Burka}, 739 F. Supp. at 834. Such a situation would likely arise where a subsequent employer asked an applicant to truthfully explain any terminations or suspensions from prior employment. \textit{Id.} Rather than endorsing a policy that promoted telling untruths, the court accepted that "[t]he necessity of revealing the stigmatizing contents of one's ... files on future job applications ... satisfies the likelihood of public disclosure condition." \textit{Id.} Therefore, the court concluded that an individual's liberty interests are affected by submission to mandatory drug testing. \textit{Id.}

\textsuperscript{250} \textit{Journal of Contemporary Health Law and Policy [Vol. 10:243}
court concluded that in cases where the employer’s policy was not to inform the applicant of the reasons for denying employment, there was no likelihood of public disclosure of the test results.\textsuperscript{52} The court further concluded that even if employment was denied because of a positive drug test, the public would be unable to infer the reason behind the denial.\textsuperscript{53} Thus, under the \textit{Burka} court’s analysis, the applicant’s liberty interest is unaffected unless the employer discloses its reasons for rejecting the employment application, and the Fifth Amendment offers minimal grounds for an applicant to challenge a testing program on the theory of deprivation of liberty without due process.

2. \textit{Unreasonable Search and Seizure}

The second constitutional basis for challenges to preemployment drug testing by a government agency is unreasonable search and seizure. The Fourth Amendment states that “[t]he right of the people to be secure... against unreasonable searches and seizures, shall not be violated.”\textsuperscript{54} The purpose of the amendment is to protect individuals from arbitrary invasions of privacy by government officials.\textsuperscript{55} This protection extends to both government employees\textsuperscript{56} and employees of government-regulated industries.\textsuperscript{57} Prior to two 1989 Supreme Court decisions, the reasonableness of drug testing programs under the Fourth Amendment was uncertain. Unfortunately, unanswered questions remain despite Supreme Court guidance on the issue.

\textit{a. Guidance from the Supreme Court: Skinner and Von Raab}

Two Supreme Court cases, \textit{National Treasury Employees Union v. Von Raab}\textsuperscript{58} and \textit{Skinner v. Railway Labor Executives Ass’n},\textsuperscript{59} provide the controlling authority on Fourth Amendment challenges to drug testing. The \textit{Skinner} and \textit{Von Raab} majority opinions, both authored by Justice Ken-

\begin{itemize}
\item \textsuperscript{52} \textit{Id.} The employer’s “policy is to refrain from even informing applicants... of the specific reasons for their dismissal. Rejected applicants... would be unable even to explain the grounds for their rejections and thus would not be required to lie or to dissemble about those grounds.” \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 834-35 n.12.
\item \textsuperscript{54} U.S. \textsc{Constitution} amend. \textsc{IV}. See \textit{Mapp v. Ohio}, 367 U.S. 643, 656-57 (1961).
\item \textsuperscript{56} \textit{See} O’Connor v. Ortega, 480 U.S. 709, 717 (1987).
\item \textsuperscript{57} \textit{See}, e.g., \textit{Skinner v. Railway Labor Executives’ Ass’n}, 489 U.S. 602 (1989).
\item \textsuperscript{58} 489 U.S. 656 (1989).
\item \textsuperscript{59} 489 U.S. 602 (1989).
\end{itemize}
nedy, concluded that drug testing programs implemented by the government or pursuant to government regulation are "searches" within the meaning of the Fourth Amendment. The Court based both holdings on the same legal theory. The principal difference between the cases was the type of drug testing program involved. The Skinner Court dealt with the government's ability to mandate drug testing programs in government-regulated industries, and the Von Raab Court addressed the government's ability to require a drug testing program for its own employees.

The Skinner Court recognized that testing for drugs involves several levels of searches and seizures under the Fourth Amendment. The Court first identified the searches, and then proceeded to the substantive issue of their reasonableness. Guided by the principle that only unreasonable searches and seizures are prohibited by the Fourth Amendment, Justice Kennedy concluded that reasonableness is to be determined by an analysis of all the circumstances surrounding the search and seizure. The Court reached a final determination of reasonableness by weighing the level of governmental intrusion against the legitimate interests asserted by the government for the intrusive policy.

