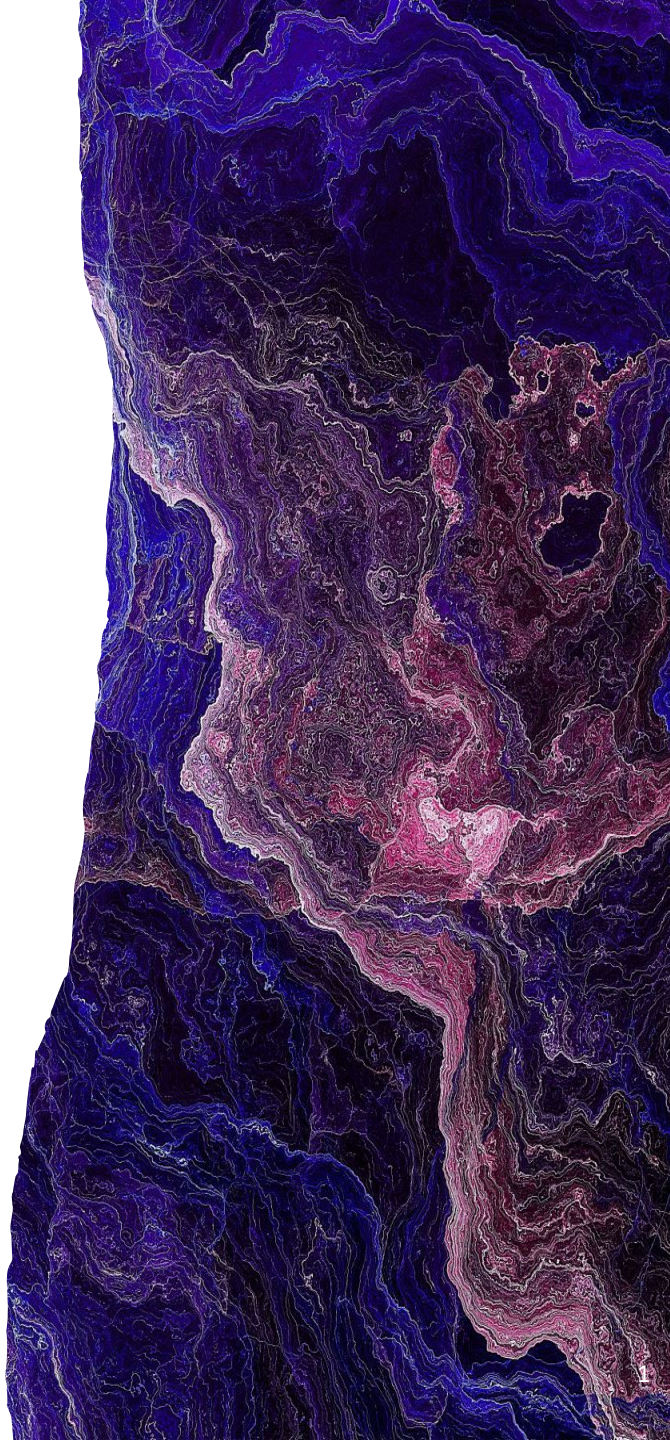
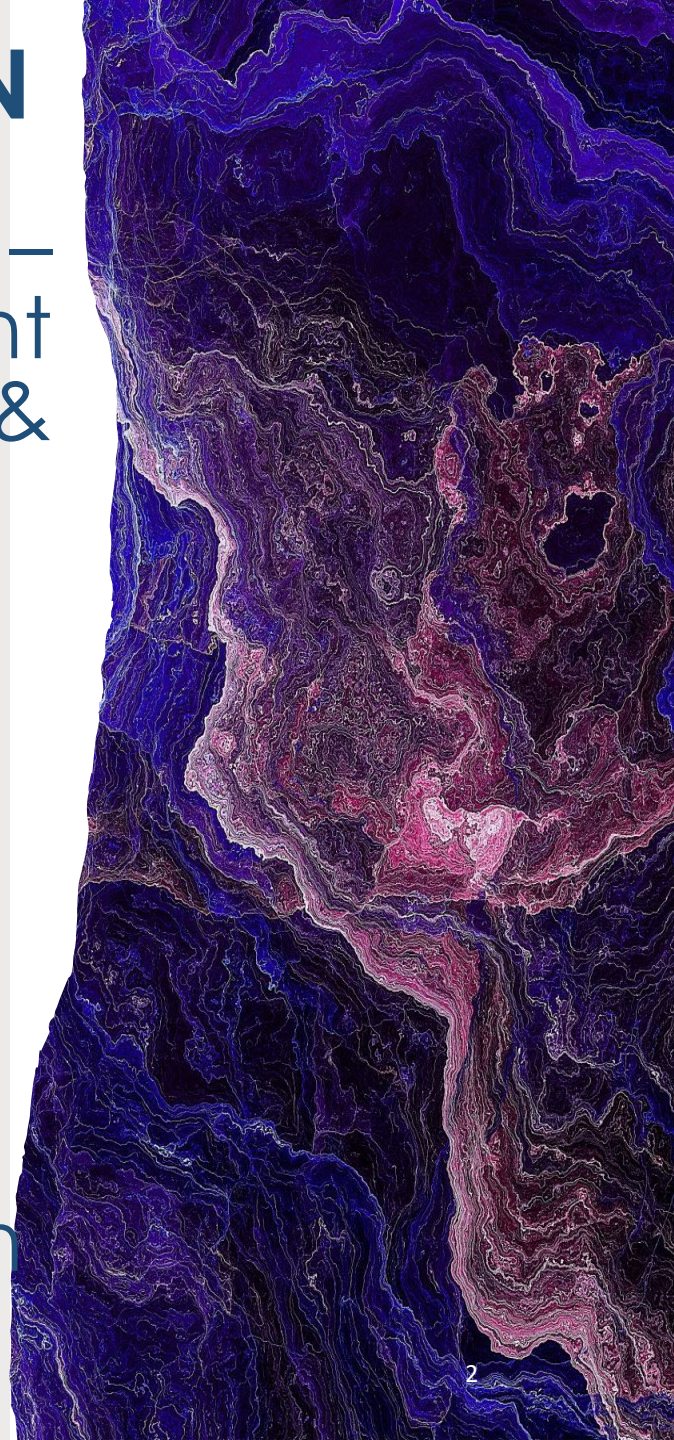
TAKE IT TO THE LIMITS

Restrictions on Public Employer Drug & Alcohol Testing



FOURTH AMENDMENT U.S. CONSTITUTION

- Drug/alcohol testing by a public employer – (urinalysis/blood/saliva) = 4th Amendment Search & Seizure U.S. Constitution & implicates privacy rights :
  - *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 616-618
  - *Nat'l Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 663-665
  - *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 853, 876

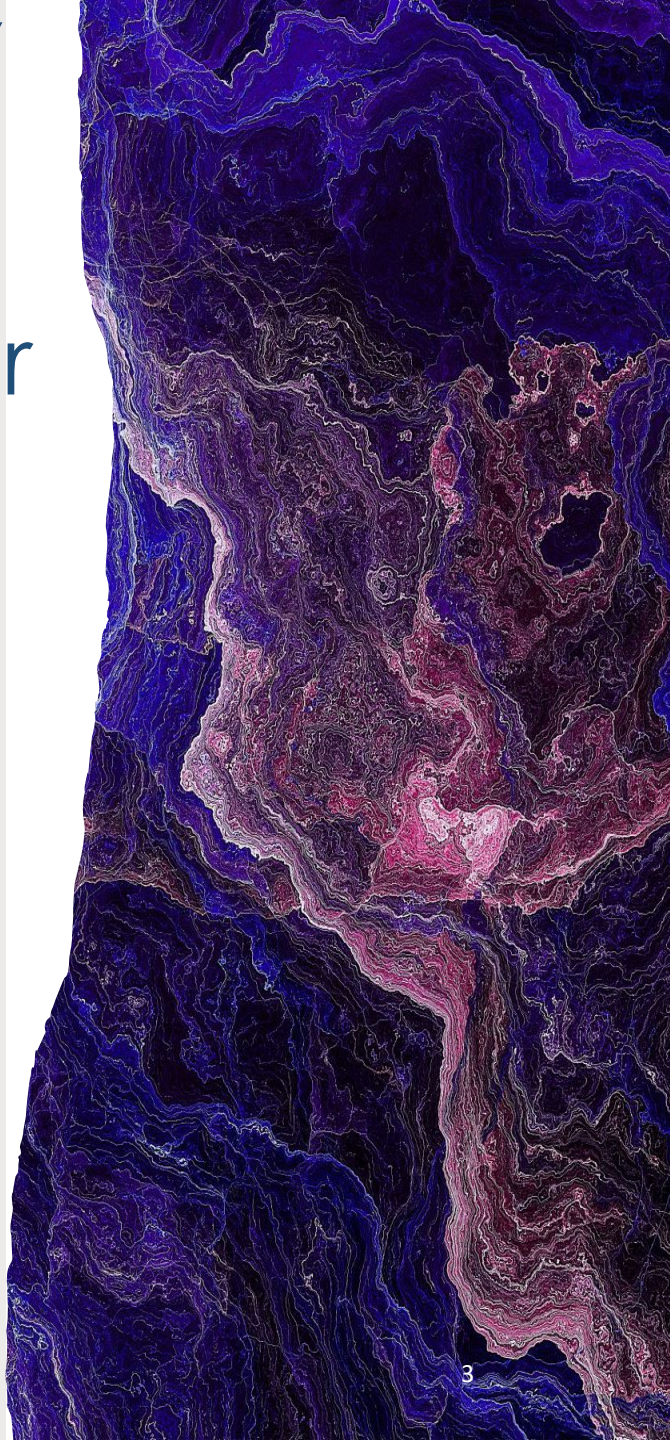


MUNI EMPLOYERS CONSTRAINED BY 4TH AMENDMENT

- Drug/alcohol testing by Muni Employer = 4th Amendment Search & Seizure, U.S. Constitution

- Generally, Muni Employer must have **"individualized suspicion"** to test employees

Skinner v. Railway Labor Executives' Assn. (1989) 489 U.S. 602, 616-618



LIMITED "SPECIAL NEED" EXCEPTION TO INDIVIDUALIZED SUSPICION

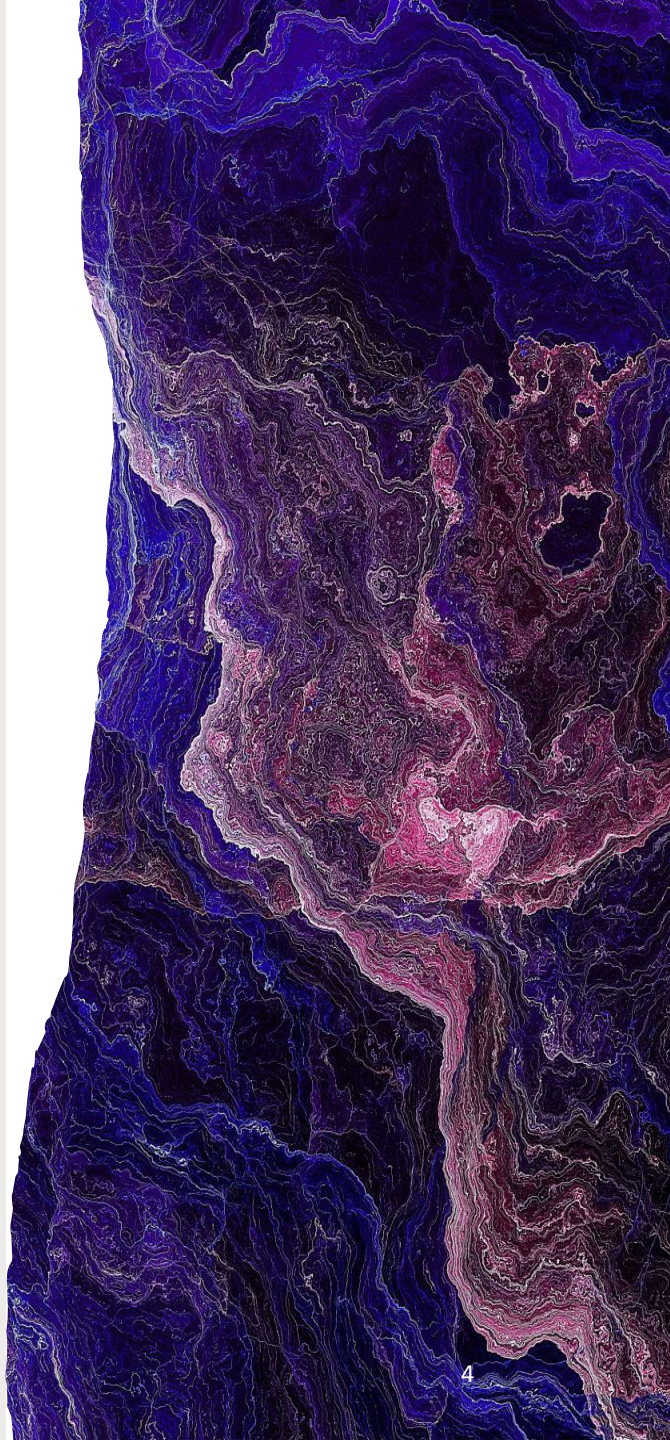
Muni Employer to conduct **suspicionless sting** (also called "random drug testing") loyees

e special need, outside the need for law cement exists, <u>and</u>

"special need" outweighs employees' y interest.

ia School Dist. 47J v. Acton (1995) 515 U.S. 646

asury Employees Union v. Von Raab , 489 U.S. 89).

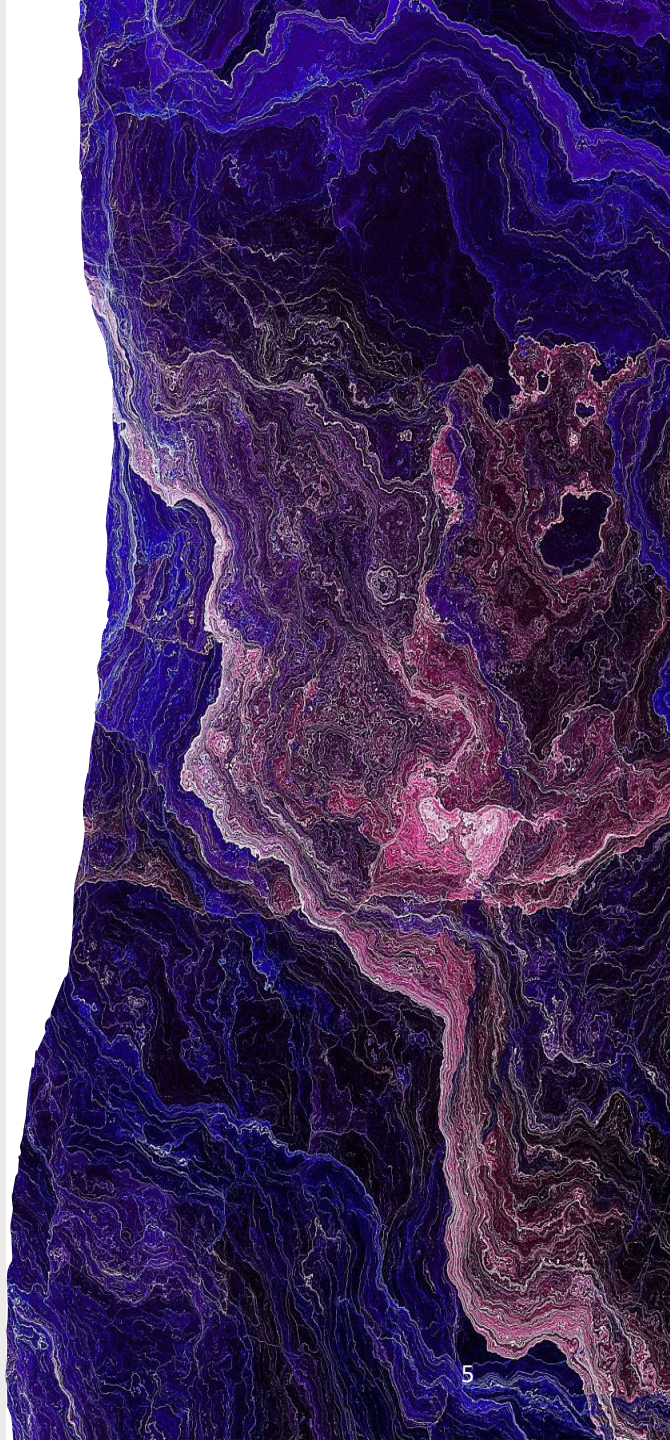


SPECIAL NEED EXCEPTION TO INDIVIDUALIZED SUSPICION

al need "beyond the need for law
ement" for
ety-sensitive" or
urity- sensitive" positions

e "fraught with such risks of injury to others
ven a momentary lapse of attention could
isastrous consequences."

r v. *Railway Labor Executives' Assn.*
489 U.S. 602, 628



REASONABLE INDIVIDUALIZED SUSPICION

- Generally, under the state or federal constitution, a drug or alcohol test must be based on "reasonable individualized suspicion" of wrongdoing.
  - *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646
  - *Loder*, 14 Cal.4th at p. 897



NDIVIDUALIZED SUSPICION THAT PLOYEE IS UNDER THE INFLUENCE

ner 'individualized suspicion" exists is fact-c inquiry.

e requiring employee to drug test, City should e to articulate compelling reasons why

g non-safety-sensitive employees injured in the scope oyment to submit to a drug test without any lized suspicion of wrongdoing is prohibited. *See, eachers of New Orleans v. Orleans Parish Sch. Bd. Holmes*, 142 F.3d 853 (5th Cir. 1998). *See, Chandler v.* 0 U.S. 305, 313 (1997).



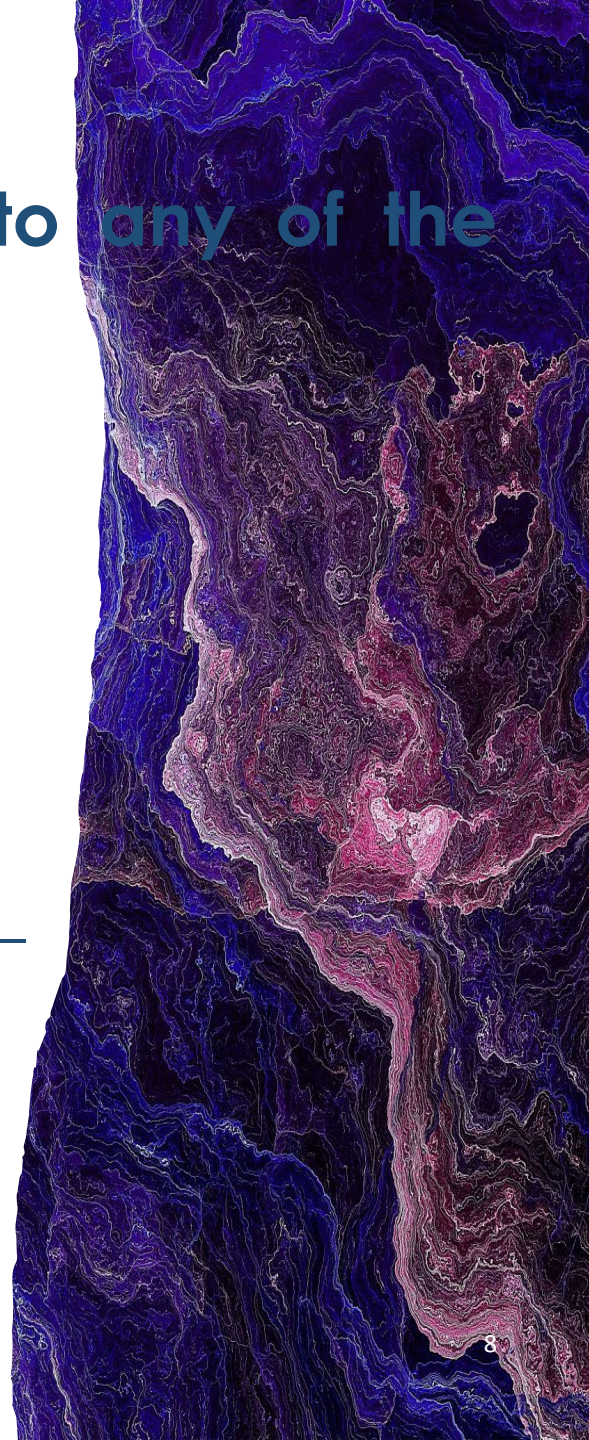
WHAT IS INDIVIDUALIZED SUSPICION?

