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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: WALKER L. CHANDLER, ET AL., Petitioners v. ZELL  
D. MILLER, GOVERNOR OF GEORGIA, ET AL.

CASE NO: 96-126

PLACE: Washington, D.C.

DATE: Tuesday, January 14, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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WALKER L. CHANDLER, ET AL., :  
Petitioners :  
v. : No. 96-126  
ZELL D. MILLER, GOVERNOR OF :  
GEORGIA, ET AL. :  
- - - - -X

Washington, D.C.  
Tuesday, January 14, 1997

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:08 a.m.

APPEARANCES:  
WALKER L. CHANDLER, ESQ., Zebulon, Georgia; on behalf of  
the Petitioners.  
PATRICIA GUILDAY, ESQ., Assistant Attorney General of  
Georgia, Atlanta, Georgia; on behalf of the  
Respondents.

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1 PROCEEDINGS

2 (10:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 96-126, Walker Chandler v.  
5 Zell D. Miller, Governor of Georgia.

6 Mr. Chandler.

7 ORAL ARGUMENT OF WALKER L. CHANDLER

8 ON BEHALF OF THE PETITIONERS

9 MR. CHANDLER: Mr. Chief Justice, and may it  
10 please the Court:

11 In 1990 the State of Georgia adopted a law  
12 requiring drug testing of all members of the State  
13 government, State employees. Almost as an afterthought,  
14 it adopted a law requiring drug testing as a condition of  
15 employment or candidacy for candidates for public office.

16 The first of those laws was struck down in the  
17 lower courts. This law was brought forward before this  
18 Court by me and my co-plaintiff, who ran for office in  
19 1994.

20 QUESTION: Mr. Chandler --

21 MR. CHANDLER: Yes.

22 QUESTION: -- you say that the petitioners ran  
23 for office in '94, and in the petition you brought here  
24 there's no assertion that any of the petitioners plan to  
25 run again in the future, is there?

1 MR. CHANDLER: Not in the -- as I recall, not in  
2 the actual pleadings in the lower court. However --

3 QUESTION: No. So how would we have  
4 jurisdiction?

5 MR. CHANDLER: Your Honor, I believe this case  
6 would not be moot, because it would be capable of  
7 repetition and yet evading --

8 QUESTION: Well, how would it be if none of the  
9 petitioners plan to run again?

10 MR. CHANDLER: Your Honor, I plan to run again.

11 QUESTION: But that was not stated --

12 MR. CHANDLER: That was not stated below. Also,  
13 Justice O'Connor, I -- my candidacy and the candidacy of  
14 all Libertarian Party members is premised on the concepts  
15 of limited government and freedom from unconstitutional  
16 searches and seizures among all the other liberties  
17 reserved to the people by the Founding Fathers, and in  
18 that respect I would think that OCGA 21-2-140 is violative  
19 of the interests of all candidates, whether or not --

20 QUESTION: Well, that's a merits argument,  
21 certainly, but normally we would look to see if there's  
22 some situation in a case like this of being capable of  
23 repetition and avoiding any review, and normally we would  
24 look to see some avowal that yes, indeed, these  
25 petitioners or at least one of them intends to run again.

1 MR. CHANDLER: Yes, I understand that.

2 QUESTION: And you didn't seek to bring this on  
3 behalf of a class of candidates.

4 MR. CHANDLER: No, sir, Your Honor, I did not.

5 QUESTION: Mr. Chandler --

6 MR. CHANDLER: Yes.

7 QUESTION: -- I'm wondering why, if you want to  
8 raise this issue, you don't have to refuse to take the  
9 drug test, rather than go ahead and take it and get on the  
10 ballot and then challenge it later.

11 MR. CHANDLER: Your Honor, we filed this action  
12 prior to submitting to the test, prior to qualification by  
13 having this little piece of paper that certified us as  
14 being drug-free.

15 We were the nominees of our party. We had an  
16 obligation to take forward the message of our party, the  
17 other messages of our party in the electoral process, so  
18 we essentially had no choice but to submit -- unwillingly,  
19 perhaps, but to submit to this State-ordered search.

20 QUESTION: When did you file the suit, before  
21 the election or after the election?

22 MR. CHANDLER: Before the election, Your Honor,  
23 in May of --

24 QUESTION: So at that time there's no doubt that  
25 the case was not moot.

1 MR. CHANDLER: Yes, Your Honor.

2 QUESTION: At that time it was very much alive.

3 MR. CHANDLER: Yes, Your Honor.

4 QUESTION: So the complaint is that you -- what,  
5 that you didn't amend your complaint in order to assert  
6 repetition after the election? Have we ever required  
7 that, amending a complaint in a suit that originally was  
8 not moot in order to aver that mootness has not occurred?

9 MR. CHANDLER: I don't know, Justice Scalia.

10 QUESTION: I don't recall we've ever required  
11 that.

12 QUESTION: Anyway, as an officer of the court,  
13 you represent to us that you intend to run again, that  
14 this issue will arise again if the Georgia law stands?

15 MR. CHANDLER: Yes, sir.

16 We search in vain the cases that this Court has  
17 handed down which deal with suspicionless searches to find  
18 where any blanket search of this nature, this magnitude,  
19 and lacking any showing of any compelling State interest,  
20 has been granted by this Court.

21 QUESTION: Suppose that a State agency said, in  
22 the interests of all of our employees, everyone once a  
23 year must take a physical exam. We don't want to know the  
24 results. All we want you to do is to say that you've gone  
25 to a doctor, any doctor you want, for a physical



1 examination. Is that a search?

2 MR. CHANDLER: Yes, Your Honor, I would think  
3 that would be a search.

4 QUESTION: When does a search arise, when you go  
5 into the doctor's office?

6 MR. CHANDLER: I would think so, Your Honor.

7 QUESTION: Even though the results are disclosed  
8 only to you?

9 MR. CHANDLER: I would think that it would be a  
10 search, because if the result of that search is that you  
11 can no longer serve in that agency, then --

12 QUESTION: No, no. No, the agency says, we  
13 don't care what the medical exam discloses. We just, in  
14 the interests of our employees we want you to be examined  
15 once a year.

16 MR. CHANDLER: Well, I would think, Your Honor,  
17 that's -- with all due respect, that's not before the  
18 Court, and -- but the --

19 QUESTION: Well, there are a lot of things that  
20 are not before the Court that are going to be before the  
21 Court based on this opinion, and so we have to write an  
22 opinion that covers more than your particular case because  
23 we're interested in the general principle.

24 MR. CHANDLER: Yes, Your Honor. I --

25 QUESTION: So I'm asking why this is a search.

1           MR. CHANDLER: I would think that it would be a  
2 search if, as a result of that search, a person could lose  
3 employment.

4           QUESTION: That's not my hypothetical. All you  
5 have to do is go to the doctor and just certify that  
6 you've had a physical exam once a year at a doctor of your  
7 choice. The agency says we want to do this in the  
8 interests of our employees, and that may well -- we can  
9 play with the hypothetical.

10          MR. CHANDLER: Yes, sir.

11          QUESTION: The agency pays for it, or whatever.  
12 Why is that a search?

13          MR. CHANDLER: I would think it would be a  
14 search under the principles of -- that were announced in  
15 Schermberger, which drew a distinction between bodily  
16 searches --

17          QUESTION: That is to say, Schmerber?

18          MR. CHANDLER: Yes, sir.

19          QUESTION: Well, there the -- involuntarily a  
20 needle was inserted in the -- with the patient by a doctor  
21 who was not of his choice at a time that was not of his  
22 choice. He had -- he was there, on the gurney, in  
23 custody. But that's quite different, it seems to me, from  
24 just saying go to a doctor once a year.