There are several common standards that generally satisfy the reasonableness requirement under Fourth Amendment analysis. They include: the acquisition of a warrant, individualized suspicion, and probable cause. Application of these standards to satisfy the reasonableness requirement for drug testing in the workplace, however, is difficult and im-

60. Id. at 617; Von Raab, 489 U.S. at 665.
63. Skinner, 489 U.S. at 616.
64. Id. at 619 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).
Recognizing this problem, the Supreme Court adopted an exception to the stricter reasonableness standard traditionally applied in other difficult situations. The Court injected a governmental "special need" into the equation used to determine the reasonableness of a search.

The Skinner Court concluded that the government had a special interest in protecting the safety of both the general public and individuals dealing with the railroad industry. The Court maintained that prohibiting employees in the industry "from using alcohol or drugs on duty, or while subject to being called for duty," furthers that special interest. In Von Raab, the "special need" of the government factor tipped the scales decidedly in favor of the government. The Von Raab Court concluded that the government possessed special and compelling interests in maintaining the integrity of government personnel involved in drug interdiction and in ensuring the public safety against government employees carrying firearms. Accordingly, the Von Raab Court concluded that testing those "employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm" was reasonable.

Under the Skinner and Von Raab decisions, drug testing for employment purposes does not violate the Fourth Amendment prohibition against unreasonable search and seizure if the government can establish a special need that outweighs the individual's privacy interests. This special need must arise in the context of public safety protection or in the context of direct interdiction of illegal drugs.

b. Application of Skinner and Von Raab to Preemployment Drug Testing

Plaintiffs and defendants alike have relied on the Supreme Court's reasoning in the Skinner and Von Raab opinions in challenges to drug testing at all levels. Courts have generally required the presence of a public safety concern to find a preemployment drug testing program reasonable.
under the Fourth Amendment; a mere application for employment is not enough to satisfy the reasonableness standard. However, courts have concluded that individuals' status as applicants lessens their privacy rights, and under the Skinner and Von Raab tests, the government's burden in defending an employment applicant's challenge to a drug testing program is a minimal one.

Willner v. Thornburgh presents an excellent example of the reduced right to privacy for job applicants. In this case, the United States District Court for the District of Columbia considered an applicant's ability to challenge mandatory preemployment drug testing by the Department of Justice. Considering whether the testing was an unreasonable search and seizure, the court determined that the government was not required to show as great a need for the testing to successfully outweigh an applicant's privacy interests, as it was required to show to justify employee testing. The court initially concluded that the drug test was a minimal intrusion on the applicant's privacy. The court then added several new factors to the equation. First, the court noted that the applicant was aware of the impending drug test prior to his application. Second, the court reasoned that if the applicant was not willing to have his privacy

75. See Georgia Ass'n of Educators v. Harris, 749 F. Supp. 1110, 1118 (N.D. Ga. 1990) (striking down as unconstitutional a Georgia law that required all applicants for state employment to submit to and pass a drug test). The court expressly stated, however, that absent the statute, the state could still test any applicants who sought positions for which testing is permissible under the Skinner and Von Raab tests. Id.; see also International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1307 (9th Cir. 1991) (holding that the Department of Transportation had a sufficient interest in protecting public safety on the highways to require preemployment controlled substance testing of truck drivers).

76. Several federal jurisdictions have held that a mere interest in the integrity of the workforce is not a sufficient basis to require an individual to submit to drug testing. See, e.g., Harmon v. Thornburgh, 878 F.2d 484, 490 (D.C. Cir. 1989); Georgia Ass'n of Educators, 749 F. Supp. at 1115.


78. See Yurow, supra note 35, at 148-49.


80. Willner, 928 F.2d at 1186.

81. Id. at 1188. The court reasoned: Decreasing levels of intrusiveness require decreasing levels of justification. If the reasonable privacy expectations of applicants are less than those of employees and if the testing procedure for applicants is itself unintrusive, the government is not required to demonstrate as high a degree of justification as it must to conduct random testing of those already employed.

