STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1938

Kim Verhein, petitioner,
Appellant,

vs.

Emily Johnson Piper,
Commissioner of the Minnesota Department of Human Services,
Respondent,

Washington County Community Services,
Respondent.

Filed July 16, 2018
Reversed
Klaphake, Judge[*]
Dissenting, Johnson, Judge

Washington County District Court
File No. 82-CV-17-190

Stephen Dekovich, Southern Minnesota Regional Legal Services, Inc., St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Ali P. Afsharjavan, Assistant Attorney General, St. Paul, Minnesota (for respondent commissioner)

Peter J. Orput, Washington County Attorney, Richard D. Hodsdon, Assistant County Attorney, Stillwater, Minnesota (for respondent county)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Klaphake, Judge.

[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

S Y L L A B U S

A condition of random drug testing within Minnesota Statutes section 256D.024, subdivision 1(a) (2016), for receipt of benefits under chapter 256D, applies to persons who become eligible for benefits during the five-year period following completion of a court-ordered sentence for a qualifying drug crime and does not extend beyond the five-year period.

O P I N I O N

KLAPHAKE, Judge

Appellant challenges the denial of her application for Minnesota supplemental aid (MSA). After a hearing, respondent-commissioner concluded that Minn. Stat. § 256D.024, subd. 1 (2016), unambiguously conditions appellant's receipt of MSA benefits on submission to random drug testing. The district court concluded on appeal that the drug-testing requirement within section 256D.024, subdivision 1(a), does not violate the doctrine of unconstitutional conditions. On appeal to this court, appellant argues that the commissioner erred in concluding that the statute unambiguously applies to her, and the district court erred in concluding that the statute is constitutional. Because the statute is ambiguous, and because the canons of construction resolve the ambiguity in favor of appellant, we reverse.

FACTS

In January 2000, appellant Kim Verhein was convicted of fifth-degree possession of a controlled substance and sentenced to 17 months' imprisonment. At some point after

her release from a correctional facility in 2001, she applied for and began receiving MSA benefits.

In November 2013, the Minnesota Department of Human Services informed respondent Washington County Community Services (the county) that appellant had a post-July 1, 1997, drug conviction. The county notified appellant that, under section 256D.024, subdivision 1(a), she is required to undergo random drug testing as a condition of receiving MSA benefits. In September 2015, the county notified appellant that her random drug testing would occur on September 16, 2015. Appellant appeared for testing, but refused to provide a sample. The county terminated appellant's MSA benefits effective November 1, 2015.

In June 2016, appellant reapplied for MSA benefits. The county denied appellant's application and informed her that her prior refusal to submit to testing rendered her ineligible to receive benefits for five years. Appellant appealed the denial of her application to respondent Commissioner of the Minnesota Department of Human Services (the commissioner), arguing that the drug-testing requirement did not apply to her, her refusal to submit to testing did not render her ineligible for a five-year period, a permanent drug-testing requirement violates the Fourth Amendment, and she is entitled to a curative payment for unpaid benefits dating back to November 1, 2015. After a hearing, the commissioner concluded that section 256D.024, subdivision 1(a), unambiguously requires random drug testing of persons convicted of certain felony drug offenses after July 1, 1997, as a condition of receiving MSA benefits. Appellant requested reconsideration of the decision. The commissioner denied the request.

In January 2017, appellant appealed the commissioner's decision to the district court. Appellant argued that the testing requirement within section 256D.024, subdivision 1(a), is unconstitutional because it conditions her receipt of benefits on a relinquishment of her Fourth Amendment rights. The district court affirmed the commissioner's decision in part, concluding that the plain and unambiguous language of the statute conditions receipt of benefits for persons convicted of a drug offense after July 1, 1997, on submission to random drug testing. The district court concluded that appellant's Fourth Amendment challenge failed, citing precedent of this court indicating that the doctrine of unconstitutional conditions does not apply to the Fourth Amendment. The district court remanded the issue of whether a five-year ineligibility period applied to test refusals.[1]

This appeal follows.

ISSUES

I. Is the appeal moot?

II. Does Minn. Stat. § 256D.024, subd. 1, unambiguously condition eligibility for MSA benefits on random drug testing of applicants and recipients who have completed a court-ordered sentence for a qualifying drug conviction more than five years prior?

III. Is appellant entitled to a curative payment?

[1]On remand, the commissioner reversed the denial of appellant's application for benefits, directing the county to "reinstate the application for processing and to provide [a]ppellant an opportunity to comply with the drug testing requirement." The commissioner concluded that Minn. Stat. § 256D.024, subd. 1(a), requires testing in order to receive benefits, but it does not make an applicant ineligible for a five-year period if the applicant refuses to take a test.

ANALYSIS

I.

As a preliminary matter, the commissioner argues that this appeal is moot because appellant only appealed the 2016 denial of her application, and the commissioner reversed that denial on remand. Appellant argues that the case presents a live controversy because she has challenged whether Minn. Stat. § 256D.024, subd. 1, requires her to submit to drug testing as a condition of receiving benefits, an issue that was not resolved when the case was remanded.

The issue of whether an appeal is moot is a legal question subject to de novo review. *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). "[Appellate courts] consider only live controversies, and an appeal will be dismissed as moot when intervening events render a decision on the merits unnecessary or an award of effective relief impossible. But an appeal is not moot when a party could be afforded effective relief." *Wayzata Nissan, LLC v. Nissan N. Am., Inc.*, 875 N.W.2d 279, 283 (Minn. 2016) (citations omitted). "Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Dean v. City of Winona*, 868 N.W.2d 1, 4-5 (Minn. 2015) (quotations omitted). This court may not issue advisory opinions. *Farm Bureau Mut. Ins. Co. v. Schwan*, 687 N.W.2d 388, 391 (Minn. App. 2004).

Appellant appealed the denial of her application and demanded payments dating back to the termination of her benefits in 2015. On remand from the district court's order, the commissioner reversed the denial of appellant's application, permitting it to be

processed. But appellant's receipt of benefits continues to be conditioned on compliance with testing requirements. It is this condition that appellant challenged below and continues to challenge on appeal. We therefore conclude that the appeal presents a live controversy between the two parties, and this court may afford effective relief.

Even if the commissioner's action on remand rendered this appeal technically moot, we conclude that the appeal is reviewable because it is "functionally justiciable." "[Appellate courts] have the discretion to consider a case that is technically moot when the case is functionally justiciable and presents an important question of statewide significance that should be decided immediately." *Dean*, 868 N.W.2d at 6 (quotations omitted). The exception is to be narrowly applied, but may be satisfied if "the record contains the raw material (including effective presentation of both sides of the issues raised) traditionally associated with effective judicial decision-making." *Id.* (quotation omitted).

The parties have effectively presented both sides of the controversy, and the applicability and constitutionality of Minn. Stat. § 256D.024, subd. 1, affects all persons who apply for or receive general assistance or MSA benefits and who also have a post-July 1, 1997, felony drug conviction. The commissioner provides guidance to all counties on how to apply Minn. Stat. § 256D.024, subd. 1, when processing applicants' requests for benefits. This presents an issue of statewide significance that should be decided immediately. *See In re Guardianship of Tschumy*, 853 N.W.2d 728, 740-41 (Minn. 2014) (reaching merits of a moot issue to clarify the scope of guardians' authority to remove life-support for a ward because of the thousands of wards within the state); *Kahn v. Griffin*, 701 N.W.2d 815, 823 (Minn. 2005) (considering merits of an election procedure because it was

similar to procedures used in other Minnesota cities). We therefore proceed to the merits of this appeal.

II.

