COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Plaintiffs-Appellants: GARY WAYNE TIMM AND CYNTHIA JEAN TIMM, **Defendants-Appellees:** 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.	Δ COURT USE ONLY Δ Case Number: 00-CA-1698
Appeal from the Denver District Court County of Denver, Colorado Civil Action No. 2000 CV 1311, Courtroom 3 The Honorable William G. Meyer, District Judge	
JACOBS CHASE FRICK KLEINKOPF & KELLY LLC John R. Webb #1876 1050 17th Street, Suite 1500 Denver, CO 80265 Phone: (303) 389-4644, Fax: (303) 685-4869 *ATTORNEY FOR PLAINTIFFS-APPELLANTS* *Of Counsel:* HOLME ROBERTS & OWEN LLP Sherri Heckel Kulmann # 18832 John C. Lowrie # 31379 1700 Lincoln, Suite 4100 Denver, CO 80203 Phone: (303) 860-7000, Fax: (303) 866-0200 *In cooperation with:* AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO Mark Silverstein, #26979 Simon Mole, #29904 400 Corona St. Denver, CO 80218 Phone: (303) 777-5482	

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants Gary Wayne Timm and Cynthia Jean Timm (the "Timms") respectfully submit the following Opening Brief.

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Can the State's conditioning licensure of persons who care for dogs in the greyhound dog racing industry, based on their consent to suspicionless drug testing by urinalysis of randomly selected licensees, a warrantless search generally impermissible under both the Colorado and the United States Constitutions, be upheld on the State's claimed "special needs" of licensed trainers being responsible for the care of their animals, of dog racing being heavily regulated in Colorado, and the State's financial interest arising from taxing wagers on dog races?

Even if these State interests do constitute "special needs," then did disputed factual issues preclude the balancing of those interests against Constitutional rights that must occur to justify suspicionless, random drug testing, and therefore render summary judgment inappropriate?

II. STATEMENT OF THE CASE

A. Nature of the Case.

This case presents a constitutional issue of the highest importance: Will this Court force citizens to choose between loss of the Fourth Amendment's fundamental protection against suspicionless searches and forfeiture of employment in their chosen profession, absent a specific finding of "special needs," and on a record replete with disputed factual issues?

As licensed trainers, the Timms care for dogs. (Supp. R. at 51) The category of licenses that the Timms hold or held did not vest them with *any* involvement in handling wagers on dog races, actually running dog races or judging race results, all of which are handled by other categories of licensees. (Supp. R. at 51-52) Moreover, the Timms do not fit into any of

the narrow categories of persons who may lawfully be subject to drug testing without reasonable suspicion: they have no law enforcement responsibilities, they do not carry firearms, and their actions do not seriously risk their safety or the safety of other persons. Nor have they done anything to diminish their expectation of privacy.

Yet, Cynthia Timm lost her license, and now cannot participate along with her husband, Gary Timm, in greyhound dog racing in Colorado, because she exercised her constitutional rights by refusing to submit to a suspicionless, random drug test. Gary Timm continues to hold a license but remains subject to random testing, in violation of his constitutional rights.

The Timms sought a declaration establishing that they have the right, under the Fourth Amendment to the United States Constitution and Article II, § 7, of the Colorado Constitution, not to be required to submit to random and suspicionless drug testing. Specifically, they challenged a policy of the Colorado Racing Commission that requires randomly selected licensees to provide samples of their urine, to be tested for the presence of illicit drugs, without reasonable cause or suspicion of drug use.

B. Course of Proceedings.

The Timms commenced this action on March 16, 2000. (Supp. R. at 1-8) In lieu of answering, defendants filed a motion to dismiss on May 26, 2000. (R. at 6) On June 6, 2000, defendants amended their motion to dismiss with a motion for summary judgment and a supporting affidavit. (Supp. R. at 47) Defendants argued issues of the safety of trainers, the health and welfare of dogs, the integrity of racing events and fiscal interest arising from taxing wagers on races, all of which supposedly explain extensive state regulation of the greyhound racing industry. *Id.*

The Timms filed an opposition to the motion to dismiss and later an opposition to the summary judgment motion, accompanied by an affidavit of Gary Timm. (R. at 12; Supp. R. 40, 51-53) The Timm affidavit directly controverted factual assertions explicit and implicit in defendants' arguments. (R. at 47-50, 51-53) No case management order was entered. Hence, neither party had the opportunity to take any discovery.

On August 24, 2000, the District Court granted defendants' motion for summary judgment, without hearing oral argument. (Supp. R. 68-70) The District Court did not make any specific finding of what state interest satisfied the constitutionally mandated "special need." Instead, the District Court observed that, "the racing industry is heavily regulated in Colorado . . . ," that "as trainers, the plaintiffs are the absolute insurers of the condition of the animals," and that "the State of Colorado has a financial interest in racing." *Id.* The District Court did not directly address defendants' safety or racing integrity arguments. *Id.*

The District Court relied solely on two cases from other jurisdictions dealing with the horse racing industry, which raises different safety issues, and its supposedly "sordid history." *Id.* The District Court concluded that the Colorado Supreme Court's cases precluding drug testing in the school setting were "not directly applicable." *Id.*

C. <u>Disposition Below</u>.

The District Court summary judgment order disposed of all issues.

