ALAN WILSON
ATTORNEY GENERAL

November 7, 2011

The Honorable Mike Forrester
Member, House of Representatives
287 Creekridge Drive
Spartanburg, SC 29301

Dear Representative Forrester:

In a letter to this office, you ask "[u]nder what authority, if any, does a county council have the authority to enact an ordinance requiring elected officials residing in that county, including the county legislative delegation, to submit to a drug screen as a condition for holding office?"

Law/Analysis

S.C. Code Ann. §4-9-25 gives counties the authority "to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. . . ."

Furthermore, in rendering this opinion, we keep in mind that "[a] municipal ordinance is a legislative enactment and is presumed to be constitutional. The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." Town of Scranton v. Willoughby, 306 S.C. 421, 412 S.E.2d 424, 425 (1991). The South Carolina Supreme Court has held that "the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt." City of Beaufort v. Baker, 315 S.C. 146, 432 S.E.2d 470, 474 (1993).

Determining whether an ordinance is valid is a two-step process. First, the court must determine whether a municipality has the power to adopt the ordinance. If no power exists, the ordinance is invalid. Second, the court must determine whether the ordinance is consistent with the Constitution and general laws of this State. Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651, 654 (2002); Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890, 893 (2000). Moreover, "[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Ops. S.C. Atty. Gen., December 14, 2006; October 17, 1991. While we do not address the constitutionality of a particular ordinance in this opinion, if we were to do so, such an ordinance would remain enforceable until declared otherwise by a court. In reviewing the constitutionality or validity of a municipal ordinance, this office indicated in a prior opinion dated July 15, 1996, that:

> . . . an ordinance, if it should be adopted, would be entitled to the same presumptions of constitutionality to which an enactment of the General Assembly would be. It would be presumed that the ordinance would be constitutional in all respects. The ordinance will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. . . . All doubts of constitutionality are generally resolved in favor of constitutionality. While this office advises whenever it may identify a particular constitutional infirmity, it is solely within the province of the courts of this State to actually declare an enactment or ordinance unconstitutional or unenforceable for other reasons.

Thus, while we may comment upon the validity of the proposed ordinance, we reiterate that an ordinance remains valid and enforceable until a court concludes otherwise. See Ops. S.C. Atty. Gen., January 22, 2008; January 2, 2008; March 27, 2006.

With this caveat in mind, we note that since we were not given a copy of such proposed ordinance to review, this opinion aims to give you general information as to the validity of the type of ordinance you describe. The most obvious legal challenge to drug testing in the circumstances you present is an allegation that it violates the Fourth Amendment prohibition against unreasonable searches and seizures: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const., amend. IV. The Fourth Amendment and its exclusionary rules are applicable to the individual states by virtue of the Fourteenth Amendment. See Mapp v. Ohio, 367 U.S. 643 (1961); State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001).

The South Carolina Constitution also provides a safeguard against unlawful searches and seizures. See S.C. Const. art. I, §10. We note that in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), the South Carolina Supreme Court explained the relationship between the Federal and South Carolina Constitutions is significant, because "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." Id., 541 S.E.2d at 840 [citing State v. Easler, 327 S.C. 121, 489 S.E.2d 617, 625 n. 13 (1997)].

> Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights. Id. This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling. See Segura v. Texas, 826 S.W.2d 178, 182 (Tex. App. 1992). Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution.

Forrester, 541 S.E.2d at 840.

The Forrester Court especially recognized South Carolina's explicit constitutional right to privacy. In addition to language which mirrors the Fourth Amendment, the South Carolina Constitution contains an express protection of the right to privacy: "[t]he right of the people to be secure in their

persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . ." [Emphasis added]. The Court explained that:

> even in the absence of a specific right to privacy provision, this Court could interpret our state constitution as providing more protection than the federal counterpart. However, by articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence.
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> . . . South Carolina and the other states with a right to privacy provision imbedded in the search and seizure provision of their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context. See, *e.g.*, Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993) (finding the state constitutional right to privacy prevented the forced medication of a death row inmate in preparation of execution). Furthermore, many of the states that have adopted explicit state constitutional right to privacy provisions have read their constitutions as applying protection above and beyond the protection provided by the federal Constitution. See, *e.g.*, State v. Church, 538 So.2d 993 (La. 1989) (disallowing a police roadblock under the state constitution's right to privacy even though it did not violate the Fourth Amendment).
>
> The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.

Forrester, 541 S.E.2d 840-41.

