

ACLU-VT Testimony Opposing H. 237  
Senate Judiciary Committee  
April 11, 2018

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.

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. This is highly problematic. First, at best, these tests merely detect the presence of certain drugs in a person's system. They say nothing about actual impairment at the time of testing. The use of oral fluids tests may result in punishment and detention for people for having any detectable amount of a legal substance in their body, even though this adds nothing to the determination of whether a person is an impaired driver. For example, marijuana will soon be legal in Vermont, and is currently legal for medical users. THC can remain in blood and saliva for many days after use or last exposure. With roadside saliva testing, 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. Furthermore, 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. Under this legislation, people could be punished and detained for having any amount of THC in their system regardless of whether they are actually impaired. The same goes for people who are on legal prescriptions of benzodiazepines and amphetamines.



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Second, saliva testing raises serious equal protection issues regarding race and other protected categories—specifically, there is ample reason to be concerned that roadside warrantless saliva testing will lead to more discrimination against people of color and people with disabilities. Based on the data collected by state law enforcement agencies, Vermont already has pronounced racial disparities in traffic stops and searches. As this bill broadens police warrantless search and arrest authority, it increases the chance that traffic stop, search, and arrest disparities will worsen.

Another equal protection issue may arise with regard to people taking prescription medication, many of whom are considered to have a disability under the Americans with Disabilities Act (ADA) and other federal and state anti-discrimination statutes. As you know, roadside stops are considered seizures under the Fourth Amendment, and many factors contribute to whether or not a given seizure is legitimate. Because the oral fluids tests (when accurate) will be positive for commonly prescribed medications such as anti-depressants and pain management medicines, such tests will undoubtedly result in longer seizures and interrogations of drivers with disabilities who lawfully take the tested-for, doctor-prescribed medicines than those who do not. This is the essence of disparate and unequal treatment – people with any presence of those particular drugs in their system are always going to be seized, no matter their actual impairment, for a longer time, as compared to those without, based strictly on a flawed oral fluid test.

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* (197 Vt. 63 (2014)), the Vermont Supreme Court averred that individuals have an expectation of privacy in their 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. Furthermore, as mentioned earlier, many saliva screening devices can show the presence of other drugs, including prescription medication. With these roadside tests, the government will have a record of the prescriptions people are taking, raising additional medical privacy concerns.



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Finally, 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—something we have statutorily required for breathalyzers. Considering the cost of these machines – we’ve heard that units may cost as much as \$5,000 each, not including the cost of upgrades, replacements, and so on – we should not be investing in technology that is not considered reliable and accurate by the country’s highest traffic safety authority.

The ACLU recognizes the state has a legitimate interest in addressing impaired driving, and fortunately, we already have a fairly reliable test of impairment – the standard field sobriety test has been used for decades to test for impaired driving. It is a more appropriate screening tool for individuals suspected of being under the influence of THC, with or without alcohol, because unlike a saliva test, a field sobriety test focuses on actual impairment.

Again, the ACLU supports efforts to ensure road safety, but this bill does nothing to advance that goal while creating multiple civil liberties concerns and discriminating against patients who take legal prescription medication. For that reason, the ACLU continues to oppose this legislation, and will examine every opportunity to challenge it if it is enacted.

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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>.