III. STATEMENT OF RELEVANT FACTS

This case challenges the actions of the Colorado Racing Commission ("the Commission"), a five-member body appointed by the Governor, and the Colorado Division of Racing Events ("the Division") in implementing a random, suspicionless drug testing program

applicable to all licensees in the greyhound dog racing industry. (Supp. R. at 2) The Commission and the Division exist within the Colorado Department of Revenue and perform their duties and functions pursuant to C.R.S. § 12-60-201(1). *Id.*

A. The Commission Licenses All Persons Associated With Greyhound Racing, Including Those who Neither Handle Wages Nor Conduct Races.

The Commission issues various categories of licenses to individuals who, as kennel operators, trainers, assistant trainers, on-site owners and kennel helpers, merely train and care for greyhounds in the kennel facilities located at licensed racing parks (collectively "Kennel Licensees"). *See* 1 C.C.R. 208-1; (Supp. R. at 3). Cynthia Timm held a trainer license. (Supp. R. at 2) Gary Timm holds a trainer license and an authorized agent license. *Id.* The record contains no evidence that Kennel Licensees have any role in handling wagers, conducting race meets or judging race results.

In addition to Kennel Licensees, the Commission also issues licenses to persons who act as racing officials, track security officials and lead-outs. (Supp. R. at 3) These licensees have exclusive control over the conduct of greyhound racing events. *Id.* Although the State's random, suspicionless drug testing program applies to these licensees as well, this case does not address their rights.

B. The Record Contains No Evidence Showing a Need for Drug Testing of Kennel Licensees.

On January 15, 1999, the Division, acting pursuant to Rule 3.437 of the Commission, CCR 208.1, issued Policy R-512 concerning "Random Drug Testing (Human)." (Supp. R. at 3-4) Policy R-512 outlines the random procedure for determining whether drug testing will occur on a given race day and, if so, how the persons from any category of licensees should be

randomly selected for the testing. *Id.* Under this random drug testing rule, a licensee who refuses to submit to a random, suspicionless drug test is presumed to have tested positive and is summarily suspended. (Supp. R. at 3) In order to resume participation after suspension, the licensee must submit to an arranged drug test, must produce a "negative test result," and must accept further testing to "verify continued unimpairment." *Id.*

The record contains no evidence that, prior to the 1999 adoption of Policy R-512 and of Rule 3.437, a pervasive problem of drug abuse existed among Kennel Licensees or among any other persons associated with greyhound racing in Colorado. The record contains no evidence that greyhound racing in Colorado has a history of corruption. To the contrary, the only evidence expressly negates both pervasive drug use and corruption. (Supp. R. 49-51)

C. Cynthia Timm's Suspension and License Revocation Were Without Reasonable Cause or Suspicion.

On July 30, 1999, Roy W. Mitze, a Compliance Officer for the Commission, informed Cynthia Timm that pursuant to Rule 3.437 and Policy R-512, she had been randomly chosen, without reasonable cause or suspicion, for a drug test. (Supp. R. at 5) She was told that she had to submit a urine sample immediately. *Id.* Cynthia Timm had done nothing to create reasonable suspicion that she had used or was under the influence of drugs. *Id.*

On the basis of her constitutional rights, Cynthia Timm refused to provide a urine sample. *Id.* Sylvia Laurence, a Racing Coordinator for the Commission, physically took Cynthia Timm's license and informed her that she would have to leave the kennel area immediately. *Id.* She did so. *Id.*

On August 1, 1999, Cynthia Timm was notified in written Ruling No. 99-14 by a Board of Judges (Craig Mondragon, Jack Riggio and Susan K. Gross), acting on behalf of the Division

and at the direction of the Commission pursuant to Commission Rule 6.122, that her license had been summarily suspended under C.R.S. 12-60-507(1)(a) for violation of a racing rule. *Id.* She was directed to appear before a Board of Judges created by the Division at a hearing on August 4, 1999. *Id.* Prior to the August 1, 1999 suspension, Cynthia Timm had never been subject to any disciplinary or similar proceeding concerning her Colorado trainer license. *Id.*

At the August 4, 1999 hearing, no evidence was produced concerning reasonable suspicion that Cynthia Timm had used or been under the influence of drugs. *Id.* On the basis of her constitutional rights, Cynthia Timm again refused to be tested on a random basis, without reasonable cause or suspicion. *Id.* By letter dated August 4, 1999, the Commission notified Cynthia Timm that her license had been revoked. *Id.*

Her license remains revoked to this day. Without a license, Cynthia Timm cannot obtain access to the race track kennel facility, and she cannot fulfill the role of a greyhound trainer. (Supp. R. at 5) As a consequence of the revocation of her license, Cynthia Timm can no longer work with her husband in the greyhound racing industry and has been forced to obtain employment outside the industry. *Id.* at 5-6.

D. Gary Timm Remains Subject to Random, Suspicionless Drug Testing.

In November of 1999, Gary Timm was informed that pursuant to Rule 3.437 and Policy R-512, he had been randomly chosen, without reasonable cause or suspicion, for a drug test. (Supp. R. at 6) Although Gary Timm had done nothing to create reasonable suspicion that he had used or was under the influence of drugs, he submitted to the test. *Id.* As a licensee, he remains subject to further suspicionless testing.

