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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,394

F.O.P. MIAMI LODGE NO. 20,
et al,

Petitioners,

VS.

CITY OF MIAMI,

Respondent.

On Petition to Review A Decision of the District Court of Appeal for the Third District *of* Florida

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BRIEF FOR AMICUS CURIAE, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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QUESTION PRESENTED

AS PRESENTED BY THE FACTS IN THIS CASE, IS THE COMPULSORY DRUG TESTING OF POLICE OFFICERS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING OR, IN THE ALTERNATIVE, MAY A GOVERNMENTAL ENTITY REQUIRE ITS POLICE OFFICERS TO SUBMIT TO DRUG TESTING WITHOUT HAVING FIRST ENTERED INTO COLLECTIVE BARGAINING REGARDING THE SUBJECT?

TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. DRUG TESTING PUBLIC-SECTOR EMPLOYEES IMPLICATES THE FUNDAMENTAL FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES 5

II. DRUG TESTING PUBLIC-SECTOR EMPLOYEES RAISES SERIOUS PRIVACY CONCERNS UNDER THE FLORIDA CONSTITUTION 8

111. WAIVER OF FUNDAMENTALLY PROTECTED RIGHTS, WHETHER GUARANTEED BY THE FEDERAL OR STATE CONSTITUTION, CAN ONLY BE HAD THROUGH THE INDIVIDUAL AND NOT THROUGH THE UNION..... 10

IV. A GOVERNMENT TESTING POLICY THAT OTHERWISE JUSTIFIABLY INFRINGES AN INDIVIDUAL'S FUNDAMENTAL RIGHTS, AND THUS DOES NOT NECESSARILY MANDATE INDIVIDUAL WAIVER, MUST STILL BE COLLECTIVELY BARGAINED TO SURVIVE STRICT SCRUTINY 14

V. STATE LAW SHOULD BE INTERPRETED TO AVOID CONSTITUTIONAL DIFFICULTY UNDER EITHER THE FEDERAL OR STATE CONSTITUTIONS..... 18

CONCLUSION 19

TABLE OF CITATIONS

Cases

Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed.2d 147, 160-61 (1974) 12

Beattie v. City of St. Petersburg Beach, 733 F. Supp. 1455 (M.D. Fla. 1990) 7, 8, 11, 18 n.5

City of Miami v. F.O.P. Miami Lodge 20, 571 So.2d 1309 (Fla. 3d DCA 1989) 1, 2

Craig v. Boren, 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed.2d 574 (1977) 15

Dimeo v. Griffin, 924 F.2d 664 (7th Cir. 1991) 7, 8, 11

Guiney v. Roache, 873 F.2d 1557 (1st Cir.), cert. denied, --- U.S. ---, 110 S. Ct. 404, 107 L. Ed.2d 370 (1989) 7, 8

Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), cert. denied sub nom. Bell v. Thornburgh, --- U.S. ---, 110 S. Ct. 865, 107 L. Ed.2d 949 (1990) 7

Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990) 7, 8

Int'l Brotherhood of Electrical Workers v. Skinner, 913 F.2d 1454 (9th Cir. 1990) 15 n.4

Lesser v. Neosho County Community College, 741 F. Supp. 854, 861 (D. Kan. 1990) 13

Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 108 S.Ct. 1877, 100 L. Ed.2d 410 (1988) 12

Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed.2d 632 (1964) 13

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed.2d 385 (1989) ..... passim

National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990)..... 16 n.4

Public Health Trust of Dade County v. Wons, 541 So.2d 96 (Fla. 1989) 9

Rasmussen v. South Florida Blood Service, Inc.,
500 So. 2d 533 (Fla. 1987) 9

Schmerber v. California, 384 U.S. 757,
86 S. Ct. 1826, 16 L. Ed.2d 908 (1966) 5

Shaktman v.State,
553 So. 2d 148 (Fla. 1989) 8, 9, 11, 15, 16

Skinner v. Railway Labor Executives Ass'n,
489 U.S. 602, 109 S. Ct. 1402,
103 L. Ed.2d 639 (1989) 5, 6, 7, 16