PART 2: OBSERVATIONS (Place a checkmark next to any of the following observations exhibited by the employee.)

PHYSICAL

Walking: ____
Stumbling; ____
Unsteady; ____
Swaying; ____
Holding on; ____
Unable to walk; ____
Staggering; ____
Falling; ____
Other (describe)_____

Standing: ____
Feet wide apart; ____
Rigid; ____
Sagging at knees; ____
Swaying; ____
Unable to stand; ____
Staggering; ____
Dizziness; ____
Other (describe)_____



MARIHUANA

WEED with ROOTS in HELL

NOT RECOMMENDED FOR CHILDREN

MISERY

Smoke That Goes In Youth's Eyes



What Happened to Nellie's Parties



WEIRD ORGIES
WILD PARTIES

WHAT IS INDIVIDUALIZED SUSPICION?

PHYSICAL

Jerky; ____ Nervous; ____
Slow; ____ Normal; ____
Hyperactive; ____
Reduced reaction time; ____Not following tasks; ____
Diminished coordination; ____ Tremors; Other (describe)_____
Eyes: ____ Bloodshot;____ Watery; ____ Droopy; ____ Glassy; ____ Closed; ____ Dilated/Constricted Pupils; ____ Other (describe)_____
Face: ____ Flushed; ____ Pale; ____ Sweaty; ____
Other (describe)_____


Say. Their. Name.

WHAT IS INDIVIDUALIZED SUSPICION?

PHYSICAL

Breath: ____ No alcoholic odor; ____ Faint alcoholic odor; ____
Alcoholic odor; ____ Chemical odor; ____ Sweet/pungent tobacco odor; ____
Heavy use of breath spray; ____
Other (describe)_____
Speech: ____ Whispering; ____ Slurred; ____ Shouting; ____ Incoherent; ____
Slobbering; ____ Silent; ____ Rambling; ____ Mute; ____ Slow; ____
Other (describe)_____
Appearance: ____ Neat; ____ Unruly; ____ Messy; ____ Dirty; ____
Stains on clothing; ____ Marijuana Odor ____
Partially dressed; ____ Bodily excrement stains; ____
Visible puncture marks or tracks; ____
Burnt rope smell on clothes, hair, body; ____
Excessive sweating in cool area; ____
Other (describe)_____



WHAT IS INDIVIDUALIZED SUSPICION?

BEHAVIORAL

Demeanor: ____ Cooperative; ____
Calm; ____ Talkative/Rapid Speech; ____
Polite; ____ Sarcastic; ____ Sleepy; ____ Crying; ____
Sleeping on job; ____ Argumentative; ____ Excited; ____
Withdrawn; ____ Mood swings; ____ Overreacts to minor things; ____ Excessive laughter; ____ Forgetful; ____
Other(describe)_____
Actions: ____ Hostile; ____ Fighting; ____ Profanity; ____ Drowsy; ____ Threatening; ____ Erratic; ____ Hyperactive; ____ Calm; ____ Resisting communication; ____ Paranoid; ____ Possessing, using or distributing an illegal substance; ____ Baseless Panic; ____
Other(describe)_____
_____



WHAT IS INDIVIDUALIZED SUSPICION?

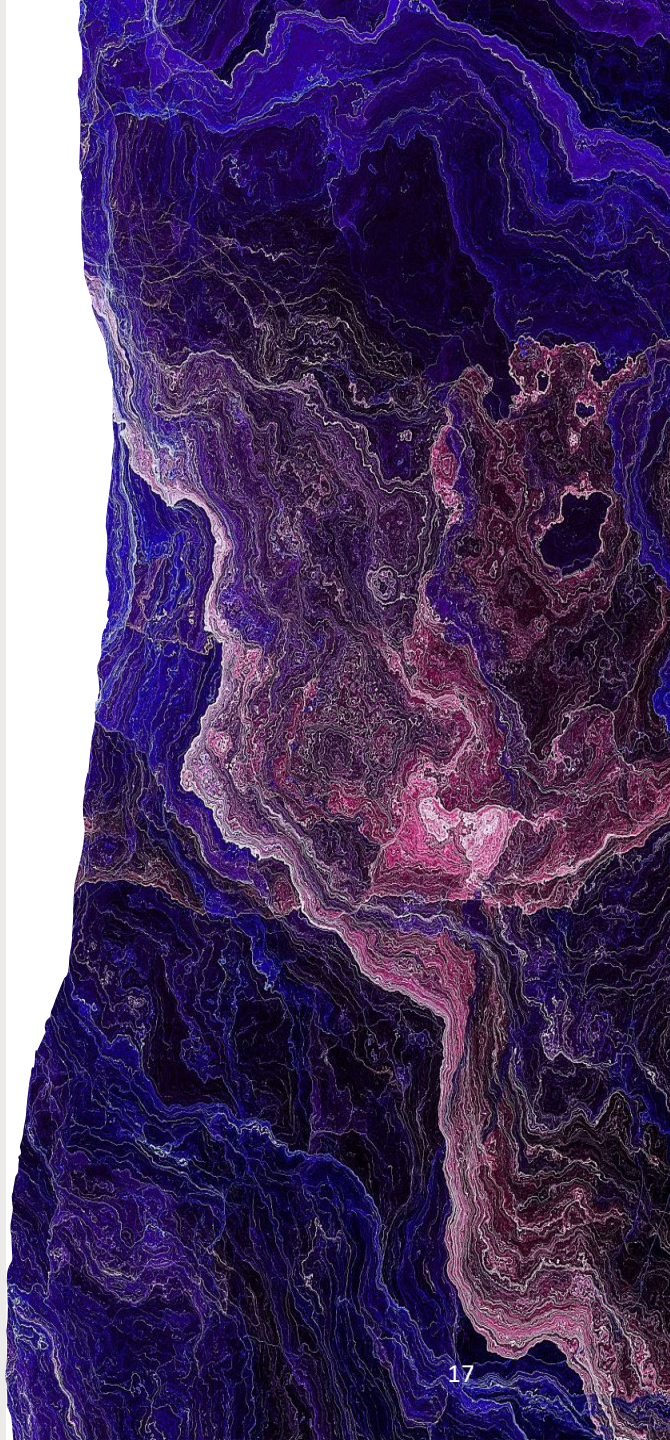
BEHAVIORAL Appetite: ____ Always munching on something; ____ Constantly Chewing Gum; ____ Frequently Eating Candy; ____
Popping Mints Often; ____
Other(describe)_____

MISCELLANEOUS ____
Presence of alcohol and/or drugs in employee's possession or vicinity ____
On-the-job misconduct by employee ____
Employee admission to alcohol and/or drug use or possession _____

COMPELLING INTEREST

A City desiring to implement a **random drug testing** policy should

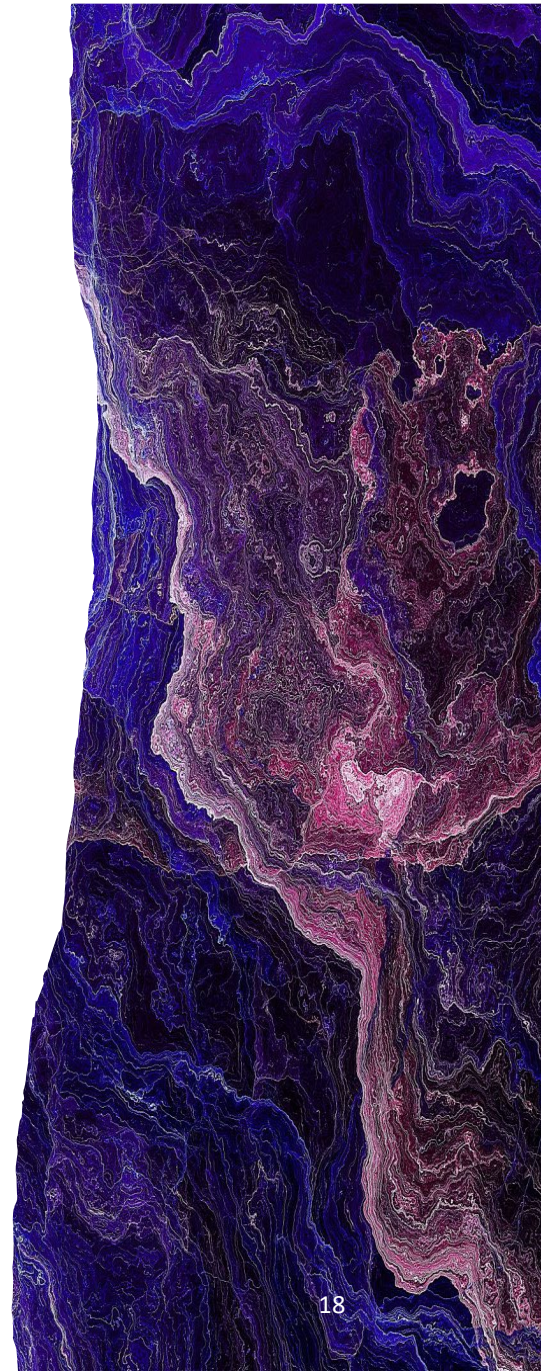
1. Articulate a "compelling interest" beyond the need for law enforcement that justifies such testing, then
2. Determine which employees may legitimately be randomly tested.
3. If unable to identify a "compelling interest" beyond the need for law enforcement, City should not perform random drug tests.



SAFETY-SENSITIVE POSITIONS

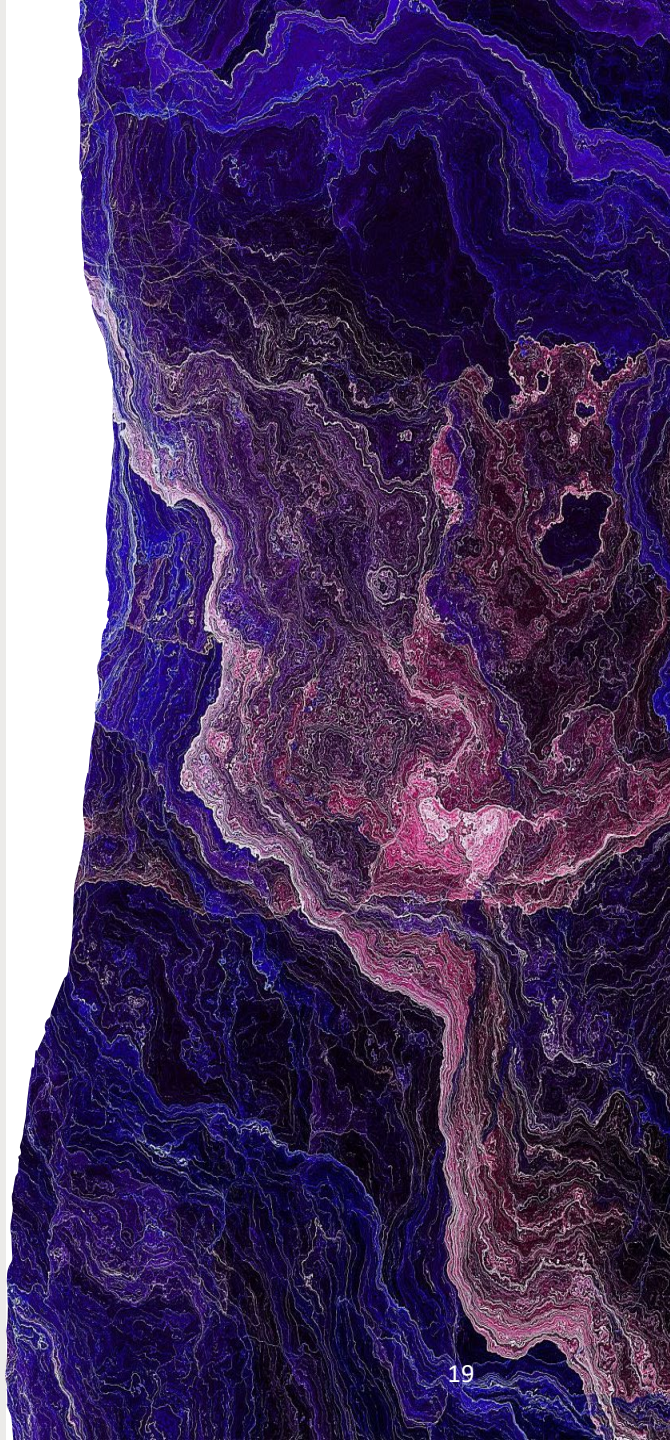
Courts have held that employees holding *safety-sensitive* positions may be randomly drug tested without violating the Fourth Amendment:

- Law enforcement employees carrying firearms/are directly involved in drug interdiction *Von Raab*, 489 U.S. at 679;
- Public transporters in industries where a documented problem drug or alcohol-related incidents. *Skinner*, 489 U.S. 602;
- Operators of heavy machinery/large vehicles or hazardous substances. *Id; Aubrey v. Sch. Bd. of Lafayette Par.*, 148 F.3d 559 (5th Cir. 1988);



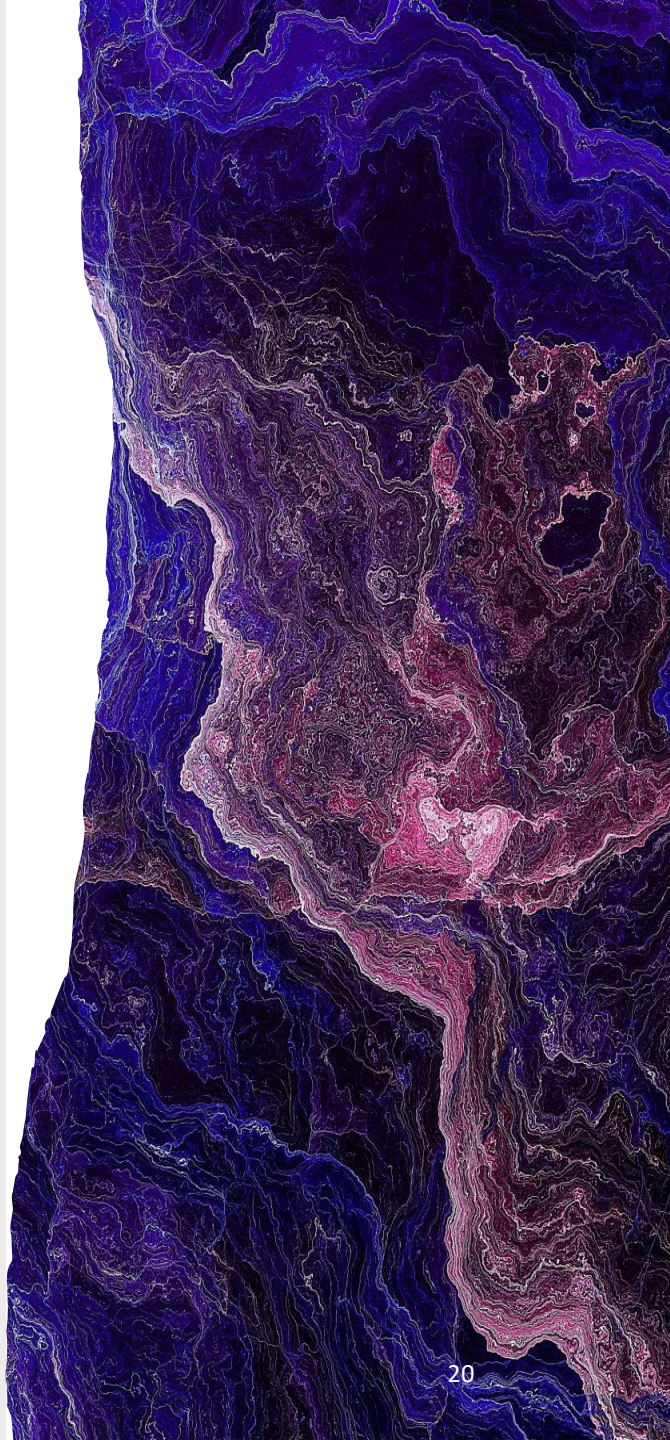
SAFETY-SENSITIVE (cont.)

- Employees working in high-risk areas such as highway medians. *Bryant v. City of Monroe*, No. 14-30020, 2014 WL 6466862 (5th Cir. 2014)); and
- Wastewater treatment employees who handle hazardous chemicals. *Bailey v. City of Baytown, Texas*, 781 F. Supp.1210 (S.D. Tex. 1991).
- Post-accident drug testing of employees holding safety- sensitive positions without individualized suspicion of wrongdoing has been upheld. *See Skinner*, 489 U.S. at 620.



WHAT OTHER JOBS ARE SAFETY- OR SECURITY-SENSITIVE?