E. Greyhound Trainers Perform Routine Animal Care and Are Not Involved In Actual Racing.

As licensed trainers at the Rocky Mountain Greyhound Park ("the Park") in Colorado Springs, the Timms generally care for the greyhounds that they own or lease within their kennel. (Supp. R. at 51) All greyhounds must be kenneled at the Park. *Id.* The kennel facilities are approximately 400 yards from the race track. *Id.*

The record contains no evidence of drug-impaired trainers who did not perform these duties. (Indeed, the record contains no evidence that a drug impaired trainer could not perform the routine duties associated with animal care.) Defendants offered only speculation and argument as to the supposed effects of hypothetical drug use by trainers on their ability to care for animals. (Supp. R. at 47-50)

When a racing event is scheduled at the track, race officials notify the trainers of the particular dogs they want for a given race. (Supp. R. at 51) The trainers then take the designated dogs to the weigh-in area near the track. *Id.* During the transit to the weigh-in area, the dogs are kept on leashes and are muzzled.[1] *Id.* Once the dogs are weighed in by other categories of licensees, the dogs are handled exclusively by race officials and other licensees who replace the muzzles. *Id.* The trainers have no interaction with the dogs after they have been tendered to the race officials. *Id.* at 51-52.

A state-licensed veterinarian is also present at the weigh-in. (Supp. R. at 52) The veterinarian offices at the Park and can observe the health and well-being of all dogs. *Id.* The race veterinarian is governed by an entire chapter of the Code of Colorado Regulations and has specific statutory duties. *See* 1 C.C.R. 208-1, Chapter 5.

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[1] Greyhounds are generally well-behaved animals. (Supp. R. at 52) If a single dog lost its muzzle on its way to the weigh-in area at the track, no danger to persons present would result. *Id.*

Once the dogs have completed their race, the race officials remove the dogs' muzzles. (Supp. R. at 52) The unmuzzled dogs are then delivered by lead-outs back to the trainers. *Id.* At this time the dogs are returned by trainers to their respective kennels. *Id.*

F. Trainers have No Access to the Restricted Areas Where the Dogs are Drug Tested and the Dogs' Identities are Verified Before Every Race.

After the weigh-in, the dogs are kept in a restricted area at the Park. (Supp. R. at 51-52) Trainers have no access either to this restricted area. (Supp. R. at 52) During this time, a urine sample is taken from each of the dogs. *Id.* Each urine sample is later tested for illegal doping and contaminants. *Id.* Prior to the race, race officials also check the ear tattoos of each of the dogs to verify identity.[2] *Id.* The race officials then place a numbered race blanket on each of the dogs. *Id.*

G. Trainers also have No Access to the Race Track.

A high speed, mechanical lure leads greyhounds around the track. (Supp. R. at 43) Another category of licensees, lure operator, runs this device. *Id.* Trainers, however, do not have access to the track itself. (Supp. R. at 52) The general public and the trainers are similarly separated from the track by a chain link fence and a concrete wall. *Id.* Alcohol is served to the general public at the Park. *Id.* Defendants offered no evidence that trainers could have any more access to the race track, and thereby be imperiled due to the lure, than the general public.

H. The Record Contains No Evidence That Either the Timms, or Kennel Licensees in General, Fit Into Any of the Categories Where the Law Occasionally Allows Suspicionless Drug Testing.

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[2] Dogs are rarely scratched from races for misidentification. (Supp. R. at 52) For example, over a six-month period at the Greyhound Park, only a very few dogs were scratched for misidentification from over 21,000 runnings. *Id.*

In the District Court below, it was undisputed that the Timms have no law enforcement responsibilities; they do not carry firearms; and their actions do not seriously imperil the safety of others. The record does not suggest that the Timms did anything to diminish their constitutional right to privacy, such as having to submit to physical examination as a condition of licensure.

I. The Record Contains No Evidence that Drug Testing Protects the State's Fiscal Interest.

Colorado received $ 6,542,580.07 from wagers on greyhound and horse racing. (R. at 42) However, defendants presented no evidence that greyhound racing in Colorado has a history of unsavoriness or corruption. Nor did defendants present any evidence of events that have either eroded or even threatened to erode public confidence in the integrity of greyhound races. (R. 10-11) To the contrary, the only evidence in the record indicates that races in Colorado are run cleanly and fairly. (Supp. R. at 52)

IV. SUMMARY OF ARGUMENT

Summary judgment should not have been entered in this case. The erosion of the Timm's constitutional rights, on which the State bore the burden of proof, called for far more than the District Court's "rush to judgment."

Random, suspicionless drug testing is a warrantless search, often held to be unconstitutional under both Colorado and federal law. To justify random, suspicionless drug testing, the State bears the burden of proving a "special need," typically involving an extreme safety risk or sensitive government employment. Here, the evidence concerning safety was disputed. The State did not even assert sensitivity of trainers' employment.

The State argued that a "special need" could be found from its interests in the health of race animals, the integrity of dog racing, and revenues derived from taxing wagers. Neither the United States Supreme Court nor the Colorado Supreme Court have ever recognized these interests as "special needs."

The evidence was either non-existent or disputed that supposed but unproven drug use had impacted or even could impact either the health of race animals or the integrity of dog racing. Instead of meeting its burden, the State merely speculated that drug use would imperil race animals, thus jeopardizing race integrity, thereby reducing wagers and ultimately eroding taxes. This speculation cannot survive appellate scrutiny because the evidence negated both pervasive drug use among dog trainers and corruption within the dog racing industry.

