

<p>COURT OF APPEALS STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Plaintiffs-Appellants:</p> <p>GARY WAYNE TIMM and CYNTHIA JEAN TIMM,</p> <p>Defendants-Appellees:</p> <p>DAVID REITZ, in his official capacity as Director of the Colorado Department of Revenue Division of Racing Events, an administrative agency of the State of Colorado, and IRVING S. HOOK, W. GALE DAVEY, MICHAEL B. JOHNSON, GENE NAUGLE and ARNOLD L. MACKLEY, in their official capacities as members of the Colorado Racing Commission.</p>	<p>00-CA-1698 Case Number</p>
<p>Appeal from the Denver District Court, County of Denver, Colorado</p> <p>Civil Action No. 2000 CV 1311, Courtroom 3</p> <p>The Honorable William G. Meyer, District Judge</p>	
<p>JACOBS CHASE FRICK KLEINKOPF & KELLEY LLC John R. Webb #1876 1050 17th Street, Suite 1500 Denver, CO 80265 Attorney for Plaintiffs-Appellants Telephone: (303) 389-4644 Facsimile: (303) 685-4869</p>	

HOLME ROBERTS & OWEN LLP

John C. Lowrie, #31379

1700 Lincoln, Suite 4100

Denver, Colorado 80203

Telephone: (303) 860-7000

Facsimile: (303) 866-0200

In cooperation with:

American Civil Liberties Union Foundation of Colorado

Mark Silverstein, #26979

Simon Mole, #29904

400 Corona St.

Denver, Colorado 80218

Telephone (303) 777-5482

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

I. THE STATE CANNOT MEET ITS BURDEN TO PROVE A "SPECIAL NEED" BY ADVANCING UNSUPPORTED FACTUAL ASSERTIONS AND IGNORING FACTUAL DISPUTES

This summary judgment case was precipitously decided, before any discovery had been taken, and on a very meager record.¹ The State does not and cannot dispute that the testing challenged here is a warrantless search which it has the burden of justifying under the Fourth Amendment to the United States Constitution. *See Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1287 (Mar. 21, 2001); *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997); *People v. Redderson*, 992 P.2d 1176, 1181 (Colo. 2000). Nor does the State dispute that when such a warrantless search occurs outside the law enforcement context, the State must show a "special need."² *Chandler*, 520 U.S. at 314; *Earls v. Bd. of Education of Tecumseh Public Sch. Dist.*, 242 F.3d 1264, 1269 (10th Cir. 2001); *Trinidad School Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1105 (Colo. 1998). Moreover, "If the government has not made its special need showing, then the inquiry is complete, and the testing program must be struck down as unconstitutional," without review of other considerations. *19 Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1072 (10th Cir. 1998).

¹ Indeed, the sole affidavit the State relied on when it moved for summary judgment failed even to assert that the challenged program of drug testing was justified by a special need. To avoid any possible doubt over the inadequacy of the record below, the Timms have attached the affidavit as Appendix A. Notwithstanding the State's various arguments on appeal, this affidavit says absolutely nothing about any of the following: (1) Why the drug testing rule was adopted; (2) What specific duties trainers must perform; (3) How drug use could impact performance of a trainer's duties; (4) How trainers are exposed to any dangerous conditions at race parks; (5) What risks a drug impaired trainer would pose to the general public; (6) What corruption, if any, exists among trainers; or (7) What drug use, if any, occurs among trainers.

² *University of Colorado v. Derdeyn*, 863 P.2d 929, 944-45 (Colo. 1993) catalogues interests that meet this test, which the Supreme Court reduced to public safety and national security.

Yet, the State ignores both its burden of proving a "special need"³ and the limitations on summary judgment adjudication by presenting this Court with numerous, material factual assertions that have no basis in the record, advancing many other assertions that were expressly contested below and then arguing disputable inferences from the very few undisputed facts. In an effort to show a "special need" the assertions tabulated in Appendix B were advanced in the State's brief without any factual support in the record.