25          MR. CHANDLER: It may well be, Your Honor.

1 QUESTION: It may well be? You think -- I  
2 assume this physical exam requires a strip, right?

3 MR. CHANDLER: Yes, sir.

4 QUESTION: And you're saying that that's not a  
5 search, requiring you to go to somebody else and strip  
6 down and have that person examine your body?

7 MR. CHANDLER: I think it's --

8 QUESTION: What possibly could be a search if  
9 that's not a search?

10 MR. CHANDLER: Yes, Your Honor.

11 QUESTION: I mean, you might want to argue about  
12 whether it's an unreasonable search, but you don't have  
13 any doubt it's a search, do you?

14 MR. CHANDLER: No, sir, Your Honor.

15 QUESTION: Mr. Chandler, would you have any  
16 problem if what the State did instead of requiring a drug  
17 test within 30 days of filing your nominating petition is  
18 require every candidate for the State office to file an  
19 affidavit certifying that the candidate is not now and has  
20 not in the past used or ingested illegal narcotic drugs?

21 MR. CHANDLER: I would object to that, Your  
22 Honor, because that would --

23 QUESTION: There's no search.

24 MR. CHANDLER: There is no search, but I --

25 QUESTION: It certainly wouldn't -- you wouldn't

1 be here on the basis that you are here today.

2 MR. CHANDLER: That would be true.

3 QUESTION: And a State has wide latitude, does  
4 it not, to define qualifications for State office?

5 MR. CHANDLER: Yes, so long as those -- so long  
6 as they do not violate people's constitutional  
7 protections.

8 QUESTION: And what constitutional protection  
9 would be violated by requiring such an affidavit, that to  
10 be a candidate for State office you certify that you're  
11 not a drug abuser?

12 MR. CHANDLER: Or never have been in your  
13 hypothetical, Your Honor. You asked if I would object,  
14 and I would object not on a constitutional grounds --

15 QUESTION: I'm asking on what constitutional  
16 basis.

17 MR. CHANDLER: I'm sorry, Your Honor, I fail to  
18 know of a constitutional basis that that might fit within  
19 that hypothetical.

20 QUESTION: You just wouldn't like it.

21 MR. CHANDLER: Yes, Your Honor. I think that it  
22 might have some implication for free -- free speech  
23 implications under the First Amendment, Your Honor, but --

24 QUESTION: Well, if you had to take an oath that  
25 you have never been disloyal to the Government of the

1 United States, of a State, or you've never been a member  
2 of, say, the Socialist Party, then you might have an  
3 objection under a different amendment than the one you're  
4 claiming, but you are claiming the Fourth Amendment, and  
5 you are doing it in relation to a bodily intrusion.

6 The Fourth Amendment puts on the same line as  
7 the security of one's person the security of one's papers.  
8 Would you then question the requirement that if you run  
9 for office you must do a complete financial disclosure  
10 which will involve disclosing papers?

11 MR. CHANDLER: I think that there the Court has  
12 drawn distinctions in the past between bodily searches and  
13 financial disclosure. I did not object in this case to  
14 financial disclosure.

15 QUESTION: But the Fourth Amendment does say  
16 persons, houses, papers, so why would you say that it's  
17 all right to demand papers but not have anything to do  
18 with the person?

19 MR. CHANDLER: Because I think there is a  
20 strong, compelling privacy interest in the person that  
21 goes far beyond the compelling -- any compelling  
22 interest --

23 QUESTION: Where do you get that from in the  
24 Constitution?

25 MR. CHANDLER: Justice Ginsburg, I do not know.

1 QUESTION: Well, isn't --

2 QUESTION: And is it the personal interest in  
3 not having to strip and have needles inserted, or is it  
4 the personal interest in not disclosing the results,  
5 because if it's the latter, then your case is perhaps more  
6 difficult.

7 MR. CHANDLER: I think it's the former, Your  
8 Honor. It's the actual giving up of bodily fluids, the  
9 insertion of --

10 QUESTION: So you think most people would think  
11 that that's more of an invasion of privacy, just going to  
12 the doctor once a year, than having to disclose all of  
13 your financial records, all of your holding, all of your  
14 poverty or all of your wealth, as the case may be?

15 MR. CHANDLER: There is a big distinction in  
16 this case, Your Honor, and that is that if I disclose my  
17 wealth I cannot be kept off the ballot.

18 QUESTION: Mr. Chandler, every invasion of  
19 privacy is not a search, is it? Are you willing to equate  
20 every invasion of privacy with a search?

21 I mean, would you consider it a search if,  
22 instead of having someone examine you physically to decide  
23 whether you have cocaine in your body, you are required to  
24 disclose whether you have cocaine in your body?

25 I mean, that may be an invasion of privacy, but

1 is it a search?

2 MR. CHANDLER: Yes sir, I would deem it a  
3 search.

4 QUESTION: You think it's a search?

5 MR. CHANDLER: Yes, Your Honor.

6 QUESTION: So when I ask you, you know, are you  
7 a drug addict, I'm searching you? Words have no meaning  
8 if we're going to talk like that.

9 QUESTION: Why --

10 QUESTION: You just told me it wasn't, so which  
11 answer are you giving? You answered to me that no, it  
12 wouldn't be a Fourth Amendment search, but I'd object, and  
13 now you tell Justice Scalia, yes, it's a search. Now,  
14 which answer do you want to abide by here.

15 MR. CHANDLER: I'm sorry, Justice O'Connor, I'm  
16 not exactly sure of the contradiction that I've voiced  
17 here.

18 QUESTION: Mr. Chandler, going back to Justice  
19 Ginsburg's question, assuming that you had actually to  
20 disclose papers, produce papers as distinct simply from  
21 producing information, so that there really were -- in the  
22 same sense that we're talking with here, there really were  
23 a search involved, I take it that your answer would -- I  
24 take it that your answer to the question would not  
25 necessarily be the same as your position here, because the

1 governmental interests involved are different.

2           You might or might not think the Government had  
3 a sufficient interest in requiring that kind of production  
4 from its political candidates, but at least the  
5 Government's justification, what we would look to to  
6 decide whether it was reasonable or not would, I take it,  
7 in your view be different from the weight of the  
8 government's justification in this case. Is that a fair  
9 way to characterize your position?

10           MR. CHANDLER: Yes, Your Honor. I think that  
11 would be a fair way to characterize it.

12           QUESTION: And your real argument before us, I  
13 take it, doesn't go to the scope of what is or is not a  
14 search, but the scope of what is permissible on the  
15 grounds that the government does have a justification  
16 which is sufficiently weighty to make that search a  
17 reasonable one. Is that it?

18           MR. CHANDLER: Well, I certainly felt like it  
19 was a -- that a financial search or a financial disclosure  
20 was a more reasonable government requirement than a drug  
21 test.

22           QUESTION: All right, and what is your reason  
23 for saying that this particular search is not a reasonable  
24 one? What's the nub of your attack on the government's  
25 justification?



1 MR. CHANDLER: First, there is no real evidence  
2 of a real problem. There -- this -- the searches which  
3 have been allowed by this Court have always been narrowly  
4 limited to certain areas -- the front line in the war on  
5 drugs, drug interdiction, the use of firearms, the train  
6 accidents, things where a real problem or a real  
7 potentiality has been shown, and not mere hypotheticals.

8 And so the essence of this case is that this is  
9 just yet another attempt at expansion of governmental  
10 power over people for a very symbolic purpose, which is  
11 put on the State of Georgia. It's not a test that's  
12 designed to keep drug abusers out of office. It's a  
13 blanket search, carried out for symbolic purposes to -- in  
14 my opinion to show that the General Assembly of Georgia is  
15 against drugs.

16 QUESTION: Mr. Chandler, at the outset of your  
17 argument you mentioned that there was a -- the statute  
18 originally applied to all State employees, and that that  
19 was held invalid. Was that by Georgia courts or a Federal  
20 court?