Lastly, even if the State proved a "special need," which it did not, these and other disputed factual issues precluded the District Court from balancing, as it must, any "special need" against the constitutional right to be free from unreasonable searches. At a minimum, the District Court should have, but did not, and could not on a disputed record, resolve why other protections, such as an on-site veterinarian and drug testing of all dogs, did not adequately safeguard State interests, without random, suspicionless drug testing of trainers.

V. ARGUMENT

A. **Random, Suspicionless Drug Testing is Presumptively Unconstitutional and Will Only be Upheld if the State Demonstrates a "Special Need" Sufficient to Overcome the Individual's Constitutional Rights**.

Both the Fourth Amendment to the United States Constitution and Article II, Section 7, of the Colorado Constitution protect individuals from unreasonable searches and seizures by the State. *See City of Indianapolis v. Edmond*, 121 S.Ct. 447, 451 (2000) (invalidating a

suspicionless roadblock designed to interdict unlawful drugs); *University of Colorado v. Derdeyn*, 863 P.2d 929, 935-36 (Colo. 1993) (*"Derdeyn"*) (invalidating random, suspicionless drug-testing of student athletes at the University of Colorado, Boulder). Generally, searches and seizures are unreasonable when made without either a warrant issued on probable cause or a showing of individualized suspicion of wrongdoing. *See Edmond*, 121 S.Ct. at 451; *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 115 S. Ct. 2386, 2390-91 (1995) . To justify a warrantless or suspicionless search, the State bears the burden of demonstrating a "special need," above and beyond the normal need for law enforcement. *See Chandler v. Miller*, 520 U.S. 305, 313-315, 117 S. Ct. 1295, 1300-01 (1997); *City and County of Denver v. Casados*, 862 P.2d 908, 911(Colo. 1993).

Random, suspicionless drug testing represents a category of warrantless search that is presumptively unreasonable and therefore unconstitutional, absent a showing of "special need" by the State. *Derdeyn*, 863 P.2d 929, 936; *Chandler*, 520 U.S. at 313-315, 117 S. Ct. at 1301-02 ("Our precedents establish that 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."). Determining whether a suspicionless drug testing scheme complies with the Fourth Amendment requires a careful analysis of a number of factors. These factors vary from case to case, with the result that drug testing programs have been upheld in some factual contexts and rejected in others. In applying the "special needs" doctrine, the Supreme Court has upheld mandatory urine testing in three cases and rejected it in the most recent case. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 489 S. Ct. 1384 (1989); *Skinner v.*

Railway Labor Executives' Ass'n, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413-14 (1989); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386 (1995) (upholding mandatory testing of high school athletes); *Chandler*, 520 U.S. 305, (rejecting mandatory urine testing of candidates for political office).

The imposition of random, suspicionless drug testing on individuals by the State has been closely scrutinized and often rejected by the Colorado Supreme Court. Two of these cases, which the District Court dismissed in a single sentence, delineate the heavy burden the State must meet in order to justify this testing. *See Trinidad School District No. 1 v. Lopez*, 963 P.2d 1095, 1106 (Colo. 1998) ("*Lopez*") (rejecting mandatory testing of high school students participating in the marching band); *Derdeyn*, 863 P.2d at 935-36 ("CU asserts no significant public safety or national security interests . . . the great majority of cases following Skinner and Von Raab clearly militate against the conclusion that CU's program is a reasonable exercise of state power under the Fourth Amendment.").

In *Derdeyn*, the Colorado Supreme Court identified the limited number of situations where the State might be able to show a "special need" for random, suspicionless drug testing, including: government employees who are engaged in jobs raising an extreme risk of injury to others; government employees who are privy to extremely sensitive information; pilots for the nation's airlines; and law enforcement officers who conduct front-line drug interdiction. *See Derdeyn*, 863 P.2d at 943-44. Below, the State did not even attempt to invoke a single one of these recognized bases as justification for random, suspicionless testing. Moreover, even if a court determines that the government has demonstrated a "special need," then the court must conduct a balancing test that weighs the privacy interest upon which the search intrudes against

"the nature and immediacy of the governmental concern at issue . . . and the efficacy of the means for meeting it." *Lopez*, 963 P.2d 1095, 1106 (Colo. 1998), quoting *Vernonia School Dist.*, 515 U.S. 646, 660 (1995).

In *Chandler*, 520 U.S. 305, 117 S. Ct. 1295 (1997), the Supreme Court's most recent decision analyzing whether the "special needs" exception permits suspicionless urine testing, the Court rejected a Georgia statute that required candidates for state office to submit urine samples and pass a drug test. The Court emphasized the limited scope of the exception that sometimes permits searches without individualized suspicion. *See id.* at 309 ("Georgia's requirement that candidates for state office pass a drug test . . . does not fit within the closely guarded category of constitutionally permissible suspicionless searches."). The Court further explained that:

> Our precedents established that 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.