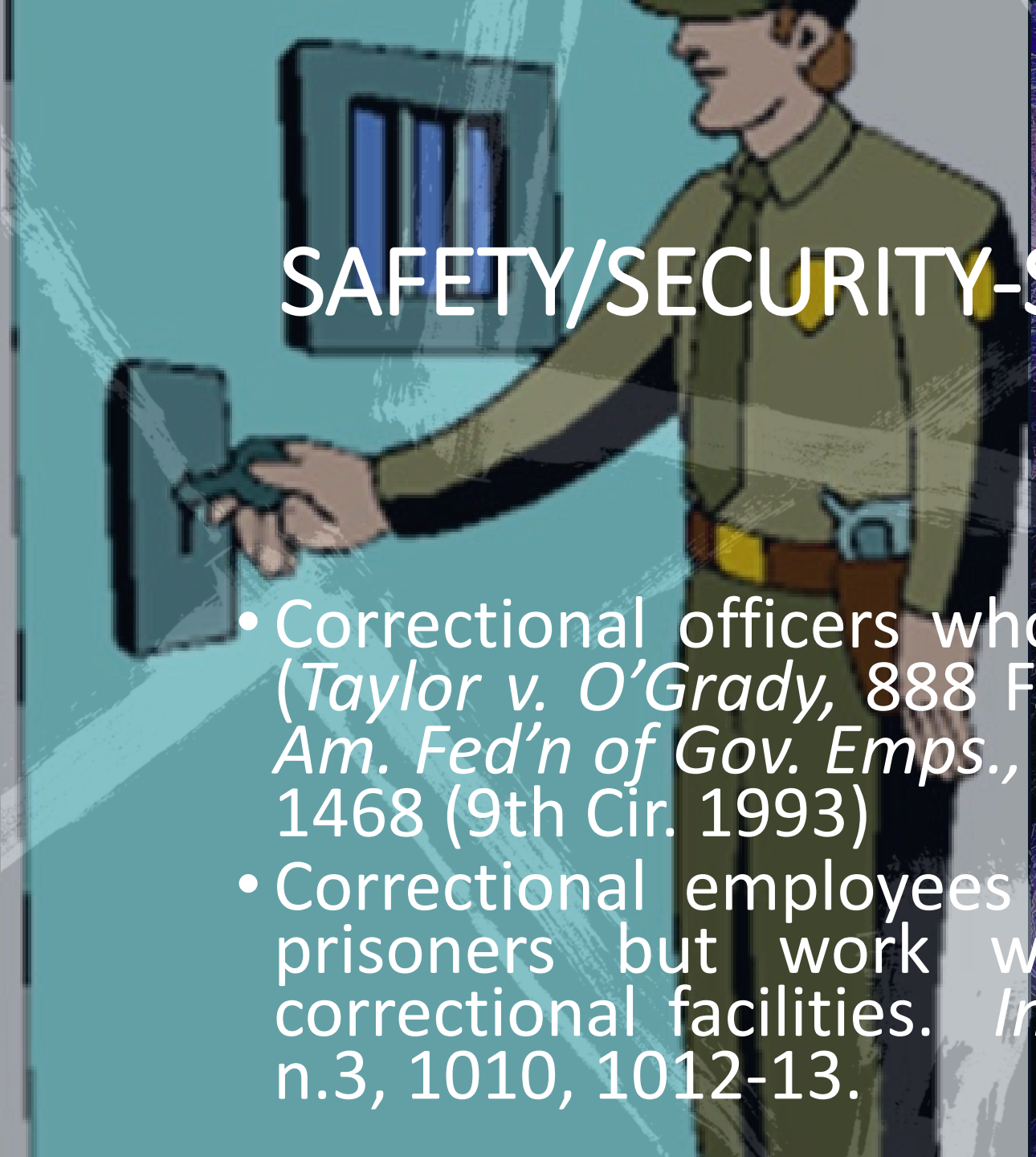
- Railway crews. *Skinner*, 489 U.S. 602
- Employees with "routine access to dangerous nuclear power facilities." *Skinner*, 489 U.S. at 628
- Customs employees who "engage directly" in preventing drug trafficking. *Von Raab*, 489 U.S. at 668
- Customs employees *required* to carry firearms. *Von Raab*, 489 U.S. at 672



SAFETY/SECURITY-SENSITIVE JOBS #2

- Police Officers. (*Carroll v. City of Westminster* 233 F.3d 208, 213 (4th Cir. 2000)
- "[L]aw enforcement personnel who carry firearms." *AFSCME Council 79 v. Scott* 717 F.3d 851, 858 (11th Cir. 2013)
- Customs employees who handle "truly sensitive information." *Von Raab*, U.S. at p. 678.
- Parole or probation officers and their field service assistants. *Int'l Union v. Winters,* 385 F.3d 1003, 1010, 1012-13. (6th Cir. 2004)





SAFETY/SECURITY-SENSITIVE JOBS #3

- Correctional officers who have contact with prisoners. (*Taylor v. O'Grady,* 888 F.2d 1189, 1199 (7th Cir. 1989); *Am. Fed'n of Gov. Emps., AFL-CIO v. Roberts* 9 F.3d 1464, 1468 (9th Cir. 1993)
- Correctional employees who do not have custody of prisoners but work within the perimeter of the correctional facilities. *Int'l Union*, 385 F.3d at 1006 & n.3, 1010, 1012-13.

SAFETY/SECURITY-SENSITIVE JOBS #4

- Employees providing health/psychological care to prisoners. *Int'l Union*, 385 F.3d at 1006, 1012-13.
- Employees providing services to residents at hospitals for mentally ill/developmentally disabled or veterans' homes' residents. *Int'l Union*, 385 F.3d at 1006, 1012-13.)
- Medical residents. *Pierce v. Smith,* 117 F.3d 866, 874 (5th Cir. 1997)
- Any hospital employee involved in direct, hands-on patient care," including hospital scrub technicians. *Kemp v. Claiborne County Hosp.* 763 F. Supp. 1362, 1368. (S.D. Miss. 1991)



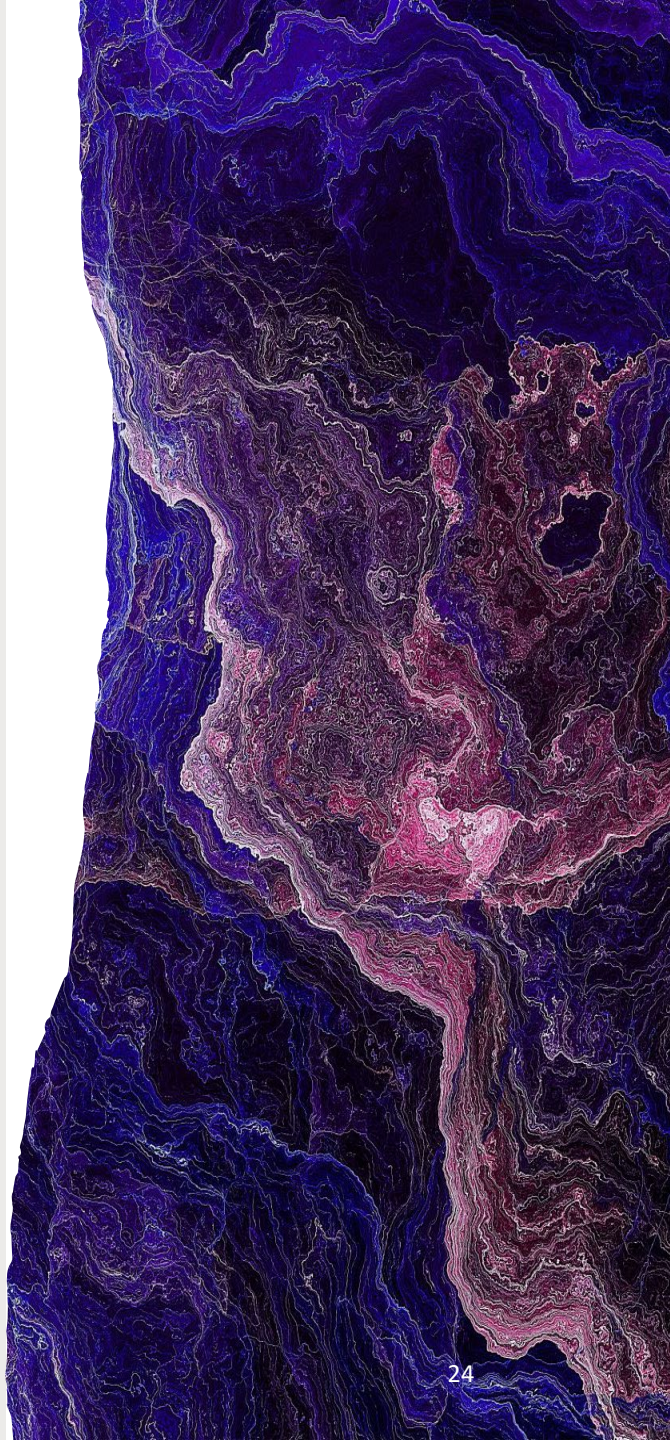
CONSENT? NOT VOLUNTARY

r a state constitution: "[a] search otherwise sonable cannot be redeemed by a public oyer's exaction of a 'consent' to the search ondition of employment."

er, 14 Cal.4th at 886, fn. 19

r U.S Constitution: "[e]mployees who must t to a drug test or be fired are hardly acting arily, free of either express or implied duress oercion."

Fed'n of State, County & Mun. Emps. uncil 79 v. Scott 717 F.3d 851, 874 (11th Cir. 3)

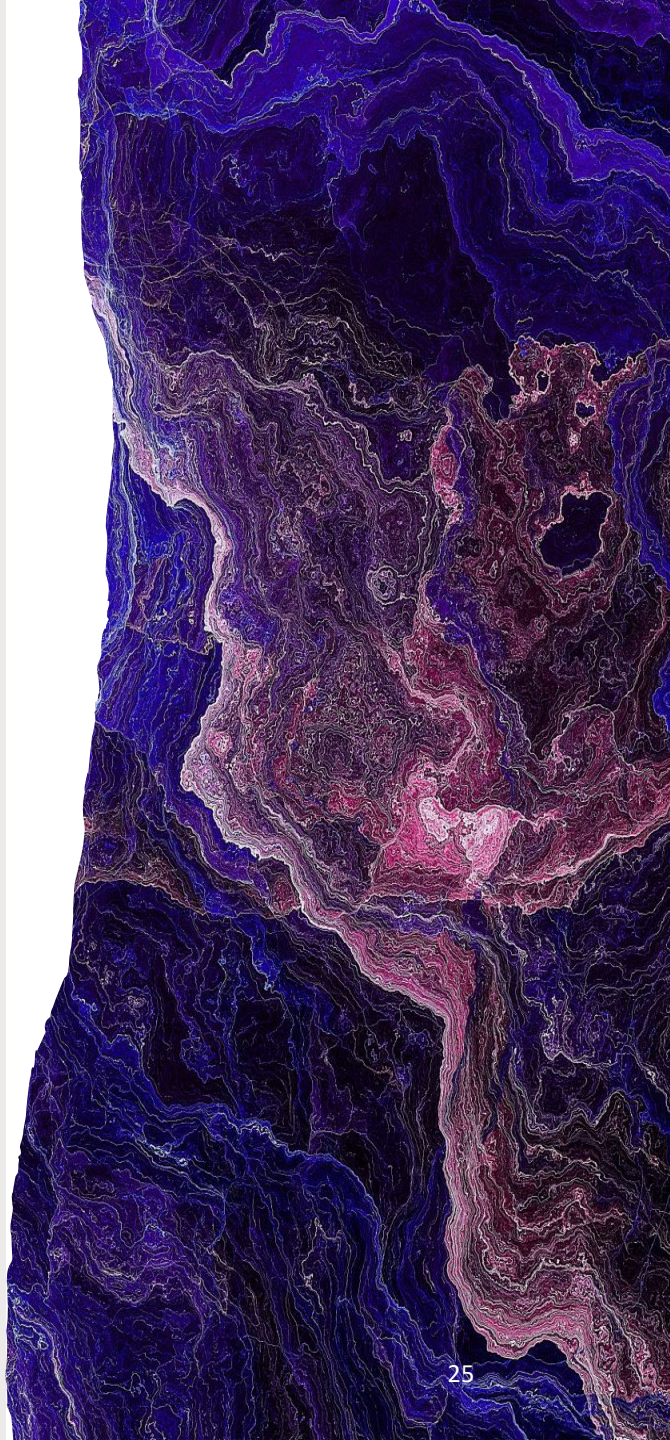


SPECIAL NEED EXCEPTION TO INDIVIDUALIZED SUSPICION

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r v. *Railway Labor Executives' Assn.* 489
2, 628 (1989)



SAFETY/SECURITY-SENSITIVE JOBS #5

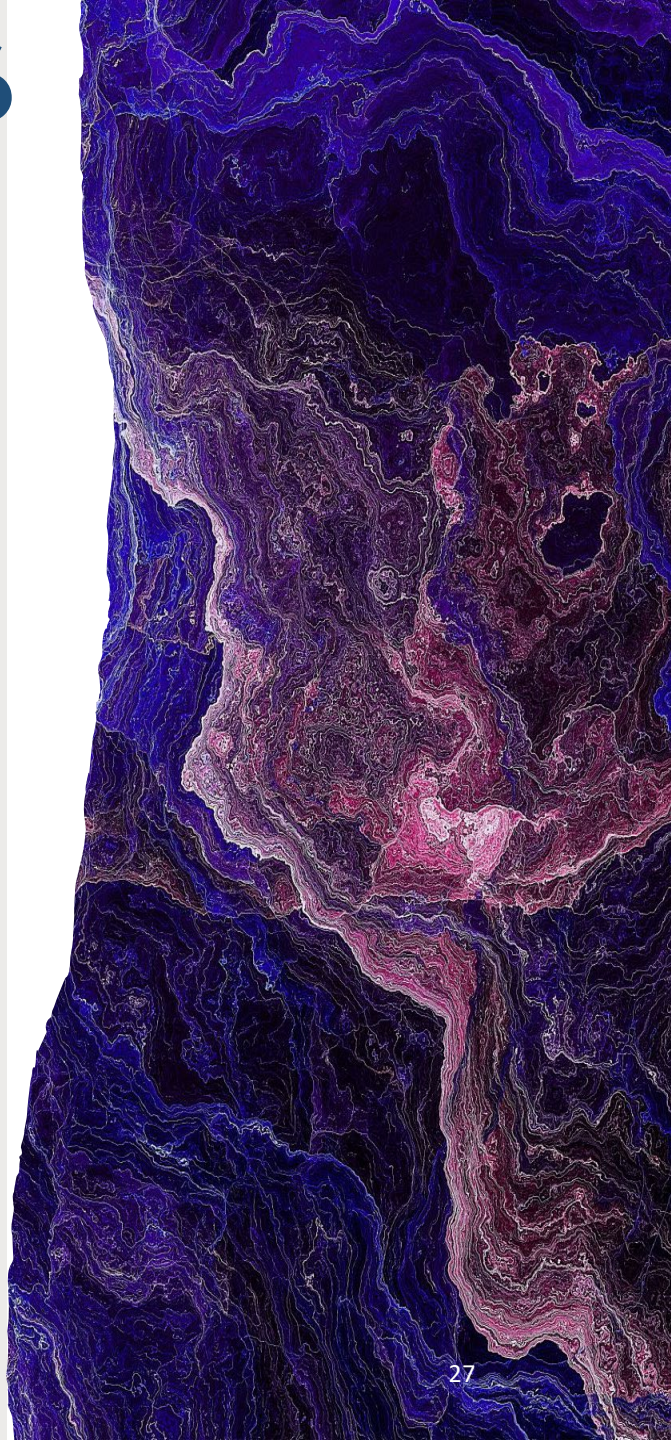
MAYBE school employees:

- 5th, 6th, & 11th Circuits have upheld testing of school custodians, substitute teacher applicants, and teachers based on concerns for the safety of schoolchildren and maintenance of environment conducive to education.
- *Aubrey v. School Bd. of Lafayette Parish* (5th Cir. 1998) 148 F.3d 559 [school custodians]
- *Knox County Educ. Assn. v. Knox County Bd. of Educ.* (6th Cir. 1998) 158 F.3d 361, 367 [teachers]
- *Friedenberg v. School Board of Palm Beach County* (11th Cir. 2018) 911 F.3d 1084, 1104 [substitute teacher applicants]
- *But see: Am. Fed'n of Teachers-West Virginia, AFL-CIO v. Kanawha County Bd. of Educ.* (S.D. W. Va. 2009) 592 F. Supp. 2d 883, 901-902 [teachers]



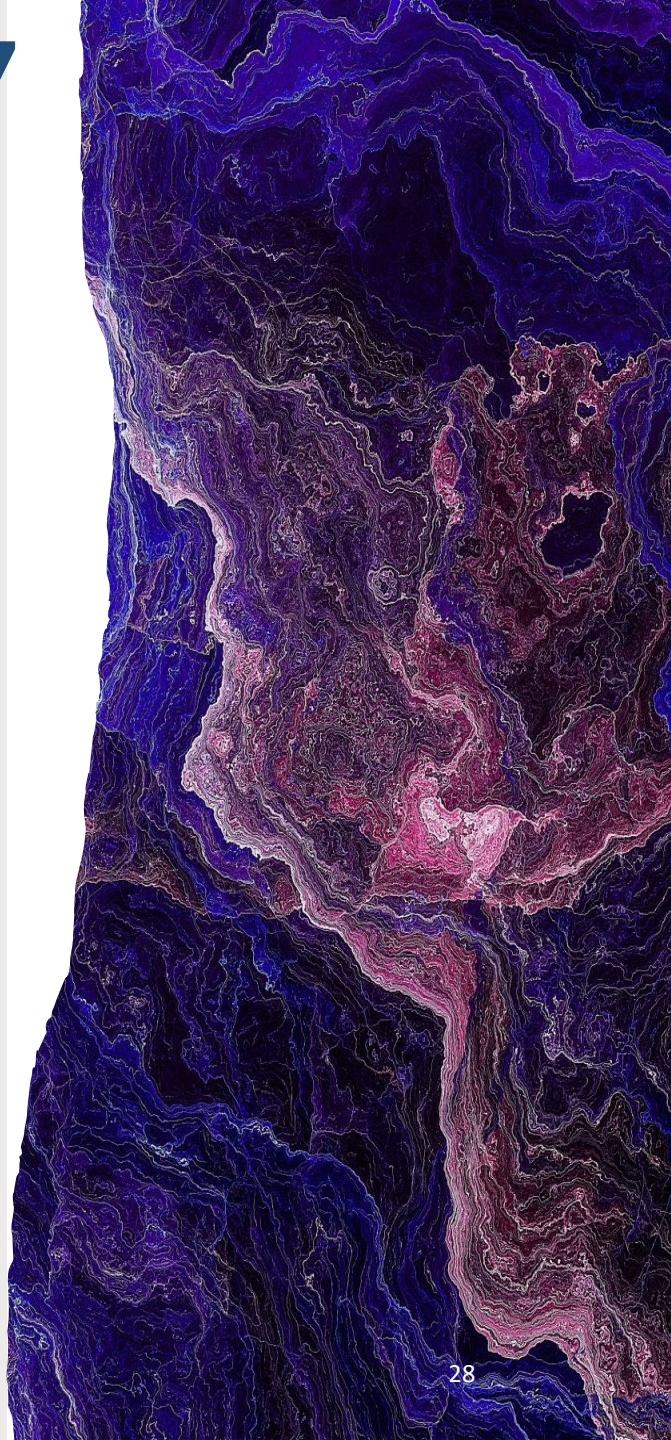
SAFETY/SECURITY-SENSITIVE JOBS #6

- Firefighters. *Hatley v. Department of Navy*,164 F.3d 602, (Fed. Cir. 1998)
- Employees who operate "heavy machinery or large vehicles." *AFSCME Council 79 v. Scott,* 717 F.3d 851, 858 (11th Cir. 2013)
- Employees who are involved with "the operation of natural gas and liquified natural gas pipelines." *Lanier*, 518 F.3d at p. 1152



SAFETY/SECURITY-SENSITIVE JOBS #7

- "[C]onstruction and maintenance workers" who operate power tools and heavy equipment in close proximity to fellow workers. *Smith*, 72 Cal.App.4th at 162)
- "[C]ertain categories of employees in [an employer's] chemical plant." *Semore v. Pool,* 217 Cal.App.3d 1087, 1098, fn. 6 (1990)
- Housekeeping staff on an offshore oil drilling platform. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.,* 23 Cal.App.4th 51, 66-67, *as modified on denial of reh'g*. (1994)



SAFETY/SECURITY-SENSITIVE JOBS #8

- Positions "involving the operation of dangerous instrumentalities, such as trucks …weigh[ing] more than 26,000 pounds, … used to transport hazardous materials, or … carry[ing] more than fourteen passengers at a time." *Lanier*, 518 F.3d at 1152.





SAFETY/SECURITY-SENSITIVE JOBS #9

- Employee whose "job duties included driving City vehicles and transporting co-workers, operating heavy groundskeeping equipment, handling pesticides, and working in high-risk areas such as highway medians." (*Bryant v. City of Monroe* (5th Cir. 2014) 593 F. App'x 291, 297.)

- "[E]mployees operating motor vehicles carrying passengers." (*Smith*, 72 Cal.App.4th at p. 160.)