21 MR. CHANDLER: Federal court, but that was a  
22 companion statute, not this statute.

23 QUESTION: I understand, but who held it  
24 unconstitutional?

25 MR. CHANDLER: The district court in Atlanta.

1 QUESTION: A State district court, or a Federal  
2 district court?

3 MR. CHANDLER: A Federal district court, Your  
4 Honor.

5 QUESTION: Was that case appealed?

6 MR. CHANDLER: I don't know, Your Honor.

7 QUESTION: When was that? Is it --

8 MR. CHANDLER: That was in 1990.

9 QUESTION: 1990.

10 MR. CHANDLER: Yes, sir.

11 QUESTION: Thank you.

12 MR. CHANDLER: This -- a very similar case was  
13 brought in the district court. this district -- Harmon v.  
14 Thornburgh was also decided in the district court level in  
15 1990, where the Justice Department wished to test, have  
16 blanket tests of all Justice Department attorneys, and  
17 that was held by the court at that time, the district  
18 court, to be not within the parameters announced by this  
19 court in Skinner and Von Raab.

20 Certiorari was sought in that case by the  
21 Government and was denied. I consider this case to be  
22 almost exactly in line with that particular case.

23 QUESTION: Well, the statute here, Mr. Chandler,  
24 does single out certain high-ranking State offices, and I  
25 think -- I would think you're in a position -- you ran for

1 what, lieutenant governor?

2 MR. CHANDLER: Yes, Your Honor.

3 QUESTION: You're in a position to challenge the  
4 requirement for lieutenant governor. I don't know that  
5 you're in a position to challenge requirements for other  
6 offices which you didn't seek, and certainly, don't you  
7 think there is an argument on behalf of the State that the  
8 people have a right to have a lieutenant governor who is  
9 free of drug use?

10 MR. CHANDLER: First, Your Honor, the -- my co-  
11 plaintiff, Sharon Harris, ran for commissioner of  
12 agriculture. Secondly, there was never any showing that  
13 drug abuse or drug use in high offices or any other  
14 offices in Georgia has been any kind of a problem.

15 QUESTION: Well, Georgia, then you feel can't  
16 adopt a prophylactic rule that says we want to make sure  
17 it doesn't become a problem?

18 MR. CHANDLER: No, sir, I do not think they can.  
19 I think that a potential problem, a hypothetical,  
20 potential problem is not a real problem and is therefore a  
21 symbolic problem.

22 QUESTION: What if the Georgia statute, instead  
23 of reading the way it does, had said everybody has to take  
24 this drug test but anybody can get on the ballot. All you  
25 have to do is announce the results of your drug test.

1 MR. CHANDLER: Your Honor, that might be more  
2 permissible in my opinion, because then it would at least  
3 leave it to the voters to decide whether they want to  
4 choose a person who submits to a test, who passes a  
5 test --

6 QUESTION: Why --

7 MR. CHANDLER: -- or who refuses a test.

8 QUESTION: I thought you were complaining about  
9 the search.

10 MR. CHANDLER: Yes.

11 QUESTION: The search would be exactly the same  
12 in that situation, wouldn't it?

13 MR. CHANDLER: Yes, Your Honor.

14 QUESTION: So how would it be any better? I  
15 mean, if your real objection is the search, your answer  
16 should be, you know, no, it's just as bad.

17 QUESTION: I think he's capable of answering  
18 himself.

19 QUESTION: Well, but he's not capable, perhaps,  
20 of perceiving whether what he's objecting to is the  
21 search, Chief Justice. If -- maybe you're not objecting  
22 to the search, then. You have some other problem than the  
23 search?

24 MR. CHANDLER: I certainly object to the search  
25 as a prerequisite to being -- to ballot placement, Justice

1 Scalia.

2 QUESTION: Well, isn't there a search in this  
3 other case? But you don't object to that.

4 MR. CHANDLER: In which other case?

5 QUESTION: In the case the Chief Justice put to  
6 you, where you had to undergo the same search, but you  
7 could run whether it came out positive or negative.

8 MR. CHANDLER: Well, I'm just saying that  
9 there's -- that that would not -- I think it's for the  
10 people of Georgia to decide whether or not you can be on  
11 the ballot, Your Honor.

12 QUESTION: I'm sorry, I just don't understand,  
13 given that your objection is to the search --

14 MR. CHANDLER: Yes.

15 QUESTION: -- why you would not -- if it is to  
16 the search.

17 MR. CHANDLER: Yes.

18 QUESTION: Maybe it's not. I don't understand  
19 why you would not find the Chief Justice's hypothetical  
20 just as bad as the one that you confront. You can't run  
21 unless you get searched.

22 MR. CHANDLER: Well, obviously, Your Honor, I  
23 have objected to the search.

24 QUESTION: Or take another example. No testing  
25 before, but the moment you are elected to office, you must

1 have a test and you must repeat it annually. Would you  
2 object to that? Then the voters make their choice without  
3 any requirement of a --

4 MR. CHANDLER: I would object to that because,  
5 Justice Ginsburg, there's no showing that there is a  
6 problem.

7 QUESTION: Well then, how does that differ from  
8 in between the time that you're on the ballot and the time  
9 that you're elected? What is the difference in my  
10 situation, in the question that I pose and the one that  
11 Justice Scalia posed?

12 MR. CHANDLER: I believe this Court has held, at  
13 least since the Carroll case in 1925, that blanket  
14 searches are intolerable, and that that would just be a  
15 blanket search.

16 QUESTION: And would that be the same if every  
17 employee was required to get a physical examination once a  
18 year?

19 MR. CHANDLER: Yes, sir, I believe it would be.  
20 It would be a blanket search required by government, and I  
21 think a blanket search of people to determine whether or  
22 not they're using drugs, or whether or not they have a  
23 terminal illness, or whether or not they have a genetic  
24 defect, or a blood-borne disease -- we have to look at --

25 QUESTION: And that's because you object to the

1 intrusion of going into the doctor's office, not the  
2 disclosure of the result?

3 MR. CHANDLER: Insofar as that intrusion is  
4 forced upon me by the State, yes, Your Honor.

5 QUESTION: Mr. Chandler, I guess the test under  
6 the Fourth Amendment is whether the search is reasonable.

7 Now, does it enter into the balance of whether  
8 it's reasonable at all if it were shown that the virtually  
9 universal experience of private employers is to require an  
10 annual physical of employees, or to require a periodic  
11 drug testing?

12 Does that affect the balance when we look at a  
13 State-ordered search or not? Does it affect what's  
14 reasonable, the general practice in the private community?

15 MR. CHANDLER: I do not think so, Justice  
16 O'Connor, because there's a difference between the  
17 contractual relationship between employee and an employer  
18 and the political relationship between the government and  
19 candidates, and people who wish to be a part of that  
20 government. That would be my answer to that question,  
21 Your Honor, but it may not address the point that you're  
22 concerned with.

23 QUESTION: You'd have no problem with the law  
24 saying -- or maybe you do, but if a high official, say the  
25 Governor, uses drugs, he is immediately disqualified from

1 office, illegal drugs?

2 MR. CHANDLER: Your Honor, for one thing,  
3 that --

4 QUESTION: Would you have a problem with that?

5 MR. CHANDLER: I would even have a problem with  
6 that, Your Honor.

7 QUESTION: Why?

8 MR. CHANDLER: For one thing, that presupposes  
9 that the person that's in the high office has broken the  
10 laws of the State of Georgia. The person could have, for  
11 example, been in a jurisdiction or another country where  
12 such drug use was not even illegal. Therefore, he would  
13 not have broken the laws under the State of Georgia.