MSA benefits are available to aged, blind, or disabled persons who receive supplemental security income from the federal government under 42 U.S.C. §§ 1381-1383f (2012 & Supp. 2016). Minn. Stat. § 256D.425, subd. 1 (2016). County social services agencies, under the supervision of the commissioner, are required to administer and distribute benefits to recipients of general assistance and supplemental security income. Minn. Stat. §§ 256.01, subd. 2 (Supp. 2017), 393.07, subd. 2 (2016). An applicant for MSA benefits must meet the eligibility requirements under the general-assistance chapter, Minn. Stat. §§ 256D.01-.54 (2016 & Supp. 2017). Minn. Stat. § 256D.405, subd. 1(a) (requiring the agency to determine an applicant's eligibility under "this chapter").

Section 256D.024, subdivision 1(a), limits the eligibility for benefits under the general-assistance chapter if an individual has been convicted of certain drug crimes after July 1, 1997. The statute provides:

> If an applicant or recipient has been convicted of a drug offense after July 1, 1997, the assistance unit[2] is ineligible for benefits under this chapter until five years after the applicant has completed terms of the court-ordered sentence, unless the person is participating in a drug treatment program, has successfully completed a drug treatment program, or has been assessed by the county and determined not to be in need of a drug treatment program. Persons subject to the limitations of this subdivision who become eligible for assistance under this

[2]Assistance unit is defined as "an individual who is, or an eligible married couple who live together who are, applying for or receiving benefits." Minn. Stat. § 256.02, subd. 1a.

> chapter shall be subject to random drug testing as a condition of continued eligibility and shall lose eligibility for benefits for five years beginning the month following:
>
> (1) any positive test result for an illegal controlled substance; or
>
> (2) discharge of sentence after conviction for another drug felony.

Minn. Stat. § 256D.024, subd. 1(a). "Drug offense" is defined as "a conviction that occurred after July 1, 1997, of sections 152.021 to 152.025, 152.0261, 152.0262, or 152.096" and includes convictions in other jurisdictions for "possession, use, or distribution of a controlled substance, or conspiracy to commit any of these offenses, if the offense occurred after July 1, 1997, and the conviction is a felony offense in that jurisdiction, or in the case of New Jersey, a high misdemeanor." *Id.*, subd. 1(b).

Appellant challenges the commissioner's conclusion that section 256D.024, subdivision 1, requires her to submit to chemical testing as a condition of receiving MSA benefits because of her conviction for fifth-degree possession of a controlled substance in 2000. She argues that the commissioner misinterprets the plain language of the statute by applying the drug-testing provision to persons who completed the court-ordered sentence more than five years prior to applying for or receiving benefits. In the alternative, she argues that the statute is ambiguous and that the canons of construction dictate a narrower application of the statute.

Judicial review of the commissioner's order is authorized under Minn. Stat. § 256.045, subds. 3(a)(1), 7, 9 (2016 & Supp. 2017). The scope of review is governed by Minn. Stat. § 14.69 (2016). *Zahler v. Minn. Dep't of Human Servs.*, 624 N.W.2d 297, 301 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). This court may affirm, remand,

reverse or modify the commissioner's decision if appellant shows that the decision is affected by a violation of constitutional provisions or an error of law, and her substantial rights were prejudiced. Minn. Stat. § 14.69. We review the commissioner's order independently and give no deference to the district court's review. *Zahler*, 624 N.W.2d at 301.

This court reviews questions of statutory interpretation de novo. *Wayzata Nissan, LLC*, 875 N.W.2d at 284. The object of statutory interpretation is to ascertain the intent of the legislature. Minn. Stat. § 645.16 (2016). When the intent of the legislature is clear from a statute's plain and unambiguous language, we interpret the statute according to its plain meaning and do not consider other principles of statutory interpretation. *Binkley v. Allina Health Sys.*, 877 N.W.2d 547, 550 (Minn. 2016). If the statute is ambiguous, we may look beyond statutory language to discern legislative intent. *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012). A statute is ambiguous if, as applied to the facts of the case, it is susceptible to more than one reasonable interpretation. *Id.* at 72-73.

The parties agree that the first sentence of the statute is unambiguous. It places a limitation on certain drug offenders' eligibility for benefits during the five years after completion of a court-ordered sentence unless certain treatment options are completed, underway, or unnecessary.

The second sentence is the crux of the parties' disagreement. Both parties agree that the sentence is unambiguous, but they disagree on the meaning of the statute. Appellant argues that "[p]ersons subject to the limitations of this subdivision who become eligible" refers to persons within the ineligibility period who become eligible by satisfying

one of the three conditions. Appellant also argues that she is not subject to the limitations of the subdivision because she is not within the five-year ineligibility period. The commissioner argues that the statute refers to all persons with a post-July 1, 1997, qualifying conviction who were ineligible for benefits because of the conviction and who later became eligible for benefits.

Because the dispute centers on the language "[p]ersons subject to the limitations of this subdivision who become eligible," we begin by ascertaining the plain meaning of the words at issue, looking to the definitions of the words and the rules of grammar. Minn. Stat. § 645.08(1) (2016); *Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016). "Limitation" is commonly defined as "[a] restriction." *Black's Law Dictionary* 1012 (9th ed. 2009); *The American Heritage Dictionary* 1044 (3d ed. 1992). "Subject," frequently followed by "to," has been defined as "suffering a particular liability or exposure" or as "likely to be conditioned, affected, or modified in some indicated way." *Webster's Third New International Dictionary*, 2275 (2002). Likewise, "subject to" has been defined as "governed or affected by." *Black's Law Dictionary* 1425 (6th ed. 1990).

One reading of "[p]ersons subject to the limitations of this subdivision who become eligible" coincides with the commissioner's interpretation. In such an interpretation, "limitations of this subdivision" may refer to the restrictions on the scope of the statute's application—section 256D.024, subdivision 1, only applies to certain types of drug crimes and requires a conviction date after July 1, 1997. It does not apply to persons with drug convictions from 1996, for example. Under this interpretation, persons with the required qualities "who become eligible for assistance under this chapter" are required to complete

random drug testing as a condition of continued eligibility. In such an interpretation, it does not matter when or how the person becomes eligible for benefits.

We conclude that the subdivision has an alternative, reasonable interpretation when applied to the facts of this case. The statute clearly relates to a five-year restriction of benefit eligibility for persons defined in the statute. The five-year eligibility restriction is also a "limitation" contained within the subdivision. Appellant argues that she is no longer subject to this limitation because it has been more than five years since she completed her court-ordered sentence. The only manner in which appellant could suffer or be exposed to an additional five-year ineligibility period would be if she committed an additional qualifying crime. Under this interpretation, appellant is no longer a person "subject to the limitations of this subdivision."

However, the commissioner, accepting the ineligibility period as a limitation, argues that appellant's prior subjection to the five-year period of ineligibility coupled with her status as someone who is now eligible for assistance under the chapter satisfies the "[p]ersons subject to the limitations of this subdivision who become eligible" requirement. Reading the statute as a whole, it is clear the phrases "[p]ersons subject to the limitations of this subdivision" and "who become eligible" present further ambiguity.

First, the former phrase is written in present tense, implying the individual must be "subject to the limitations of this subdivision" at the time he or she becomes eligible for assistance under the chapter. Whether someone is presently subject to the limitations of the subdivision depends on whether the limitations are defined solely by the details of the individual's criminal conviction, or whether it relates to the ineligibility period. Under the

latter, someone could "become eligible for assistance under this chapter" years after the ineligibility period has ended and thus not be "subject to the limitations of [the] subdivision" at that time.