JOBS THAT ARE NOT SAFETY/SECURITY- SENSITIVE

- Candidates for public office. *Chandler v. Miller* 520 U.S. 305, 321, (1997)



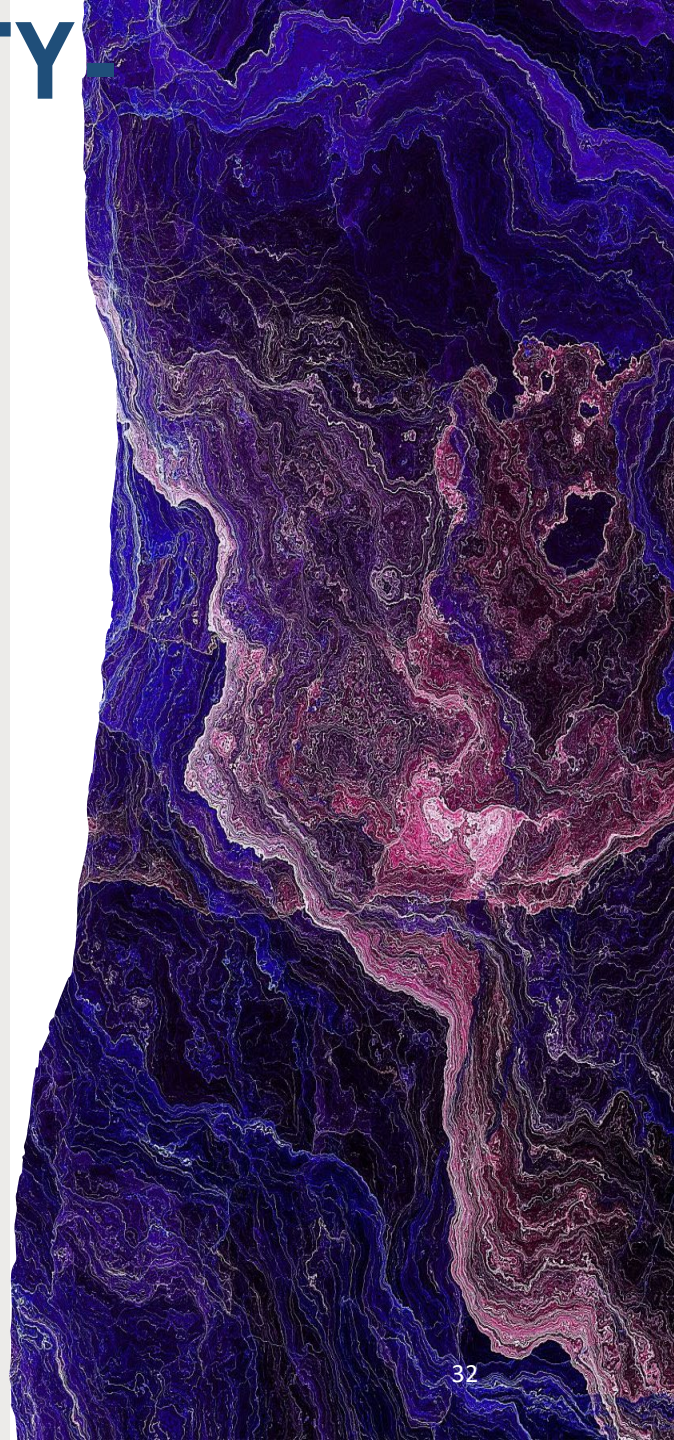
- Executive secretary for a company vice-president and marketing director. *Kraslawsky v. Upper Deck Co.* 56 Cal.App.4th 179, 183, 188. (1997)

JOBS THAT ARE NOT SAFETY/SECURITY-SENSITIVE #2

- Clerk, based on some "vague and indefinite safety risk." *AFSCME Council v. Scott*, 717 F.3d 851, 877-79 (11th Cir. 2013)

The Court nixed:

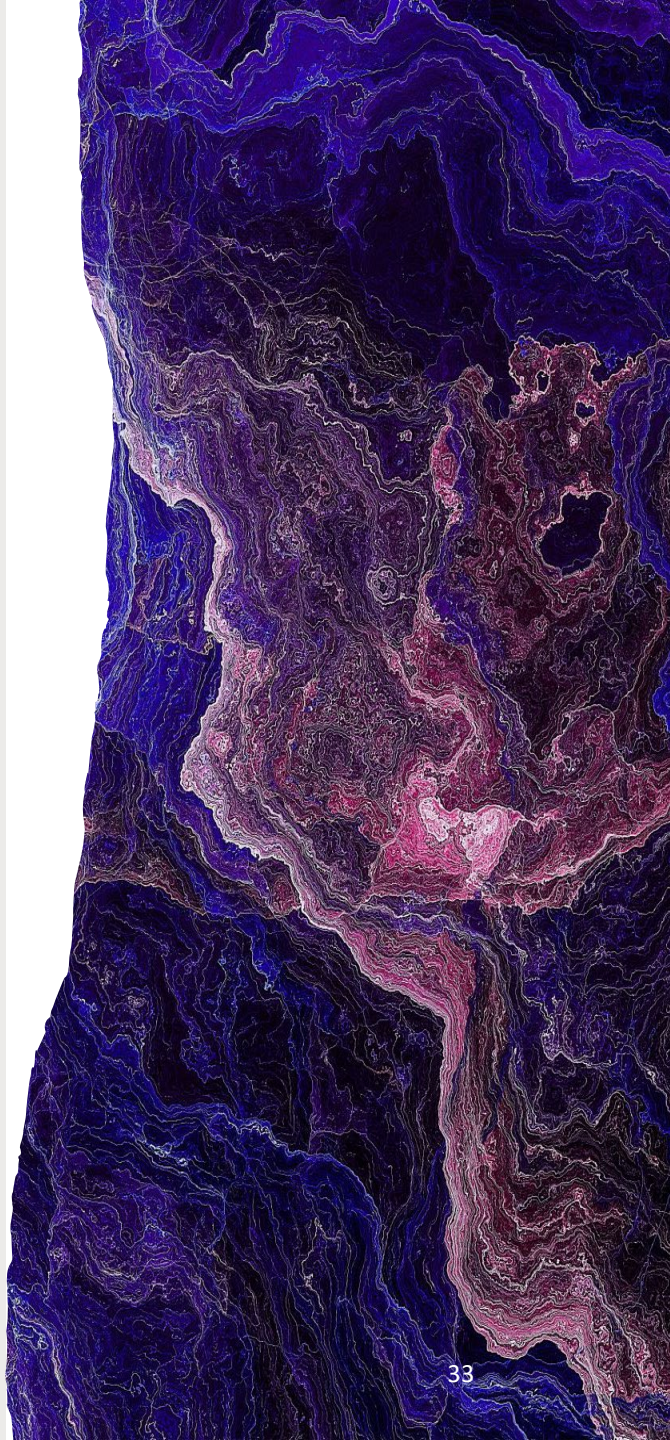
- "driving a car in the workplace parking lot."
- Lifting "stacks of heavy boxes, to high stair cases, to files on high shelves, wet floors, to elevators and escalators"



JOBS THAT ARE NOT SAFETY – OR SECURITY - SENSITIVE #3

- Employees who work at specialized residential schools for at-risk youth who had "very limited contact with students and [bore] no responsibility for maintaining" zero tolerance policy prohibiting student drug use. (*Nat'l Fed'n of Fed. Emps. v. Vilsack*, (D.C. Cir. 2012) 681 F.3d 483, 489-497.)

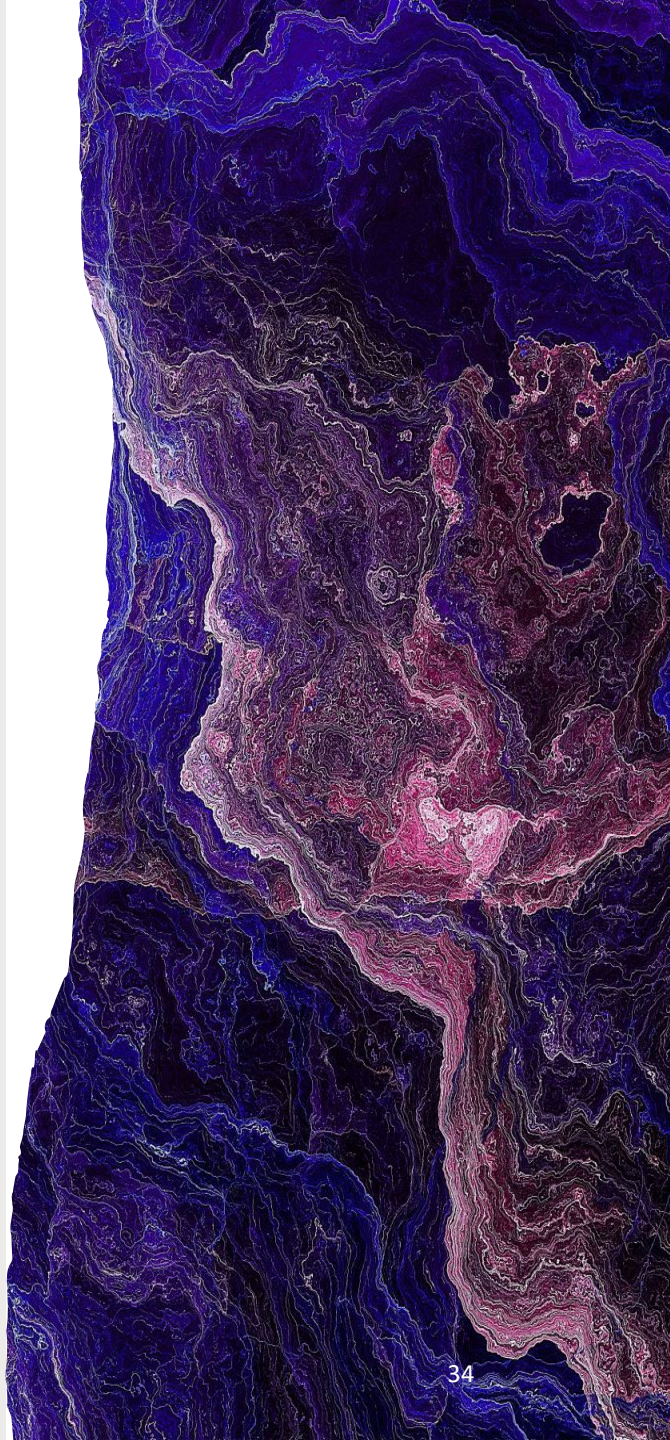
- Debt collectors. (*Aro v. Legal Recovery Law Offices, Inc.* (Cal. App. Apr. 8, 2015) 2015 WL 1577597, at *6.)



JOBS THAT ARE NOT SAFETY OR SECURITY - SENSITIVE? #4

- Accountants
- Accounting Technicians
- Animal Caretakers
- Attorneys
- Baggage Clerks
- Co-Op Students
- Electric Equipment Repairers
- Mail Clerks/Assistants
- Messengers

Von Raab, 489 U.S. at 78



CONSTITUTIONAL LIMITS ON THE *METHOD* USED FOR SAMPLE COLLECTION

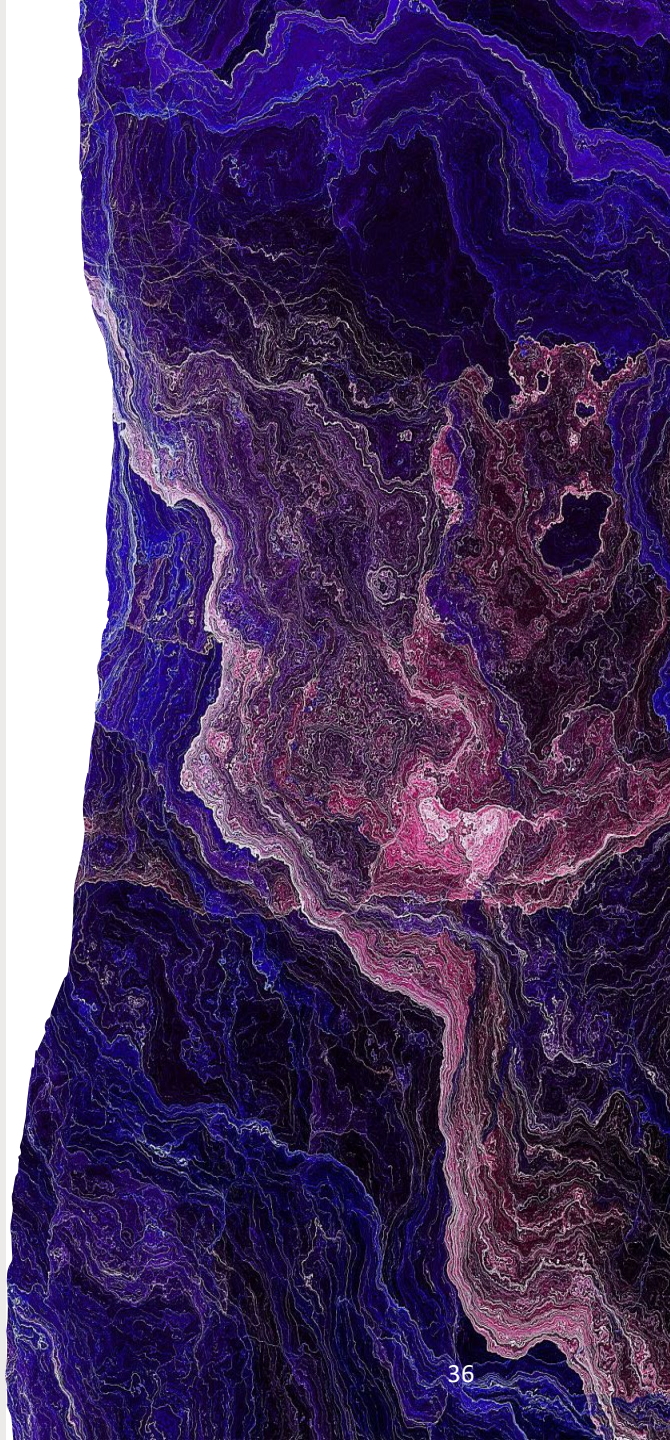
Even when drug and alcohol testing is constitutionally permissible, constitutional pitfalls abound in the method a City employer administers testing.





BLOOD TESTS

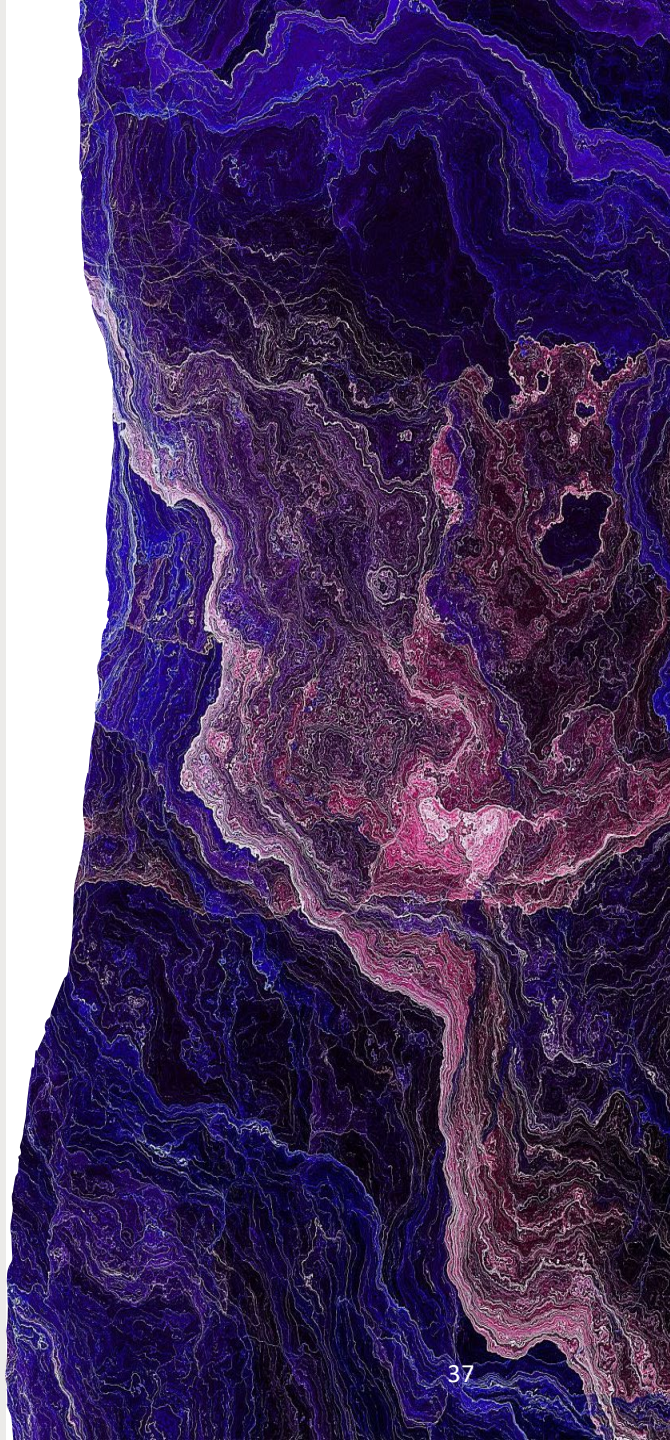
- Blood tests are not "an unduly extensive imposition on an individual's privacy and bodily integrity."
  - *Skinner*, 489 U.S. at p. 625,
  - *Missouri v. McNeely* 569 U.S. 141, 159 (2013), citing *Skinner*, 489 U.S. at 618-633



URINE TESTS

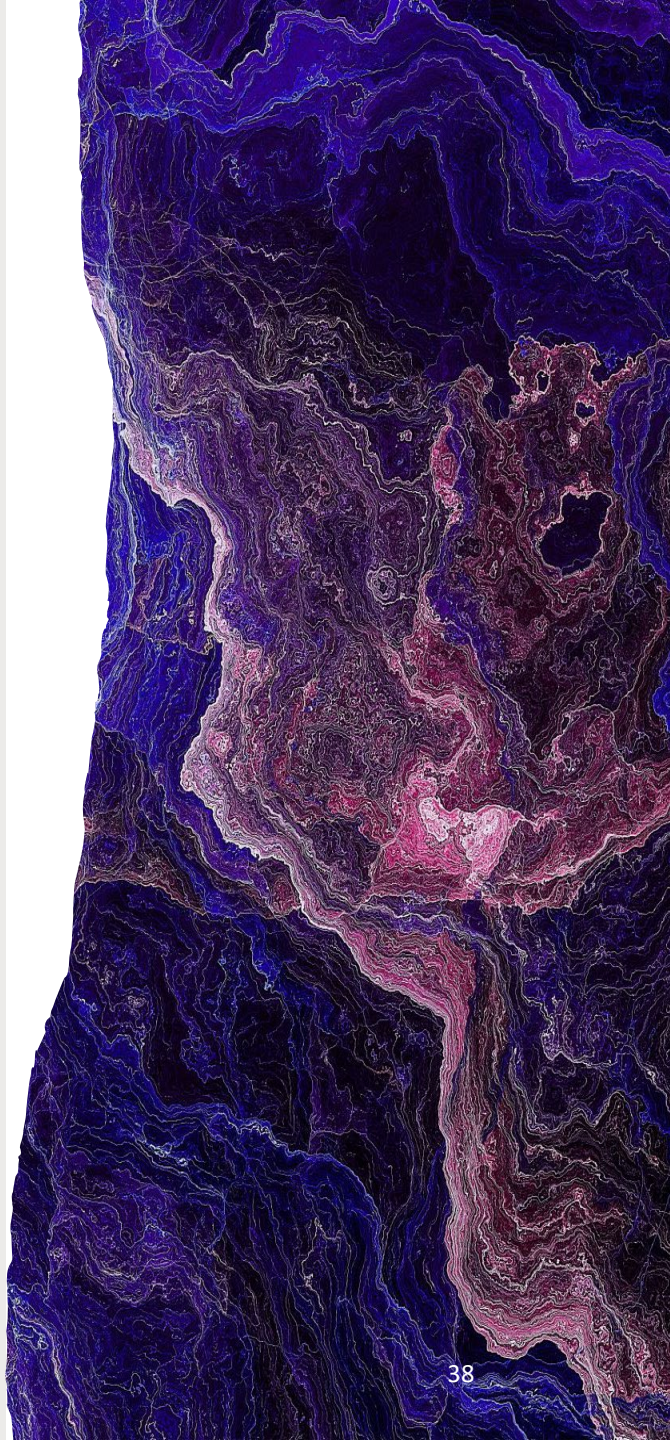
- But "[a] more difficult question is presented by urine tests" because "the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns ***not implicated by blood or breath tests.***" *Skinner*, 489 U.S. at 626 (Emphasis added)

- Courts have invalidated urine tests where the collection method is determined to unnecessarily intrude on privacy interests



URINE TESTING (cont.)