82. Id.

83. Id. at 1190.
invaded by the drug test, he simply could have withdrawn his employment application.\textsuperscript{84} Third, the court concluded that given the application requirements, applicants could not "reasonably expect to . . . shield their private lives from government scrutiny during the hiring process."\textsuperscript{85} Finally, the court concluded that because drug testing of job applicants had been a common practice in the private sector for a considerable amount of time,\textsuperscript{86} the public generally expects drug testing to accompany applications for employment.\textsuperscript{87}

Although the lower standard of protection for privacy interests of job applicants is a recent development, it could be extended to other areas of preemployment drug testing. The consequences would likely mean that the current standards for employee testing set forth in \textit{Skinner} and \textit{Von Raab}, which are already easy for the government to meet, would no longer be necessary in the context of applicants for employment. Future development of this area of the law will make it increasingly difficult for an applicant to prevail on a claim of unreasonable search and seizure under the Fourth Amendment in the context of drug testing.

\section{Available Remedies}

Although it has become increasingly difficult for an individual to challenge preemployment drug testing, an applicant still might prevail under one of the constitutional theories. Assuming an individual prevails, the question arises as to the remedy for the constitutional violation. The following section addresses remedies that may or may not be available.

\textsuperscript{84} \textit{Id.} The Willner court quoted Judge Friendly, who stated that "there is a human difference between losing what one has and not getting what one wants." \textit{Id.} (quoting Henry J. Friendly, \textit{Some Kind of Hearing}, 123 U. PA. L. REV. 1267, 1296 (1975)).

\textsuperscript{85} Willner, 928 F.2d at 1191. The court was alluding to questions posed on the job application form as well as to a required background check of applicants. The court stated:

> By divulging . . . whether he uses, or has used within the past five years, marijuana, cocaine, narcotics, hallucinogens, or other dangerous or illegal drugs, and by consenting to an F.B.I. investigation in which his friends, neighbors, relatives and past and present business associates may be asked if he uses drugs, an applicant relinquishes whatever privacy he might otherwise retain with respect to such information, even when the information is derived from chemical analysis.

\textit{Id.} at 1189.

\textsuperscript{86} "Some of the nation's largest employers, including American Telephone & Telegraph, DuPont, Exxon, Federal Express, Trans World Airlines, and United Airlines, have drug-testing programs for job applicants." \textit{Id.} at 1191-92.

\textsuperscript{87} \textit{Id.} at 1192. "Nonetheless, what is occurring generally outside government is some indication of what expectations of privacy 'society is prepared to accept as "reasonable" when the government engages in the hiring process." \textit{Id.} (citing \textit{Katz} v. United States, 389 U.S. 347, 361 (1967)).
A. The Remedy Under a Theory of Due Process

Little substantive relief is available to the applicant prevailing on a due process claim. Under the Due Process Clause of the Fifth Amendment, an individual is entitled to some form of hearing prior to deprivation of a liberty or property interest. In the context of a challenge to preemployment drug testing, the only remedy available is the imposition of procedural safeguards to give the applicant notice of the testing program. Thus, even if an applicant proves his rights were violated, the employer can remedy the situation by giving the applicant adequate notice of the testing, and by allowing the applicant the opportunity to withdraw his application to avoid injury. Therefore, the remedy available for a due process challenge would not be effective to prevent further preemployment drug testing.

B. Remedies Available Under a Theory of Unreasonable Search and Seizure

More opportunities for relief are available to an applicant or applicants challenging a preemployment drug testing program as an unreasonable search and seizure, because relief is available both at law and in equity. However, an analysis of the various Fourth Amendment remedies indicates that most provide little substantive relief. Indeed, of all the remedies available, only an injunction can effectively protect the Fourth Amendment rights of an applicant.

1. Remedy at Law: Compensation

In general, compensation as a remedy at law is not available for unlawful search and seizure. When property is seized in violation of the Fourth Amendment, the normal remedy is exclusion of the evidence in a subsequent decision-making proceeding, such as a trial. Only in the rare instances where the seizure directly causes the harm will a court grant

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89. Yurow, supra note 35, at 154. "For a job applicant, the issue is whether the applicant is fully aware before pursuing a position that drug testing may be required, and that a positive result will prompt adverse consequences." Id. Yurow suggests providing notice to an applicant by placing a warning on the job application “that urinalysis drug testing is a pre-condition of employment.” Id. (citing Dozier v. New York City, 519 N.Y.S.2d 135, 143 (N.Y. App. Div. 1987)).
90. Id. at 154-55.
compensatory relief. At least one court has addressed the issue. In
Burka v. New York City Transit Authority, the plaintiff requested monetary damages as a remedy for a Fourth Amendment violation. The court stated that the purpose of the exclusionary rule is "to deter future unlawful government conduct." The court reasoned that in instances where future unlawful conduct would not be deterred by the exclusion of tainted evidence, however, the evidence should be admitted. The court concluded that because the consideration of drug test results by potential employers did not directly harm the plaintiffs, they were not entitled to compensatory relief. The only remedy the Burka court allowed was injunctive relief.