It is firmly established that any government-compelled drug testing imposed by law and enforced by government officials is a "search" within the meaning of the search and seizure provisions of the Fourth Amendment and article I, §10 of the South Carolina Constitution. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617 (1989) ("[b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions [are] searches under the Fourth Amendment"); see National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); State v. Houey, 375 S.C. 106, 651 S.E.2d 314, 316 (2007); State v. Baccus, 367 S.C. 41, 625 S.E.2d 216, 222 (2006); see also Ops. S.C. Atty. Gen., October 31, 2000; July 31, 1990. Thus, the question at issue is whether the search is "reasonable."

Generally, under these provisions, searches and seizures conducted without a warrant based on individualized suspicion of wrongdoing are considered *per se* unreasonable. See, *e.g.*, Skinner, 489 U.S. at 619; State v. Bultron, 318 S.C. 323, 457 S.E.2d 616, 621 (Ct. App. 1995); see also Horton v. California, 496 U.S. 128, 133 (1990) [observing "general rule that warrantless searches are presumptively

unreasonable"]; cf. Schmerber v. California, 384 U.S. 757, 770 (1966) [holding both probable cause and a search warrant "are ordinarily required" for searches of dwellings and intrusions upon the body]; State v. Register, 308 S.C. 534, 419 S.E.2d 771, 772 (1992) [same]. There are exceptions, however, including one based on "special needs, beyond the normal need for law enforcement." Chandler v. Miller, 520 U.S. 305, 313-14 (1997); Skinner, 489 U.S. at 619. When such "special needs" are alleged, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. Chandler, 520 U.S. at 305-306. The government bears the burden of demonstrating a special need. Id. at 314. Thus, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id. In evaluating the constitutionality of any law regarding drug testing, a court would balance the individual's privacy interests against the government's interests. Id.

Both federal and South Carolina courts have upheld a special needs analysis, rather than a traditional probable cause inquiry, in cases where testing of bodily fluids was sought not as part of a criminal investigation by law enforcement, but rather to promote other important government interests. See, *e.g.*, Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) [analyzing school district's requirement that student athletes submit to random drug tests]; Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) [upholding highway checkpoint stops designed to detect drunk drivers]; Von Raab, 489 U. S. at 665 [analyzing United States Customs Service employee drug testing program]; Skinner, 489 U.S. at 617 [analyzing Federal Railroad Administration employee drug testing program]; Houey, 651 S.E.2d at 316 [analyzing §16-3-740(B) compelling a person accused of a criminal offense in which the victim is exposed to bodily fluids to submit to HIV and other STD testing]; Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001) [finding a statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug-free workplace is a legitimate exercise of the State's police powers in regulating public safety and welfare.

The Chandler Court emphasized these constitutionally-permissible suspicionless searches, however, are "closely guarded" and require a "context-specific inquiry, examining closely the competing private and public interests advanced by the parties." Chandler, 520 U.S. at 309, 314. In fact, we note the Von Rabb Court did not ratify a blanket testing program for all United States Customs' agents. The Court found constitutional random drug testing of those employees who are directly involved in drug interdiction and who carry firearms, while returning to the lower court the question of whether employees who handle "classified" information should be considered employed in "safety-sensitive" positions. Von Rabb, 489 U.S. at 675-76. The government also bears the burden of demonstrating a clear, direct nexus between the nature of the employee's duty and the nature of the feared violation. If the government shows a special need, courts then must determine whether the privacy interests implicated by the search are minimal and whether an important governmental interest furthered by the search would be placed in jeopardy by a requirement of individualized suspicion of illegal drug use as opposed to a random search. Chandler, 520 U.S. at 314. The government's ability to make these showings will depend on several factual issues, as explained more fully below. However, only in cases "where risk to public safety is substantial and real," or where "public safety is genuinely in jeopardy," will suspicionless drug testing be considered "reasonable" for Fourth Amendment purposes. Id. at 323.

Relevant to your question, we refer specifically to the Chandler decision, which involved Georgia candidates' challenge to a state statute requiring them to submit to and pass a drug test in order to qualify for state office. The federal district court dismissed a motion for an injunction, stressing the importance of the state offices sought by the candidates. The Eleventh Circuit Court of Appeals affirmed, balancing the competing interests and deciding the Georgia law did not conflict with the Fourth and Fourteenth Amendments. The Eleventh Circuit acknowledged the absence of any record of drug abuse by elected officials in Georgia, but observed the use of drugs draws into question an elected official's judgment and integrity, jeopardizes the discharge of public functions, including antidrug law enforcement efforts, and undermines public confidence and trust in elected officials. The court also rejected any privacy concerns, reasoning the test could be conducted in a doctor's office, the release of the results would depend upon a candidate deciding to run after a positive test, and that "candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position." Id. at 310-12.