Second, the remainder of the subdivision provides an example of when a person may be both "subject to the limitations of this subdivision" and "become eligible for assistance under this chapter." Those persons are the people who qualify for one of the three exceptions to the five-year period of ineligibility. Those persons are presumptively ineligible for benefits upon conviction until they are determined to have completed treatment, to be presently in treatment, or to not need treatment. The persons whom the county determines have satisfied one of those conditions are persons who are subject to the ineligibility period referenced in the subdivision, but who nevertheless become eligible. For example, one exception that enables a person to become eligible for benefits is if the person is "participating in a drug treatment program." If the person otherwise qualifies for benefits under the chapter and is in a treatment program, the person may apply for and receive benefits. However, presumably, if the person fails to participate in a treatment program after the application for benefits is approved, the person would lose benefits and continue to be subject to the five-year ineligibility period. *See* Minn. Stat. § 256P.04, subd. 8 (2016) (requiring counties to determine recertification eligibility annually).

Having concluded that the statute may be interpreted in several reasonable yet conflicting ways, we examine the canons of construction to effectuate the intent of the legislature. When ascertaining the intention of the legislature, we may consider:

(1) the occasion and necessity for the law;
(2) the circumstances under which it was enacted;
(3) the mischief to be remedied;
(4) the object to be attained;
(5) the former law, if any, including other laws upon the same or similar subjects;
(6) the consequences of a particular interpretation;
(7) the contemporaneous legislative history; and
(8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16.

Section 256D.024 became law as part of a larger modification to Minnesota's assistance programs. *See* 1997 Minn. Laws. ch. 85, arts. 1-3, at 500-633 (implementing and amending programs related to temporary assistance for needy families (TANF), food stamps, and general assistance). Modifications to Minnesota's assistance programs were necessitated by the federal government's passage of legislation concerning grants of federal money to states for assistance to needy families. *See* 42 U.S.C. §§ 601-619 (2012 & Supp. 2016). The federal legislation ended an entitlement program that provided aid to families with dependent children, and replaced it with block grants to the states. Minn. Stat. § 256J.01, subd. 2 (2016); *see* 42 U.S.C. § 603(a). In response to the federal legislation, Minnesota created the Minnesota Family Investment Program (MFIP), which includes cash and food assistance programs, as well as payments to third-party vendors who provide assistance to qualifying individuals. Minn. Stat. §§ 256J.01, subd. 1, .28, .35, .395 (2016).

As part of the act creating MFIP, the Minnesota legislature repealed and amended portions of the general-assistance chapter. 1997 Minn. Laws. ch. 85, art. 3, §§ 24, 25, 56, at 612-14, 633. The general-assistance chapter was amended to apply only to "single adults, childless couples, or children as defined in section 256D.02, subdivision 6,

ineligible for federal programs who are unable to provide for themselves." 1997 Minn. Laws. ch. 85, art. 3, § 24, at 612. Families who had previously received general-assistance benefits became governed by MFIP. *See* Minn. Stat. § 256J.01, subd. 3 (Supp. 2017).

In making these changes to the general-assistance chapter, the legislature also adopted Minn. Stat. § 256D.024. Different versions of the senate bill that became section 256D.024 indicate that the senate originally sought blanket ineligibility for TANF benefits of persons with a qualifying conviction, S.F. 1, introduction (Jan. 9, 1997), and then changed the ineligibility period to two years for persons with a qualifying conviction seeking general-assistance benefits, S.F. 1, first, second, and third engrossments (Mar. 13 & 20, 1997). The house of representatives sought to add a five-year period of ineligibility and the language, "Persons subject to the limitations imposed by this section who become eligible for assistance under this chapter shall be subject to random drug testing as a condition of continued eligibility . . . ." State of Minnesota, *Journal of the House*, 80th Sess. 902, 1898 (Mar. 20 & Apr. 10, 1997). Both houses eventually passed the legislation as it stands today. The legislative history of the bill is inconclusive on whether the legislature intended the person to be presently subject to the period of ineligibility in order to be subject to the drug-testing requirement. We therefore look to provisions on similar subjects.

The federal legislation that necessitated changes to Minnesota's assistance programs includes a provision that renders persons ineligible for food assistance and federally-funded TANF benefits if the person is convicted of a felony controlled-substance crime. 21 U.S.C. § 862a(a) (2012). But individual states may opt out of the prohibition,

or limit the period of ineligibility. *Id.*, (d)(1) (2012). Minnesota, in creating MFIP, opted to place certain limitations on applicants with prior qualifying drug convictions, but did not render those applicants ineligible permanently. Minn. Stat. § 256J.26 (2016). Applicants and participants in the food-support program of MFIP, "who have been convicted of a drug offense that occurred after July 1, 1997, may, if otherwise eligible, receive food stamps or food support if the convicted applicant or participant is subject to random drug testing as a condition of continued eligibility." *Id.*, subd. 1(b). At first glance, this provision appears to indicate that a person will be subject to drug testing indefinitely for receipt of food-support benefits. However, under the subdivision, "drug offense" is defined as "an offense that occurred during the previous ten years from the date of application or recertification." *Id.*, subd. 1(c). For other MFIP benefits, an applicant or participant who committed a drug offense "during the previous ten years from the date of application or recertification" is "subject to random drug testing as a condition of continued eligibility." *Id.*, subd. 1(a)(2).

Under MFIP, participants are required to complete recertification forms for continued eligibility, and counties are required to recertify participants' eligibility "in an annual interview." Minn. Stat. §§ 256J.30, subd. 4, 256P.04, subd. 8 (2016). Therefore, recipients are only subject to drug-testing requirements for ten years following the drug offense; upon recertification after the ten-year period, a recipient's prior crime no longer qualifies for testing purposes.

Section 256D.024, subdivision 1(b), does not include the ten-year limitation in its definition of "drug offense." It only limits the drug offenses to post-July 1, 1997

convictions. Minn. Stat. § 256D.024, subd. 1(b). But the language at issue in this case, "[p]ersons subject to the limitations of this subdivision who become eligible for assistance," was not used by the legislature in drafting the drug-testing requirements under section 256J.26. Rather, the legislature used precise language to indicate that the drug-testing requirements under MFIP are limited to recipients and applicants within the ten-year period following a conviction, and limited in duration because of the annual recertification requirement. While indicating the legislature's intent to limit the duration of drug-testing provisions in parts of the same overhaul of state assistance programs, section 256J.26 does not answer the question of what the legislature intended by the language at issue in this case. But it does not follow that section 256D.024's drug-testing period is unlimited in duration.

The agency's interpretation of the provision in its manuals indicates that the drug-testing provision is intended to be limited in the manner advocated by appellant. Generally, this court "must give effect to an agency's regulation containing a reasonable interpretation" of a statute. *Christensen v. Harris Cty.*, 529 U.S. 576, 586-87, 120 S. Ct. 1655, 1662 (2000) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 2781-82 (1984)); *see Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997) (indicating an agency's interpretation of its regulations is controlling unless plainly erroneous); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989) (giving "considerable deference" to an agency's interpretation of its own regulations). But if an agency has not promulgated a regulation on the issue presented, courts will give the agency's interpretation "a lesser form of deference." *In re*

Gillette Children's Specialty Healthcare, 867 N.W.2d 513, 522 (Minn. App. 2015) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40, 65 S. Ct. 161, 164 (1944)), *aff'd* 883 N.W.2d 778 (Minn. 2016). In such a case, our deference to an agency's rulings, interpretations, or opinions will depend "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control." *Young v. United Parcel Serv., Inc.*, ___ U.S. ___, ___, 135 S. Ct. 1338, 1351-52 (2015) (citing *Skidmore*, 323 U.S. at 140, 65 S. Ct. at 164).