14 It is a shifting majority decides what is legal  
15 and illegal. We see tobacco, for example, approaching  
16 illegality in this country, or portions thereof. That  
17 introduces the novel idea that a citizen of a State is  
18 subject to the jurisdiction of that State no matter where  
19 in the world he or she might go, and that is an element --

20 QUESTION: You think drug use is irrelevant to  
21 the abilities and the qualifications of a public  
22 officeholder?

23 MR. CHANDLER: Your Honor, I would think that  
24 that would be a matter of a question of how long ago was  
25 it, the frequency of use --



1 QUESTION: Let's just suppose, during his term  
2 of office.

3 MR. CHANDLER: During his term of office, Your  
4 Honor, again it might be a question of frequency. It  
5 might be a question of which drugs are being talked about.  
6 It might be -- there might be any number of questions --

7 QUESTION: If they're illegal drugs --

8 MR. CHANDLER: If --

9 QUESTION: -- would you distinguish between  
10 illegal drugs?

11 MR. CHANDLER: Your Honor, we would like always  
12 for our elected officials to be people who obey the law.  
13 However, when the Founding Fathers set forth the Fourth  
14 Amendment's prohibitions against illegal searches, I think  
15 they realized that people would be doing things that were  
16 illegal, and the answer that they sought, the answer that  
17 they would not allow would be blanket, suspicionless  
18 searches.

19 QUESTION: But Mr. Chandler, I think the issue  
20 that's been raised is at least so far not an issue of  
21 search, as such, but an issue of substantive  
22 qualification.

23 Do you think there is anything unconstitutional  
24 about a State law provision to the effect that an  
25 officeholder who commits a crime -- let's make it easy, a

1 crime in the State, under State law, forfeits his office?  
2 Is that unconstitutional?

3 MR. CHANDLER: I do not think that would be  
4 unconstitutional.

5 QUESTION: Okay.

6 MR. CHANDLER: One of the issues here is, are  
7 there adequate protections that the people and the  
8 governments have to answer these questions? I think there  
9 are already adequate protections in normal law  
10 enforcement, in the electoral process itself when people  
11 can be weeded out.

12 Nothing prevents a -- an opponent of a  
13 politician in an election process to hold out his piece of  
14 paper saying he's been tested and then challenge his  
15 opponent to be tested. Nothing would prevent that sort of  
16 buffoonery, and there's also the adequate protection of a  
17 free press and public scrutiny. People live their whole  
18 lives, and they should be judged, perhaps, by the things  
19 that they do and the things that they say, and not by the  
20 products of their bodies.

21 I would like to reserve the remainder of my time  
22 for rebuttal.

23 QUESTION: Very well, Mr. Chandler.

24 Ms. Guilday, we'll hear from you.

25 ORAL ARGUMENT OF PATRICIA GUILDAY

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ON BEHALF OF THE RESPONDENTS

MS. GUILDAY: Mr. Chief Justice, and may it please the Court:

This Court has established in Skinner, Von Raab, and Acton the test which permits drug testing in various contexts. The State of Georgia is not here today to challenge that test in any way or to ask for any extensions of that test. What we are asking the Court to do is to take the balancing of that test and apply it in a Tenth Amendment context, in the elections context.

QUESTION: Does Georgia think this case is moot?

MS. GUILDAY: Georgia thinks that the injunctive relief that Mr. Chandler and the co-petitioner sought with respect to the 1994 election is certainly moot.

The complaint also included a demand for, and the district court also recognized that the complaint also included a demand for declaratory judgment as to the merits, the constitutional merit of that statute, so to that extent, no, we do not think the case is moot.

QUESTION: Even in the absence of -- that the petitioners would seek office in the future, and in the absence of a class action?

MS. GUILDAY: Justice O'Connor, we would admit that that question is close. We read closely this Court's opinion in Storer, Norman, Meyer v. Grant, and the

1 Democrat Party v. Wisconsin, all of which were elections  
2 cases.

3 There were various factual contexts in those  
4 cases, and in many, or in some at least, the facts were  
5 similar, where the election was over and there was no  
6 statement that the particular candidates intended to run  
7 for office in the future.

8 Nonetheless, this Court held that because it was  
9 an elections context and the issues were likely to come  
10 before the Court again, that -- I'm not sure which way to  
11 read the Court, either. It was not moot, and so we will  
12 hear it, or it is moot, but even though it is moot we are  
13 going to consider it because it is an elections context.

14 QUESTION: I hope we didn't say that.

15 (Laughter.)

16 QUESTION: I mean, if it is moot, how would we  
17 have Article III jurisdiction at all? That's  
18 jurisdictional.

19 MS. GUILDAY: I believe --

20 QUESTION: How could we say, even if it's moot  
21 we have jurisdiction?

22 MS. GUILDAY: If it is not -- if it is moot, the  
23 Court does not have jurisdiction.

24 QUESTION: You said that's what we have said.

25 MS. GUILDAY: To be truthful, my reading of

1 those cases makes it unclear as to what the Court was  
2 saying in each particular case.

3 QUESTION: Do you think it's a pleading  
4 question, Ms Guilday, that whether a case is moot or not  
5 depends on what has been pleaded, as opposed to what  
6 exists?

7 Suppose he pleaded that he would run again but  
8 you could demonstrate that he has no intention of running  
9 again, wouldn't the case be moot?

10 MS. GUILDAY: Your question asked whether it was  
11 a pleading --

12 QUESTION: I mean, it seems to me it's moot if  
13 he has no intention of running again. If he intends to  
14 run again and you accept that he -- do you deny that he  
15 intends to run again?

16 MS. GUILDAY: No, we do not.

17 QUESTION: It seems to me the case is not moot.

18 QUESTION: There is such a case where the person  
19 said he was not going to run again and this Court did hold  
20 it moot. I forgot the name of it. But there are other  
21 temporal things, like residency to qualify to vote, or  
22 pregnancy, that inevitably are going to be over for that  
23 particular individual.

24 MS. GUILDAY: That is correct, but in the  
25 elections context, whether this particular candidate

1 decides to run again, certainly there will be other  
2 candidates who may make --

3 QUESTION: But he didn't ask for a class action.

4 MS. GUILDAY: He did not.

5 QUESTION: And he has represented in Court today  
6 that he does intend to run again.

7 MS. GUILDAY: That's correct, Your Honor.

8 QUESTION: So if it's a pleading defect, it's a  
9 curable one.

10 MS. GUILDAY: Correct, and that was going to be  
11 my response to Justice Scalia's question. If it is a  
12 pleading defect, the fact that Georgia comes in and proves  
13 that he's not going to run again, then it's no longer a  
14 pleading. Then it's evidentiary. So --

15 QUESTION: So how does this work? I mean, if a  
16 case is moot, and then the parties come to this Court and  
17 they tell us something, a fact, make a factual statement  
18 that would mean it wasn't moot, are we just supposed to  
19 say, all right, now we treat the amendment as -- the  
20 complaint as if it were amended? I mean, how does this  
21 work?

22 I mean, there might be a lot of moot cases that  
23 people could file statements and say, well, we would like  
24 here to say a few things we didn't say in the district  
25 court which will make them not moot. Are we now supposed

1 to treat all these cases as if they weren't? I mean, how  
2 does it work?

3 MS. GUILDAY: It works, Your Honor, in fact that  
4 Mr. Chandler and the other petitioners pled in their  
5 complaint, or they requested in their complaint for  
6 declaratory relief as well as relief --

7 QUESTION: I don't see why that matters if it  
8 isn't a class action, and if there's no claim that he is  
9 going to run again. I mean, a lot of people would like  
10 declaratory relief on a lot of theoretical questions that  
11 they have, very interesting questions of law, but --

12 MS. GUILDAY: This Court --

13 QUESTION: -- how does this all work? I don't  
14 think it's just enough to come in and say, I would like  
15 some declaratory relief here in the absence of a showing  
16 that you have some plaintiff to whom it makes a  
17 difference.