2. Equitable Remedies

Where monetary relief for a violation of the Fourth Amendment is unavailable, a plaintiff can seek equitable relief, but the only practical remedy a court can provide for the injuries caused by a preemployment testing program is to declare the program unconstitutional and enjoin its further implementation.

a. Declaratory Relief

Courts have granted declaratory relief to remedy Fourth Amendment violations caused by drug testing programs. Declaratory judgments alone, however, provide little actual protection against unreasonable

95. Id. at 219 (citing James v. Illinois, 110 S. Ct. 648, 651 (1990)).
96. Id. (citing Illinois v. Krull, 480 U.S. 340 (1987)).
97. Id. at 219.
98. Id. at 220. The Burka court stated that the Due Process Clause provides compensation as a remedy for parties injured by government action. Id. at 219. It is clear, however, that in the context of drug testing and a potential deprivation of liberty by the government, remedies available to job applicants extend only to the provision of notice by the employer. The court further reasoned that the exclusionary rule does not apply to work-related disciplinary proceedings in dismissing the plaintiff's plea for compensation. Id. at 220.
99. See id.
100. See id.
searches and seizures. For example, in Georgia Ass'n of Educators v. Harris,\(^{101}\) the court concluded that the state’s interest in maintaining a drug-free workplace alone was insufficient to outweigh the applicant’s privacy interest under the Von Raab test.\(^{102}\) The court held that the statute mandating drug testing for all state employment applicants was unconstitutional because it was overinclusive.\(^{103}\) The court stated that mandatory testing was only permissible for employment positions for which the state’s interests were sufficient to outweigh those of the individual.\(^{104}\) Declaratory relief alone, however, did not remedy the applicant’s interest in avoiding intrusive drug testing. Although it gave the state legislature guidance as to how to design a permissible testing program,\(^{105}\) declaratory relief provides limited help for other job applicants, who may still have to bring suit to establish that their individual rights were violated.

Another example of the inadequate protection of declaratory judgments alone against Fourth Amendment violations is Burka v. New York City Transit Authority.\(^{106}\) In this case, the court sought to remedy a Fourth Amendment violation by declaring that the information obtained through an unconstitutional testing program be expunged from the employees’ work records in order to protect their privacy interests.\(^{107}\) The court concluded that the employees were entitled to have the drug testing information expunged from their records, but they were not entitled to have employment decisions overturned because the use of drug testing information in the decision-making process did not violate the Fourth Amendment.\(^{108}\)

The practical effect of this unique remedy is unclear from the opin-

\(^{102}\) Harris, 749 F. Supp. at 1114-15. The court stated:
[D]efendants [are not relieved] of their obligation to articulate a substantial governmental interest served by testing all job applicants. Because defendants have failed to articulate such an interest, their side of the balancing scale is empty, and even if plaintiffs’ fourth amendment interests are “lighter” than those of existing employees, they are undoubtedly “heavy” enough to prevail here.

\(^{103}\) Id. at 1114 n.5.
\(^{104}\) Id. at 1116. “[T]he court is not forbidding defendants [the state] from drug testing those job applicants whom they are constitutionally permitted to test. Rather, the court is only saying that defendants may not conduct those tests pursuant to the [state law].” Id.

\(^{105}\) See id.
\(^{107}\) Burka, 747 F. Supp. at 220.
\(^{108}\) Id.
ion.