Smith v. Maryland, 442 U.S. 735,
99 S. Ct. 2577, 61 L. Ed.2d 220 (1979) 9 n.1

In re T.W.,
551 So. 2d 1186 (Fla. 1989) 8

Winfield v. Division of Pari-Mutuel Wagering,
477 So.2d 544 (Fla. 1985) 10

Wygant v. Jackson Board of Education, 476 U.S. 267,
106 S. Ct. 1842, 90 L. Ed.2d 260 (1986) 11, 12

Miscellaneous

Finkin, The Limits of Majority Rule
in Collective Bargaining, 64 Minn. L. Rev. 183 (1980) 13

Levy, State Regulation of Drug Testing:
Are Organized Workplaces Exempt?,
1988 U. Chi. Legal Forum 141 12

STATEMENT OF THE CASE

Following allegations that certain Miami police officers were using and purchasing unlawful drugs, the City of Miami, through its police department, ordered drug tests for the officers in question, One of the officers refused the test and was subsequently discharged, The other two officers protested but otherwise submitted to testing.

The Fraternal Order of Police, Miami Lodge 20, (hereinafter, "the Union"), thereafter filed unfair labor practice charges against the City of Miami. The Public Employees Relations Commission (PERC) ultimately ruled that drug testing was a mandatory subject of collective bargaining and that an unfair labor practice had occurred because the Union had not previously vested in the City the right to examine police officers through drug tests.

The City appealed. The Third District Court of Appeal ruled on January 31, 1989, that PERC was correct in holding that drug testing was a mandatory subject of collective bargaining, City of Miami v. F.O.P. Miami Lodge 20, 571 So.2d 1309 (Fla. 3d DCA 1989). The court also concluded that the Union had not waived its right to collectively bargain over drug testing by granting the City the power to examine police officers. Id. at 1318.

On rehearing en banc the District Court of Appeal on April 17, 1990 overruled these conclusions. 571 So.2d at 1320. The divided en banc court ruled that the decision to test employees for drugs is not subject to mandatory bargaining. Instead, it

falls within the managerial prerogative. Id. at 1329.

The Union then moved that the question be certified to the Florida Supreme Court. 571 So.2d at 1333. The Third District Court of Appeal agreed to certify the following question:

> AS PRESENTED BY THE FACTS IN THIS CASE, IS THE COMPULSORY DRUG TESTING OF POLICE OFFICERS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING OR, IN THE ALTERNATIVE, MAY A GOVERNMENTAL ENTITY REQUIRE ITS POLICE OFFICERS TO SUBMIT TO DRUG TESTING WITHOUT HAVING FIRST ENTERED INTO COLLECTIVE BARGAINING REGARDING THE SUBJECT?

Id. at 1333.

SUMMARY OF ARGUMENT

The position of the American Civil Liberties Union Foundation of Florida, Inc. (hereinafter, "the ACLU"), is that suspicionless drug testing of public sector employees violates the Fourth and Fourteenth amendments to the United States Constitution. Hence, any mandatory or random testing of police officers, without individual waivers by the police officers being tested, violates the federal Constitution, Moreover, suspicionless testing of public-sector employees violates Section 23 of Article I of the Florida Constitution.

The ACLU does not seek to argue in the present case the relative merits of suspicion-based as opposed to suspicionless testing. Neither does the ACLU challenge in this proceeding the specific constitutional merits of Miami's testing policy. Instead, the ACLU hopes only to warn the Court of the potential constitutional consequences of its decision in this case. Specifically, the ACLU addresses the constitutional implications of individual and group waiver af fundamental rights.

Where fundamental rights are at stake, waiver normally may only occur on an individual basis. In the absence of a compelling state interest and narrowly tailored means an individual's personal decision not to waive his rights can not be infringed. Moreover, a public-sector union can not collectively waive an individual's fundamental rights.