18 MS. GUILDAY: This Court has responded to that  
19 very argument in the series of cases that I've just cited,  
20 which are in the elections context. They have not  
21 required to my reading of those cases any actual  
22 allegational proof that the particular candidate who is  
23 the plaintiff in that particular case --

24 QUESTION: Isn't it a class action on behalf of  
25 other people who are clearly going to run?

1 MS. GUILDAY: I do not believe that all of those  
2 were class actions. I may be wrong in that, but I do not  
3 believe --

4 QUESTION: Ms. Guilday, as I understand it, when  
5 this complaint was filed he didn't have to assert that he  
6 intended to run again because the election had not yet  
7 occurred. There was clearly no mootness when the  
8 complaint was filed. Isn't that correct?

9 MS. GUILDAY: That is absolutely correct.

10 QUESTION: So the only issue is whether he had  
11 some obligation after the election to amend the complaint.  
12 Now, is there some obligation? Did the State, after the  
13 election, move to dismiss on the basis of mootness?

14 MS. GUILDAY: Because we believed that the --

15 QUESTION: Did the State do that?

16 MS. GUILDAY: No, it did not.

17 QUESTION: So why would we amend his complaint?  
18 Did the court ask him to amend, to come forward to show  
19 that what was originally clearly not moot is now moot?  
20 Did the court make any such request?

21 MS. GUILDAY: The district court --

22 QUESTION: I can't imagine why he would have  
23 amended his complaint, no one having raised this issue.

24 QUESTION: And Justice Scalia will correct me on  
25 this if I am mis-citing 1653, but it does say that



1 defective allegations of jurisdiction may be amended in a  
2 trial or appellate court, so --

3 QUESTION: Thank you for the law, Justice  
4 Ginsburg.

5 (Laughter.)

6 QUESTION: Ms. Guilday, may I ask you whether  
7 there is any place in the record in this case where we  
8 might find evidence of some particular or special need in  
9 Georgia for a suspicionless general search program for  
10 candidates for office in Georgia?

11 Is there any place where, in this record, we  
12 might find that, oh, there have been a number of  
13 officeholders, State officeholders in Georgia who have  
14 turned out to have drug problems?

15 MS. GUILDAY: There is no such record evidence  
16 in this case, Your Honor.

17 QUESTION: Was any offered by the State and  
18 rejected?

19 MS. GUILDAY: No, Your Honor. The reason there  
20 was not -- and I'm not sure at what stage you're talking  
21 about.

22 At the time the legislature passed this statute,  
23 Georgia law has consistently held from the beginning that  
24 in Georgia the statute itself evidences the legislative  
25 history. There is no recording of any committee hearings,

1 of any floor debate, anything like that.

2 QUESTION: Is there any indication anywhere in  
3 this record that Georgia has a particular problem here  
4 with State officeholders being drug abusers?

5 MS. GUILDAY: No, there is no such evidence,  
6 Your Honor, and there is no -- to be frank, there is no  
7 such problem as we sit here today.

8 QUESTION: Has this Court, in dealing with  
9 suspicionless searches, looked to what special needs there  
10 might be that would be an indication that a  
11 suspicionless -- a blanket, suspicionless search would be  
12 appropriate? Isn't that what we've looked to? Is there a  
13 special need for the government?

14 MS. GUILDAY: I think the question as to whether  
15 there is a special --

16 QUESTION: Have we looked to that, or not? Von  
17 Raab or other cases on which you rely, has this Court  
18 looked at a special need by the government --

19 MS. GUILDAY: Absolutely.

20 QUESTION: -- for a suspicionless search  
21 program?

22 MS. GUILDAY: Absolutely, the Court has looked  
23 at special need.

24 QUESTION: Okay. So what is the need Georgia  
25 asserts here that is special?

1 MS. GUILDAY: The special need that Georgia  
2 asserts is that in Georgia the elected officials that are  
3 included in this statute are by constitution trustees and  
4 servants of the public. They are, by that constitutional  
5 provision, held to a much higher standard than is the  
6 ordinary citizen. They are, in fact, fiduciaries to the  
7 public.

8 QUESTION: Could Georgia require, instead of a  
9 physical search, an affidavit of a proposed candidate that  
10 that candidate is not now and has not been in the past a  
11 drug abuser, or user of illegal drugs?

12 MS. GUILDAY: That requirement would raise  
13 issues involving the Fifth Amendment. Obviously, the  
14 opposite side of that is a compelled statement as to  
15 whether or not I use drugs.

16 Secondly, this statute does not ask the  
17 candidate to say that I use illegal drugs. All it does is  
18 say the negative of that, that on this particular --

19 QUESTION: And you think a State could not ask a  
20 candidate to make some affidavit or certification  
21 regarding illegal drug use?

22 MS. GUILDAY: I believe it could not.

23 QUESTION: Even if the State offers criminal  
24 immunity for making that statement?

25 MS. GUILDAY: That would then raise questions as

1 to Federal law, would that State immunity affect any  
2 Federal drug enforcement --

3 QUESTION: What is your reason for saying that  
4 the State could not require an affidavit that you had not  
5 used illegal drugs as a candidate?

6 MS. GUILDAY: I think the question would, one,  
7 put in -- it would be more intrusive and be more violative  
8 of the First Amendment rights of the individual to say, I  
9 have or have not in my past used illegal drugs.

10 QUESTION: What First Amendment right is  
11 violated there?

12 MS. GUILDAY: The compelled -- the State is  
13 compelling him to make a statement which he may or may not  
14 want to make.

15 QUESTION: Well, what if the State were to  
16 require a candidate to file an affidavit saying that he  
17 had complied with the financial disclosure laws of the  
18 State, and --

19 MS. GUILDAY: I think the State does require  
20 that.

21 QUESTION: And would that, too, be a violation  
22 of the First Amendment?

23 MS. GUILDAY: It would not.

24 QUESTION: Why is one different from the other?

25 MS. GUILDAY: The difference is, this Court has

1 upheld the validity of the financial disclosure laws in  
2 several cases.

3 QUESTION: But we've never upheld the validity  
4 of drug laws?

5 MS. GUILDAY: You've upheld the validity of drug  
6 laws. You have not upheld the validity of a affidavit --  
7 you have not addressed the issue, to my knowledge, of an  
8 affidavit saying I have or have not used drugs.

9 QUESTION: But why isn't the First Amendment  
10 issue, if there is one, the same in each case? In each  
11 case perhaps a candidate is unwilling to make that  
12 statement, and yet nonetheless the State requires it of  
13 him before he goes on the ballot.

14 MS. GUILDAY: The issue in the First Amendment  
15 is, how intrusive is that of the First Amendment right?

16 QUESTION: So it's more intrusive to find out  
17 that a person has violated the drug laws than they've  
18 violated the financial disclosure laws?

19 MS. GUILDAY: The Georgia statute does not  
20 require a citizen to state that he has violated the drug  
21 law.

22 QUESTION: No, but this is a hypothetical.

23 MS. GUILDAY: As to an affidavit saying I have  
24 not violated the drug laws?

25 QUESTION: Yes.

1 MS. GUILDAY: I still think that is more  
2 intrusive, because it is covering a larger period of time  
3 than is a drug test on one specific day that discloses  
4 only the presence of five specific drugs.

5 QUESTION: May I ask in that connection whether  
6 it would be constitutional or not to require an affidavit?  
7 At least it would not be a search, whereas I think you  
8 would agree that this test does involve a search.