520 U.S. at 318.

After conducting an extensive review of its previous drug testing cases, the Court in *Chandler* stressed that the government must first make a threshhold showing that its proffered special need is "substantial," *before* the weight of the government's interest may be balanced against the individual privacy interests at stake. *Id.* at 318. In this case, the Court pointed out that the challenged regulation targeted a group with no documented history of drug abuse and whose activities posed no hazard to public safety. *Id.* at 321-22. The Court noted that the government had failed to established "any indication of a concrete danger" that demanded departing form the usual rule of individualized suspicion. *Id.* at 319. Analyzing the details of the drug testing scheme, the Court concluded that it "not well designed to identify candidates

who violate antidrug laws," nor was it "a credible means to deter illegal drug users from seeking office." *Id.* at 318. The Court concluded that Georgia had failed to meet its threshold burden of establishing a special need. *Id.* at 322.

As the Tenth Circuit recently explained in *19 Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998), the *Chandler* decision makes it crystal clear that the first question is whether the government's drug testing program is warranted by a "special need":

> *Prior* to conducting the balancing, in surveying the public interests at issue, . . . we must specifically inquire into whether the drug-testing program at issue is warranted by a "special need." *Only* if we can say that the government has made its special need showing do we then inquire into the relative strengths of the competing private and public interests to settle whether the testing requirement is reasonable under the Fourth Amendment. 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.

Id., 156 F.3d at 1072 (emphasis added).

The Tenth Circuit noted that the Supreme Court in *Chandler* identified two general characteristics that must be examined in determining whether the government has met its burden of demonstrating a "special need":

> First, the [*Chandler*] Court examined whether the proffered governmental concerns were "real" by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public. . . . Second, the Court examined whether the testing scheme met the related goals of detection and deterrence.

Id. at 1073. Applying this test, the Tenth Circuit rejected the challenged drug testing scheme because the challenged drug testing policy "lacks a real capacity to address drug use in the

workplace" and thus fails to satisfy the second part of the test for establishing a "special need." *Id.* at 1074. Accordingly, no balancing of interests was necessary. *Id.* at 1074-75.

Warrantless 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 recognized 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*, 156 F.3d 1068, 1072 ("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").

In this case, the District Court failed to hold the government to the test articulated in *Derdeyn*, *Chandler* and *Solid Waste Mechanics*. Had the District Court done so, it would have concluded that the government had utterly failed to meet its burden of producing evidence that

the challenged drug testing program served a "special need." First, the State provided *no* evidence to indicate that the drug testing program was "was adopted in response to a documented drug abuse problem," *19 Solid Waste Mechanics*, 156 F.3d at 1073, either among trainer licensees or in the greyhound racing industry in general. Nor did the State introduce any evidence to show "whether drug abuse among the target group would pose a serious danger to the public." *Solid Waste Mechanics*, 156 F.3d at 1073. Because of this failure to produce evidence, the State failed to establish the first prong of the "special need" test.

In addition, the State introduced no evidence to show that the testing program "met the related goals of detection and deterrence." *Solid Waste Mechanics*, 156 F.3d at 1073. Indeed, the State did not introduce any evidence about the nature of the testing program at all. Thus, the District Court was not in any position to determine whether the challenged program was like the scheme rejected as ineffective in *Chandler* or whether it was more like the drug testing schemes the Court upheld in its three earlier drug testing cases, schemes which were deemed "quite effective at discovering drug users and deterring drug use." *Solid Waste Mechanics*, 156 F.3d at 1073, citing *Chandler*, 520 U.S. at 319.

Here, the only *undisputed* evidence of "special need" before the District Court concerned the facts that the State regulates greyhound racing, in which trainers care for dogs, and its receipt of revenue from wagers placed on greyhound races. For reasons explained in the following two sections of this brief, these two interests do not satisfy the State's heavy burden. The other reasons advanced by the State were either mere speculation or the subject of *disputed* evidence, and hence could not be resolved on summary judgment as a "special need." The failure of the

State to meet its burden of showing a "special need" necessitates the remand of this case for trial.

B. **The Mere Fact that the State Regulates Greyhound Racing Does Not Satisfy the State's Burden of Showing a "Special Need" Without Separately Examining the Sufficiency of the State's Interests Underlying that Regulation**.

The State argued, and the District Court apparently accepted, that because the State heavily regulates greyhound racing, the fact of regulation somehow justifies random, suspicionless drug testing of licensees. The Timms agree that their decision to work in the Colorado greyhound racing industry subjects them to some State regulation. That concession, however, does not eliminate their constitutional rights to be free from unreasonable personal searches under the Fourth Amendment and Colorado Constitution for several reasons.

First, not all State regulatory action impinges on the fundamental constitutional rights of individuals. The vast majority of regulations applicable to greyhound racing participants are constitutionally innocuous. For example, the Timms must pay a fee to be licensed. *See* 1 Colo. Code Regs. § 208-1. The Timms must also provide certain background information to participate in the industry. *Id.* Regulations of this nature do not significantly impair constitutional rights. Hence, these and regulations similar to those imposed on greyhound racing licensees need only meet "minimum rationality." *See Regency Services Corporation v. Board of County Comm'rs*, 819 P.2d 1049, 1059-60 (Colo. 1991).

Second, as discussed in the preceding section of this brief, the State can only conduct warrantless or suspicionless searches if it meets its burden of establishing a "special need." *See Chandler*, 520 U.S. at 313-315. Attempting to justify impairment of constitutional rights by random drug testing based on the mere fact of other types of State regulation impermissibly

substitutes the lower standard of "minimum rationality" for the higher standard of "special need." The District Court's decision cannot be sustained with this bootstrap argument that by the fiat of exercising its regulatory power, the State can stamp out constitutional rights. *Cf. Wilcher v. Wilmington*, 139 F.3d 366, 374 (3d Cir. 1998) ("we have never held that regulation alone is the sole factor that determines the scope of an employee's expectation of privacy."); *Horsemen's Benevolent and Protective Ass'n, Inc. v. State Racing Commission*, 532 N.E.2d 644, 650 n.3 (Mass. 1989) ("*Horsemen's*").