Apparently, the court ordered the employee records expunged to prevent future employers from using the drug test results in employment decisions. However, the court did not reverse past employment decisions based on the improperly obtained information. As a result, the parties could not obtain relief in the form of reinstatement or reconsideration of job applications.

b. Injunctive Relief

The aforementioned remedies afford little substantive relief to preemployment applicants who successfully challenge drug testing programs. To provide effective substantive relief to these plaintiffs, a court must stop the testing or prohibit employers from using the test results in hiring decisions. One effective, but inefficient means for a court to provide such relief is to declare the program's statutory basis unconstitutional. A more efficient way for a court to stop the constitutionally offensive testing is for a court to enjoin continued testing. However, courts generally avoid enjoining an entire program if possible, and determine the constitutionality of a drug testing program on an employment position-by-position basis.

An example of a court's use of injunctive relief is found in Burka v. New York City Transit Authority. The Burka court balanced the privacy interests of the individuals against the safety interests of the employer and concluded that drug testing for employees in certain positions was unreasonable. The court enjoined testing for those positions, but it refused to enjoin the entire program because it saw no

109. See id.
114. See id. The court decided the constitutionality of testing applicants and current workers in the following positions: subway booth attendants and station cleaners—testing held constitutional; turnstile maintainers and stock handlers—testing held unconstitutional; employees in the car equipment department, including painters and cleaners—testing held unconstitutional; car repair supervisors—testing held constitutional; most employees in the track maintenance division—testing held constitutional (excluding the power distribution maintainers). Id. at 821-23. The list describes other positions and the constitutionality of "suspicionless" drug testing based on the safety-sensitive nature of the jobs involved. Id. at 823-26.
115. See id.
reason why the agency would not comply with the court's order.\textsuperscript{116} The
court further reasoned that enjoining the whole program would be tanta-
amount to creating operating procedures for the agency, which the court
considered imprudent.\textsuperscript{117}

The use of equitable relief by courts indicates that it is unconstitutional
to implement a program mandating drug testing for all employment ap-
plicants if the reasons for doing so do not outweigh the privacy interests
of the individuals tested. Because legislatures can enact new statutes that
comply with constitutional requirements, the injunction is the only practi-
cal remedy available to a job applicant with a successful constitutional
challenge to a testing program. However, an analysis of an applicant's
ability to seek injunctive relief in light of the holding in \textit{American Postal
Workers Union v. Frank} illustrates the difficulty involved in remedying
such a constitutional violation.

c. \textit{The Injunction as Affected by American Postal Workers Union
v. Frank}

An analysis of the cases where an individual applicant or group of ap-
plicants was permitted to challenge a mandatory preemployment drug
testing program illustrates a judicial trend of deciding constitutionality on
an individual basis rather than a group basis. The decision in \textit{Frank}
furthers this trend.

There are two contexts in which preemployment testing has been chal-
lenged by a group of individuals. First, groups have challenged
mandatory preemployment drug testing in class action suits.\textsuperscript{118} Under
the Federal Rules of Civil Procedure, a group of individuals must be certi-
ﬁed by the court as a class before they can bring a class action suit in that
capacity.\textsuperscript{119} Although certification is a lengthy and difﬁcult process\textsuperscript{120}
courts have certiﬁed classes of applicants for agency employment.\textsuperscript{121}
Once certiﬁed, courts have granted the class standing to challenge preem-
ployment drug testing and to seek an injunction.\textsuperscript{122} However, even in
class action suits, courts remain unwilling to enjoin an entire agency test-

\textsuperscript{116} \textit{Burka}, 747 F. Supp. at 225.
\textsuperscript{117} \textit{See id.}
\textsuperscript{119} \textit{FED. R. CIV. P. 23.}
\textsuperscript{120} \textit{See id.}
\textsuperscript{121} \textit{Burka, 121 F.R.D. at 216.}
\textsuperscript{122} \textit{See, e.g., id.}
The second manner in which groups have sought to enjoin a drug testing program is through suits brought by organizations such as labor unions.\textsuperscript{124} Courts have allowed a labor union to challenge drug testing programs under the doctrine of associational standing.\textsuperscript{125} Labor unions tend to avoid challenging preemployment testing because of standing problems.\textsuperscript{126} Labor unions have challenged preemployment testing when their members were applying for jobs that required drug testing.\textsuperscript{127} Although organizations are subject to the same substantive requirements set forth in \textit{Skinner} and \textit{Von Raab}, courts permit them to seek an injunction in their prayer for relief.\textsuperscript{128}