As this Court has repeatedly emphasized, summary judgment requires that there be no genuine issue of material fact and that all doubts be resolved against the party seeking the relief.⁴ The State cannot avoid these factual disputes by now arguing for judicial notice of "commonly

³Warrantless searches are presumed to be unreasonable. The government bears the burden of overcoming the presumption by demonstrating that the search fits within an exception to the warrant requirement. *See People v. Brewer*, 690 P.2d 860, 863 (Colo. 1984) ("A search without a warrant is presumed to be invalid, and the burden is on the People to prove that the search fell within some exception to the warrant requirement."). In drug testing cases, courts have recognize that the government bears the burden of proving that these suspicionless and warrantless searches are justified. *See, e.g., United Teachers of New Orleans v. Orleans Parish School Bd.*, 142 F.3d 853, 856 (5th Cir. 1998) ("The school boards have not shown that their rules are responsive to an identified problem in drug use by teachers, teachers' aids, or clerical workers"); *Aubrey v. School Bd. of Lafayette Parish*, 148 F.3d 559, 563 (5th Cir. 1998) (describing ruling in Chandler as striking down drug testing because "Georgia failed to show a special need substantial enough to override the candidates' privacy interests"); *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052, 1058 (7th Cir. 2000) ("To be a reasonable search, without a warrant and probable cause, the government must show a 'special need'"); *19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1072 (10th Cir. 1998) ("Only if we can say that the government has made that special need showing do we then inquire into the relative strengths of the competing private and public interests").

⁴ Many of the State's unsupported assertions are prefaced with phrases begging this Court to fill in the factually deficient record with sheer speculation. For instance, the State calls for the Court to utilize "common sense" and to decide this case from a standard of "[a]ny casual observer of greyhound racing;" "[a]s anyone knows;" and as "is fair to say." State's Brief at 15, 18, 20.

known facts."⁵ State's Brief at 8. Because the State did not identify these "facts" below, only reversal can give the Timms the opportunity to be heard that Rule 201(e), C.R.E., mandates. Nor can the State belatedly backfill the record by now making arguments that it failed to raise below. For example, while the State attached the 1999 Annual Report to the Governor to one of its briefs in the District Court, the State never argued the reference in this report to results of national drug testing, as it now does to this Court. State's Brief at 21, fn. 4.

II. THE STATE'S RELIANCE ON CASES FROM NEW JERSEY AND ILLINOIS IS MISPLACED

In surprising disregard of precedent from the Colorado Supreme Court, the Tenth Circuit and the U.S. Supreme Court, the State relies almost exclusively on two cases involving horse racing in New Jersey and Illinois. *See* State's Brief at 7-14 (*citing Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) ("*Dimeo*") and *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986) ("*Shoemaker*"). Given the unsupported and disputed factual assertions shown above, this reliance in effect invites this Court to supplement the meager record here by adopting the factual findings of those courts.⁶ *See* State's Brief at 7-14. Such reliance would essentially obliterate the Plaintiffs' due process right to test the State's case, which includes the opportunity to discover the facts that the State relies on, the

⁵ *See, e.g., USA Leasing, Inc., L.L.C. v. Montelongo*, Case No. 99CA2495, 2001 Colo. App. LEXIS 788 (Colo. App. May 10, 2001); *Gilmore v. Concerned Parents of Pueblo*, No. 99CA1164, 2000 Colo. App. LEXIS 1874 (Colo. App. Oct. 26, 2000); *Avemco Insurance Company v. Northern Colorado Air Charter, Inc.*, No. 99CA1262, 2000 Colo. App. LEXIS 1697 (Colo. App. Sept. 28, 2000); *Polk v. Hergert Land & Cattle Company*, 5 P.3d 402, 406 (Colo. App. 2000); *Scott System, Inc. v. Scott*, 996 P.2d 775, 780 (Colo. App. 2000).

⁶ The State even cites a 127-year old Colorado case in struggling to equate the facts of *Dimeo* to this case. *See* State's Brief at 8 (*citing Eldred v. Malloy*, 2 Colo. 320, 322 (1874)). The citation to *Eldred's* caustic view of gambling seems out of place in light of the fact that Colorado now has legalized gambling. *See* Colorado Constitution, Art. XVIII, § 9 (constitutional provision authorizing limited stakes gaming).

opportunity to subject them to cross-examination, and the opportunity to offer contrary evidence in rebuttal. For example, the State cites *Dimeo* concerning “Drug use impairs care and alertness . . .,” (State's Brief at 18), of which this record contains no evidence. State’s Brief at 18. Moreover, the State’s reliance on *Dimeo* and *Shoemaker* is misplaced for at least the following reasons.

