

## ACLU-VT Testimony Opposing H. 237

The ACLU of Vermont supports roadside safety and wants impaired drivers off the road. However, we strongly oppose H. 237 and urge the committee to reject it.

As many policymakers, scientists, and civil liberties advocates have already said repeatedly in the past, there are multiple, fundamental problems with roadside saliva testing, and this legislation raises the same concerns as before.

First, in Section 2 of the bill, the new subsection D at 23 V.S.A. §1201 would lower the BAC limit from .08 to .05 for a person with “any detectable amount” of THC in his or her blood. This ‘zero tolerance’ provision permits criminal punishment for having THC in one’s system. Such a provision is arbitrary, not based on scientific evidence, and will not make our roads safer. It is also fundamentally unfair.

First, possession of marijuana will soon be legal in Vermont. This provision punishes people for having any detectable amount of a legal substance in their body, whether that person uses marijuana for recreational or medicinal purposes. Secondly, THC can remain in blood and saliva for many days after use, so a driver may be punished even though he or she may not be impaired. Unlike with alcohol, people may not know when ‘any detectable amount’ of THC is still in their system. Third, just as the Governor’s Marijuana Advisory Commission recently stated, there is no scientifically reliable standard THC level of driving impairment, with or without the presence of alcohol. Depending on body mass, every individual has a different THC level that will result in impairment. A daily user of medical marijuana may have a very high Delta9, yet not be impaired, while someone who only occasionally partakes may have a lower Delta9 but actually be impaired. A person may be less impaired with THC and alcohol in their system than, say, someone who has recently consumed alcohol and prescribed opioids. Under this bill, people will be punished for having any amount of THC in their system regardless of whether they are actually impaired. This bill creates no nexus between presence of THC and actual impairment.

Next, in Section 3 of the bill, the new subsection (3) at 23 V.S.A. §1202 would allow for saliva testing to detect the presence of a drug in a person’s body. Again, this is highly problematic. First, according to NHTSA, it has not yet been clearly established that oral fluid screening devices are accurate or reliable.<sup>1</sup> We should not rely on technology that has not been absolutely proven to be accurate. Second, the mere presence of THC does not necessarily indicate impairment. Indeed, some studies have shown that THC can remain in a subject’s saliva up to eight days after their last exposure to cannabis. Justifying the arrest of a person due to any presence of THC in their saliva raises serious due process concerns.

Saliva testing also raises substantial issues with regard to personal dignity and privacy. A saliva test on the side of the road is much more invasive of privacy and bodily integrity than a breathing test due to the physical removal of oral fluids and therefore DNA. Even though the bill forbids the ‘extraction’ of DNA, the removal of saliva is obviously accompanied by the removal of DNA. In *Vermont v. Medina*, the Vermont Supreme Court averred that individuals have an expectation of privacy in their

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<sup>1</sup> Richard Compton, *Marijuana-Impaired Driving: A Report to Congress* 14, NHTSA (July 2017), <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf>.

oral cavity and in the information contained in their DNA—a saliva test may very well constitute an Article 11 search requiring a warrant. Even if it does not, the privacy invasion of such a test, combined with our previously related concerns, outweighs the government interest in performing these tests. In an age of creeping government and private-sector intrusion, we should reject the normalization of another bodily invasive test.

Finally, in Vermont, based on the data collected by state law enforcement agencies we know that we already have massive racial disparities in traffic stops and searches. As this bill broadens police search and arrest authority, it is not unreasonable to think these disparities would not be present with regard to stops and searches for suspected marijuana impairment. Therefore, this bill would also present serious equal protection issues.

The ACLU recognizes the state has a legitimate interest in addressing impaired driving, and fortunately, we already have a reliable test of impairment – the standard field sobriety test has been used for decades to test for impaired driving, and it is proven to be accurate and effective. It is an appropriate screening tool for individuals suspected of being under the influence of THC, with or without alcohol, and focuses on actual impairment. The recently passed cannabis law is rather modest, with no taxed and regulated market. There is no evidence or reason to think that this incremental bill will lead to increased incidence of impaired driving.

Again, the ACLU supports efforts to ensure road safety, but this bill does nothing to advance that goal while creating multiple civil liberties concerns. For that reason, the ACLU continues to oppose this legislation, and will seek to challenge it if it is enacted.