- *Indirect "Aural" Monitoring-* ***yes***
  - Courts are more likely to uphold urine collection tests that provide for indirect "aural" monitoring where the monitor is in the room during the test and can hear, but is not in a position to visually observe, the collection.
    - (*Vernonia School Dist. 47J,* 515 U.S. at p. 657.)
  - "[A]ll the leading cases observe that such indirect monitoring is minimally intrusive."
    - (*Loder,* 14 Cal.4th at p. 925 [conc. and dis. opn. of Chin, J.].)
- *Direct Visual Monitoring -* ***no***
- "particularly intrusive" and has only been upheld in very limited circumstances outside of the employment context. *See, e.g., Hill*, 7 Cal.4th at 43 (NCAA athlete testing)

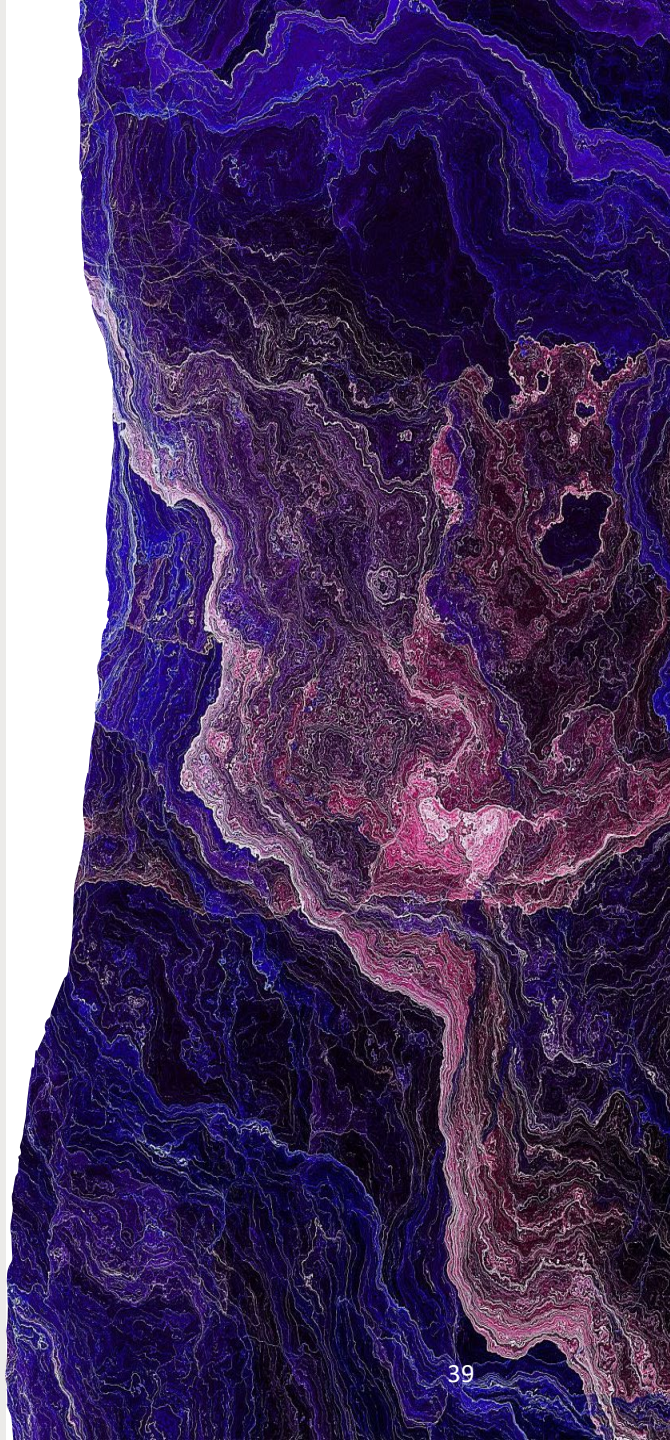


SPIT HAPPENS! SALIVA TESTS

- A mouth swab drug test, or saliva drug test, is a screening tool that uses an applicant's or employee's saliva to detect substance use. Also known as oral fluids drug tests, saliva drug tests, and oral swab tests.

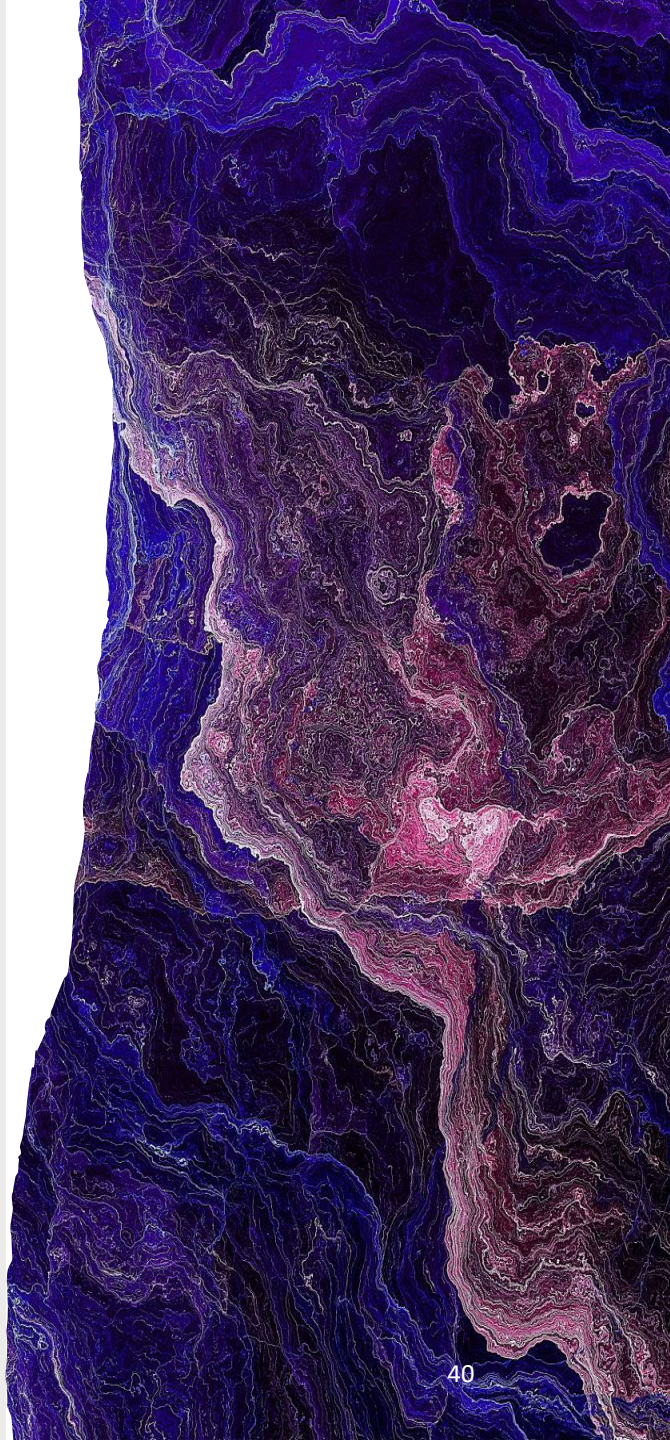
- Mouth swab drug tests aren't the typical types of pre-employment drug screens cities use, but they are an easier-to-administer alternative to urine or blood tests.

- Samples are collected under supervision, so more difficult for an applicant/employee to tamper with them, and they are also less invasive than blood, urine.



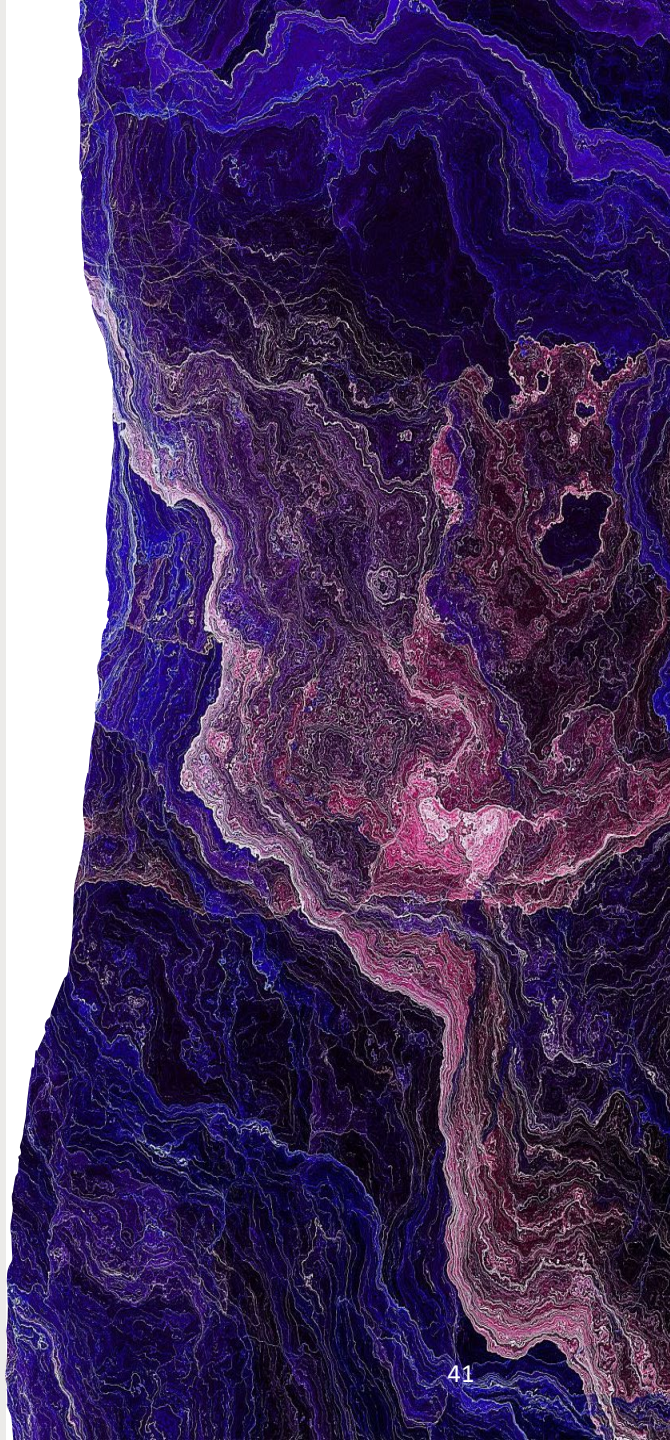
JUST SPIT! SALIVA TESTS

- DOT Proposed Rules February 2022 https://www.federalregister.gov/documents/2022/02/28/2022-02364/procedures-for-transportation-workplace-drug-and-alcohol-testing-programs-addition-of-oral-fluid
- Patterned after HHS Rule for Federal Sector Employee Testing.
- Saliva detects Meth, MDNA (Ecstasy) Cocaine, Heroin & Opioids, PCP, Benzodiazepines, Marijuana (THC)



SALIVA TESTING?

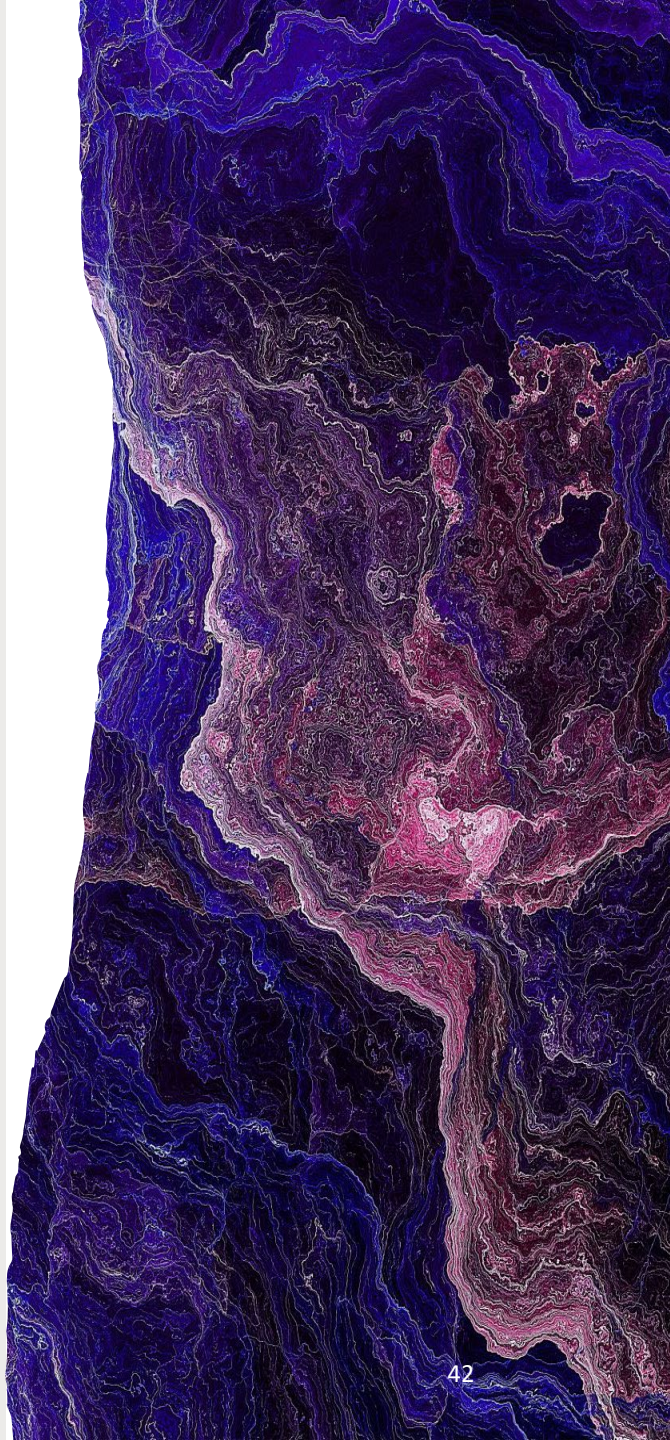
- Opiates have variable detection windows, but can generally be detected for 24 to 36 hours in a donor's saliva.
- Marijuana use can be detected within the last 24 hours.
- Long-acting benzodiazepines, including diazepam or oxazepam, are detectable for up to 10 days after use.
- An intermediate benzodiazepine such as lorazepam can only be detected for up to five days because the body can metabolize it faster.



JOB APPLICANT TESTING?

- Is mandatory "suspicionless testing" permissible for pre-employment?

- In *Loder v. City of Glendale* 14 Cal.4th 846 (1997), the California Supreme Court held that employers may subject applicants to *suspicionless* testing as part of an onboarding medical examination *regardless of whether they will hold security- or safety-sensitive positions*



JOB APPLICANTS? (cont.)

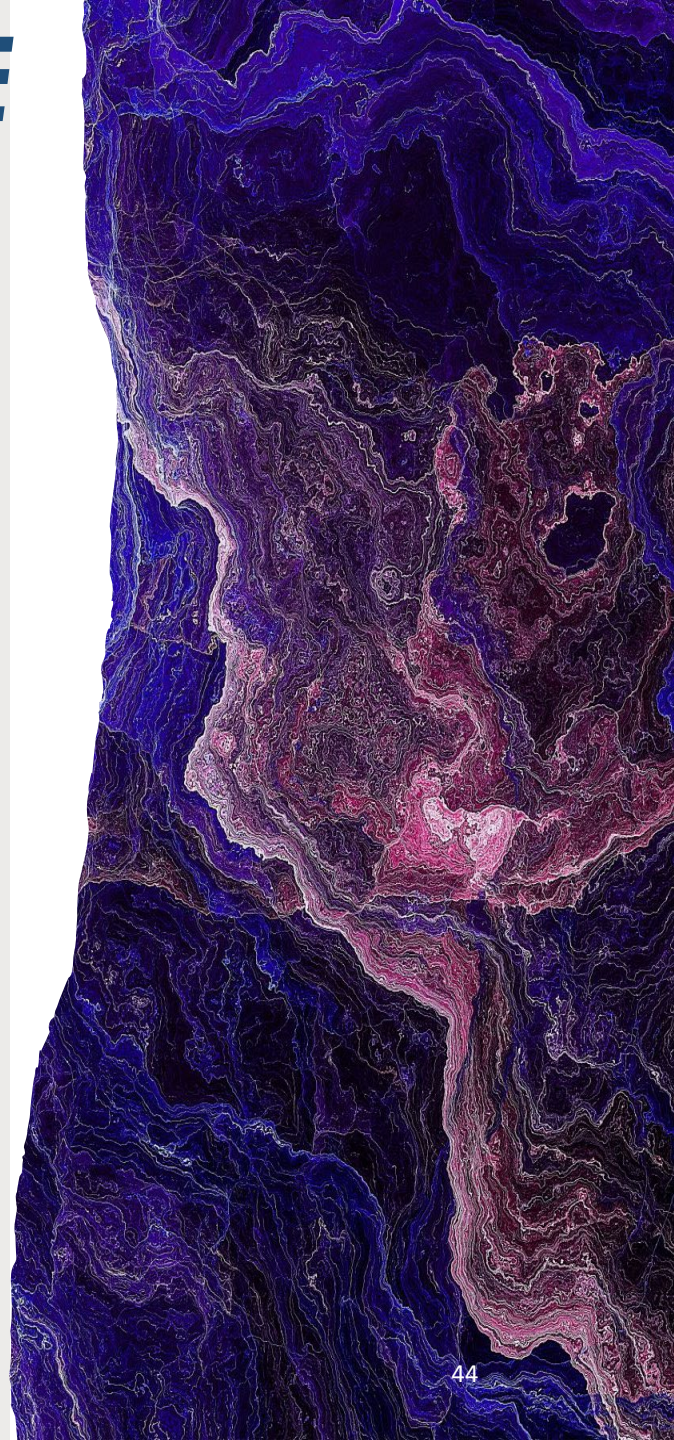
- However *Lanier v. City of Woodburn* 518 F.3d 1147 (9th Cir. 2008), the Ninth Circuit has applied the same legal standard to job applicants that applies to current employees.



LANIER V. CITY OF WOODBRIDGE

- *Lanier* applied for P/T Page, at City public library
- City gave Lanier a conditional employment offer, subject to background check & pre-employment drug/alcohol screening. Rescinded offer after Lanier refused testing.