In an 8-to-1 decision, the United States Supreme Court reversed the Eleventh Circuit. It held that Georgia's justification for its statute did not rise to the level of a special need. In doing so, the Court emphasized that only "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id. at 314 [quoting Skinner, 489 U.S. at 624]. The Court noted that Georgia conceded there was no evidence of a demonstrated problem of drug abuse among state officials, and that "those officials typically do not perform high-risk, safety-sensitive tasks." Chandler, 520 U.S. at 318. In fact, of the three primary factors the Court had looked for in its earlier decisions – a history of drug abuse, immediate safety concerns, and diminished expectation of privacy - only the latter was arguably present in Chandler. The Court pointed out that Georgia had failed to prove that its concerns about drug use by state officials were real and not "simply hypothetical" and "symbolic" of its commitment to the societal war on drugs. Id. at 322. Contrasting Chandler with earlier rulings concerning "special needs," the majority cautioned: "if a need of the 'set a good example' genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in Skinner, Von Raab, and [Acton] ranked as 'special' wasted many words in entirely unnecessary, perhaps even misleading, elaborations." Id.

Citing Gregory v. Ashcroft, 501 U.S. 452 (1991), a decision upholding mandatory retirement for state judges at age 70 as a reasonable age classification, Georgia argued in Chandler that the special needs analysis must be considered with Georgia's Tenth Amendment sovereign power, because establishing qualifications for candidates for state office was a province of the state. Id. at 317. Although the Chandler Court found Gregory reaffirmed that states "enjoy wide latitude" to set qualifications for state offices, it held that basic constitutional protections could not be infringed upon. Id. [citing McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating state provision prohibiting members of clergy from serving as delegates to state constitutional convention); Communist Party of Ind. v. Whitcomb, 414 U.S. 441 (1974) (voiding loyalty oath as a condition of ballot access); Bond v. Floyd, 385 U.S. 116 (1966) (holding that Georgia Legislature could not exclude elected representative on ground that his antiwar statements cast doubt on his ability to take an oath)]. The Chandler Court stated, "[w]e are aware of no precedent suggesting that a State's power to establish qualifications for state offices - any more than its sovereign power to prosecute crime - diminishes the constraints on state action imposed by the Fourth Amendment." Chandler, 520

U.S. at 317. On this premise, the Court concluded that a state may not infringe upon an individual's Fourth Amendment rights under the guise of its sovereign power to establish qualifications for state office. It thus rejected the request to defer to the state's measures to set conditions of candidacy for state office. Id. at 317-18.

Before engaging in the special needs analysis, however, the Court acknowledged that Georgia's drug testing statute was "relatively noninvasive," and if a special need was shown, the statute could not be faulted for excessive intrusion on the candidates' privacy interests. Id. at 318. Thus, the "core issue" for the Court to decide was whether Georgia's certification requirement was warranted by a special need. Id. Attempting to clarify what constitutes a special need, the Court explained, "the proffered special need for drug testing must be substantial - - important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." Id. The Court concluded that Georgia had not made such a showing despite its argument that drug use is incompatible with holding high state office because it "draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials." Id.

In particular, the Court explained that Georgia failed to meet its burden of establishing a special need for its drug testing statute, primarily because it offered no evidence of any real "concrete danger." Id. Justice Ginsburg highlighted an admission made by counsel for the respondents at oral argument that Georgia had no particular problem with state officeholders being drug abusers in the past. Id. Another rationale advanced in support of the Georgia certification requirement challenged in Chandler was that it served to deter unlawful drug users from becoming candidates, and thus stopped them from attaining high state office. The Court rejected that justification as well, pointing out that, because the test date was no secret, users of illegal drugs, except for those "prohibitively addicted," could abstain from drug use for a pretest period sufficient to avoid detection. Id. at 320. The Court also noted Georgia had not shown that drug addicts were likely to be candidates for state office and it offered no reason "why ordinary law enforcement methods would not suffice to apprehend such addicted individuals, should they appear in the limelight of a public stage." Id. Finally, the Court reasoned that should a drug addict succeed in obtaining a high state office, the public limelight would be sufficient to uncover such office holder's drug abuse because public officials are subject to relentless scrutiny. Id. at 318. The Court stated:

> [w]hat is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiting candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. The suspicionless tests, according to respondents, signify that candidates, if elected, will be fit to serve their constituents flee from the influence of illegal drugs. But Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not "special," as that term draws meaning from our case law.