9 MS. GUILDAY: This Court has established that it  
10 is a search, so --

11 QUESTION: Now, similarly we go into the  
12 financial disclosure area and say an affidavit describing  
13 one's finances would not be a search, but do you think  
14 under the reasoning you're advancing in this case that  
15 Georgia could constitutionally require every candidate for  
16 public office to say not only what his finances are but  
17 say, you may examine all of my private papers in order to  
18 be sure I haven't committed a violation of law in the  
19 past, and you'd get a full picture of my finances.

20 So instead of a financial disclosure statement,  
21 we just say, you may search my papers, all of my private  
22 papers to try and find out if I've been guilty of any  
23 wrongdoing. Would that be permissible?

24 MS. GUILDAY: That would not be permissible.

25 QUESTION: Why not, because it would probably

1 weed out the unqualified candidates.

2 MS. GUILDAY: The test comes down again to  
3 balancing how intrusive is the nature of that infringement  
4 on First Amendment rights versus how intrusive is it in  
5 the Fourth Amendment context.

6 QUESTION: You'd rather have your papers  
7 searched than your body searched? I don't -- I'm not sure  
8 that that's -- as far as intrusiveness is concerned --

9 MS. GUILDAY: I'm not sure it's a question of  
10 which I would rather. This Court has held in the  
11 financial disclosure area that there are limits on what  
12 those statutes can require.

13 They have not gotten so far -- this Court and  
14 other courts have not gone so far to require a full  
15 production of income tax records, which would reveal a  
16 variety of information -- you know, how many times I've  
17 gone to the doctor, how many businesses I own, or what --  
18 all of the other financial transactions I might have had.  
19 Questions --

20 QUESTION: Well, I suppose there are Federal  
21 laws that say income tax returns are not open to  
22 examination by third parties.

23 MS. GUILDAY: That's the point I'm making, that  
24 to compel --

25 QUESTION: But there's no Federal law, is there,

1 saying that a State may not require a proposed candidate  
2 to make certain certifications or affidavits before being  
3 a candidate? There's no Federal law about that, is  
4 there --

5 MS. GUILDAY: There's no --

6 QUESTION: -- restricting the qualifications  
7 that a State may set for its elected officials?

8 MS. GUILDAY: The same constraints that apply in  
9 this case, and that is the First Amendment, how in the  
10 elections context --

11 QUESTION: You think the First Amendment is  
12 violated by seeking -- by a State requiring an affidavit  
13 of a potential candidate disclosing all criminal offenses  
14 of which the candidate has been convicted in the past?

15 MS. GUILDAY: Perhaps we should look at the  
16 Tenth Amendment. The Tenth Amendment says that a  
17 candidate restriction or a ballot restriction is  
18 constitutionally valid if it is a reasonable and  
19 nonarbitrarily intrusive restriction upon the individual's  
20 fundamental rights.

21 QUESTION: Well, I wouldn't have thought you  
22 could derive all of that from the Tenth Amendment. It  
23 doesn't say anything about ballot restrictions that I know  
24 of.

25 MS. GUILDAY: This Court has used the Tenth



1 Amendment to authorize the States to control their own  
2 elections, to regulate their own elections. Of course,  
3 within those constraints --

4 QUESTION: So you take the position that a State  
5 cannot ask -- make it a requirement for a candidate for  
6 State office to file an affidavit disclosing criminal  
7 offenses of which that proposed candidate has been  
8 convicted?

9 MS. GUILDAY: No, I do not take that position  
10 because criminal --

11 QUESTION: You just did in response to my  
12 question, so what is your answer? Can a State do that?

13 MS. GUILDAY: My answer is --

14 QUESTION: Yes or no.

15 MS. GUILDAY: Yes, if it is otherwise  
16 constitutional. Your question --

17 QUESTION: Well, what other constitutional  
18 issues does that raise? These are matters of public  
19 record. Is it some constitutional violation to require an  
20 affidavit on some matter of public record --

21 MS. GUILDAY: No.

22 QUESTION: -- on a proposed candidate?

23 MS. GUILDAY: No, and that was going to be my  
24 answer. No. Criminal convictions are matters of public  
25 record in most States. In some States they are not. And

1 so no, that would not be a restriction that impinges the  
2 Constitution in any way. state's records for examination by a  
3 represent. However, the financial disclosure statements, it  
4 because of the privacy interest that that intrudes, yes, ap  
5 does touch upon constitutional issues, and at that point  
6 this Court has called -- has made limits on what drug  
7 information can be revealed. It's not an across-the-  
8 board, open all your papers up to the --

9 QUESTION: Can you -- have you finished your  
10 answer to Justice O'Connor? Can you -- can I get you back  
11 to the Fourth Amendment? That's the part of this case  
12 that I'm most interested in, because it does raise a  
13 Fourth Amendment issue. It comes back to the same  
14 balancing Do you agree that if the State required, as a  
15 condition for running for office, that the candidate must  
16 allow a representative of the State to make -- or, say, a  
17 certified public accountant of his own choosing to make a  
18 thorough examination of all his financial papers,  
19 including his income tax returns -- I don't think there's  
20 any Federal statute that says he can't make his income tax  
21 returns available if he wants to -- that that would  
22 violate the Fourth Amendment? Do you think it would or  
23 would not? QUESTION: Do you think it would violate -- that

24 statute would MS. GUILDAY: I'm sorry, your hypothetical --

25 QUESTION: My hypothetical is, the State

1 requires not just a financial disclosure affidavit, but an  
2 opening up of the candidate's records for examination by a  
3 representative of the election commission, or whatever it  
4 is, to find out if this man may have committed some crimes  
5 or done a lot of bad things that the electorate would like  
6 to know about, such as possibly buying and selling drugs  
7 from time to time, which might be revealed by his  
8 financial records.

9 In order to accomplish that goal, could they  
10 require that sort of a general requirement of candidates?  
11 Reveal your financial papers. We don't want to trust your  
12 word that you did or did not do it.

13 MS. GUILDAY: It comes back to the same  
14 balancing test, and that is, how invasive are those -- is  
15 that restriction, or --

16 QUESTION: They're invasive in that they reveal  
17 everything that's in writing in your private files about  
18 your correspondence with people and your financial  
19 transactions.

20 MS. GUILDAY: I think that requirement would  
21 require the candidate to disclose much more information  
22 than would be permitted under the Fourth Amendment.

23 QUESTION: Do you think it would violate -- that  
24 statute would violate the Fourth Amendment?

25 MS. GUILDAY: I do.

1 QUESTION: And your reason for saying, this is  
2 different, is that the search is less intrusive?

3 MS. GUILDAY: Exactly, just as this Court has  
4 held in Skinner, Von Raab, and Acton.

5 QUESTION: Because it is a body search as  
6 opposed to a paper search?

7 MS. GUILDAY: I don't think the distinction is  
8 body versus paper. I think the distinction is what  
9 information is disclosed.

10 QUESTION: Well, what about a case -- let's take  
11 a building search. I suppose the State has just as much  
12 interest in assuring itself that its candidates and its  
13 officers are not drug possessors and drug dealers as it  
14 has in assuring them that they are at least not current  
15 drug users.

16 Would it violate the Fourth Amendment to require  
17 a candidate to open his house to a search by some private  
18 investigatory agency which would then certify after the  
19 search that no drugs were found there? Would that violate  
20 the Fourth Amendment?

21 MS. GUILDAY: I believe it certainly would  
22 violate the Fourth Amendment.

23 QUESTION: And why is opening the house less  
24 intrusive than opening the body?

25 MS. GUILDAY: The difference is in the

1 information that is disclosed.

2 QUESTION: Well, the information in the one case  
3 says there are no drug residues in the body, and the  
4 information in the other case is, there are no drugs in  
5 the house. Why is there a significant distinction between  
6 those two disclosures?