Third, cases in which courts have looked at pervasive regulation as limiting Fourth Amendment rights involve only premises searches. *See, e.g., Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774 (1970) (premises search of catering establishment with liquor license). Under the so-called "administer exception," for example, liquor authorities have been allowed to search licensed premises. *Id.*; *See also Marshal v. Barlow's*, 436 U.S. 307, 312-13, 98 S. Ct. 1816, 1820 (1978); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528-29, 87 S. Ct. 1727, 1730-31 (1967). This line of authority, however, has never been extended to justify drug testing, or any other type of personal searches.

Hence, the requisite scrutiny to protect constitutional rights in this case must focus on rigorous analysis of the *reasons* underlying State regulation of dog racing. However, on the record below the only undisputed reason underlying the State's regulation of greyhound racing--the revenues derived from taxing wagers on races--does not satisfy the State's burden of showing a "special need," as explained in the next section of this brief. The other underlying reasons proffered to the District Court by the State are tainted by disputed factual issues that preclude disposition of constitutional rights on summary judgment.

For example, the State asserted that drug impaired trainers could jeopardize their safety or that of other industry participants because of dangers posed by the high-speed mechanical lure which leads dogs around the track, or because a dog's muzzle might come off during the weigh-in process. The State offered no evidence that trainers operate the lure. *See Burka v. New York City Transit Auth.*, 739 F. Supp. 814, (S.D.N.Y. 1990) (finding that suspicionless drug testing of non-safety sensitive employees, such as turnstile operators was unconstitutional, but upholding suspicionless searches for individuals who held safety sensitive positions, such as firearm carrying subway collection agents). According to Gary Timm's affidavit, trainers have no more access to the tracks than does the general public. (Supp. R. at 51-53) This affidavit also states that greyhounds are generally well behaved and loss of a muzzle would pose no risk of serious injury. *Id.*

The State also asserted that drug-impaired trainers could not protect "the health and safety of the animals," citing C.R.S. § 12-60-101. The State presented neither evidence of what, exactly, trainers do, nor of whether drug impairment would preclude or ever had – prior to adoption of the drug testing regulations in 1999 – precluded performance of those unspecified duties. The State did not even address the role of the licensed veterinarian who observes the health and condition of race animals. The State cited no legal authority equating the care of racing animals with the requisite "special need," except to the extent of the fiscal interest assertion addressed in the following section of this brief.

Apart from a supposed but unproven nexus to fiscal interest, discussed below, animal welfare cannot alone be a "special need." Improperly cared for race animals do not raise serious safety issues. If animal care constituted a special need, then a wide variety of persons would be

subject to random, suspicionless testing. Examples include cattle feed lot operators, pet store employees and the staffs of animal shelters.

C. **The State's Fiscal Interest Arising From Taxing Wagers On Greyhound Racing Does Not Establish The Requisite "Special Need" Justifying Random, Suspicionless Drug Testing**.

As with the State's regulation of the greyhound racing industry, the Timms do not dispute that the State derives *some* revenues from wagers on greyhound races in Colorado. However, equating the State's fiscal interest in greyhound racing to the requisite "special need" for a warrantless, suspicionless search suffers from two equally fatal legal flaws. It is also tainted by disputed factual issues.

First, as discussed in the prior section of this brief concerning regulation, the State cannot bootstrap its burden of establishing a "special need" by substituting a lower constitutional standard for the requisite "special need." Yet, the State's "fiscal interest" argument again does just this. Like the broad range of State regulations applicable to the greyhound racing industry, the State's decision to tax wagers on races--or to tax anything else, for that matter--raises only a question of minimum rationality. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41, 93 S. Ct. 1278, 1301, 120 S. Ct. 1375, 1380 (1973) ("the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.").

Second, courts should be loath to allow infringement of a citizen's constitutional rights on the basis of a state interest that has no logical stopping point, "thus allowing the exception to swallow the rule." *Florida v. J.L.*, 529 U.S. 266, 262 (2000). Because taxation can be justified on minimum rationality grounds, the State has a "fiscal interest" in a broad and potentially ever

expanding range of activities. Accepting the "fiscal interest" argument means that *every* person, engaged in *any* activity subject to or even dealing with taxation, could on that basis *alone* be required to submit to a random drug test, regardless of the amount of tax actually collected.[3]

Two examples show why the "fiscal interest" argument is wrong. Retail clerks collect sales taxes from customers who purchase goods in Colorado. The State could rationally assert that a drug impaired clerk may not collect the proper amount. Under the State's logic, this analysis would alone justify random, suspicionless testing of every person employed as a retail sales clerk in Colorado. Similarly, local governments derive revenues from real property taxes. It could be argued that drug impaired owners will not care for their properties, resulting in lower property value, and therefor erosion of the tax base. Hence, everyone who purchases real property could be subject to random, suspicionless drug testing.