- 9th Circuit: The City failed to articulate "special need" to screen Lanier "without suspicion" Court "discern[ed] no substantial risk to public safety posed by Lanier's prospective position as a part-time library page." *Id.* at 1152

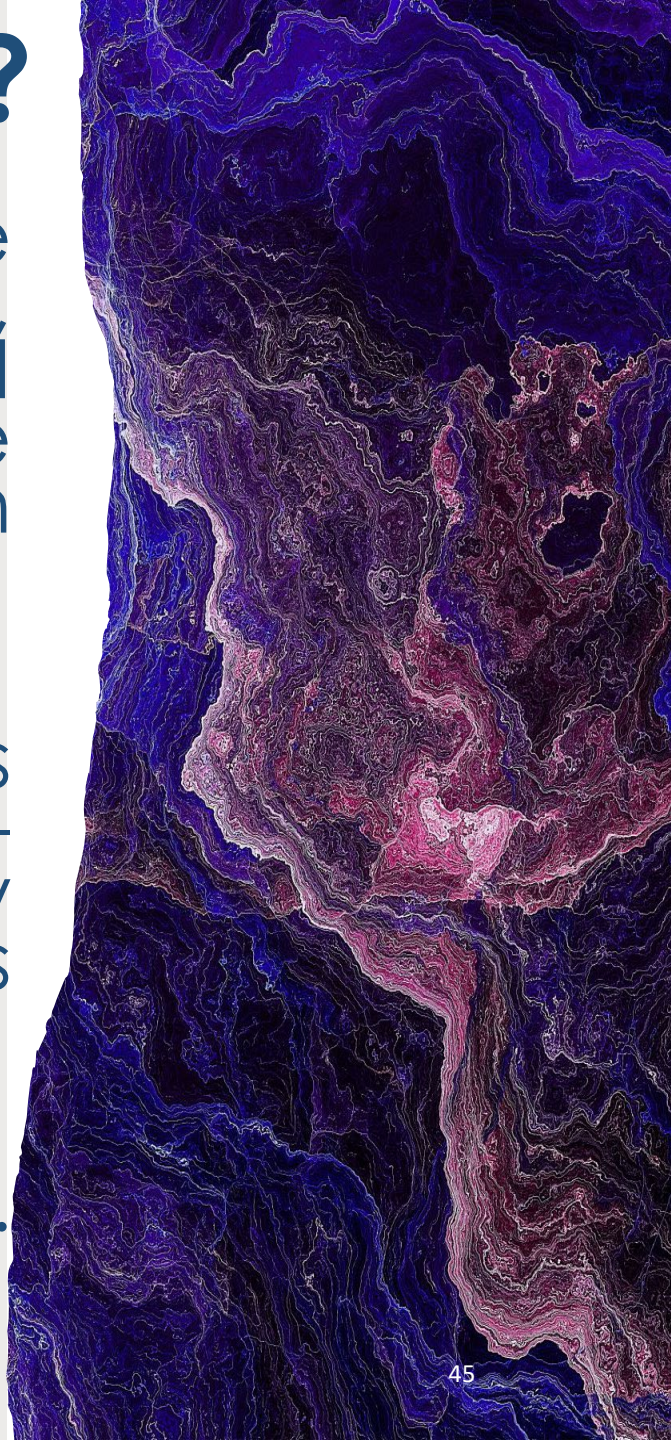


HARMONIZING *LODER* & *LANIER*?

- It is possible that these cases may be harmonized on the ground that, unlike *Loder*, the drug testing in *Lanier* was not administered as part of a medical examination in which the applicant already had a reduced expectation of privacy.

- At least one district court in the 9th Circuit has rejected the argument that applicants for non-safety- or non-security sensitive positions may be subject to pre-employment medical exams without justification.

  Taylor-Failor v. County of Hawaii 90 F. Supp. 3d 1095, 1101 (D. Hi. 2015)

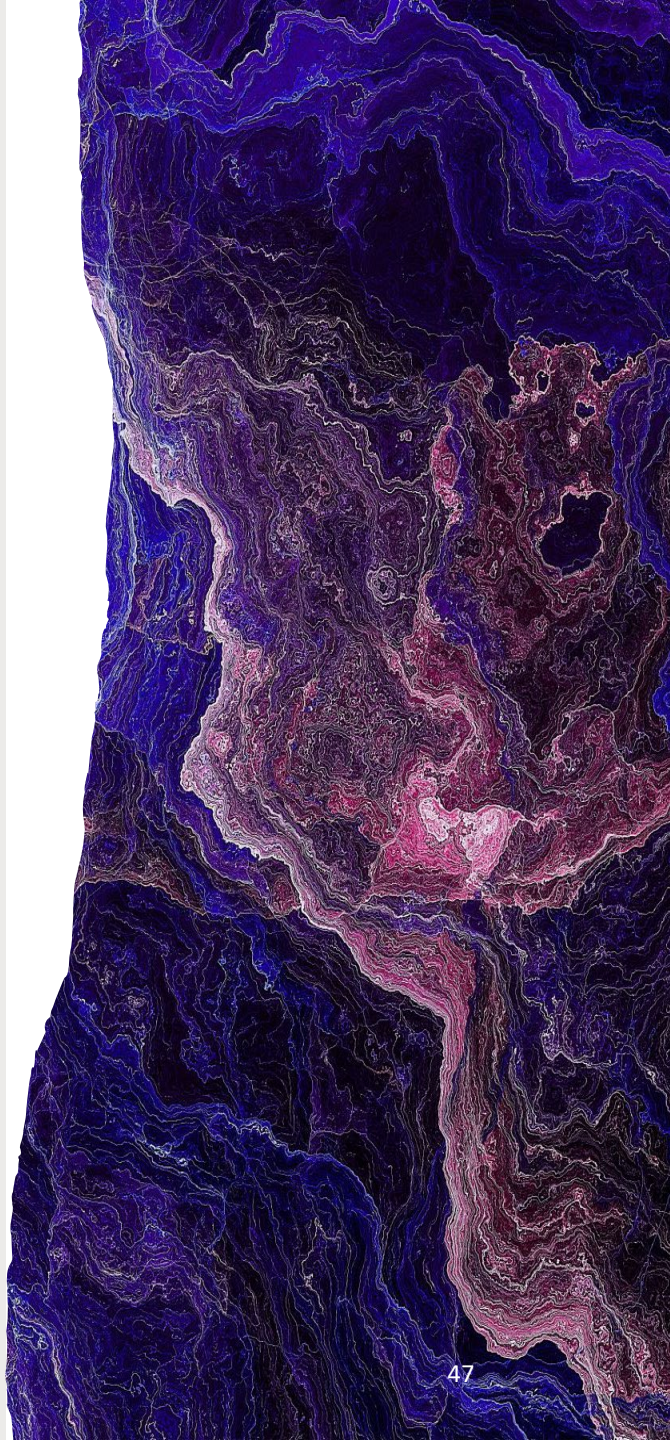



Federal Prohibitions &
Affirmative Duties

FEDERAL DRUG-FREE WORKPLACE ACT

- Drug-Free Workplace Act ("DFWA") requires **federal grant recipients** to prohibit unlawful drug use and other drug-related activity ***at the employer's worksites***. (See 41 U.S.C §§ 8101(a)(5), 8103

- Failure to comply may result in suspension or termination of grants and disqualification for future grants for up to 5 years. (41 U.S.C. § 8103(b); *See also,* Executive Order 12549 – Debarment and Suspension



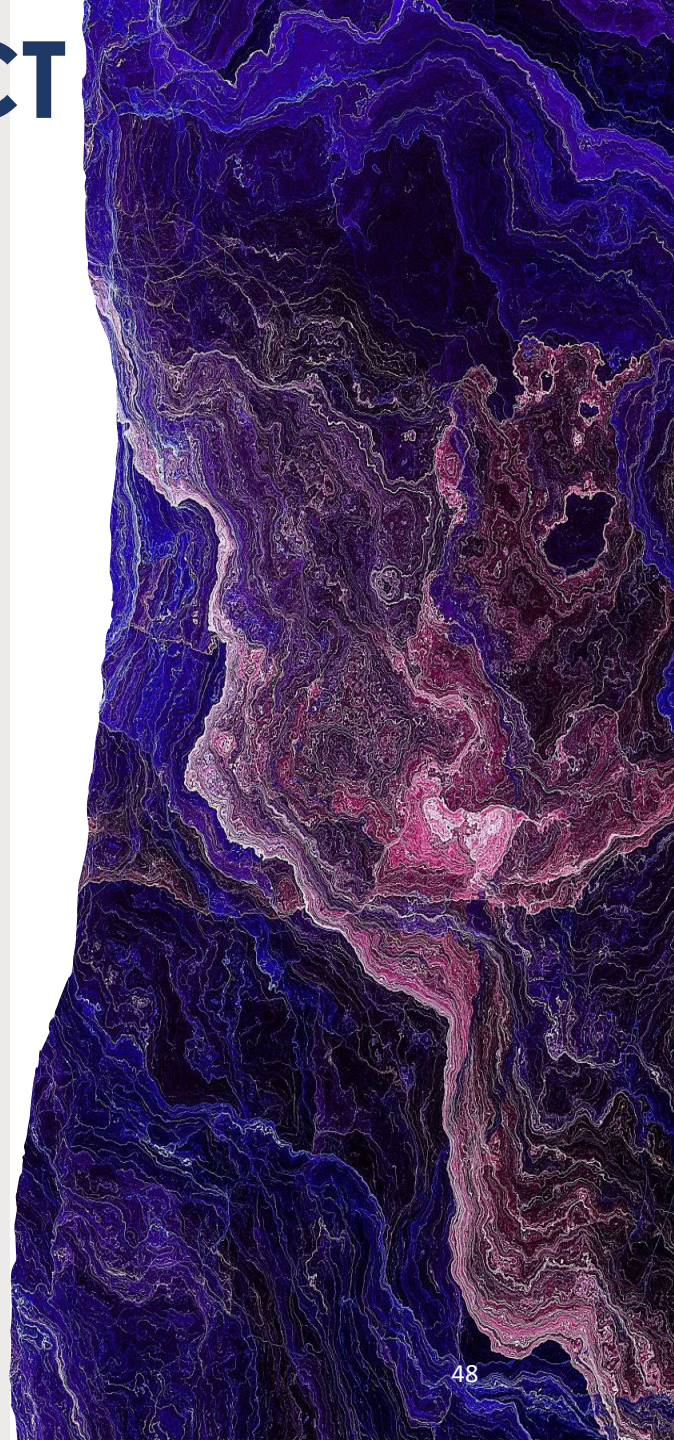
FEDERAL DRUG-FREE WORKPLACE ACT

The DFWA does **NOT** require:

- A drug testing program OR
- Regulation of ***off-duty*** conduct of employees

- *Parker v. Atlanta Gas Light Co.* (S.D. Ga. 1993) 818 F. Supp. 345, 346

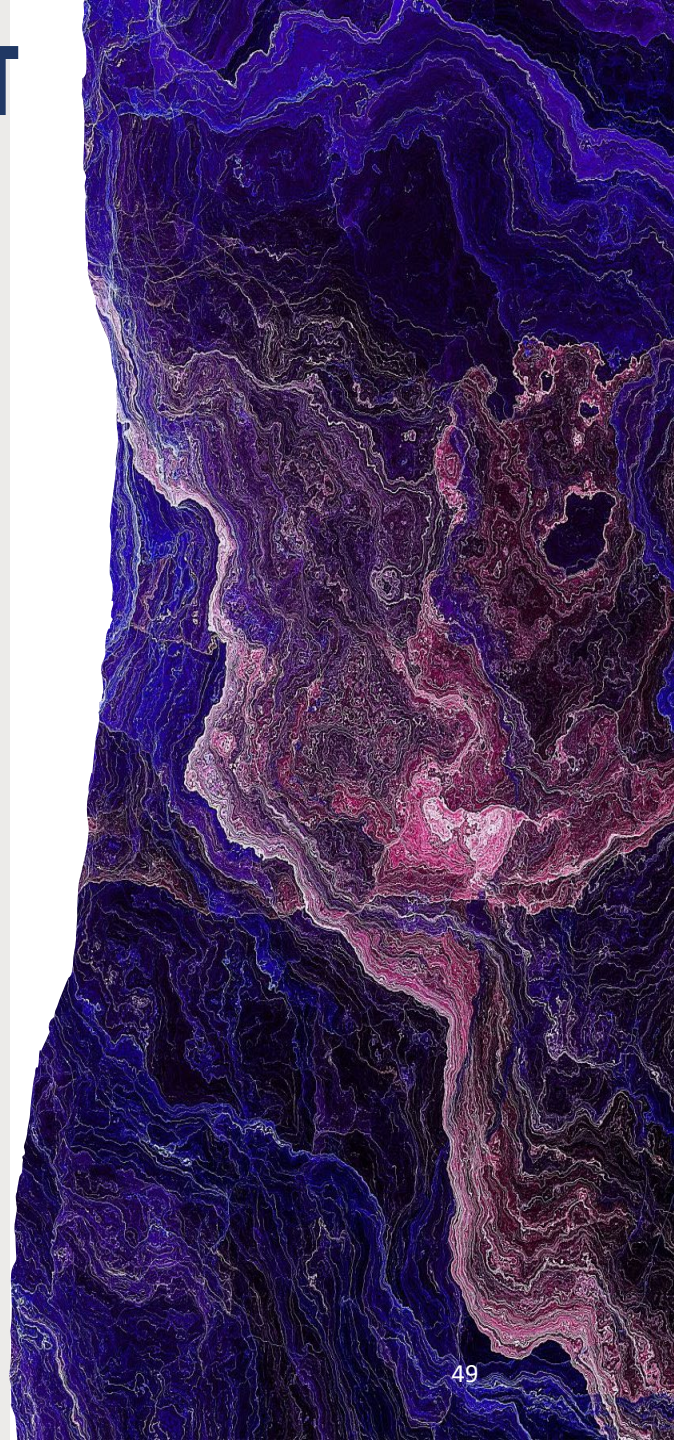
- *Noffsinger v. SSC Niantic Operating Company LLC* (D. Conn. 2017) 338 F.Supp.3d 78, 84.



FEDERAL CONTROLLED SUBSTANCES ACT

- Controlled Substances Act ("CSA") prohibits possession of cannabis; makes it unlawful for any person to knowingly and intentionally distribute cannabis. 21 U.S.C. §§ 844(a), 841(a)(1).

- Generally, state courts have held that the CSA **does not preempt** state laws legalizing recreational or medical cannabis use. *See, e.g., Smith v. Superior Court* (2018) 28 Cal.App.5th Supp. 1, 5-6



United States Department of Transportation

FMCSA
Federal Motor Carrier Safety Administration

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Enforcement and SD

UG & ALCOHOL
LEARINGHOUSE

Learn | About | Contact



Welcome to the Drug and Alcohol Clearinghouse

nline database that gives employers and government agencies real-time access to information about driver drug and alcohol program violations.

Type here to search

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DRUG & ALCOHOL CLEARINGHOUSE

[Event Name]
[Audience]

[Date]



U.S. Department of Transportation
Federal Motor Carrier Safety Administration

The Clearinghouse Initial Rule

- Mandated by Congress (MAP-21, Section 32402)
- Published December 5, 2016
- Established requirements for the Clearinghouse
- **Implemented on January 6, 2020**



Read the Clearinghouse final rule at:

www.fmcsa.dot.gov/regulations/commercial-drivers-license-drug-and-alcohol-clearinghouse

Who is required to use the Clearinghouse?

- ☑ Drivers who hold commercial driver's licenses (CDLs) or commercial learner's permits (CLPs)
- ☑ Employers of CDL drivers who operate commercial motor vehicles
- ☑ Consortia/Third-Party Administrations (C/TPAs)
- ☑ Medical Review Officers (MROs)
- ☑ Substance Abuse Professionals (SAPs)
- ☑ State Drivers Licensing Agencies (SDLAs)



The FMCSA Commercial Driver's License Drug and Alcohol Clearinghouse



Record

Employers and **medical review officers** report violation information to the Clearinghouse (positive tests, refusals to test, actual knowledge)

Retain

Secure database retains the violation and CDL/CLP number

Includes driver's status in return-to-duty (RTD) process

Query

Employers and C/TPAs query the Clearinghouse for violation information, with driver consent

FMCSA uses data for enforcement purposes

State enforcement agencies will receive driver eligibility status (i.e., Prohibited/Not Prohibited)

Drivers can access only their own information

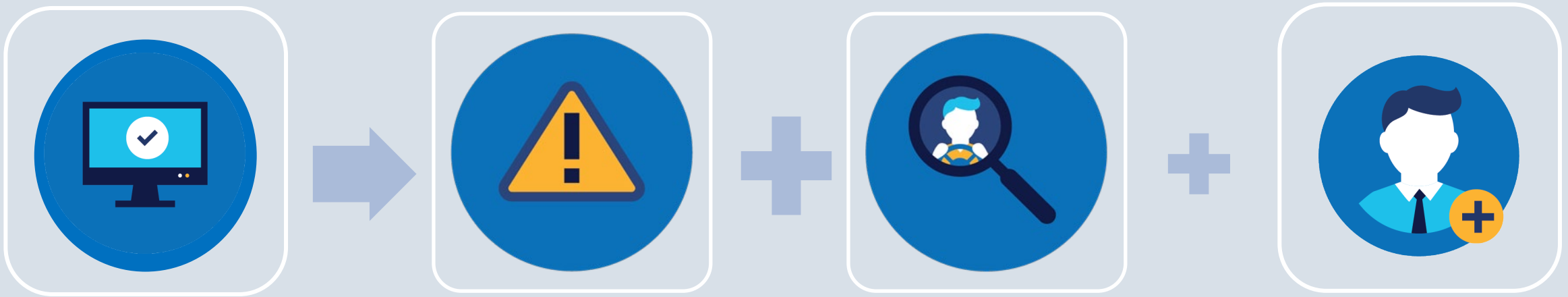
Am I covered by the Clearinghouse rule?