7 MS. GUILDAY: There's two distinctions. In the  
8 Georgia statute, yes, we require the candidate to submit  
9 the urine sample. The information comes back only to him.  
10 That is, whether or not there are --

11 QUESTION: And he then has to pass it on -- and  
12 I guess I was assuming -- maybe I didn't state it  
13 carefully enough, but I was assuming that in my example he  
14 would have to pass on the certification from the private  
15 investigatory agency. In each case the candidate could  
16 withhold the certification and be disqualified. Assuming  
17 that, is there any distinction in principle or practice  
18 between the degree of intrusion?

19 MS. GUILDAY: The private investigatory agency  
20 has learned a substantial amount of information.

21 QUESTION: Well, so does the laboratory or the  
22 tester in the case of the bodily search.

23 MS. GUILDAY: The tester learns only the  
24 presence of those five drugs. Any other individual that  
25 walks into a candidate's home or to my home learns

1 everything about me, and I think that's the distinction,  
2 the amount of information that's disclosed by the required  
3 test.

4 QUESTION: Or the amount of what is searched  
5 also. Isn't that relevant also? I mean, wouldn't your  
6 answer be different if the test in question, even though  
7 it only came up with those five drugs, is a test that  
8 required a full body search, body cavity search and  
9 everything else.

10 MS. GUILDAY: That's absolutely true.

11 QUESTION: Your point here is this is just a  
12 urinalysis. That's all that's involved.

13 QUESTION: How does this test work, actually?  
14 Like -- I don't see how -- I'm not totally familiar with  
15 how the statute works. It sounds as if it tells a  
16 candidate, well, in some 30-day period of your choosing go  
17 in and get a drug test. Is that what it does?

18 MS. GUILDAY: Not within some 30 days of your  
19 choosing, 30 days within the qualifying deadlines for the  
20 particular office that you were running for.

21 QUESTION: Is it a deadline, or is it when he  
22 files? I mean, it's usually -- say the deadline's  
23 September 30. Suppose he files the preceding June 30.

24 MS. GUILDAY: No. This statute says --

25 QUESTION: It has to be -- in other words, the

1 deadline's September 30. It has to be in the month of  
2 September.

3 MS. GUILDAY: The particular offices that are  
4 involved in the statute have particular times for  
5 qualifying.

6 QUESTION: So you have to be 30 days previous to  
7 that.

8 MS. GUILDAY: Right.

9 QUESTION: You find one day where you go in and  
10 you're drug-free.

11 MS. GUILDAY: That's correct.

12 QUESTION: All right, so how's that supposed to  
13 prove anything? I mean, I guess the greatest druggie in  
14 the world could go in and find a day when he was drug-  
15 free.

16 MS. GUILDAY: As this Court held in Von Raab,  
17 perhaps the greatest druggie in the world could not.

18 QUESTION: Is that right? That's what I don't  
19 know. I mean, how -- what are the facts? That is, if a  
20 person does take drugs, is it impossible to find a day in  
21 a 30-day period when he's free of drugs and would pass the  
22 test?

23 MS. GUILDAY: That, of course --

24 QUESTION: Suppose he stays off drugs for a  
25 month preceding, or 2 months preceding the test.

1 MS. GUILDAY: If that particular individual can  
2 do that, yes, you're right, when he goes in for his drug  
3 test, his drug test is going to become positive --

4 QUESTION: How long in advance of the test do  
5 you have to stay off drugs if a moderate drug user, before  
6 the moderate drug user is drug-free on the day of the  
7 test? Is 3 weeks good enough? Is 4 weeks good enough?

8 MS. GUILDAY: The cases before this Court have  
9 cited expert testimony giving a range of from 22 days  
10 until a month before.

11 QUESTION: All right. So I mean, what is the  
12 statute doing?

13 MS. GUILDAY: It's doing --

14 QUESTION: Is it simply -- what is the theory  
15 behind the statute other than making a political  
16 statement? Is it that there are some people who want to  
17 run for office who find it impossible to refrain from  
18 drugs for 22 days prior to their voluntarily going in and  
19 taking the test? I mean, what is the theory of the  
20 statute?

21 MS. GUILDAY: I think that is one purpose, to --

22 QUESTION: Is that an important purpose, a  
23 purpose that we find those people in society who are not  
24 able to stay off drugs for 22 days and therefore -- is  
25 that the basic idea?



1 MS. GUILDAY: That is not the primary reason,  
2 no. It is a reason that this Court in Von Raab found to  
3 be significant. In our case, the primary purpose we would  
4 offer this Court for this statute is that the information  
5 that a negative drug test gives to the public about the  
6 individual candidate is significant.

7 QUESTION: Has this Court ever gone into the --  
8 I mean, I thought in Vernonia, for example they're like  
9 random drug-testing. Random drug-testing, of course,  
10 catches people.

11 MS. GUILDAY: That's correct.

12 QUESTION: Have there been cases which are not  
13 random drug-testing?

14 MS. GUILDAY: Von Raab involved pre-employment  
15 or pre-promotion testing, one-time basis, of individuals  
16 who sought positions in the various categories. It was  
17 not random testing.

18 QUESTION: Ms. Guilday, do I understand you  
19 correctly that your major reason, Georgia's major reason  
20 is symbolic to the extent I think you said they wanted the  
21 public -- they wanted the people who were in public office  
22 to have what it takes to exercise their best judgment. Is  
23 that --

24 MS. GUILDAY: That is our purpose. It is not  
25 our position that that is a solely symbolic purpose. It

1 may have symbolic implications, but because a statute is  
2 symbolic, if it's otherwise constitutional, does not  
3 render it constitutional.

4 QUESTION: This is my question, then. If it  
5 comes down to, this is not like the random test that's  
6 designed to catch people but is in part symbolic, and the  
7 State is making a judgment, and then we have a  
8 Constitution with the Fourth Amendment in it, if we're  
9 choosing between the public perception, the lesson that we  
10 want to teach the people, doesn't the constitutional  
11 amendment come first, come before the notion that we want  
12 people to show that they can exercise their best judgment  
13 by being willing to submit to drug testing?

14 MS. GUILDAY: My way of answering that question  
15 is what I started saying in the beginning. The Fourth  
16 Amendment requires the balancing test that this Court used  
17 in Skinner, Von Raab, and Acton to determine whether or  
18 not a particular --

19 QUESTION: But my question to you is, then,  
20 doesn't the Fourth Amendment always win on that balance  
21 unless you have a good reason, a reason beyond, we want to  
22 show that these people take tests.

23 One reason is that you would catch people, as  
24 was the case in the train engineer, but here that's not  
25 the purpose.

1 MS. GUILDAY: The Fourth Amendment always wins  
2 out if in that balancing test the government interests are  
3 not sufficient to outweigh the privacy interest. It is  
4 our position that when you do that test in an elections  
5 context in which the people have a right to know anything  
6 about a candidate which touches on their qualifications  
7 for office --

8 QUESTION: Then go for -- once they're in  
9 office, and they're going to be in and maybe run for  
10 election, so do this periodically? Can people have any  
11 less -- is their interest any less if we're doing this  
12 balancing?

13 MS. GUILDAY: No, the balancing is no less in  
14 that context. The distinction or the reason for not  
15 requiring them then primarily are procedural. Once --

16 QUESTION: But you could -- as a matter of  
17 constitutional law, Georgia could say, annually, or even  
18 randomly, everyone in office in this State has to have a  
19 drug test.

20 MS. GUILDAY: Everyone in the category of  
21 offices that are included in the statute, yes, I believe  
22 Georgia could have --

23 QUESTION: But if you rely on the public's right  
24 to know everything about the candidate, as I think you  
25 described it, it seems to me that that would justify a

1 totally unrestricted search of the house and all private  
2 papers.

3 MS. GUILDAY: I said that and I -- and that is a  
4 quote from one of this Court's cases. However, obviously  
5 the Constitution has to define everything.