First, *Dimeo* and *Shoemaker* were decided on well-developed factual records. See *Dimeo v. Griffin*, 721 F. Supp. 958, 960 (N.D. Ill. 1989); *Shoemaker v. Handel*, 608 F. Supp. 1151, 1153 (D.N.J. 1985). The lower courts in those cases held extensive evidentiary hearings, which the District Court in this case did not. Instead, the District Court granted summary judgment based entirely on the only two pieces of evidence proffered below by the State: the unremarkable affidavit of Daniel J. Hartman, which fails to establish any of the purported “special needs” that the State now advances (R. at 10-11); and the Report of the Fifty-First Pari-mutuel Wagering Season from 1999. R. at 27-46.⁷

Second, *Dimeo* and *Shoemaker* dealt with horse racing, which differs from dog racing. The historical problems with horse racing that may have existed in New Jersey and Illinois 10 to 15 years ago have never been shown to exist in greyhound racing in Colorado.⁸ Additionally, *Dimeo* and *Shoemaker* primarily involved drug testing of jockeys. The Timms, by contrast, are dog trainers, who do nothing during races and who have no greater access to the race track during race meets than does the general public. R. at 63. See *Dimeo*, 943 F.2d at 685; *Shoemaker* 608 F. Supp. at 1157.

⁷ This Court should view with suspicion the State's *ad hoc* effort to supplement the record by attaching unauthenticated documents to its brief. For example, Policy R-512 (State Appendix H) appears nowhere in the record. The totally unauthenticated version now presented by the State is an odd compendium of pages bearing both typed and hand-written page numbers.

⁸ Nor do hearings by the U.S. House of Representatives in 1972 (State’s Brief at 19) illuminate greyhound racing in Colorado in 2001.

Third, since those cases were decided more than a decade ago, the United States Supreme Court has decided a host of cases dealing with both suspicionless drug testing and the “special needs” doctrine under which it must be analyzed.⁹ None of these cases support the State’s attempt to justify suspicionless searches of persons under the doctrine that sometimes permits warrantless administrative searches of business premises. See, *City of Indianapolis v. Edmund*, 531 U.S.32 ___, 121 S.Ct. 447, 451-52 (2000) (discussing premises search cases). Moreover, *Chandler* provided significant clarification to the Supreme Court’s Fourth Amendment “special needs” jurisprudence by marking the first time the Supreme Court found a proffered “special need” to be constitutionally insufficient.¹⁰

Fourth, *Shoemaker* has been sharply criticized. See, e.g., *Horsemen’s Benevolent and Protective Association, Inc. v. State Racing Comm’n*, 532 N.E.2d 644, 702 (Mass. 1989). While the State seeks to avoid this criticism because the court in *Horsemen’s* relied on the Massachusetts constitution, the Colorado Supreme Court has held that when interpreting the Colorado Constitution more broadly, “[W]e are not bound by Federal precedent” concerning parallel provisions of the United States Constitution. *People v. Young*, 814 P.2d 834, 843 (Colo. 1991); see also, *People v. Unruh*, 713 P.2d 370, 377 (Colo. 1986).

⁹ *Ferguson v. City of Charleston*, ___ U.S. ___, 121 S. Ct. 1281 (2001); *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives’ Assoc.*, 489 U.S. 602 (1989).

¹⁰ *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 924 (N.D. Tex. 2001); *Earls v. Bd. of Education*, 242 F.3d 1264, 1269 (10th Cir. 2001); *Baron v. City of Hollywood*, 93 F. Supp. 1337, 1339-40 (S.D. Fla. 2000); *Marchwinsky v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2001).

Fifth, the State emphasizes among the “special needs” identified in *Dimeo* that racing is a magnet for gambling, and generally corrupt. See State’s Brief at 9. Yet, the Timm’s evidence on these points is that the Colorado dog racing industry does not have a history of corruption or drug use, and races are run “cleanly and fairly.” R. at 63.¹¹ The State’s adoption of Judge Posner’s finding that Illinois horse racing continued to have betting through bookmakers is also unsupported in the record here. If corruption is a dispositive issue, then on this record it is a disputed issue, making summary judgment inappropriate.

The State’s reference to 52 criminal filings (State’s Brief at 19) is misleading for two reasons: first, the information is not limited to filings involving greyhound racing; second, even if limited to greyhound racing, convictions, not criminal filings, would be the proper benchmark.¹² *Phelps v. Louisiana State Racing Comm.*, 611 So.2d 379 (La. App. 1992) adds nothing to the State’s argument because the court observed that the regulations at issue failed to incorporate “constitutional safeguards . . . specifically that random drug testing be limited to safety-sensitive or security-sensitive positions.” 611 So.2d at 741.