The commissioner has promulgated regulations concerning eligibility requirements under the general-assistance program. Minn. R. 9500.1200-.1272 (2017). These regulations are silent concerning any drug-testing requirements. However, the department of human services does create and disseminate a combined manual to county financial workers which "gives financial workers a complete, *authoritative*, concise set of provisions to determine eligibility for the cash and food programs and to issue client benefits." Minn. Dep't of Human Servs., *Combined Manual (CM)*, http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_016956 (last updated June 1, 2018) (emphasis added). A provision in a manual used by an agency can "approach[] the status of a formal rule of law of the agency." *Doe v. State, Dep't of Pub. Welfare*, 257 N.W.2d 816, 819 (Minn. 1977).

The commissioner, through the combined manual, provides the following direction to all county financial workers charged with administering general assistance and MSA programs:

> A unit is ineligible if it contains a member who admits in writing on the CAF that he/she is convicted of a drug felony on or after 7-1-97. This also applies if the county agency has other reliable verified documentation supporting its position about a unit member's drug conviction, including the list of convicted drug felons provided by DHS.
>
> The ENTIRE unit is ineligible for 5 years from the date the convicted person completes terms of the court-ordered sentence, UNLESS the convicted member meets 1 of the following conditions:
>
> > Participates in a drug treatment program.
> > OR
> > Has successfully completed a drug treatment program.
> > OR
> > Has been assessed by the county as NOT needing a drug treatment program.
>
> If the convicted person meets 1 of the above conditions, the unit may receive benefits. He/she is subject to random drug testing as a condition of continued eligibility.

Minn. Dep't of Human Servs., *Combined Manual: Drug Felons* (Jan. 2015), http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=CM_00112703. A natural reading of the combined manual indicates that a person is only subject to random drug testing if "the convicted person meets 1 of the above conditions," and the only aspects of the policy labeled as "conditions" are the three treatment-related exceptions to the five-year ineligibility period. *See id*. The department's manual, as written, is contrary to the position the commissioner now takes on appeal.

The agency's interpretation of drug-testing requirements for MSA recipients has likewise been inconsistent. Prior to 2013, the combined manual did not direct counties to

require drug testing of MSA recipients with a prior qualifying drug conviction. *See* Minn. Dep't of Human Servs., *Combined Manual*: *Description of Changes Attachment* 2 (Oct. 2013), http://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs16_178758.pdf. The combined manual specifically exempted MSA recipients from the drug-testing requirements of section 256D.024, indicating "no provisions" for drug testing. *Id.* The commissioner's interpretation of section 256D.024 in this appeal—to condition appellant's receipt of MSA benefits on submission to drug testing—cannot be considered consistent or longstanding for purposes of deference. *See Young*, ___ U.S. at ___, 135 S. Ct. at 1351-52.

The legislature, in passing sweeping modifications to state assistance programs, expressed an intent to limit drug testing of recipients to a certain and definite period following a conviction. Granting effect to the commissioner's current interpretation of the statute would require persons receiving MSA or general-assistance benefits to undergo chemical testing indefinitely, even if decades have passed since the completion of a court-ordered sentence. In light of these considerations, and the department's inconsistent and contrary interpretations of the statute, we conclude that "[p]ersons subject to the limitations of this subdivision who become eligible for assistance under this chapter" applies to persons within the five-year period of ineligibility who become eligible through satisfaction of one of the three treatment-related conditions listed in section 256D.024, subdivision 1(a). Those persons are subject to the limitations of the subdivision, and thus are subject to random drug testing for continued eligibility. After the passage of the five-year period, those persons are no longer "subject to the limitations of [the] subdivision"

and therefore are no longer required to undergo chemical testing for receipt of benefits. Those who, like appellant, have long since completed their court-ordered sentences and five-year period of ineligibility are not "[p]ersons subject to the limitations of this subdivision" and are not required to undergo chemical testing for receipt of benefits under chapter 256D.

III.

Appellant challenged the underpayment of MSA benefits based on the agency's misapplication of section 256D.024, subdivision 1(a).

"A county agency must issue a corrective payment for underpayments made to a participant or to a person who would be a participant if an agency or client error causing the underpayment had not occurred." Minn. Stat. § 256P.08, subd. 8 (2016). "Corrective payments are limited to 12 months prior to the month of discovery." *Id.*

Because the agency erred in premising appellant's receipt of MSA benefits on the condition of random drug testing, she is entitled to curative payments stemming from the agency's error. In July 2016, appellant made the commissioner aware of the error and the underpayment of benefits dating back to November 2015. Because the commissioner was notified of the error, and because all underpayments sought by appellant stemmed from the preceding 12-month period, the commissioner was obligated to issue full corrective payments based on the commissioner's erroneous application of drug-testing conditions to appellant. The commissioner erred in its decision to refuse to make corrective payments to appellant dating from November 2015.

D E C I S I O N

Minnesota Statutes section 256D.024, subdivision 1(a), is subject to multiple interpretations concerning the limitations of the subdivision and its application. Applying the canons of construction, and in light of the varying positions and interpretations of the statute endorsed by the department of human services, we conclude that the condition of random drug testing applies to persons who become eligible for benefits under chapter 256D during the five-year period following completion of a court-ordered sentence for a qualifying drug crime. The drug-testing condition does not extend beyond the five-year period.

Reversed.

JOHNSON, Judge (dissenting)

I would conclude that section 256D.024, subdivision 1(a), of the Minnesota Statutes requires Verhein to submit to random drug testing as a condition of receiving supplemental-aid benefits. I also would conclude that the random-drug-testing requirement in section 256D.024, subdivision 1(a), does not violate Verhein's rights under the Fourth Amendment to the United States Constitution. Accordingly, I would conclude that the commissioner properly determined that Verhein is ineligible for supplemental-aid benefits. Therefore, I respectfully dissent from the opinion of the court.

I.

The first issue raised by Verhein's appeal is whether she is required by statute to submit to random drug testing as a condition of receiving supplemental-aid benefits.

The parties' arguments require the court to engage in statutory interpretation. "The first step in statutory interpretation is to determine whether the statute's language, on its face, is ambiguous." *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). "'A statute is ambiguous only if it is subject to more than one reasonable interpretation.'" *Id.* (quoting *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013)). If a statute is unambiguous, "then we must apply the statute's plain meaning." *State v. Nelson*, 842 N.W.2d 433, 436 (Minn. 2014) (quotation omitted). But if a statute is ambiguous, "then we may apply the canons of construction to resolve the ambiguity." *Thonesavanh*, 904 N.W.2d at 435. When interpreting a statute, we apply a *de novo* standard of review. *Id.*

A.

The text of subdivision 1(a) describes the group of persons who are required to submit to random drug testing as a condition of receiving certain welfare benefits. The description is found in the noun phrase that is the subject of the second sentence: "*Persons subject to the limitations of this subdivision who become eligible for assistance under this chapter* shall be subject to random drug testing as a condition of continued eligibility . . . ." Minn. Stat. § 256D.024, subd. 1(a) (2016) (emphasis added).