But even accepting the State's basic premise on fiscal interest, despite its constitutional flaws, on the record below the State has only speculated concerning the facts necessary to connect evils supposedly eliminated by drug testing to prejudice to its fiscal interest: first, drug impaired trainers cannot care for dogs; second, other checks and balances fail to detect the improper care; third, improperly cared for dogs compromise races; fourth, the public ceases betting because races are suspect; and, finally, State revenues therefore decline. The speculation surrounding the State's attenuated position is shown by the undisputed evidence that dog trainers do not handle races, dog trainers are not associated with the placement of wagers, and checks and balances such as a veterinarian's presence and drug testing of dogs exist to protect both dogs and

[3] The slippery slope associated with using financial interest as a justification for drug testing is illustrated by the inability to articulate a meaningful standard. Would $1 million in tax revenues be enough? Would $10 million? The question cannot be answered on a constitutionally sound basis.

race integrity. The following section of this brief addresses two other critical inadequacies in the record as to this chain of speculation.

D. **The State Further Failed to Meet its Burden of Showing a "Special Need" Because the Record Contains No Evidence of Pervasive Drug Use Among Licensees, Much Less of Any Connection Whatsoever Between Drug Use and Inability to Perform the Very Routine Tasks of a Licensed Dog Trainer**.

The State's attempted justification of drug testing based on protecting its fiscal interest in revenues from wagers on greyhound races rests on numerous factual premises, at least two of which are either negated or unsupported in the record. The failure of the State's premises eliminates the need further to examine each step in the chain of speculation supposedly connecting drug testing to protection of the State's fiscal interest.

First, no evidence in the record shows that dog trainers, or for that matter anyone else associated with the greyhound racing industry, have a pervasive drug problem. *See Lopez*, 963 P.2d at 1103 ("the evidence shows a serious drug problem in the general student body." However, . . . there is no relevant information about drug usage among students who participate in extracurricular activities."); *Chandler*, 520 U.S. at 319-20 ("A demonstrated problem of drug abuse . . . would shore up an assertion of special need for a suspicionless general search program."). The absence of drug-use evidence in the record undermines the assertion of fiscal interest as a "special need" for random drug testing. *Lopez*, 963 P.2d at 1108-09; *Chandler*, 520 U.S. at 321-22.

Second, no evidence in the record even suggests that supposed but unproven drug use would hamper performance of the duties of dog trainers. If anything, this case exemplifies the opposite of the very few sensitive occupations that have been singled out for drug testing. *See, e.g., Exxon v. Exxon Seaman's Union*, 76 F.3d 1287, 1294 (3d Cir. 1996) ("A clearly defined and

cautiously administered program of drug testing . . . is the natural corollary to . . . a strong public policy that precludes allowing intoxicated or drug-impaired seamen to remain in safety-sensitive positions aboard oil tankers."); *Ruston v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988) (nuclear power engineers); *Guiney v. Roche*, 873 F.3d 1557, 1558 (1st Cir. 1989) (police officers carrying firearms and involved in drug interdiction).

The absence of evidence of a causal connection between hypothetical drug use and supposed inability to perform the duties of a dog trainer, coupled with undisputed evidence that dog trainers do not have a pervasive drug problem, removes "fiscal interest" as the State's claimed "special need" for drug testing dog trainers. The State cannot fulfill its burden of showing a "special need" with speculation. *See Chandler*, 520 U.S. at 322; *Horsemen's*, 532 N.E.2d at 651-52.

E. **The Authorities Relied on by the District Court are Inapposite Because the Only Evidence in the Record Negates Both a History of Corruption in Colorado's Dog Racing Industry and any Safety Concerns**.

In lieu of the Colorado Supreme Court's well-developed precedent on drug testing, the District Court followed *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) ("*Dimeo*") and *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986) ("*Shoemaker*"). The District Court's complete reliance on *Dimeo* and *Shoemaker* should not be adopted by this Court for several reasons: first, *Dimeo* and *Shoemaker* are factually distinct on several critical grounds; second, the record in this case is disputed as to the core factual underpinnings of *Dimeo* and *Shoemaker*; and, third, *Dimeo* and *Shoemaker*, which were decided before the U.S. Supreme Court's many decisions on drug testing, do not represent the majority rule on the issues decided. Each of these reasons warrants separate discussion.

The District Court's wholesale adoption of the factual analysis from *Dimeo* and *Shoemaker*, especially with a meager record and on summary judgment, was error. *Dimeo* and *Shoemaker* are factually distinct. *Shoemaker* involved jockeys in the New Jersey horse racing industry and *Dimeo* involved similar drug testing of jockeys and racing participants in the Illinois horse racing industry.

The Timms train dogs, they do not ride race horses. Unlike jockeys, dog trainers have no access to the racing areas. The racing areas in greyhound parks are not as dangerous as those associated with horse racing. *See Dimeo v. Griffin*, 721 F. Supp. 958, 965 (N.D. Ill. 1989) ("In 1987 over 100 [Jockey] Guild members suffered injuries in racing in the United States severe enough to cause at least one week of disability. Nationally about two Jockeys per year die in racing accidents."); *Dimeo*, 943 F.2d at 681 (Horse racing "is highly dangerous to jockeys and to their counterparts in harness racing.")