III. THE STATE IGNORES THE MOST RECENT COURT DECISIONS LIMITING SUSPICIONLESS SEARCHES

¹¹ The State cites to the *First Annual Report to the Governor of the State of Colorado by the Colorado Racing Commission for the period January 1, 1949 to December 31, 1949*, a document that was not before the District Court, for the mistaken proposition that Colorado has a history of corrupt practices in greyhound racing. A close reading reveals that the three instances in 1949 dealt with stimulants being given to the dogs. See State’s Brief, Appendix F, p. 9. Precautions in place at the track now ensure that the greyhounds are drug-free and in good health. R. at 63.

¹² *Gillins v. Unemployment Compensation Bd. of Review*, 534 Pa. 590, 633 A.2d 1150 (Pa. 1993); see also, *McKnight v. School Dist.*, 105 F. Supp. 2d 438 (E.D. Pa. 2000); *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957) (an arrest has “very little, if any probative value” in showing that the arrestee engaged in misconduct).

The State seeks to limit the Timms' fundamental constitutional right to be free from unreasonable searches based on a "context" analysis. This approach mistakenly subordinates the critical inquiry into a "special need," in disregard of recent pronouncements from the Colorado Supreme Court, the Tenth Circuit and United States Supreme Court that severely limit random, suspicionless drug testing. State's Brief at 23-24. *See Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1292 (Mar. 21, 2001) (highlighting that the "special needs" exception to the constitutional requirement of individualized suspicion is a "closely guarded category"); *Earls, supra*; *Lopez, supra*. Moreover, the contextual factors identified by the State do not survive scrutiny.

Among the contextual factors the State emphasizes is the Timms' choice to work as dog trainers. State's Brief at 22, citing *Joy v. Penn Harris Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000). But in Colorado voluntary participation in extra-curricular activities is not a consent to drug testing. *Lopez, supra*, 963 P.2d at 1110; *see also, Earls, supra*, 242 F.3d at 1276. The candidates discussed in the *Chandler* decision also made a voluntary decision to run for public office. Yet their voluntary decision was not sufficient to uphold suspicionless drug testing.

The Timms do not suggest that greyhound racing is totally immune from drug problems, but point only to the lack of "context" evidence that, as a group, dog trainers "have a pervasive drug problem." R. at 63. That ten drug tests came back positive in 1999 (State's Brief at 21) only underscores the existence of a factual dispute. Moreover and unlike the "contextual" factors in *Veronica*, the State has shown neither an "immediate [drug] crisis" among dog racing participants nor that dog trainers are "leaders of the drug culture," as were the student athletes. *See Chandler*, 520 U.S. at 316.

As demonstrated in the next subsection, the State cannot show a "special need." Therefore, the "context" argument based on discussion of how drug tests are actually conducted (State's Brief

at 23), a factor that may be considered only after a "special need" has been shown (*Chandler*, 520 U.S. at 318), and ways in which licensees have yielded some privacy interests (State's Brief at 4), rings hollow.¹³ If regulation alone justified suspicionless testing, then *Chandler* would have upheld the random testing of candidates for political office, who are subject to "relentless scrutiny" (520 U.S. at 321), and who surrender some privacy interests, such as through mandatory financial disclosure. The State cites no case equating consent to providing background and financial information with acquiescence to a warrantless and suspicionless personal search. Indeed, the State's overbroad regulatory and disclosure rationale could as easily be used to mandate suspicionless drug testing of all applicants for admission to the Colorado Bar.

IV. THE STATE'S UNSUPPORTED AND FACTUALLY DISPUTED "SPECIAL NEEDS" DO NOT JUSTIFY SUSPICIONLESS DRUG TESTING

As the Supreme Court acknowledged in *Edmund*, a program of suspicionless searches or seizures that is unconstitutional under the rationale advanced by the government might be upheld if a different government purpose were asserted to justify it. *Id.* at 121; S. Ct. at 456-57 & n.2. For that reason, a court must evaluate the evidence of the actual government purpose. *Id.* at 447 ("For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program").

In this case, the State relied on the affidavit of Daniel J. Hartman, which contains no statement of the government's purpose for initiating the random drug tests, nor does it attempt to

¹³ While the State refers to dog trainers' loss of privacy as a condition of licensure (State's Brief at 4), the cited regulation (C.C.R. 208-1, Rule 3.404) does not explain what type of search falls within the consent. *Compare, Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 929 (N.D. Tex. Mar. 1, 2001) (focusing on lack of "communal undress" and public showering in rejecting implied consent to drug testing). In *Derdeyn* the Supreme Court concluded that student athletes did not thereby have a significantly diminished expectation of privacy.

articulate a special need. In the District Court, the only articulation of a purported purpose for the testing is found in the argument of the State's counsel. Of course, the arguments of counsel are not evidence. Because the State failed to submit evidence of the actual government purpose, it failed to meet its burden of demonstrating a special need. *See Id.* at 447.