Assuming that a governmental decision to test police officers is per se violative of either the United States

Constitution or the Florida Constitution, that is, it is not supported by a compelling concern and narrowly tailored means, waiver must be sought from the individual. A unilateral decision on behalf of government to engage in such testing is unconstitutional, and a collectively bargained policy is also unconstitutional.

On the other hand, where a fundamental right is implicated, but not per se infringed, individual waiver is not constitutionally compelled. However, government still must prove that it has used the most narrowly tailored, least intrusive, means available to achieve its compelling interests. Where a collective representative exists, as in the present case, the most narrow and least intrusive manner of achieving any compelling state interest should include bargaining with the collective. In the absence of bargaining, the government can not satisfy this strictest form of judicial scrutiny,

Though collective bargaining is not sufficient to satisfy the means prong of strict scrutiny, it forms a necessary step in proving that the least intrusive alternative has been selected. For those cases where individual waiver is not constitutionally required, the Court should hold that the state public-sector labor laws require collective bargaining over drug testing.

ARGUMENT

I. DRUG TESTING PUBLIC-SECTOR EMPLOYEES IMPLICATES THE FUNDAMENTAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

The United States Supreme Court has ruled that drug tests, whether by blood, see Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908 (1966), or urine, see Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989), are searches and seizures within the meaning of the fourth amendment, Accordingly, drug tests must either be supported by a warrant and probable cause, or fall into one of a few narrowly prescribed exceptions. In Schmerber, for example, the Supreme Court found that the exigency inherent in delay (and consequently the dissipation of alcohol in a DWI suspect's blood) justified dispensing with the warrant requirement.

More recently, the Supreme Court has elaborated on the so-called "administrative exception" to the fourth amendment. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed.2d 385 (1989); Skinner, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed.2d 639. Under this exception, government may avoid both the warrant requirement and the necessity of having particularized suspicion if the government is not specifically searching for criminal activity. But to make use of this exception, the state must establish a compelling concern and then utilize the least restrictive alternative. See Von Raab, 489 U.S. at ---, 109 S. Ct. at 1393, 103 L. Ed.2d at 705.

In Von Raab the Court found this test satisfied in relation to the mandatory testing of certain employees of the United States Customs Service who sought promotion within the Service. Hence, the Court allowed the government to test employees who were either actively engaged in drug interdiction, carried firearms, or who were privy to classified information. Id. Other employees, however, such as accountants and messengers, were found by the Court to potentially fall outside the compelling interests of the government. Id. In regard to these employees the Supreme Court remanded to the lower courts to determine whether testing of these employees was absolutely necessary. Id.

In Skinner the Supreme Court also allowed for the relaxation of traditional constitutional safeguards. The Court upheld federal regulations that required compulsory blood and urine testing of railroad personnel involved in major train accidents. Skinner, 489 U.S. at ---, 109 S. Ct. at 1420, 103 L. Ed.2d at 654. The Court concluded that there exists a compelling interest in detecting the cause of accidents. Id. Mandatory testing was found to reflect a narrow policy of achieving this goal, because an accident by itself was enough cause to justify testing. See also id. at ---, 109 S. Ct. at 1422, 103 S. Ct. at 656 (Stevens, J., concurring) ("the public interest in determining the causes of serious railroad accidents adequately supports the validity of the challenged regulations").

Lower courts interpreting Skinner and Von Raab have been

hesitant to read too much into the Supreme Court's opinions. Instead, rather than read the Supreme Court's decisions to grant a blank check for suspicionless testing, courts have been careful to consider each case under its peculiar facts. Skinner, for example, has been distinguished as a case where there existed "concrete evidence that events have not gone as planned." Harmon v. Thornburgh, 878 F.2d 484, 488 (D.C. Cir. 1989), cert. denied sub nom. Bell v. Thornbursh, --- U.S. ---, 110 S. Ct. 865, 107 L. Ed.2d 949 (1990). In the absence of such "concrete evidence," such as a train accident, suspicionless testing might prove unconstitutional.