In \textit{Frank}, the First Circuit denied the Union associational standing based on the type of relief sought.\textsuperscript{129} The court reasoned that an injunction is permissible only to stop the threat of future harm caused by an unconstitutional search and seizure,\textsuperscript{130} and absent a reasonable threat of future harm, a party has no standing to seek injunctive relief.\textsuperscript{131} The Union’s members were employees of the USPS by definition.\textsuperscript{132} However, the court concluded that current applicants were only potential members,\textsuperscript{133} and therefore no current member of the Union reasonably faced the threat of future injury from a preemployment drug test.\textsuperscript{134} Be-

\begin{itemize}
\item \textsuperscript{123} See supra note 115 and accompanying text.
\item \textsuperscript{124} See, e.g., National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292 (9th Cir. 1991).
\item \textsuperscript{125} For a superb analysis of the requirements of associational standing pertaining to a union’s challenge of an employer’s drug testing policy, see American Postal Workers Union v. Frank, 968 F.2d 1373, 1375-78 (1st Cir. 1992).
\item \textsuperscript{127} See, e.g., International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292 (9th Cir. 1991); Transportation Inst. v. United States Coast Guard, 727 F. Supp. 648 (D.D.C. 1989); Georgia Ass’n of Educators v. Harris, 749 F. Supp. 1110 (N.D. Ga. 1990).
\item \textsuperscript{128} See, e.g., supra notes 126-27.
\item \textsuperscript{129} Frank, 968 F.2d at 1376-77.
\item \textsuperscript{130} Id. at 1376.
\item \textsuperscript{131} Id.; Los Angeles v. Lyons, 461 U.S. 95, 111 (1983); see also Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138 (1992).
\item \textsuperscript{132} Frank, 968 F.2d at 1377.
\item \textsuperscript{133} Id. at 1374.
\item \textsuperscript{134} Id. at 1377.
\end{itemize}
cause the Union did not represent someone who could be redressed by an injunction, the court concluded that the Union lacked standing to seek an injunction.135

IV. IMPLICATIONS OF AMERICAN POSTAL WORKERS UNION V. FRANK

The Frank holding principally affects the ability of a group of individuals to challenge a drug testing program applied to all persons seeking employment with a government agency or in a field regulated by the government. Before applicants are given the opportunity to make out a case under the Skinner and Von Raab tests, they must meet one of two lengthy and arduous procedures to perfect a challenge. Applicants must either seek to certify themselves as a class or bring individual lawsuits to determine the safety sensitivity of each position of employment. The latter route is inefficient and unnecessarily burdensome in terms of time and financial resources.

There are also problems associated with the policy of compelling multiple individual challenges to drug testing programs. Only allowing an association to seek to enjoin preemployment drug testing on behalf of its member-applicants and denying the same relief to applicants who do not have an organization to represent their interests is inherently unfair. Article III standing requirements should not be used to promote an inequitable policy in which standing is granted to some and denied to others when the interests in jeopardy are the same for all. Such a policy should be reassessed to create a more equitable result.

V. CONCLUSION

The holding in American Postal Workers Union v. Frank, which denied standing to a labor union seeking to enjoin a mandatory preemployment drug testing program for all USPS job applicants, furthers a policy that requires individuals to bring constitutional challenges to drug testing programs. Although in accordance with the current law of standing, the holding in Frank is both inefficient and inequitable. Although American Postal Workers Union v. Frank will not be the last challenge to drug testing programs, it has set a precedent that, if followed, will further under-

135. Id. at 1375. The court concluded that the Union had standing to seek relief in the form of damages because it represented individuals who had been subjected to the tests. Id. at 1376. However, it is fairly clear that relief for injury to one's freedom from unreasonable search and seizure cannot be adequately had in the form of damages. See supra notes 91-99 and accompanying text.
mine an individual's ability to assert his rights under the Fourth Amendment. The Supreme Court in the *Skinner* and *Von Raab* decisions tried to provide guidance to protect the rights of citizens in the context of drug testing programs. Unfortunately, decisions like the First Circuit's in *American Postal Workers Union v. Frank* illustrate fundamental flaws in the Supreme Court's constitutional analysis. It would be in the best interests of all parties involved if the Supreme Court were to provide a more efficient means by which job applicants can seek the constitutional protection to which they are entitled.