- All CDL drivers who operate CMVs on public roads and their employers and service agents. This includes, but is not limited to:
  - Interstate and intrastate motor carriers, including passenger carriers
  - School bus drivers
  - Construction equipment operators
  - Limousine drivers
  - Municipal vehicle drivers (e.g., waste management vehicles)
  - Federal and other organizations that employ drivers subject to FMCSA drug and alcohol testing regulations (e.g., Department of Defense, municipalities, school districts)
- Government entities are not required to obtain a USDOT Number under 49 CFR Part 390, however they *are* subject to the Controlled Substance and Alcohol Testing regulations in 49 CFR Part 382

Learn more about the specific actions each user can take at:

https://clearinghouse.fmcsa.dot.gov/Resource/Index/User-Roles

Employer Requirements



Register

- Link to your FMCSA Portal account (optional)

Record

- Report CDL driver drug and alcohol program violations
- Test refusals, actual knowledge

Query

- Check if driver is prohibited from operating a CMV
- Pre-employment and annual

Designate

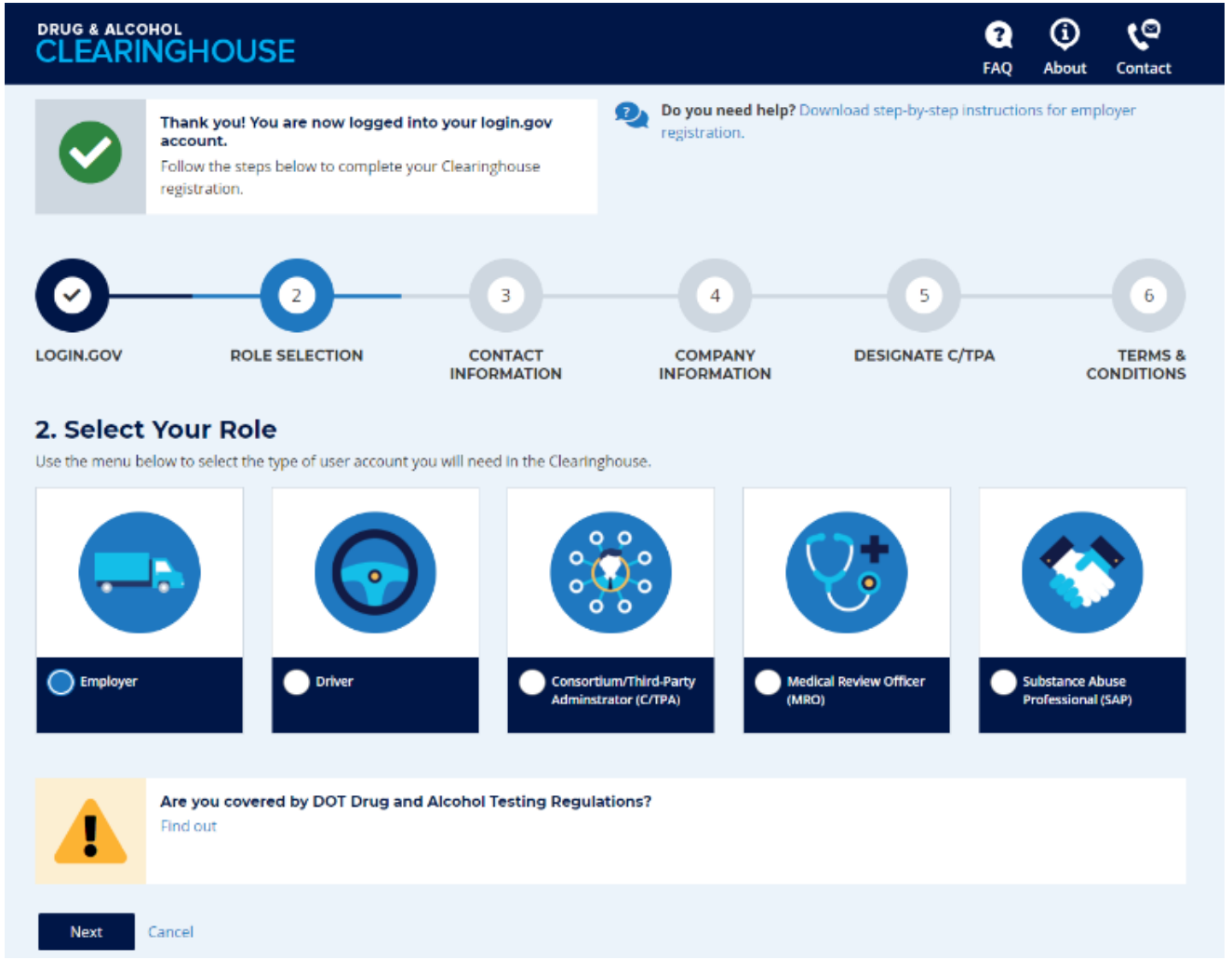
- Designate a C/TPA (optional)
- C/TPA may conduct queries, report violations and RTD information on your behalf

Registering for the Clearinghouse

- Must have a login.gov account to register for the Clearinghouse

  When selecting a method for second factor authentication do not select “backup codes”

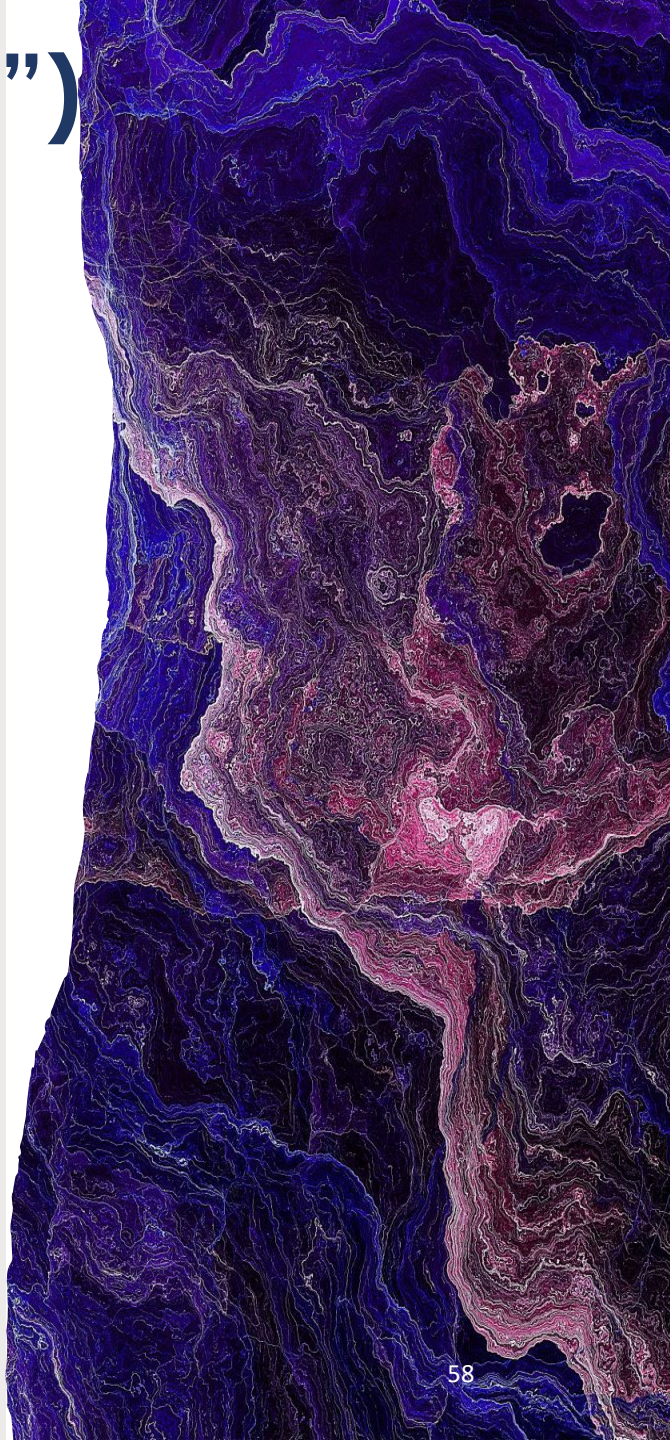
- After you have logged in to your login.gov account, select your user role



AMERICANS WITH DISABILITIES ACT("ADA")

- ADA prohibits both "***medical examinations***" & "***disability-related inquiries***" unless the exam or inquiry is
  - "shown to be **job-related**" *and*
  - "**consistent with business necessity**."

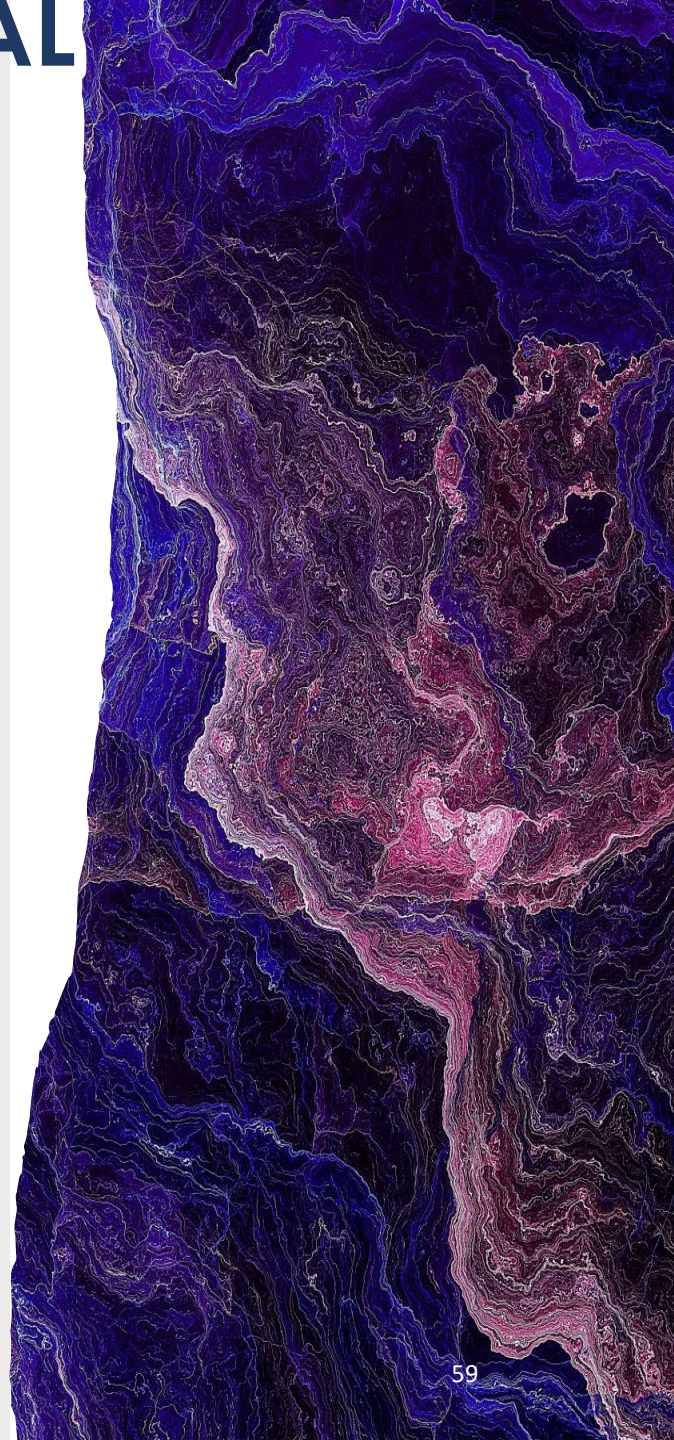
  42 U.S.C. § 12112(d)(4)(A)
- A "medical examination" is "a procedure or test that seeks information about an individual's physical or mental impairments or health."
- A "disability-related inquiry" is a "question (or series of questions) that is likely to elicit information about a disability."



WHEN IS *DRUG TESTING* A MEDICAL EXAMINATION?

- "a test to determine the illegal use of drugs shall not be considered a medical examination." 42 U.S.C. § 12114(d)

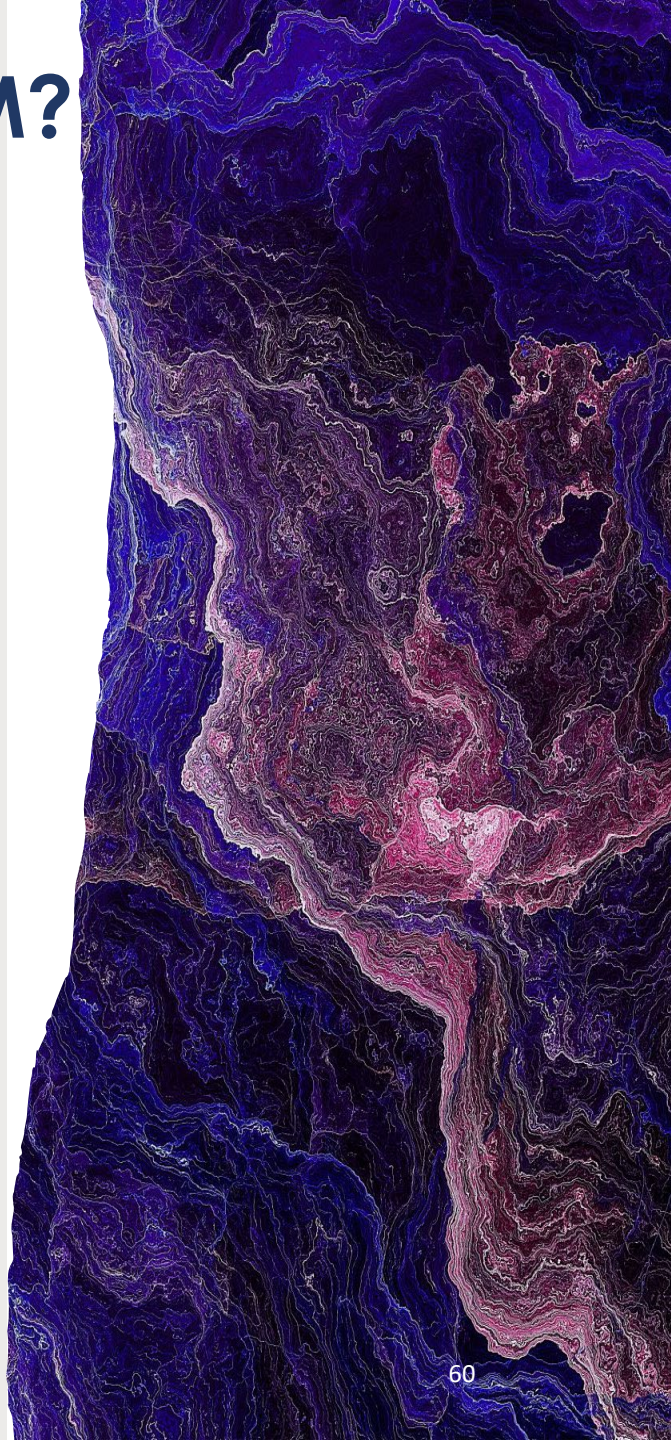
  - "The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act." 42 U.S.C. § 12111(6)(A).
  - The term "illegal use of drugs" "does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of federal law." 42 U.S.C. § 12111(6)(A)



WHEN IS *DRUG TESTING A* MEDICAL EXAM?

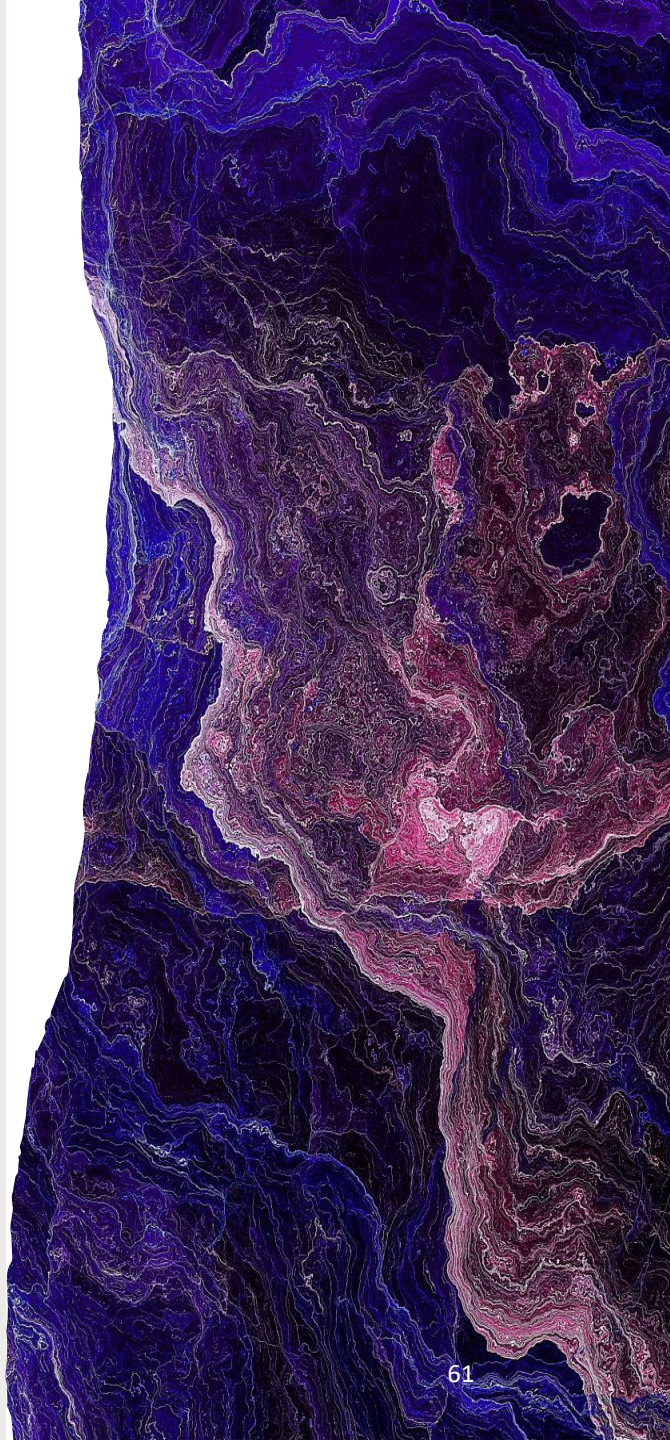
- Testing for cannabis, other federally banned substances, or prescription drugs without a prescription is not a "medical examination" under the ADA.

- Courts has concluded this applies even to medical use of cannabis that is lawful under state law because such use remains unlawful under federal law See, e.g., testing for cannabis, other federally banned substances, or prescription drugs without a prescription is not a "medical examination" under the ADA See, e.g., *James v. City of Costa Mesa* 700 F.3d 394, 405 (9th Cir. 2012)



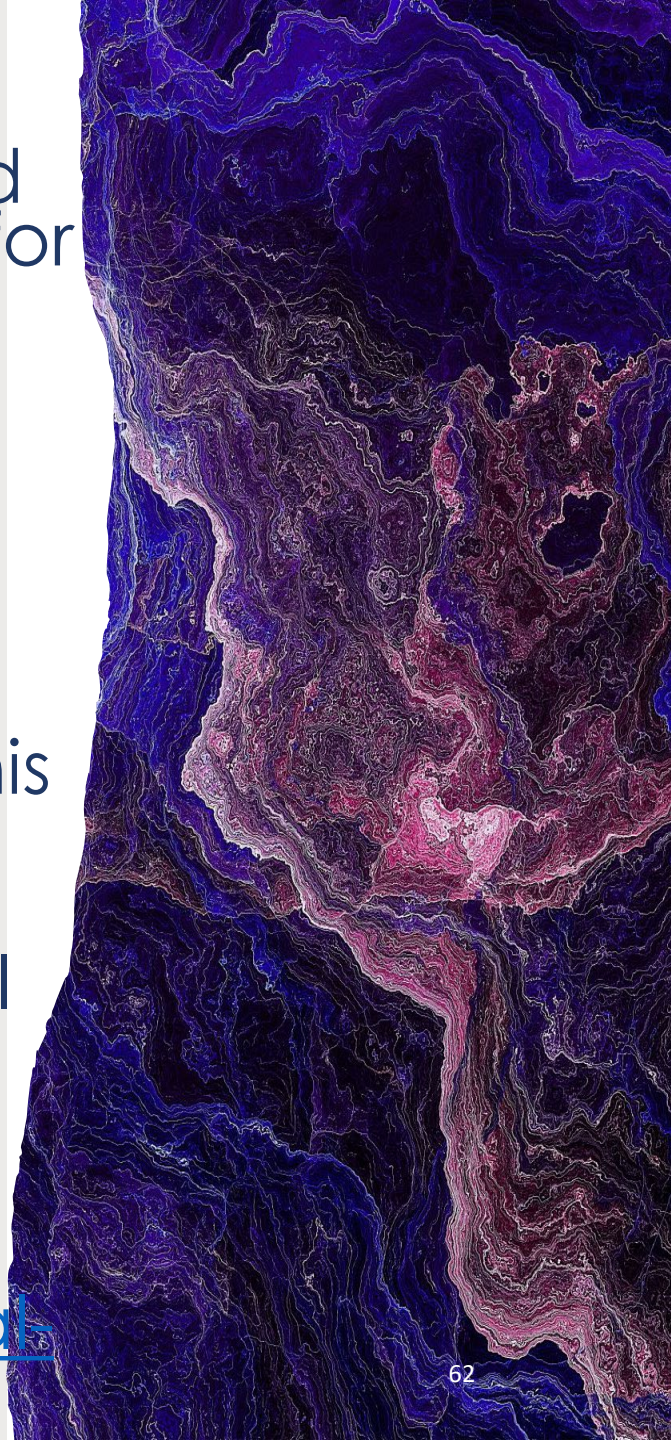
ADA: WHEN IS *ALCOHOL TESTING* A MEDICAL EXAMINATION?