Von Raab, too, has been limited, as reflected by Guiney v. Roache, 873 F.2d 1557 (1st Cir.), cert. denied, --- U.S. ---, 110 S. Ct. 404, 107 L. Ed.2d 370 (1989); Beattie v. City of St. Petersburg Beach, 733 F. Supp. 1455 (M.D. Fla. 1990); and Dimeo v. Griffin, 924 F.2d 664 (7th Cir. 1991). In Guiney the court refused to allow suspicionless testing of certain police department employees. The same was true of firefighters in Beattie, and of persons engaged in the horse racing industry in Dimeo.

Of course, the courts have by no means been unanimous or consistent on the issue. Although courts uniformly agree that suspicion-based testing of public sector employees does not per se violate the fourth amendment, they are in a state of disarray over periodic and random testing--programs that allow testing short of particularized suspicion. Several courts have found

suspicionless testing of public-sector employees violative of the fourth amendment. See, e.g., Guinev; Beattie; Dimeo. Others have found suspicionless testing permissible. See, e.g., Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990) (testing of federal employees holding secret security clearances).

One point, however, is clear from all of these cases--from Von Raab and Skinner to Guinev and Hartness--that is, drug testing implicates fundamental privacy rights, rights that can be subjugated only in the face of the most compelling government concerns and then only in the absolutely least intrusive fashion necessary.

II. DRUG TESTING PUBLIC-SECTOR EMPLOYEES RAISES SERIOUS PRIVACY CONCERNS UNDER THE FLORIDA CONSTITUTION.

Section 23 of Article I of the Florida Constitution guarantees to "every natural person ... the right to be let alone and free from government intrusion into his private life ...." Art, I, §23, Fla. Const. The Florida Supreme Court has had several occasions to interpret this provision and has found that it offers greater protection for privacy than does either the Fourth or Fourteenth Amendments to the United States Constitution.

For example, in In re T.W., 551 So. 2d 1186 (Fla. 1989), the Florida Supreme Court found that a minor's right to choose an abortion was entitled to greater protection under Section 23 than under the Fourteenth Amendment. Similarly, in Shaktman v. State, 553 So. 2d 148 (Fla. 1989), the Court held that Section 23 offers

protections not otherwise available under the fourth amendment.[1]

Section 23 of Article I of the Florida Constitution therefore might prohibit drug testing that otherwise does not violate the federal constitution. Indeed, the Florida Supreme Court has stated that Section 23 "ensures that individuals are able 'to determine for themselves when, how and to what extent information about them is communicated to others." Shaktman, 553 So. 2d at 150 (citation omitted).

> One of its ultimate goals is to foster the independence and individualism which is a distinguishing mark of our society and which can thrive only by assuring a zone of privacy into which not even government may intrude without invitation or consent.

Id.

The Court has applied this most basic of principles to protect an individual's right to refuse blood transfusions, see Public Health Trust of Dade County v. Wons, 541 So.2d 96 (Fla. 1989), and to protect the privacy rights of blood donors. Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533 (Fla. 1987). Emerging from these cases is the clear postulate that the state's intrusion into the human body raises serious privacy concerns under Section 23, either because of the initial invasion or because of the information that might thereafter be extracted.

Because the rights protected by Section 23 are so

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[1]/ Specifically, the Court in Shaktman concluded that the installation of pen registers implicates privacy concerns under section 23, and that to survive scrutiny must be supported by a "reasonable founded suspicion," 553 So. 2d at 152, and prior judicial approval. Id. Neither of these is required by the fourth amendment. See Smith v. Maryland, 442 U.S. 735, 99 S. Ct 2577, 61 L. Ed.2d 220 (1979).

fundamental they may only be overcome by compelling state interests that are served by the most narrowly tailored means available. See Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 547 (Fla. 1985). whether the City of Miami is able to satisfy this severe burden in the present drug testing controversy is a dubious proposition.[2] Regardless, one thing is clear--invading a person's body in search of drugs cuts to the heart of individual privacy.