6 QUESTION: And the Constitution looks a little  
7 more closely at totally suspicionless searches, doesn't  
8 it?

9 MS. GUILDAY: It does.

10 QUESTION: Yes.

11 QUESTION: I take it -- or I took it that part  
12 of your argument for the State interest that sort of  
13 overcomes the private interest here is based on the Tenth  
14 Amendment, and I'm not sure that I understand that  
15 argument.

16 I mean, I take it you do not argue that the  
17 Tenth Amendment in effect gives the State some kind of  
18 right or some dispensation from the Fourth Amendment, so  
19 what is the Tenth Amendment argument?

20 MS. GUILDAY: The Tenth Amendment argument is,  
21 in this balancing test that's required in the Fourth  
22 Amendment, that in the usual context the scales start out  
23 even for both sides. What the Tenth Amendment does is, it  
24 tips those scales from the outset on the side of the  
25 government because --

1 QUESTION: Why?

2 MS. GUILDAY: Because the Tenth Amendment in the  
3 cases this Court has held in the elections context say, we  
4 are going to give great deference to the State's own  
5 characterizations of its interest in the elections and in  
6 particular in the qualifications of its elected officials.

7 QUESTION: Well, there's no question of there  
8 being an assertable Tenth Amendment interest there, but  
9 there's no question about there being an assertable Tenth  
10 Amendment interest to prosecute homicide, but that doesn't  
11 affect the balancing that goes on in determining -- or  
12 that does not affect the Fourth Amendment analysis.

13 MS. GUILDAY: I'm not sure I understand --

14 QUESTION: Well, I suppose if someone challenged  
15 the right of the State to prosecute murder we would say,  
16 well, that certainly is not one of those powers that was  
17 taken away from the State when the national Constitution  
18 was ratified.

19 MS. GUILDAY: That's absolutely --

20 QUESTION: I don't see how that would affect the  
21 Fourth Amendment analysis when somebody objected to an  
22 unreasonable search and seizure that had resulted in  
23 evidence that the State wanted to introduce in a homicide  
24 case.

25 MS. GUILDAY: The distinction being that the

1 Tenth Amendment and in particular the elections context  
2 has repeatedly been given by this Court special  
3 consideration. In Gregory --

4 QUESTION: Well, we've said that a great deal of  
5 discretion over elections is within the State's power, but  
6 that's as far as we've gone, isn't it?

7 QUESTION: Thank you, Ms. Guilday.

8 MS. GUILDAY: Thank you, Your Honor.

9 QUESTION: Mr. Chandler, you have 5 minutes  
10 remaining.

11 REBUTTAL ARGUMENT OF WALKER L. CHANDLER

12 ON BEHALF OF THE PETITIONERS

13 MR. CHANDLER: An interesting aspect of the  
14 Tenth Amendment question to me is that that the States --  
15 that which was not granted to the Federal Government  
16 specifically was -- the rights not granted to the Federal  
17 Government was reserved to the States or the people  
18 respectively, and when the States appear to jealously  
19 protect their rights, they are not so jealous in  
20 protecting the rights that the people reserved unto  
21 themselves, and one of those rights is that a citizen  
22 should be free from unreasonable searches and seizures.

23 QUESTION: Mr Chandler, do you think this case  
24 would be stronger for the State if it was random drug-  
25 testing? Does that thought comfort you, if they amended

1 this statute to make it random?

2 MR. CHANDLER: It would not comfort me, Your  
3 Honor, and I'm not sure --

4 QUESTION: This is stronger, isn't it, because  
5 it says -- basically what you said was that this is the  
6 State's interest only in making certain that the really  
7 serious drug users who can't stay off drugs for 30 days,  
8 which you have to be quite a heavy user, that they want to  
9 identify those people, so she said that's a very important  
10 interest, identifying these very, very heavy drug users,  
11 and against that it's a fairly limited intrusion. I think  
12 that was her point. So what would your reply be to that?

13 MR. CHANDLER: The State might be in a better  
14 position if they had some sort of random search system for  
15 people who had been elected to office.

16 However, I think even such a search would  
17 violate the principles that have been enunciated by this  
18 Court in Skinner, Von Raab, and the Vernonia School  
19 District case, because there has to be some nexus between  
20 the tests, and there has to be some compelling State  
21 interest, and there has to be a showing of, not potential  
22 harm, but an actual existing harm.

23 I don't know, for example, that they've ever  
24 shown that commissioners of agriculture in Georgia have a  
25 heavy drug problem, or for that matter lieutenant

1 governors.

2 QUESTION: Well, what if they show that there  
3 was a commission of agriculture in Alabama and a  
4 lieutenant governor in Alabama who turned out to drug  
5 addicts. Does Georgia have to wait for it to happen in  
6 Georgia?

7 MR. CHANDLER: I'm not sure, Your Honor, but I  
8 would sort of think so. I would also just --

9 QUESTION: But isn't your real argument they  
10 have to wait at least till it happens in Alabama.

11 (Laughter.)

12 MR. CHANDLER: A lot of things happen in Alabama  
13 that don't happen in Georgia, Your Honor.

14 (Laughter.)

15 QUESTION: Does the State have to show that he  
16 was a worse secretary of agriculture because of that drug  
17 habit?

18 MR. CHANDLER: I would think so, Your Honor,  
19 although arguably --

20 QUESTION: I mean, it's supposed to be good for  
21 poetry. I don't know what it does for --

22 (Laughter.)

23 MR. CHANDLER: And how -- and also, Your Honor,  
24 how could we argue that drug users would be any worse than  
25 the General Assembly Georgia has now.



1 (Laughter.)

2 MR. CHANDLER: There's an old saying down in  
3 Georgia that no man's liberty or property is safe as long  
4 as it's in session, and 21.2.140 is a perfect example of  
5 that, where for the most cavalier of reasons, just pure  
6 symbolism, they want to take away people's Fourth  
7 Amendment rights, they want to make people stand up and  
8 take these tests so as to somehow show that they are -- by  
9 a piece of paper that they -- that's easily avoided that  
10 they can be qualified to hold high office.

11 QUESTION: One point that you made in your brief  
12 was that this is -- this test is not very serious because  
13 it would catch at best the worst cases, but you certainly  
14 wouldn't find more satisfactory a test that was less hard  
15 to beat, a test more pervasive, so I didn't understand  
16 your point about the lack of effect of this test.

17 MR. CHANDLER: This test is even worse because  
18 it involves cheap symbolism. The other test would violate  
19 the Fourth Amendment protections announced by this Court  
20 in Von Raab and the other cases as being suspicionless.

21 I would like to just say finally that this all  
22 reminds me of what Franklin warned us about, is that  
23 people who would give up some of their liberty to get some  
24 security will end up with neither liberty nor security.

25 And we are rapidly approaching a time in this

1 country where there are absolutely no technological limits  
2 to what a government can do to make sure that people are  
3 obeying its edicts.

4 There will be a possibility of hair testing to  
5 show that people can -- have used something that the  
6 government has declared illegal within the last 6 or 8  
7 months based on where in the hair -- the fact that we can  
8 force obedience by these people should not necessarily  
9 mean that we should do so, especially if what that means  
10 is that we have to give up our constitutional rights to do  
11 so.

12 Thank you.

13 CHIEF JUSTICE REHNQUIST: Thank you,  
14 Mr. Chandler.

15 The case is submitted.

16 (Whereupon, at 11:08 a.m., the case in the  
17 above-entitled matter was submitted.)

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

WALKER L. CHANDLER, ET AL., Petitioners v. ZELL D. MILLER, GOVERNOR OF GEORGIA, ET AL.  
CASE NO. 96-126

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Donna Maria Federico

(REPORTER)