Before this Court, the State attaches to its brief a document (which is not in the record below) that purports to state the purpose of the random drug testing program. It states that the testing was implemented:

To assure the integrity of racing, and protect the welfare of race participants [sic] and foster public confidence.

State's Brief at Appendix H, p.1. Notably absent from this statement of purpose are any references to either public safety or animal welfare, both of which the State now contends, without evidence, are special needs that motivated the State to institute the random testing. Thus, even if this Court accepts the State's belated attempt to supplement the fatally deficient record, the "available evidence" of the government's purpose (121 S. Ct. at 447) fails to support the special needs the State asserts now. Moreover, the purported purposes of "assur[ing] integrity" and "public confidence" mirror the flaw highlighted in *Chandler*: "The need revealed, in short, is symbolic, not special." 520 U.S. at 322.

A. SAFETY OF TRAINERS AND OTHER RACE PARTICIPANTS

While the State baldly asserts that drug testing of dog trainers is required to protect them and other race participants from supposed dangers involved in the running of greyhound races, the State fails to recognize that the relevant inquiry involves whether "[T]he risk to public safety is substantial

and real." *Chandler*, 520 U.S. at 318, emphasis added.¹⁴ If risk of injury only to a race participant justified suspicionless testing, then anyone could be subject to testing: if impaired, one of this Court's clerks could be injured falling down the steps on the Fourteenth Street side of the building.

Here, the record contains no evidence whatsoever that racing participants, much less the general public, are more likely to be injured due to a drug impaired trainer. The Timms agree that “[t]he sport of greyhound racing involves dogs chasing a 150 to 200 pound lure around a track at speeds up to forty miles per hour.” R. at 10. Trainers do not operate the lure, however, and the only evidence in the record is that both trainers and the public are similarly separated from the race track by a concrete wall and a chain link fence when the lure is in operation during races. R. at 63.

The flaw in the State’s safety argument isn’t lack of evidence of a “specific accident” (State’s Brief at 20), but lack of evidence of even the potential for serious injury, especially to members of the general public. Surely if the risks are so grave, the State could have presented the District Court with some hard evidence. Given the complete lack of any risk to public safety, this Court should follow the Supreme Court, which has derided reliance on hazards that are "simply hypothetical." *Chandler*, 520 U.S. at 319. *See also*, *Earls*, 242 F.3d at 1264 ("special needs must rest on demonstrated realities").

¹⁴ In *Derdeyn*, after conducting an extensive survey of the court cases that had approved various government programs involving random drug testing, the Colorado Supreme Court concluded that the Ninth Circuit had correctly focused on public safety as the driving concern in cases that had approved dispensing with the requirement of individualized suspicion. 863 P.2d at 944. The court pointed out that the University of Colorado had asserted “no significant public safety or national security interests” to support its program of drug testing student athletes. *See also*, *City and County of Denver v. Casados*, 862 P.2d 908, 912 (Colo. 1993) (Court inquired whether drug testing order covered employees "who do not hold public safety" positions) (emphasis added).

The prospect of a drug impaired trainer simply does not invoke the public safety concern of cases authorizing suspicionless drug testing. See *Von Raab*, 489 U.S. at 670 (customs agents); *Skinner*, 489 U.S. at 628-29 (train crews). The State's citation to words of Justice Kennedy in *Von Raab* (State's Brief at 21) misses the point: dog trainers are not armed customs agents, who must make split-second decisions that are fraught with peril, such as whether to fire on a suspect fleeing down a crowded street.

B. THE PROTECTION OF ANIMALS

Next, the State claims that it decided to randomly test dog trainers in furtherance of a "special need" to protect the safety and well-being of the dogs, a rationale that appears to have arisen on the way to the courthouse.¹⁵ As with the spectral safety issue, nothing in the record supports this proposition. To the contrary, the only evidence demonstrates that the health and well-being of the dogs is observed by a state-licensed veterinarian officed at the track. R. at 63.

"The Fourth Amendment requires that the government 'connect its interest in testing to the particular job duties of the applicants it wishes to test.'" *Baron v. City of Hollywood*, 93 F. Supp. 2d 1337, 1342 (S.D. Fla. 2000), quoting *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990). In *Baron*, the court held that "[w]ithout identifying a connection between the jobs and the need for testing, the City cannot meet its burden of showing a 'special need.'" *Id.* at 1342.