111. WAIVER OF FUNDAMENTALLY PROTECTED RIGHTS, WHETHER GUARANTEED BY THE FEDERAL OR STATE CONSTITUTION, *CAN* ONLY BE HAD THROUGH THE INDIVIDUAL AND NOT THROUGH THE UNION.

The **ACLU** does not **seek** to argue in this Brief the troubling questions surrounding the exact extent of protections offered by either the federal or state constitutions. These issues apparently were not briefed in the lower courts nor were they expressly presented to this **Court. The ACLU,** however, strenuously urges the Court to take notice of the constitutional problems in this case, particularly that in relation to waiver. The primary constitutional question raised in this case is whether and to what extent a public-sector union might bargain over and waive the constitutional rights of its members. **It** is this question that shall be addressed in detail by the **ACLU.**

In regard **to** the issue of waiver, the specific niceties and distinctions drawn by the various courts addressing drug testing,

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[2]/ Apparently, the constitutional issues discussed by the **ACLU** here were not raised in the courts below. Whether Miami seeks to implement a suspicion-based policy, or one that operates on something less, is not clear from the record.

see supra pages 5-8, are not of any operative importance. Instead, the critical distinction to be made when considering waiver is the more generic one between testing policies that are constitutionally justified and those that are not. Cases can fall into one of two different categories: in the former the policy is justified because the state has a compelling interest and has come forward with narrowly tailored means; see, e.g., Von Raab, 489 U.S. 656, 109 S. Ct. 1877, 100 L. Ed.2d 410; cf. Shaktman, 553 So. 2d 148; in the latter the policy is not justified because the state is unable to fulfill this heavy burden. See, e.g., Beattie, 733 F. Supp. 1455; Dimeo, 924 F.2d 664,

As for the latter category, where the state's policy is not justified because it cannot survive strict scrutiny, the United States Supreme Court has made it clear that only an individual waiver is constitutionally permissible. Public-sector unions are forbidden from bargaining away individual rights where the employer itself does not have a compelling justification. The government cannot unilaterally act, nor can it act with union acquiescence. The policy is per se unconstitutional.

The best illustration of this principle is Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed.2d 260 (1986). There, the Court struck down on equal protection grounds a collectively bargained policy favoring black school teachers over whites. The Court found that the affirmative action program was not justified because it could not survive

strict scrutiny.

It was argued in the alternative in Wygant that the white teachers had consented to the program through their union, and thus any constitutional infirmity had been waived. The Court responded by stating:

> [the school board] cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any 'waiver' of the right not to be dealt with by the government on the basis of one's race must be made by those affected.

Id. at 281 n. 8, 106 S. Ct. at 1850 n.8, 90 L. Ed.2d at 273 n.8.

Of course, prohibiting unions from bargaining away individual constitutional rights is not a novel concept. The Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 52-53, 94 S. Ct. 1011, 1021-22, 39 L. Ed.2d 147, 160-61 (1974), held seventeen years ago that certain statutory rights, specifically, those found under Title VII, could not be bargained away by union representatives. Indeed, the Supreme Court has gone so far as to suggest that private-sector unions might even be prohibited from bargaining away "its members' individual, nonpre-empted state law rights ...." Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 409 n.9, 108 S.Ct. 1877, 1883 n.9, 100 L. Ed.2d 410, 421 n.9 (1988). See generally Levy, State Regulation of Drug Testing: Are Organized Workplaces Exempt?, 1988 U. Chi. Legal Forum 141. Given that unions are precluded from waiving certain statutory rights, it makes perfect sense that a union cannot waive rights that are absolutely constitutionally protected.

Constitutional theory clearly supports this position. The Supreme Court has consistently held that "[public-sector] collective bargaining agreements constitute state action for purposes of the Fourteenth Amendment." Wyuant, 476 U.S. at 273 n.4, 106 S. Ct. at 1846 n.4, 90 L. Ed.2d at 268 n.4. A public-sector union, then, is merely a new majority, not unlike the majority of voters found behind government itself. Government cannot override constitutional rights absent some compelling interest or individual, non-coerced waiver. It follows that a public-sector union is similarly bound by the Constitution.