To determine whether Verhein is among the "[p]ersons subject to the limitations of this subdivision who become eligible for assistance under this chapter," *see id.*, we first must identify the "limitations" at issue. The statute itself does not define the words "limitation" or "limitations." *See* Minn. Stat. § 256D.024. Likewise, the word is not among the terms defined elsewhere in chapter 256D. *See* Minn. Stat. § 256D.02 (2016). Because there is no statutory definition, we must look to "the common and ordinary meaning" of the words used in the statute. *Thonesavanh*, 904 N.W.2d at 436. The word "limitation" is defined by a leading lay dictionary to have four meanings, of which the most pertinent are "[t]he act of limiting or the state of being limited," "[a] restriction," and, in law, "[a] specified period during which, by statute, an action may be brought." *The American Heritage Dictionary* 1044 (3d ed. 1996). The same dictionary defines "limited" to mean "[c]onfined or restricted within certain limits," *id.*, and defines "limit" to mean "[t]he point, edge, or line beyond which something cannot or may not proceed," *id.*

Although the statute uses the plural form of the word "limitation," in reality there is only one limitation in subdivision 1 of section 256D.024.[3] That limitation is the provision in the main clause of the first sentence, which makes an applicant "ineligible for benefits under this chapter until five years after the applicant has completed terms of the court-ordered sentence" on a disqualifying drug offense. *See* Minn. Stat. § 256D.024, subd. 1(a). That provision is a "limitation" because it causes a person's eligibility for benefits to be "[c]onfined or restricted within certain limits," *i.e.*, within a "point, edge, or line," which is five years after the person has completed the terms of his or her court-ordered sentence. *See American Heritage, supra*, at 1044. The three treatment-related exceptions to ineligibility, which are found in the "unless" clause of the first sentence, are *not* limitations. If any one of the three exceptions were to apply, it would negate or disable the limitation in the main clause of the first sentence. Regardless, all persons who might qualify for one of the three treatment-related exceptions are persons subject to the limitation in the main clause.

To determine whether Verhein is among the "[p]ersons subject to the limitations of this subdivision who become eligible for assistance under this chapter," *see* Minn. Stat. § 256D.024, subd. 1(a), we also must consider the ways in which a person may "become eligible for assistance under this chapter," *see id.* There are at least five ways. First, persons seeking general-assistance benefits may become eligible by satisfying the criteria

[3]It is immaterial that the statute uses the plural form of the word "limitation" because "the singular includes the plural; and the plural, the singular." *See Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 435 (Minn. 2009) (quoting Minn. Stat. § 645.08(1), (2) (2008)). This canon of construction applies even if a statute is unambiguous. *See id.* at 435-36.

in a statute captioned "eligibility for general assistance." *See* Minn. Stat. § 256D.05 (2016 & Supp. 2017). Second, persons seeking supplemental-aid benefits may become eligible by satisfying the criteria in the Minnesota Supplemental Aid Act. *See* Minn. Stat. § 256D.425 (2016 & Supp. 2017); *see also* Minn. Stat. § 256D.33 (2016). Third, persons seeking either type of benefits who were convicted of a drug offense after July 1, 1997, may become eligible five years after their completion of a court-ordered sentence. *See* Minn. Stat. § 256D.024, subd. 1(a). Fourth, persons seeking benefits who were convicted of a drug offense after July 1, 1997, may become eligible by participating in a drug treatment program, by successfully completing a drug treatment program, or by being assessed and determined not to be in need of drug treatment. *See id.* Fifth, persons seeking benefits who have been convicted of a drug offense after July 1, 1997, and who previously satisfied one of the three treatment-related exceptions but then lost eligibility because of a positive test result may become eligible again after the expiration of another five-year period. *See id.*

Verhein was convicted of a disqualifying drug offense in 1999. She became ineligible for supplemental-aid benefits at that time. *See* Minn. Stat. § 256D.024, subd. 1(a). She completed her court-ordered sentence in 2001. She became eligible again for supplemental-aid benefits in 2006. *See id.* Sometime thereafter, she applied for and began receiving supplemental-aid benefits, which implies that she satisfied the eligibility requirements in section 256D.425. Accordingly, she is a person "subject to the limitations of this subdivision who bec[a]me eligible for assistance under . . . chapter [256D]." *See id.* Because the statute is not "subject to more than one reasonable interpretation" in its

application to Verhein, the statute is unambiguous for purposes of this appeal. *See Thonesavanh*, 904 N.W.2d at 435 (quotation omitted).

B.

Verhein contends that the statute does not apply to her because the reference in the second sentence to "the limitations of this subdivision" necessarily refers to "the limitation on MSA eligibility that appears immediately before it, in the first sentence of subd. 1(a), for individuals with drug convictions who are within the first five years after the completion of their sentence." She further contends, "There is no other 'limitation' anywhere in subd. 1 to which this second sentence could be referring." Verhein's interpretation is flawed because it ignores the main clause of the first sentence, which makes a person ineligible for benefits based on a disqualifying drug offense. *See* Minn. Stat. § 256D.024, subd. 1(a). She does not explain why that provision, which makes a person ineligible for benefits, is not a "limitation."

The majority reasons that the phrase "[p]ersons subject to the limitations of this subdivision who become eligible for assistance under this chapter" is ambiguous on the ground that it could refer either to persons who *previously were* subject to the five-year period of ineligibility or to persons who *presently are* subject to the five-year period of ineligibility. *See supra* at 11-12. But the phrase need not be interpreted to refer to only one group or the other; it could refer to both groups of persons. That is the only reasonable interpretation in light of the principle that, in determining whether a statute is ambiguous, we should consider a statute "as a whole and interpret its language to give effect to all of its provisions." *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015). In this case, we must

give effect to the last word of the phrase: "chapter." If the phrase were limited to persons who still are within the five-year period of ineligibility, the phrase would conclude, "under this *subdivision*," not "under this *chapter*." Because the statute defines the group of persons subject to random drug tests more broadly to include persons who became eligible under any provision in chapter 256D, the statute refers to both types of persons, including persons who are beyond the five-year period of ineligibility and became eligible by satisfying the criteria in section 256D.05 and section 256D.425.

Furthermore, a related statute that expressly references section 256D.024 confirms this interpretation. The related statute, which was enacted in 2012, required the state court administrator to provide the commissioner with a report of all persons who had been convicted of felony-level drug offenses under chapter 152 after July 1, 1997, and, furthermore, requires the state court administrator, on an ongoing basis, to provide reports to the commissioner at six-month intervals of all persons convicted of such offenses during the previous six months. Minn. Stat. § 256.01, subd. 18c (2016); 2012 Minn. Laws ch. 247, art. 3, § 2, at 35-36. The statute further provides, "The commissioner shall determine whether the [persons included in the reports] are receiving public assistance under chapter 256D . . . , and if [so], the commissioner shall instruct the county to proceed under section 256D.024 . . . ." Minn. Stat. § 256.01, subd. 18c(b). The information provided by the state court administrator, which includes all convictions after July 1, 1997, would be useful for purposes of section 256D.024 only if persons who are beyond the five-year period of ineligibility are still subject to random drug testing. In determining whether a statute is ambiguous, we should "interpret each section in light of the surrounding sections to avoid

conflicting interpretations." *Eclipse Architectural Grp., Inc. v. Lam*, 814 N.W.2d 692, 701 (Minn. 2012) (quotation and alteration omitted). In doing so, we may consider statutory provisions in related chapters of the Minnesota Statutes. *See State v. Schmid*, 859 N.W.2d 816, 822-23 (Minn. 2015) (interpreting provision in chapter 97B by referring to provisions in chapter 97A). Because section 256.01, subdivision 18c, ensures that the commissioner is aware of all persons who have been convicted of drug offenses since July 1, 1997, and because the statute directs the commissioner to use that information to enforce section 256D.024, it is apparent that persons who are beyond the five-year period of ineligibility are subject to random drug testing.

C.

If I were to agree with the majority's opinion that the statute is ambiguous, I would respectfully disagree with its view that the legislative history of the statute is "inconclusive" with respect to the meaning of the phrase "[p]ersons subject to the limitations of this subdivision who become eligible for assistance under this chapter." *See supra* at 13-14. If the legislative history sheds any light on the meaning of section 256D.024, subdivision 1(a), it makes clear that the phrase includes persons who *previously were* subject to the five-year period of ineligibility. That is so because the "subject to the limitations" language was inserted into the bill at a time when the first sentence consisted *only* of the clause that contains the five-year ineligibility provision. The "subject to the limitations" language was inserted into the bill *before* the "unless" clause, which contains the three treatment-related exceptions to ineligibility.