- Unlike illegal drugs, the ADA doesn't expressly exempt testing for alcohol use from the definition of a "medical examination."
- As one court explained, the EEOC "guidance itself gives contrary instructions on alcohol testing" and the circumstances under which it constitutes a medical examination. *Bates v. Dura Automotive Sys., Inc.* 767 F.3d 566, 577 (6th Cir. 2014)



EEOC GUIDANCE

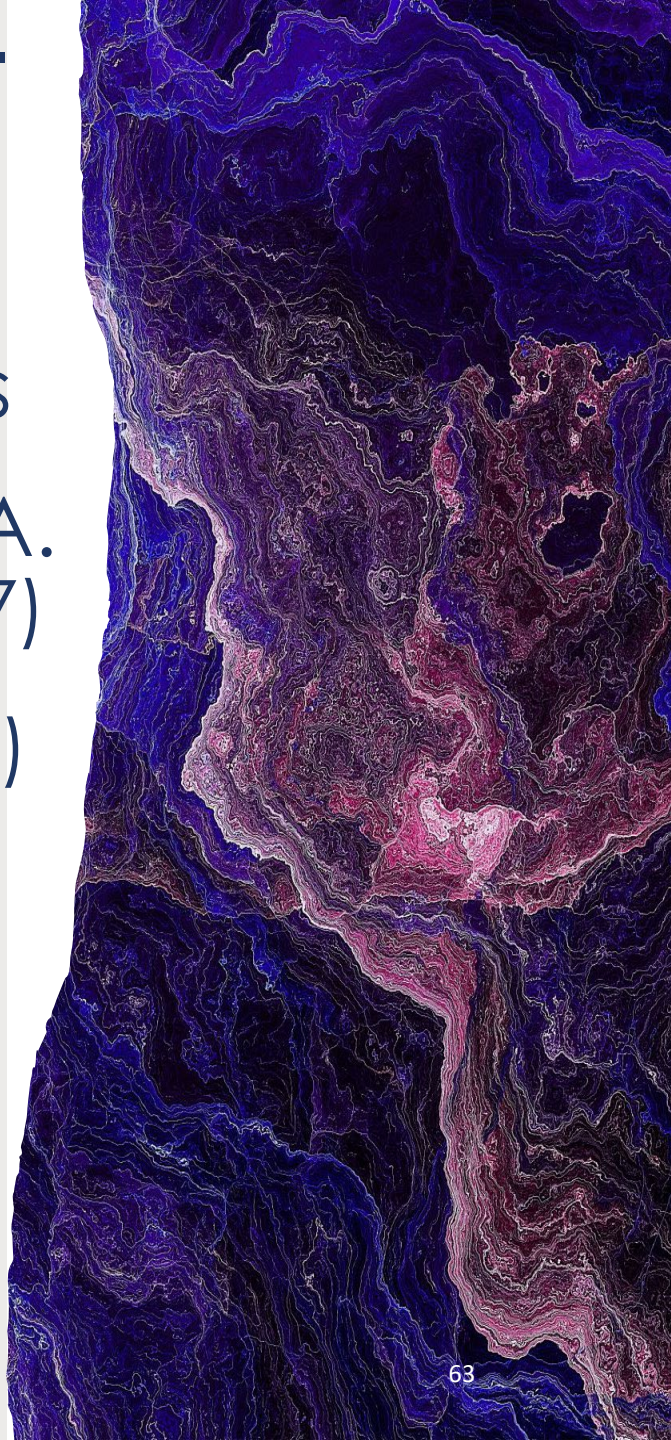
- "Medical examinations include, but are not limited to . . . blood, urine, and breath analyses to check for alcohol use." Alcohol tests for job applicants however "are medical" tests without statutory exemption." EEOC July 2000 Guidance; EEOC October 1995 Guidance
- BUT EEOC guidance states that employers "may maintain and enforce rules prohibiting employees from being under the influence of alcohol in the workplace and may conduct alcohol testing for this purpose" *upon reasonable suspicion*. EEOC July 2000 Guidance
- EEOC Informal Discussion Letter: Testing for alcohol may nevertheless be justified by business necessity (public safety or security-sensitive roles) https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-190 (2008)
- *But see:* https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-283 (2014)



WHEN IS *ALCOHOL* SCREENING A DISABILITY-RELATED INQUIRY?

- **BEFORE TESTING**: Requiring an employee to disclose use of legally-prescribed medications *before* administering drug test may be a disability-related inquiry in violation of the ADA.
  - *Williams v. FedEx Corporate Servs.* (10th Cir. 2017) 849 F.3d 889, 901
  - *Bates v. Dura Automotive Sys., Inc.* (6th Cir. 2014) 767 F.3d 566, 578

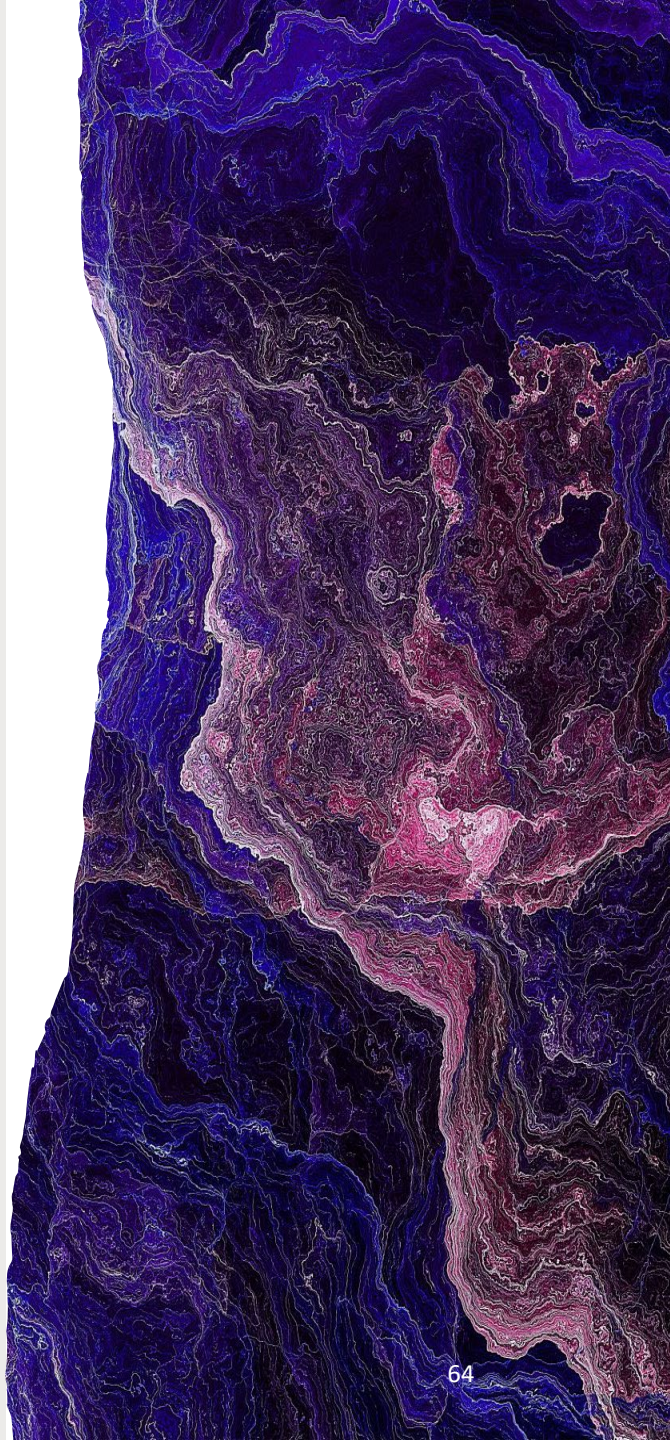
- **AFTER POSITIVE TEST**: An employer may ask applicants or employees about their lawful drug use "if an applicant [or employee] tests positive for illegal drug use." (EEOC October 1995 Guidance.)



ALCOHOL & DRUG SCREENING A DISABILTY-RELATED INQUIRY?

- Per EEOC disability-related inquiries may include "asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications." EEOC July 2000 Guidance

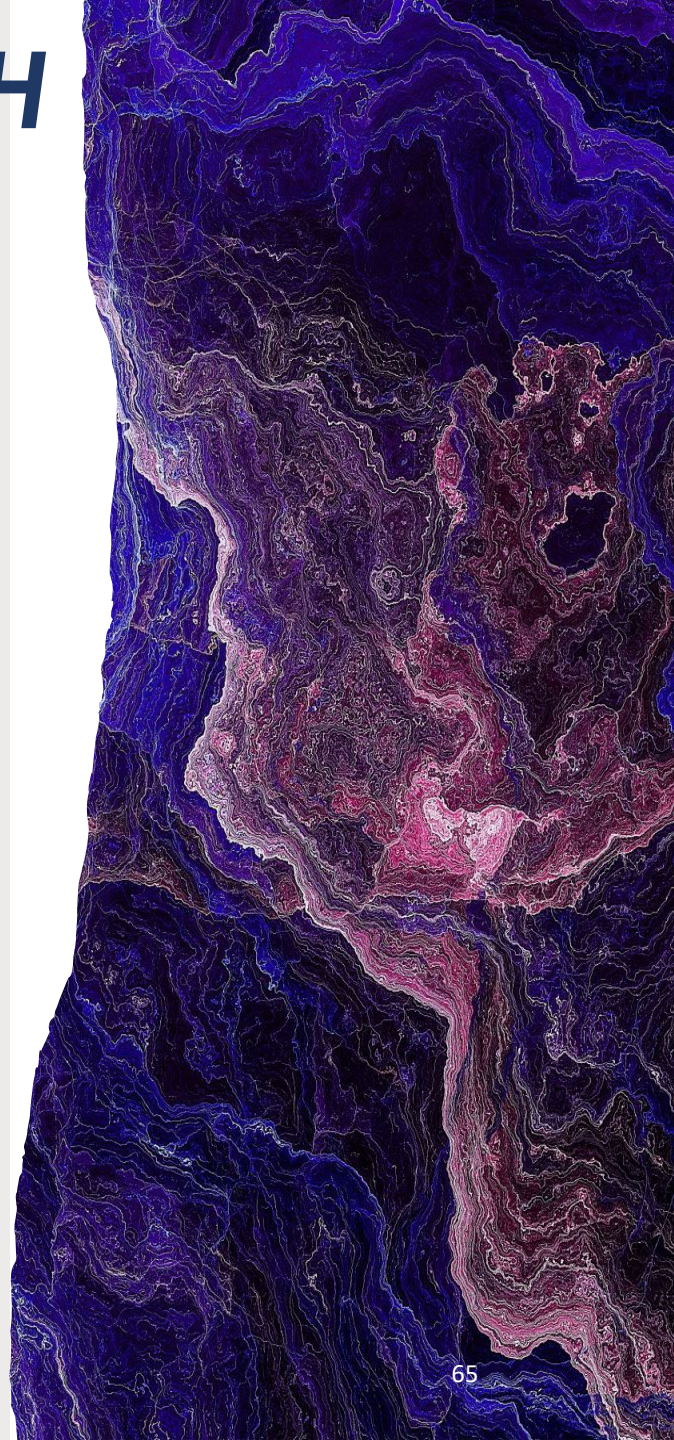
- BUT an employer may "ask[] an employee whether s/he has been drinking" without implicating the ADA's prohibition against "disability-related inquiries." EEOC July 2000 Guidance



JOB-RELATED AND *CONSISTENT WITH BUSINESS NECESSITY?*

- "In limited circumstances, . . . certain employers may be able to demonstrate that it is job-related and consistent with business necessity to require employees in positions affecting public safety to report when they are taking medication that may affect their ability to perform essential functions."

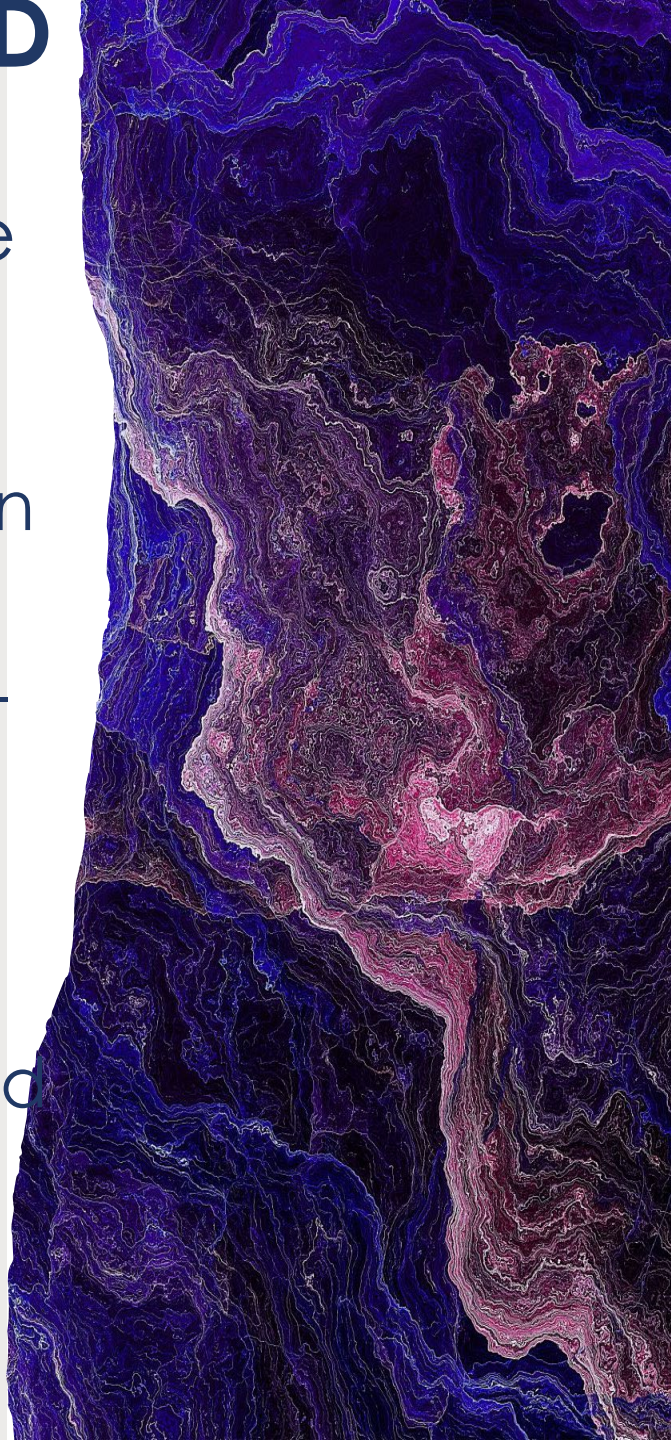
EEOC July 2000 Guidance



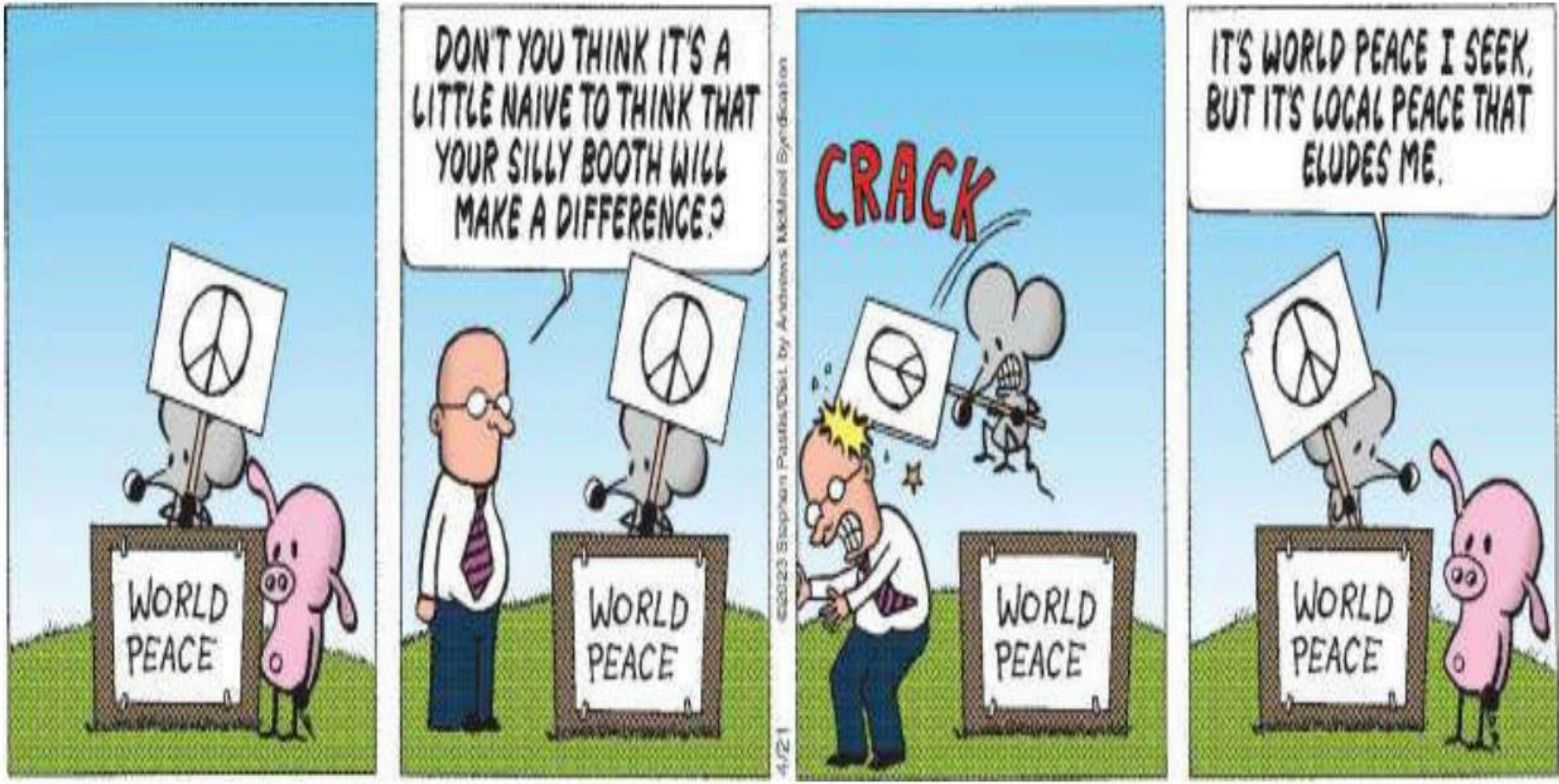
MEDICAL EXAMINATIONS/INQUIRIES HELD JUSTIFIED BY BUSINESS NECESSITY

In light of the employee's safety- or security-sensitive role:

- Asking an employee whether his medication might affect his ability to drive safely, where driving was an essential function of job, although he was never in any automobile accidents on the job.
  - *Kirkish v. Mesa Imports, Inc.* 442 F. App'x 260, 261-262 (9th Cir. 2011)
- Random breath alcohol tests of probationary employees in safety-sensitive positions.
  - *E.E.O.C. v. U.S. Steel Corp.* 2013 WL 625315, at p. *20 & fn. 13 (W.D. Pa. Feb. 20, 2013)
- Psychological examination of police officer who had exhibited highly emotional responses on numerous previous occasions.
  - *Brownfield v. City of Yakima* 612 F.3d 1140, 1146 (9th Cir. 2010)



PEARLS BEFORE SWINE By Stephan Pastis



QUESTIONS?

Thank You!

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