Id. at 321-22.

The Court acknowledged that, based on Von Raab, a "demonstrated problem of drug abuse [is] ... not in all cases necessary to the validity of a testing regime." Id. at 319 [citing Von Raab, 489 U.S. at 673-75]. Justice Ginsburg was, however, quite clear on the significance of this aspect of Von Raab, stating "[h]ardly a decision opening broad vistas for suspicionless searches, Von Raab must be read in its unique context." Id. at 321. She pointed out that the customs officers in Von Raab were regularly in contact with criminal organizations dealing in large quantities of drugs and that, unlike high-level state officials, the officers carried out their responsibilities away from the scrutiny of their superiors and certainly outside the scrutiny of the general public. Id. (citation omitted). Justice Ginsburg made it clear in Chandler that, "[h]owever well-meant, the candidate drug test . . . diminishes personal privacy for a symbol's sake." Id. at 318. Thus, where the special need was no more than a symbolic statement about the struggle against drug abuse, even a minimally intrusive testing program such as Georgia's could not be upheld. The Court found an absence of a genuine threat to public safety and that the Georgia statute's singular function was merely a "symbolic" gesture of Georgia's anti-drug position. Id. at 322. Thus, the Court concluded that "[h]owever well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action." Id.[1]

We also note the Court has emphasized the government's asserted "special need" must not be isomorphic with law enforcement needs, but rather go beyond them. See, *e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 80 (2001) [striking down a public hospital's policy of ordering drug screens for maternity patients suspected of cocaine use because "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment"]; City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000) (invalidating an Indianapolis drug checkpoint program because its "primary purpose" was "to uncover evidence of ordinary criminal wrongdoing," and noting that, "[w]hile reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs . . . cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue"). The Edmond Court later differentiated the drug checkpoint in Edmond from the immigration checkpoint in United States v. Martinez-Fuerte, 428 U.S. 543 (1976) [upholding brief stops for questioning at a fixed Border Patrol checkpoint], by emphasizing the difficulty of effectively containing illegal immigration at the border and noting that this problem was distinct from, and went beyond, regular law enforcement needs. Edmond, 531 U.S. at 38-39.

Applying the Chandler "special needs" analysis, the federal district court in O'Neill v. Louisiana, 61 F. Supp.2d 485 (E.D. La. 1998) invalidated a Louisiana statute requiring previously-elected officials to submit to random drug testing. The district court rejected the state's attempt to distinguish between drug testing for elected officials in the Louisiana statute, and the Georgia law struck down in Chandler requiring drug testing for candidates seeking public office. The federal district court explained:

> [t]he tone of the majority opinion in [Chandler], however, indicates that the Chandler Court saw little difference between the two groups. The majority explicitly referred to elected officials rather than candidates when it found that the statute's target group performed no safety sensitive tasks establishing the

[1]We note that Chandler appears to be the first case in which the Court found the government failed to demonstrate a special need.

> requisite special needs. Moreover, it is clear from the Chandler opinion that the only reason Georgia was interested in testing candidates was due to the prospect that they might later become elected officials. Absent this possibility, there was absolutely no reason to pass such a statute in the first instance. Furthermore, if it is improper to drug test a candidate for elected office, it seems incongruous to hold that once an individual is actually in office that person is somehow more susceptible to the very same search.
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> Because this Court finds no meaningful distinction between candidates for public office and those who have ascended to such office following an election, the principles of Chandler squarely control the outcome of this case.

Id. at 497.

The O'Neill Court held there was no special need for drug testing of elected officials, beyond normal needs of law enforcement, which would justify departure from the Fourth Amendment's requirement of individualized suspicion for a search. O'Neill, 61 F. Supp.2d. at 497-98. The court recognized that although elected officials had a diminished expectation of privacy, this factor also failed to sway the majority in Chandler. Further, the court found neither a history or pattern of drug abuse among elected officials, nor did they occupy sensitive positions. Id. at 497. The court thus concluded that, "[d]espite the laudable intentions of the legislature in trying to present an example for the public, the [Chandler] Court has stated unequivocally that symbolism alone is insufficient to justify suspicionless searches in violation of the Fourth Amendment." Id.