When the bill, Senate File 1, was passed by the senate, it provided as follows: "If an applicant has been convicted of a drug offense after July 1, 1997, the assistance unit is ineligible for benefits under this chapter until two years after the applicant has completed terms of the court-ordered sentence." S.F. 1, § 27, subd. 1, third engrossment (1997). In the following paragraph, the bill defined the term "drug offense" in the same manner as the statute now defines it. *Compare* S.F. 1, § 27, subd. 1, third engrossment (1997) *with* Minn. Stat. § 256D.024, subd. 1(b).

In the house of representatives, the bill was amended in committee to extend the period of ineligibility from two years to five years. State of Minnesota, *Journal of the House*, 80th Sess. 1338 (Mar. 26, 1997). When the bill reached the floor of the house of representatives, a member moved to amend the bill by adding the second sentence, as shown below:

> If an applicant has been convicted of a drug offense after July 1, 1997, the assistance unit is ineligible for benefits under this chapter until five years after the applicant has completed terms of the court-ordered sentence. Persons subject to the limitations imposed by this section who become eligible for assistance under this chapter shall be subject to random drug testing as a condition of continued eligibility and shall lose eligibility for benefits beginning the month following any positive test result for an illegal controlled substance.

State of Minnesota, *Journal of the House*, 80th Sess. 1898 (Apr. 10, 1997); S.F. 1, § 28, subd. 1, second unofficial engrossment (1997). The motion carried, and the house passed the entire bill shortly thereafter. State of Minnesota, *Journal of the House*, 80th Sess. 1898, 1904-05 (Apr. 10, 1997).

The senate did not agree to the house version of the bill. State of Minnesota, *Journal of the Senate*, 80th Sess. 1716 (Apr. 11, 1997). A conference committee was appointed. *Id.* The conference committee reported out a bill that differed from the house version, as shown below:

> If an applicant has been convicted of a drug offense after July 1, 1997, the assistance unit is ineligible for benefits under this chapter until five years after the applicant has completed terms of the court-ordered sentence, unless the person is participating in a drug treatment program, has successfully completed a drug treatment program, or has been assessed by the county and determined not to be in need of a drug treatment program. Persons subject to the limitations ~~imposed by this section~~ of this subdivision who become eligible for assistance under this chapter shall be subject to random drug testing as a condition of continued eligibility and shall lose eligibility for benefits for five years beginning the month following:
>
> (1) any positive test result for an illegal controlled substance; or
>
> (2) discharge of sentence after conviction for another drug felony.

State of Minnesota, *Journal of the Senate*, 80th Sess. 2522 (Apr. 28, 1997). Both chambers approved the conference committee version of the bill, and it was presented to the governor, who signed it. 1997 Minn. Laws ch. 85, art. 3, § 28, at 615-16; State of Minnesota, *Journal of the Senate*, 80th Sess. 2566 (Apr. 28, 1997); State of Minnesota, *Journal of the House*, 80th Sess. 3401-02 (Apr. 28, 1997).

The significance of this chronology is that, at the time the random-drug-testing requirement was inserted into the bill on the floor of the house of representatives, the only conceivable "limitation" in the bill was the five-year period of ineligibility. At that time,

the bill did not yet contain the three treatment-related exceptions to ineligibility. If the word "limitation" had any meaning at the time it was inserted into the bill, it could have referred only to the five-year period of ineligibility and not to the three treatment-related exceptions. Accordingly, at that time, the phrase "[p]ersons subject to the limitations of this subdivision who become eligible for assistance under this chapter" must have meant persons who had completed a court-ordered sentence and had become eligible for benefits five years after completing a court-ordered sentence. Thus, if the legislative history informs the interpretation of section 256D.024, subdivision 1(a), it must lead to the conclusion that persons who previously were ineligible for benefits and became eligible due to the passage of five years' time are included in the group of persons who are required to submit to random drug testing as a condition of ongoing eligibility for benefits.

D.

If I were to agree with the majority that the statute is ambiguous, I also would not resolve the ambiguity by referring to the department of human services' combined manual. *See supra* at 17-19.

As an initial matter, I question the legal authority by which we might interpret a statute in a manner consistent with an agency's prior interpretation but inconsistent with the agency's litigation position. To be sure, if an agency refers to its prior interpretation of an ambiguous statute to support its position in a pending case, a court may "give deference to the administrative interpretation of the relevant statute by a state agency if the agency is charged with the responsibility of applying the statute on a statewide basis and its interpretation is reasonable." *A.A.A. v. Minnesota Dept. of Human Servs.*, 832 N.W.2d

816, 823 (Minn. 2013). But I am unaware of any authority for giving such deference to an agency's prior interpretation of a statute if the prior interpretation is offered not by the agency but by the agency's opposing party.

Assuming without conceding that we may do so, I would not give deference to the department's combined manual in this case because the manual does not answer the question before the court. The combined manual does not address the situation in which an applicant or recipient completed a court-ordered sentence more than five years earlier. In these circumstances, it would be improper to draw any inference from the combined manual's silence, especially an inference that is contrary to the commissioner's position in this appeal.

Thus, I would conclude that section 256D.024, subdivision 1(a), requires Verhein to submit to random drug testing as a condition of receiving supplemental-aid benefits.

II.

The second issue raised by Verhein's appeal is whether the random-drug-testing requirement in section 256D.024, subdivision 1(a), violates her rights under the Fourth Amendment to the United States Constitution.[4] The majority does not reach this issue because it concludes that the statute does not apply to Verhein. *See supra* at 5-20. Because I would conclude that the statute applies to Verhein, I must consider and resolve her Fourth

[4]Verhein cites article I, section 10, of the Minnesota Constitution but does not argue that it should be interpreted more broadly than the Fourth Amendment to the United States Constitution. Accordingly, it is unnecessary to engage in a separate analysis of state constitutional principles.

Amendment argument before reaching a conclusion as to whether she was properly denied supplemental-aid benefits.

The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. As a general rule, a warrantless search of a person is unreasonable and, thus, a violation of the Fourth Amendment. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016); *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S. Ct. 1552, 1558 (2013); *State v. Stavish*, 868 N.W.2d 670, 675 (Minn. 2015).

Despite the general rule, a warrantless search of a person may be valid under the Fourth Amendment in certain circumstances. For example, a warrantless search of a person is valid if he or she consents to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 248-49, 93 S. Ct. 2041, 2043-44, 2059 (1973); *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). A warrantless search of a person may be justified by exigent circumstances, so long as there is probable cause to believe that the person has engaged in criminal activity. *McNeely*, 569 U.S. at 148, 133 S. Ct. at 1558; *Stavish*, 868 N.W.2d at 677. And a person who has been lawfully arrested may be subjected to a warrantless search incident to the arrest. *Arizona v. Gant*, 556 U.S. 332, 338, 351, 129 S. Ct. 1710, 1716, 1723-24 (2009); *State v. Bernard*, 859 N.W.2d 762, 766-68, 772 (Minn. 2015), *aff'd sub nom.*, *Birchfield*,

136 S. Ct. 2160. Furthermore, a warrantless search of a person may be valid under the Fourth Amendment even without probable cause of criminal activity, if there exist "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S. Ct. 2386, 2391 (1995) (quotation omitted); *see also Stavish*, 868 N.W.2d at 675.

A.