This concept is exhaustively analyzed by Professor Finkin in The Limits of Majority Rule in Collective Bargaining, 64 Minn. L. Rev. 183, 249-68 (1980). Speaking specifically to due process, but having application to any constitutional right, Professor Finkin argues that

> the transference of power to waive due process from the individual to a collective cannot be reconciled with the Constitution. The fourteenth amendment, ... is a limit upon the government. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." It follows that one's right to due process cannot be infringed simply because a majority of one's fellow workers choose that it be,

Id. at 253 (footnote omitted)(quoting Lucas v. Colorado General Assembly, 377 U.S. 713, 736-37, 84 S. Ct. 1459, 1474, 12 L. Ed.2d 632, 647 (1964)); see also Lesser v. Neosho County Community Collese, 741 F. Supp. 854, 861 (D. Kan. 1990) ("the fact that a majority ... may have voted for the system does not preclude any claims based on abridgement of constitutional rights.").

The implications for the present case are important, To the extent the City's decision to test police officers cannot be justified under strict scrutiny, it is per se unconstitutional. This is true under either the federal or state constitution. The City is therefore constitutionally enjoined from implementing the program unilaterally, and can not attempt to extract a group waiver from the union, Only individual waivers will be tolerated.

IV. A GOVERNMENT TESTING POLICY THAT OTHERWISE JUSTIFIABLY INFRINGES AN INDIVIDUAL'S FUNDAMENTAL RIGHTS SHOULD BE COLLECTIVELY BARGAINED TO ENSURE COMPLIANCE WITH STRICT SCRUTINY.

Assuming that the City has a compelling interest justifying its testing of police officers, and further assuming that testing itself otherwise represents narrowly tailored means, see, e.g., Von Raab, individual waivers apparently are no longer a constitutional requisite. If neither the federal nor state constitutions are violated by the policy, no individual right would be in place to necessitate an individual waiver. Where there is no individual right (whether statutory or constitutional), there need be no individual waiver,

Even without a protected right, government may face limits in attempting to unilaterally impose conditions on employment. In the drug testing context, although certain testing policies[3] might be facially constitutional because they satisfy strict scrutiny, still they implicate fundamental rights. The rights

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[3]/ Such as a policy requiring reasonable suspicion, or one like that in Skinner.

may not be violated, but they are at least implicated. When this is true, and when there exists a collective bargaining agent, though individual waiver is not necessary, a group waiver might be. Collective bargaining thus becomes relevant where a fundamental right, though not per se infringed, is at least implicated.

For a state to pass constitutional muster under strict scrutiny, it must do two things: first, it must demonstrate a compelling interest; second, it must use the least restrictive means possible for achieving its objective. See Von Raab; Shaktman. Under this second step (the "means prong" of strict scrutiny), the state must make two showings. It must demonstrate that its means are substantively narrowly tailored, and it must show that its means are procedurally the least intrusive available.

As for the former, the focus is more often than not on the number of people affected, the amount of protected activity circumscribed, or the overall breadth of the state regulation. Laws that reach too few or too many people are commonly struck down under this aspect of the means prong notwithstanding a significant state interest. See, e.g., Craig v. Boren, 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed.2d 574 (1977).

Assuming government is able to pass this much of strict scrutiny by satisfying the need for a compelling interest and substantively narrow means, its policy is facially constitutional. At least it is not per se invalid, see, e.g.,

Von Raab; Skinner, and individual waiver would appear to be unnecessary. The question still exists, however, whether the state has procedurally implemented the least intrusive means. It is in relation to this question that collective bargaining becomes important.