We note that the South Carolina General Assembly has passed several statutes permitting random drug testing to further the public policy of a drug-free work environment. In an opinion of this office dated October 31, 2000, we addressed "the constitutionality of random drug testing of public employees" pursuant to §38-73-500, which provides a workers' compensation credit for random drug testing to provide an incentive for employers to prevent drug use and work-related accidents. After discussing circumstances where warrantless drug testing of public employees without probable cause have been justified by "special needs" beyond normal law enforcement, we echoed the reasoning in Chandler, stating:

> while an exhaustive list of governmental interest allowing for random drug testing may not yet have been compiled, courts have consistently held that drug testing programs instituted simply to preserve the "integrity" of the governmental entity do not pass constitutional muster. See Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (Georgia's interest in testing all candidates for statewide office merely image related, not "special"); Boran v. City of Hollywood, [93 F. Supp.2d 1337 (2000)] (City's "public integrity sensitive" arguments insufficient to justify drug testing of applicants) Harman v. Thornburgh, [878 F.2d 484 (D.C. Cir. 1989)] (DOJ argument that drug test ensures the "integrity of its workforce" finds no support in Von Raab). Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) (generalized interest in integrity of workforce not enough to justify test).

We concluded in the opinion that "[t]he constitutionality of random drug tests for public employees depends on the "safety-sensitive" nature of the employees' position. See also §41-1-15 [authorizing an establishment of drug prevention program in the workplace which includes a substance abuse testing program]; cf. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591, 599 (2001) [upholding convictions for the sale of urine with the intent to defraud a drug or alcohol test; noting that drug testing of employees is constitutional].

If a specific ordinance were to be adopted, there are other constitutional issues which may need to be addressed. In an opinion of this office dated July 31, 1990, which pre-dated Chandler, we discussed a proposed law to authorize certain alcohol and drug testing of prospective State employees. We referred to another opinion dated April 19, 1989, and noted that:

> . . . such drug testing programs may be challenged on grounds other than an alleged fourth amendment violation concerning an unreasonable search. For example, a plaintiff might allege violations based on grounds such as equal protection, due process . . . or self-incrimination. Annot., 86 A.L.R. Fed. 420 (1988) ["Validity, under Federal Constitution, of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by State, local, or federal government"]. Such challenges have not met with much success in the courts. See, *e.g.*, Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.1986), cert. denied, 479 U.S. 986 (1986); Rushton v. Nebraska Pub. Power Dist., 653 F.Supp. 1510 (D. Neb. 1987); Palm Bay v. Bauman, 475 So.2d 1322 (Fla. App. 1985). The United States Supreme Court, however, has not yet addressed these challenges.

Conclusion

Clearly, government drug testing raises numerous legal issues. Although we were unable to locate South Carolina law addressing the validity of an ordinance such as the one being considered, the lessons of Skinner, Von Rabb, and Chandler show that a court will not uphold a government drug testing policy in the absence of individualized suspicion unless the government can establish a "special need" which sufficiently compels a justification for the departure from the strictures of the Fourth Amendment. The special need must be more than "symbolic." In other words, where a risk to public safety is substantial and real, then a search may be deemed "reasonable." Once a special need is established, the cases demonstrate that the ultimate determination of the reasonableness of a drug testing program requires a case-by-case judicial balancing of the intrusiveness of the search against the promotion of a legitimate government interest. While there is a presumption that an ordinance is constitutional, it is our opinion such an ordinance being considered here may be constitutionally suspect. Chandler explicitly rejected the notion of a need, special or otherwise, to justify the intrusion upon the Fourth Amendment rights of candidates for state office; particularly in light of the absence of evidence these public officials typically performed high-risk, safety sensitive tasks, and also the lack of concrete evidence or a history of prior drug use among elected officials. Additionally, the Chandler Court concluded that a state may not infringe upon an individual's Fourth Amendment rights under the guise of its sovereign power to establish qualifications for state office. Applying the Court's reasoning in Chandler, the Louisiana federal district

court in O'Neill held there was no special need for drug testing of elected officials to justify a departure from the Fourth Amendment's requirement for individualized suspicion for a search. However, we advise that only a court may declare an ordinance unconstitutional and only a court may prevent enforcement of such an ordinance. It is thus solely within the province of a court, possibly through a declaratory judgment action, and not this office, to declare an act or an ordinance constitutionally invalid. See Ops. S.C. Atty. Gen., January 22, 2008; January 15, 2008.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General