In this case, the Fourth Amendment analysis must begin with *Wyman v. James*, 400 U.S. 309, 91 S. Ct. 381 (1971), an opinion of the United States Supreme Court concerning facts that are quite similar to the facts of this case. A New York statute required recipients of certain welfare benefits to allow social workers to conduct home visits as a condition of receiving benefits. *Id.* at 313-14, 91 S. Ct. at 384. A recipient challenged the statute on the ground that it violated her Fourth Amendment right to be free of unreasonable searches. *Id.* The United States Supreme Court rejected the challenge for two reasons. *Id.* at 317-24, 91 S. Ct. at 386-89. The Court's primary reason for rejecting the Fourth Amendment challenge was that the home visit was not a search. *Id.* at 317-18, 91 S. Ct. at 386. The Court explained that the protection of the Fourth Amendment

> is not a factor in this case, for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term. It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But

> this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context. *We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.*

Id. (emphasis added).

Verhein did not cite *Wyman* in her opening brief. The commissioner relied heavily on *Wyman* in her responsive brief. In reply, Verhein contends that *Wyman* is inapplicable because it does not concern drug tests. She urges us to apply "the well-developed line of Supreme Court case law dealing directly with the constitutional implications of random drug testing." She presumably refers to *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402 (1989), and *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295 (1997), which she cited in her opening brief.

Verhein is correct in suggesting that there are differences between home visits and random drug tests and that, for that reason, *Wyman* is not identical to this case. But the challenged procedure in *Wyman* was a condition imposed on the receipt of welfare benefits, which is true in this case as well. And the primary purpose of the home visit in *Wyman*—to "determin[e] if there are any changes in [the recipient's] situation that might affect her eligibility to continue to receive Public Assistance," *Wyman*, 400 U.S. at 314, 91 S. Ct. at 384—is similar to the purpose of random drug testing in this case. Accordingly, *Wyman* applies to this case and controls the analysis, except to the extent that the nature of home visits differs from the nature of random drug tests.

Verhein also is correct in suggesting that the legal analysis in *Wyman* is different from the legal analysis in *Skinner* and other special-needs cases that were issued after *Wyman*. *See, e.g.*, *Chandler*, 520 U.S. 305, 117 S. Ct. 1295; *Vernonia Sch. Dist. 47J*, 515 U.S. 646, 115 S. Ct. 2386; *Skinner*, 489 U.S. 602, 109 S. Ct. 1402; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989). But to the extent that there are differences in the legal analysis, we are obligated to follow the *Wyman* opinion, not the subsequent opinions that coined the term "special needs" and developed that doctrine. The Supreme Court has warned lower federal courts and state courts not to disregard its opinions on the ground that "more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 207, 117 S. Ct. 1997, 2002 (1997). Rather, the Court has stated, "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53, 118 S. Ct. 1969, 1978 (1998). The Court has given clear instructions in this regard: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989). The Supreme Court's prerogative to overrule its own decisions exists even if a subsequent opinion appears to have "significantly undermined" the rationale of its earlier holding. *United States v. Hatter*, 532 U.S. 557, 567, 121 S. Ct. 1782, 1790 (2001).

Accordingly, *Wyman* governs to the extent that it has direct application to this case. *See Rodriguez de Quijas*, 490 U.S. at 484, 109 S. Ct. at 1921-22. The *Wyman* Court reasoned that there was no Fourth Amendment search in part because the home visits were "not forced or compelled" and that "the beneficiary's denial of permission is not a criminal act." *Wyman*, 400 U.S. at 317, 91 S. Ct. at 386. The Court explained that a home visit would occur only if the recipient consented to it: "If consent to the visitation is withheld, no visitation takes place. . . . There is no entry of the home and there is no search." *Id.* at 317-18, 91 S. Ct. at 386. That rationale is equally applicable in this case. Because there was no search in *Wyman*, there is no search, for purposes of the Fourth Amendment, in this case.[5]

[5]This part of the *Wyman* opinion appears to acknowledge that a welfare recipient may face a choice between consenting to a condition of eligibility and foregoing welfare benefits. *See Wyman*, 400 U.S. at 317-18, 91 S. Ct. at 386. That choice is the focus of the unconstitutional-conditions doctrine, which would ask whether a person was coerced into consenting to a waiver of constitutional rights or was deterred from asserting constitutional rights. *See State v. Netland*, 762 N.W.2d 202, 211-12 (Minn. 2009) (citing Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 6-7 (1988)). The district court in this case rejected Verhein's Fourth Amendment argument solely on the ground that the Minnesota courts have not recognized the unconstitutional-conditions doctrine in conjunction with Fourth Amendment rights. *See Netland*, 762 N.W.2d at 211-12; *Stevens v. Commissioner of Pub. Safety*, 850 N.W.2d 717, 724-25 (Minn. App. 2014) (citing *Netland*). Both parties have made arguments to this court concerning the unconstitutional-conditions doctrine. But the supreme court's caselaw suggests that it is unnecessary to apply the unconstitutional-conditions doctrine if the Fourth Amendment caselaw is sufficient to resolve a challenger's claim. *See State v. Thompson*, 886 N.W.2d 224, 234 n.9 (Minn. 2016). In this case, it appears that the *Wyman* opinion supplies a rule of law that accounts for the concepts of choice, consent, and coercion, which are the concerns of the unconstitutional-conditions doctrine. *Cf.* Celia Goetzl, Comment, *Government Mandated Drug Testing for Welfare Recipients: Special Need or Unconstitutional Condition?*, 15 U. Pa. J. Const. L. 1539, 1549-59 (2013). Because *Wyman* is a sufficient basis for rejecting Verhein's Fourth Amendment argument,

B.

The *Wyman* Court reasoned in the alternative that, if the home visit was a search for Fourth Amendment purposes, the search would not be unreasonable and, thus, not unconstitutional. *Id.* at 318-24, 91 S. Ct. at 386-89. The Court identified several factors leading to that conclusion, some of which are relevant to this case. For example, the Court reasoned that the welfare agency "is fulfilling a public trust" and that the state "has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Id.* at 318-19, 91 S. Ct. at 386. The Court also reasoned that the public "naturally has an interest in and expects to know how . . . charitable funds are utilized and put to work." *Id.* at 319, 91 S. Ct. at 386. The Court noted that "Mrs. James received written notice several days in advance" of the home visit and that "[t]he date was specified." *Id.* at 320-21, 91 S. Ct. at 387. The Court stated that there was no suggestion of an "unreasonable intrusion of her home," "no forcible entry," and "no impolite or reprehensible conduct of any kind." *Id.* at 321, 91 S. Ct. at 388. The Court noted that the home visit was conducted by a caseworker, not "by police or uniformed authority." *Id.* at 322, 91 S. Ct. at 388. The Court noted that the "home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding." *Id.* at 323, 91 S. Ct. at 389. The Court concluded by noting that "the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of

---

it is unnecessary to consider the unconstitutional-conditions doctrine. *See Thompson*, 886 N.W.2d at 234 n.9.

a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax." *Id.* at 324, 91 S. Ct. at 389.

Because the alternative analysis in *Wyman*, which concerns a search that is a condition of welfare benefits, has direct application to this case, I would, in the alternative, follow *Wyman*'s alternative analysis by incorporating it into the contemporary special-needs analysis. *See Rodriguez de Quijas*, 490 U.S. at 484, 109 S. Ct. at 1921-22. "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J*, 515 U.S. at 652, 115 S. Ct. at 2390. Whether a particular search satisfies the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 652-53, 115 S. Ct. at 2390 (quotation omitted).