¹⁵ See State's Brief, Appendix H, p. 1 ("Purpose" section fails to mention animal welfare). Remarkably, the State claims that animals are "equivalent in importance to the safety of other, human participants." State's Brief at 14. The cited statute, C.R.S. § 12-60-101, says no such thing. This assertion raises the question: Could the State conduct random drug tests of rodeo participants? Ranchers? Pet store owners?

In a similar manner, the State fails to meet its burden here. It presented no evidence that a drug-impaired trainer would fail to discharge the few duties that the limited record here explains that trainers must perform. Even if this Court accepts, without evidence, that “Drug use impairs care and alertness, slows reflexes, [and] impairs judgment,” (State’s Brief at 18, quoting *Dimeo*), nothing in this record speaks to what degree of care, alertness, reflexes and judgment are required to perform the duties of a dog trainer.

The State’s advocacy of animal protection as a “special need” finds no support in either the United States or the Colorado Supreme Court “special need” jurisprudence. *Partridge v. State*, 895 P.2d 1883 (Colo. App. 1995) (State’s Brief at 15) did not involve a constitutional issue and therefore is of no force here. None of the cases binding on this Court elevates animals’ right to proper care over citizens’ constitutional rights to be free from unreasonable searches or seizures. Nor does anything in the record support the State’s speculative attempt to tie animal welfare to its fiscal interest, dispelled in the following subsection.

C. FISCAL INTEREST

With public safety and animal protection being factually unsupported and legally insufficient, respectively, the State is left with fiscal interest as its sole justification for the suspicionless drug testing of dog trainers. The State cites no "special needs" case holding that fiscal interest is, in and of itself, a sufficient "special need" to justify suspicionless drug testing. While fiscal interest may be a "legitimate" interest, as the State advocates (State’s Brief at 17), a mere legitimate interest does not equate to "special need."¹⁶

¹⁶ For this reason, cases such as *Rocky Mtn. Greyhound Park, Inc. v. Wembley, PLC*, 992 P.2d 711 (Colo. App. 1999) have nothing to do with impairment of constitutional rights. Indeed, in *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (State’s brief at 13-14), the court

(continued...)

The State claims to have accumulated approximately \$6.0 million from greyhound racing in 1999.¹⁷ Notably absent from the State's brief, however, is any comparison to the State's total tax revenues for 1999: \$9,050,330,000.¹⁸ Even loss of all revenues from greyhound racing would hardly destroy the State's fiscal integrity. Protecting less than one percent of the total tax revenues sells out constitutional rights very cheaply.

More importantly, this Court need not, and on this record cannot, evaluate the State's fiscal interest as a "special need." Even to connect fiscal interest and drug testing, the Court would have to assume that: drug impaired trainers can affect race results; spectator interest would drop because of "public perception, rather than known suspicion" (State's Brief at 11); and the decline in spectator interest would result in a loss of revenue to the State.

The State offers no empirical validation of this argument by evidence of either diminished public confidence before mandatory drug testing or increased public confidence after mandatory drug testing. Moreover, the State's analysis does not explain the enormous commercial success of professional wrestling, despite serious and recurring doubt over its integrity. Yet this Court cannot ponder whether dog racing mirrors wrestling in this regard because no step in the State's analysis is supported in the record. *See, Earls*, 242 F.3d at 1264.

¹⁶(...continued)
focused on the presence or absence of a "compelling state interest." 915 F.2d at 1067.

¹⁷ The State's claim that it has "an [additional] interest in the commercial activity generated by greyhound racing" is unsupported in the record. State's Brief at 17. Commercial activity was not argued to the District Court and no evidence in the record relates to this subject.

¹⁸ Colorado Comprehensive Annual Financial Report for the year ended June 30, 1999.

V. CONCLUSION

Nothing in this record comes even close to equating the duties of dog trainers with the responsibilities of customs agents in *Von Raab* or the train operators in *Skinner* as concerns risk to the public. The State's impingement of the Timms' constitutional right to be free from unreasonable searches based on considerations of tax revenues and animal welfare cries out for scrutiny through the discovery process. After that scrutiny has occurred, the balancing test endorsed by the Colorado Supreme Court can be applied. Until then, the summary judgment should be reversed.