The *Shoemaker* and *Dimeo* cases are also inapposite because they were decided on extensive factual records. *See Shoemaker v. Handel*, 608 F. Supp. 1151, 1153-54 (D.N.J. 1985); *Dimeo*, 721 F. Supp. at 961-66. The lower courts in *Shoemaker* and *Dimeo* held evidentiary hearings and made extensive findings of fact.

Here, in contrast, the District Court made very limited findings of fact, did not specifically find a "special need" and did not hold an evidentiary hearing. (Supp. R. at 68-70) Indeed, the State did not even file an answer, instead opting to file a motion to dismiss and an alternative motion for summary judgment. The single affidavit in support submitted by the State did not provide a sufficient factual record necessary to support the State's claimed "special

need." Nor did it provide the District Court with sufficient evidence to conduct a balancing of the competing constitutional interests. *See Lopez*, 963 P.2d at 1106.

The District Court seemingly transported the proven facts from those cases to the State's speculation in this case. The record in this case contains no evidence that dog trainers in Colorado have a pervasive drug problem. *Cf. Shoemaker*, 608 F. Supp. at 1157 ("the regulations contested by plaintiffs were promulgated for the specific purpose of combatting and hopefully eliminating the perceived and actual use of alcohol and drugs which plagues this sport.") (emphasis added). The record also lacks any evidence that greyhound racing in Colorado has a history of corruption. *Cf. Dimeo*, 943 F.2d at 681 ("Horse racing in Illinois . . . has an unsavory, or at least a shadowed . . . reputation").

Lastly, the District Court erred by assuming that the *Dimeo* and *Shoemaker* cases were correctly decided. *Shoemaker* has been rejected by several courts because the decision can be read as holding that state regulation alone justifies random, suspicionless drug testing. *See Horsemen's*, 532 N.E.2d 644, 650 (Mass. 1989) ("Few courts have followed the *Shoemaker* decision, and then only in areas involving security and public safety."). *See also Lovvorn v. Chattanooga*, 846 F.2d 1539, 1545 (6th Cir. 1988). *Shoemaker* predates the U.S. Supreme Court's extensive procedure on random, suspicionless drug testing.

Unlike *Dimeo* and *Shoemaker*, the record in this case is devoid of any evidence of drug use, corruption or safety concerns. Instead, the State asks this Court to speculate whether drug testing of dog trainers would ensure the integrity of dog races or somehow serve safety or deterrent values. The State has failed to support its trampling of the Timms' constitutional right to be free from unreasonable searches and seizures. As will be shown in the next section,

factual disputes in the record demonstrates that the District Court erred in its application of the summary judgment standard.

F. **The District Court Erred by Granting Summary Judgment on a Record that was Factually Disputed**.

As this Court has frequently reminded the lower courts, summary judgment is only appropriate if the pleadings, affidavits, depositions, and/or admissions show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See* C.R.C.P. 56(c); *Gifford v. City of Colorado Springs*, 815 P.2d 1008, 1011 (Colo. App. 1991); *Civil Service Comm'n v. Pinder*, 812 P.2d 645, 659 (Colo. 1991). The movant in this case--the State--had the burden to show that there was no genuine issue of material fact. *See Civil Service Comm'n*, 812 P.2d at 649.

The State bore the burden both under constitutional law and as the movant under Rule 56. The State did not meet its two-fold burdens because disputed facts pervade this case. The disputed facts include: (1) whether dog trainers have *any* impact on the outcome of races; (2) whether dog trainers could be injured by the racing lure or anything associated with the race itself; and (3) whether drug use imperils the financial interest of the State in greyhound racing. In contrast, the following facts are undisputed: (1) the Colorado greyhound industry does not have a history of corruption or unsavoriness; (2) greyhound races in Colorado are run cleanly and fairly; and (3) dog trainers do not have a pervasive drug use problem. (Supp. R. at 51-53)

Lastly, even assuming that the State met its burden of showing a "special need" for random, suspicionless drug testing of dog trainers, which on this record it did not, genuine issues of material fact still preclude the requisite balancing of the competing constitutional interests involved in this case. *See Lopez*, 963 P.2d at 1106. The District Court was required to

undertake "a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314. For example, do other measures -- an on-site veterinarian and drug testing of all dogs -- obviate the need for random, suspicionless testing? Does hypothetical, but never proven, drug use by trainers sufficiently interfere with their ability to care for race animals to justify this testing? These questions were not answered by the District Court and cannot be answered by this court on the meager record presented.

VI. CONCLUSION

The District Court's August 24, 2000 decision should be reversed and the case remanded for trial on the genuine issues of: First, can the State demonstrate a "special need"; and, Second, if so, does that need suffice to overcome the constitutional right to be free from warrantless, suspicionless searches.

Respectfully submitted this ____ day of February, 2001.

JACOBS CHASE FRICK KLEINKOPF
& KELLY LLC

_____

John R. Webb # 1876
1050 17th Street, Suite 1500
Denver, CO 80265

Of Counsel

HOLME ROBERTS & OWEN LLP
Sherri Heckel Kuhlmann # 18832
John C. Lowrie # 31379
1700 Lincoln, Suite 4100
Denver, Colorado 80203
(303) 861-7000

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

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of February 2001, a true and correct copy of the foregoing **OPENING BRIEF OF PLAINTIFFS-APPELLANTS** was sent via first class mail, postage prepaid, addressed to the following:

Robert H. Dodd, Jr., Esq.
Colorado Attorney General's Office
Business and Licensing Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

_____

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