To use an example, consider Shaktman, 553 So. 2d 148. There the Court upheld under Section 23 of Article I of the Florida Constitution the use of pen registers, In regard to the means prong of strict scrutiny, the Court observed that "in analyzing whether the least intrusive means were utilized, one must consider procedural safeguards in conjunction with the extent of the actual intrusion into privacy." Id. at 152.[4]

In the present case, the appropriate "procedural safeguard" would appear to be the bargaining process. The question is whether the City's unilateral decision to test employees is the absolutely least intrusive way to achieve its assumedly compelling objectives, The answer appears is "no", because a less intrusive alternative is readily available. That

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[4]/ Consider also Von Raab. There the Supreme Court made much of the drug tests being be kept confidential and the employees' urine being tested for certain, defined substances. 489 U.S. at ---, 109 S. Ct. at 1394 n.2, 103 L. Ed.2d at 707 n.2. The concern, of course, was how the policy was procedurally implemented. Likewise, lower courts in drug testing actions have commonly addressed whether the type of testing used is accurate, and whether the manner of urine collection is unduly intrusive. See, e.g., National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990) (holding visual observation of urination to be unduly intrusive); Int'l Brotherhood of Electrical Workers v. Skinner, 913 F.2d 1454 (9th Cir. 1990) (addressing accuracy of urinalysis). Again, the concern is that the testing program not be too procedurally intrusive.

alternative is collective bargaining.

Requiring that a governmental employer bargain with a public-sector union reflects an affable accommodation of the individual's rights. The assumption is that the government has a compelling need to test and is otherwise using means that are narrowly tailored from a substantive perspective. It thus does not have to seek an individual waives. See supra pages 10-13. Where a bargaining system is already in place, it makes sense to preserve some modicum of input for the individual through the bargaining agent. At least this represents a less intrusive invasion of fundamental rights than allowing the City to unilaterally order compliance.

In short, the bargaining process represents an important step toward achieving the least intrusive means required for strict scrutiny. Where a collective representative is available, as in the present case, the most narrow and least intrusive manner of achieving any compelling concern, short of seeking an individual waiver, is to be bargain with the collective.

If it were otherwise the following would result. The state would be forced to seek individual waivers from certain employees, but could unilaterally order that other employees be tested. This is a large step indeed, moving from direct individual participation in the decisional process to none at all. The better result, it would seem, is to provide for a middle ground. Where individual waiver is not required at least allow for indirect participation through the union.

V. STATE LAW SHOULD BE INTERPRETED TO AVOID CONSTITUTIONAL DIFFICULTY UNDER EITHER THE FEDERAL OR STATE CONSTITUTIONS.

The Court, of course, possesses the tools to avoid at least some of the constitutional difficulties discussed above. By interpreting the state labor laws to require collective bargaining over drug testing the Court would avoid the problems raised in Part IV of this Brief. Procedurally at **least,** the state would be using the least intrusive means.

This would leave the problem raised in Parts I and II of the Brief, that is, when are individual waivers constitutionally required? The answer is whenever the state fails to prove either a compelling interest or that it has used the most narrowly tailored means available. The ACLU suggests that this issue can only be resolved by future litigation.

Of course, the ACLU would invite the Court to resolve the entire problem by holding that all publicly sponsored drug testing programs that operate on either a periodic or random basis are unconstitutional, under either the federal or state constitutions.[5] This bright line would inform unions and employers that they could only bargain over suspicion-based policies. In relation to any other policy individual waivers would be necessary. Short of such a holding, however, the ACLU urges the Court to leave to another day resolution of any further constitutional questions,

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[5]/ The ACLU policy is that only suspicion-based testing is constitutional under the fourth amendment. See Beattie, 733 F. Supp. 1455 (1990).

CONCLUSION

The ACLU urges this Court to reverse the en banc determination of the Third District Court of Appeal and hold that when drug testing is at issue, at a minimum collective bargaining is required. Collective bargaining, of course, is not sufficient to overcome individual rights, but it is a necessary step toward satisfying strict scrutiny. Whether individual waivers are also needed can be resolved in future litigation.

Respectfully submitted,

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