Appendix B

State's Assertion	Support in the Record	Disputed in the Record
<p>“Because of the great sums of money involved in greyhound racing, the attraction of greyhound racing to corrupt practices is, if anything, greater than the attraction of horse racing.” State’s Brief at 18.</p>	<p>none cited</p>	<p>“Dog racing in Colorado has not had an unsavory history . . . dog races in Colorado are run cleanly and fairly.” (R. at 63.)</p>
<p>“It goes without saying that the use of illegal narcotics would impair” a trainer’s duties. State’s Brief at 15.</p>	<p>none cited</p>	<p>There is nothing to suggest that “dog trainers, as a group, have a pervasive drug abuse problem.” (R. at 63.)</p>
<p>“If the health or care of racing animals were to suffer or be called into question, public support for the industry would quickly shrink, and along with it revenue to the state.” State’s Brief at 15.</p>	<p>none cited</p>	<p>“After the dogs are weighed in, a urine sample is taken from each of the dogs. The urine samples are tested for illegal doping and contaminants. The urinalysis is a check to maintain the integrity of the racing event.” (R. at 63.)</p>
<p>“[G]reyhounds occasionally break loose and have to be chased down or somehow corralled.” State’s Brief at 20.</p>	<p>none cited</p>	<p>“During the transit to the weigh-in area, the dogs are kept on leashes and are muzzled.” (R. at 62.)</p>
<p>If dog trainers “accidentally permit animals to run off-leash or without a muzzle, they increase the risk of injury to anyone in the area.” State’s Brief at 19-20.</p>	<p>none cited</p>	<p>“If a single dog lost its muzzle, between the kennel and the weigh-in area, no danger to persons present would result.” (R. at 63.)</p> <p>“Once the dogs complete the race, racing officials remove the muzzles from the dogs. The dogs are then delivered by lead-outs back to the trainers unmuzzled.” (R. at 63.)</p>
<p>“With literally dozens, if not hundreds, of canine animals in extremely close quarters, great care must be taken at all times when handling them to be sure they do not fight with each other or with any humans in the area.” State’s Brief at 20.</p>	<p>none cited</p>	<p>“Greyhounds are generally well behaved.” (R. at 63.)</p>

“Breaking up a dogfight can be extremely dangerous.” State’s Brief at 20.	none cited	“Greyhounds are generally well behaved.” (R. at 63.)
Trainers “must routinely awake before dawn and stay up late into the night to discharge their duties.” State’s Brief at 15.	none cited	
“The trainers are not observed by racing officials at . . . odd hours or remote locations.” State’s Brief at 15.	none cited	
Drug testing of dog trainers will promote their safety during the conduct of their duties. State’s Brief at 5.	none cited	
Drug testing of dog trainers will protect the safety of other participants in racing. State’s Brief at 5.	none cited	
Drug testing of dog trainers protects the safety of the greyhounds under the trainers’ care and control. State’s Brief at 5.	none cited	“A state-licensed veterinarian is officed at the track and observes the health and well-being of the dogs. The veterinarian is present at the weigh-in also.” (R. at 63.)
Colorado greyhound racing has a history of corruption. State’s Brief at 18-19.	none cited	“Dog racing in Colorado has not had an unsavory history . . . dog races in Colorado are run cleanly and fairly.” (R. at 63.)
Trainers are “on the track while the greyhounds are running in schooling races.” State's Brief at 20.	none cited	“The general public and the trainers are separated from the track by a chain link fence and a concrete wall.” (R. at 63.)

TABLE OF CONTENTS

	PAGE NO.
I. THE STATE CANNOT MEET ITS BURDEN TO PROVE A "SPECIAL NEED" BY ADVANCING UNSUPPORTED FACTUAL ASSERTIONS AND IGNORING FACTUAL DISPUTES	1
II. THE STATE'S RELIANCE ON CASES FROM NEW JERSEY AND ILLINOIS IS MISPLACED	3
III. THE STATE IGNORES THE MOST RECENT COURT DECISIONS LIMITING SUSPICIONLESS SEARCHES	6
IV. THE STATE'S UNSUPPORTED AND FACTUALLY DISPUTED "SPECIAL NEEDS" DO NOT JUSTIFY SUSPICIONLESS DRUG TESTING	8
A. SAFETY OF TRAINERS AND OTHER RACE PARTICIPANTS	9
B. THE PROTECTION OF ANIMALS	11
C. FISCAL INTEREST	12
V. CONCLUSION	13
APPENDIX A	A-1
APPENDIX B	B-1

TABLE OF AUTHORITIES

19 Solid Waste Dept. Mechanics v. City of Albuquerque, 156 F.3d 1068 (10th Cir. 1998) . . . 1, 2

Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559 (5th Cir. 1998) 2

Avemco Insurance Company v. Northern Colorado Air Charter, Inc., No. 99CA1262, 2000 Colo. App. LEXIS 1697 (Colo. App. Sept. 28, 2000) 3