The commissioner generally relies on counties to administer supplemental aid. *See* Minn. Stat. §§ 256.01, subd. 2(a), 393.07 (2016). Washington County, the county to which Verhein applied for supplemental aid, has adopted written procedures for implementing the random-drug-testing requirement in section 256D.024, subdivision 1(a). After determining that a person must be tested, the county selects a date for testing and sends written notice by mail at least five days in advance of the test. The county has contracted with a company that collects urine samples and conducts a "full laboratory screening." The appellate record does not include additional details of the testing procedures employed by the county or its contractor.

The Supreme Court has considered the intrusiveness of urine tests in special-needs cases. In *Skinner* and *Von Raab*, which were decided on the same day, the Court expressed concerns about the potential intrusiveness of urine tests but noted that the particular procedures employed in each case minimized the intrusiveness, and the Court concluded that the governmental interests outweighed the affected individuals' privacy interests. *Skinner*, 489 U.S. at 626-27, 633, 109 S. Ct. at 1418, 1421-22; *Von Raab*, 489 U.S. at 671-72, 677, 109 S. Ct. at 1393-94, 1396-97. In *Vernonia School District 47J*, the Court again expressed concerns about the potential intrusiveness of urine tests and emphasized that "the degree of intrusion depends upon the manner in which production of the urine sample is monitored." 515 U.S. at 658, 115 S. Ct. at 2393. The Court concluded that "the invasion of privacy was not significant" in that case and that, on balance, the drug-testing policy was reasonable. 515 U.S. at 660, 115 S. Ct. at 2394.[6]

In "balancing" a urine test's "intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests," *id.* at 652-53, 115 S. Ct. at 2390, I am

[6]Our supreme court recently considered the reasonableness of urine tests in a different context: a search incident to an arrest for driving while impaired. *See Thompson*, 886 N.W.2d at 227-30. The supreme court noted that a urine test might allow law enforcement "to extract information beyond a simple [alcohol concentration] reading," *id.* at 231 (alteration in original) (quoting *Birchfield*, 136 S. Ct. at 2178), and that "urine testing implicates weighty privacy concerns" because it requires a person to "perform[] a personal and private bodily function 'in full view' before law enforcement," *id.* at 232. The supreme court concluded that, given the purpose of determining a driver's alcohol concentration, urine tests "cannot be justified . . . given the availability of less-invasive breath tests that may be performed incident to a valid arrest." *Id.* at 233. In this case, no party has suggested that there is an alternative means of determining whether a supplemental-aid recipient uses controlled substances. Thus, although *Thompson* is useful in assessing the intrusiveness of urine tests, it has limited application to the balancing of that intrusiveness against the special need asserted by the commissioner.

mindful that, under state law, Minnesota statutes are presumed to be constitutional. *See In re Welfare of M.L.M.*, 813 N.W.2d 26, 29 (Minn. 2012) (considering whether statute violates Fourth Amendment). Our supreme court "exercise[s] the power to declare a law unconstitutional only when absolutely necessary in the particular case and then with great caution." *Soohoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (quotations omitted). Consequently, "The party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision." *M.L.M.*, 813 N.W.2d at 29. In this particular case, Verhein has not attempted to demonstrate that the county's procedures for obtaining urine samples are insufficiently protective of her privacy interests, which is an important consideration in the balancing of intrusiveness and legitimate governmental interests. *See Vernonia Sch. Dist. 47J*, 515 U.S. at 658, 115 S. Ct. at 2393. Furthermore, the commissioner assures us that the urine-test results "are private data and cannot be shared with third parties, even law enforcement, without consent, a court order, or express statutory authority." *See* Minn. Stat. § 13.46, subd. 2 (2016). Accordingly, it appears that the county's testing procedures are consistent with the testing procedures that passed muster with the Supreme Court in *Skinner*, *Von Raab*, and *Vernonia*.

Because the Supreme Court held in *Wyman* that the New York statute promoted legitimate governmental interests, and because the Supreme Court has held that warrantless urine tests are reasonable for various non-law-enforcement purposes, I would conclude that the random-drug-testing requirement in section 256D.024, subdivision 1(a), of the Minnesota Statutes is reasonable in the circumstances of this case.

C.

In both her opening brief and her reply brief, Verhein relies on *Lebron v. Secretary of Florida Dept. of Children & Families*, 772 F.3d 1352 (11th Cir. 2014), which appears to be the only precedential opinion of an appellate court concerning random drug testing as a condition of receiving welfare benefits. In that case, the United States Court of Appeals for the Eleventh Circuit considered a Fourth Amendment challenge to a Florida statute that required all recipients of certain welfare benefits to submit to random drug testing as a condition of receiving those benefits. *Id.* at 1355. The court concluded that the state did not establish a substantial need that would justify the random-drug-testing requirement. *Id.* at 1378. The court reached that conclusion by relying solely on the special-needs cases that were decided after *Wyman*. *Id.* at 1356-78. The court did not consider *Wyman* to be controlling and discussed it only briefly in a footnote near the end of its opinion. *Id.* at 1378 n.10. As explained above, however, *Wyman* must govern the analysis.

Even to the extent that the post-*Wyman* special-needs caselaw applies, *Lebron* is not persuasive. *Lebron* relies on the Supreme Court's opinion in *Chandler*, but *Chandler* is distinguishable. In *Chandler*, the Supreme Court invalidated a Georgia statute that required all persons seeking election to high state office "to certify that they have taken a drug test and that the test result was negative." 520 U.S. at 308, 117 S. Ct. at 1298. The state argued that the statute was justified because "the use of illegal drugs draws into question an official's judgment and integrity . . . and undermines public confidence and trust in elected officials." *Id.* at 318, 117 S. Ct. at 1303. The Court reasoned that the state

had not demonstrated that the problem of drug abuse among elected officials was "real and not simply hypothetical." *Id.* at 319, 117 S. Ct. at 1303. The Court also reasoned that the certification requirement was "not well designed to identify candidates who violated antidrug laws" or to "deter illegal drug users from seeking election" because, with 30 days' notice, a person could circumvent the requirement by abstaining from use before a test. *Id.* at 319, 117 S. Ct. at 1304. The Court further reasoned that the state law was merely "symbolic" and, thus, did not serve a special need. *Id.* at 322, 117 S. Ct. at 1305. In rejecting the state's argument, the Court did *not* say that the state's goals—integrity, public confidence, and public trust—were illegitimate. Thus, *Chandler* does not undermine *Wyman*'s reasoning that a state, in administering a welfare program, is "fulfilling a public trust" and "has appropriate and paramount interest and concern in" ensuring that public funds are spent effectively, and that the public "has an interest in how . . . charitable funds are utilized and put to work." *Wyman*, at 318-19, 91 S. Ct. at 386.

In any event, the weaknesses of the Georgia statute in *Chandler* and the Florida statute in *Lebron* are not present in this case. Minnesota's random-drug-testing requirement applies only to persons who have been convicted of a drug crime. Minn. Stat. § 256D.024, subd. 1(a). In contrast, the Florida statute required *all* welfare recipients to submit to random drug testing. *Lebron*, 772 F.3d at 1355. In addition, a urine test conducted by the county's contractor with only five days' notice is well designed to identify persons who are using controlled substances, unlike the certification requirement in *Chandler*. Furthermore, Verhein does not contend that section 256D.024, subdivision 1(a), is merely symbolic, and we have no reason to doubt that the statute is a genuine

attempt to promote policies stated in the supplemental-aid statute, such as "maximiz[ing] the use of federal funds for public assistance purposes" and providing assistance to Minnesota residents "who are found to have maintenance needs." *See* Minn. Stat. § 256D.34 (2016).

Thus, I would conclude that the random-drug-testing requirement in section 256D.024, subdivision 1(a), does not violate Verhein's rights under the Fourth Amendment to the United States Constitution.

For all of the reasons stated above, I would affirm the judgment of the district court.