Baron v. City of Hollywood, 93 F. Supp. 1337 (S.D. Fla. 2000) 5, 11

Chandler v. Miller, 520 U.S. 305 (1997) 1, 5, 7, 8, 9, 10

City and County of Denver v. Casados, 862 P.2d 908 (Colo. 1993) 10

City of Indianapolis v. Edmund, 531 U.S.32 ___, 121 S.Ct. 447 (2000) 5, 8

Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991) 3, 4, 5, 11

Earls v. Bd. of Education of Tecumseh Public Sch. Dist., 242 F.3d 1264 (10th Cir. 2001) . 1, 5, 7, 10, 13

Eldred v. Malloy, 2 Colo. 320 (1874) 3

Ferguson v. City of Charleston, 121 S. Ct. 1281 (Mar. 21, 2001) 1, 5, 7

Georgia Ass’n of Educators v. Harris, 749 F. Supp. 1110 (N.D. Ga. 1990) 11

Gillins v. Unemployment Compensation Bd. of Review, 534 Pa. 590, 633 A.2d 1150 (Pa. 1993) 6

Gilmore v. Concerned Parents of Pueblo, No. 99CA1164, 2000 Colo. App. LEXIS 1874 (Colo. App. Oct. 26, 2000) 3

Horsemen’s Benevolent and Protective Association, Inc. v. State Racing Comm’n, 532 N.E.2d 644 (Mass. 1989) 5

Joy v. Penn Harris Madison School Corp., 212 F.3d 1052 (7th Cir. 2000) 2, 7

Marchwinsky v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2001) 5

<i>McKnight v. School Dist.</i> , 105 F. Supp. 2d 438 (E.D. Pa. 2000)	6
<i>Nat'l Treasury Employees Union v. Von Raab</i> , 489 U.S. 656 (1989)	5, 10, 13
<i>Partridge v. State</i> , 895 P.2d 1883 (Colo. App. 1995)	12
<i>Penny v. Kennedy</i> , 915 F.2d 1065 (6th Cir. 1990)	12
<i>People v. Brewer</i> , 690 P.2d 860 (Colo. 1984)	2
<i>People v. Redderson</i> , 992 P.2d 1176 (Colo. 2000)	1
<i>People v. Unruh</i> , 713 P.2d 370 (Colo. 1986)	5
<i>People v. Young</i> , 814 P.2d 834 (Colo. 1991)	5
<i>Phelps v. Louisiana State Racing Comm.</i> , 611 So.2d 379 (La. App. 1992)	6
<i>Polk v. Hergert Land & Cattle Company</i> , 5 P.3d 402 (Colo. App. 2000)	3
<i>Rocky Mtn. Greyhound Park, Inc. v. Wembley, PLC</i> , 992 P.2d 711 (Colo. App. 1999)	12
<i>Schware v. Bd. of Bar Examiners</i> , 353 U.S. 232 (1957)	6
<i>Scott System, Inc. v. Scott</i> , 996 P.2d 775 (Colo. App. 2000)	3
<i>Shoemaker v. Handel</i> , 795 F.2d 1136 (3d Cir. 1986)	3, 4, 5
<i>Skinner v. Railway Labor Executives' Assoc.</i> , 489 U.S. 602 (1989)	5, 10, 13
<i>Tannahill v. Lockney Indep. Sch. Dist.</i> , 133 F. Supp. 2d 919 (N.D. Tex. Mar. 1, 2001)	5, 8
<i>Trinidad School Dist. No. 1 v. Lopez</i> , 963 P.2d 1095 (Colo. 1998)	1
<i>United Teachers of New Orleans v. Orleans Parish School Bd.</i> , 142 F.3d 853 (5th Cir. 1998) ..	2
<i>University of Colorado v. Derdeyn</i> , 863 P.2d 929 (Colo. 1993)	1, 8, 9

USA Leasing, Inc., L.L.C. v. Montelongo, Case No. 99CA2495, 2001 Colo. App. LEXIS 788 (Colo. App. May 10, 2001) 3

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 5

STATUTE

C.C.R. 208-1 8

C.R.S. § 12-60-101 11

Colorado Constitution, Art. XVIII, § 9 3

MISCELLANEOUS

Policy R-512 4

Rule 201(e), C.R.E. 3

Rule 3.404 8

Appendix B