



**Testimony of the ACLU of Kansas and Western Missouri  
In Opposition to SB 149 on February 20, 2013  
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My name is Gary Brunk and I am the executive director of the American Civil Liberties Union of Kansas and Western Missouri. I am here to urge you to reject Senate Bill 149 because it would encourage needless government intrusion in people's private lives and some of its provisions are constitutionally suspect, some are premature, and some are just confusing.

Nearly twenty-five years ago, the United States Supreme Court held that drug testing of urine and blood constitutes a search for purposes of the Fourth Amendment. The Supreme Court has upheld suspicionless drug testing in narrowly limited circumstances, most notably where public safety is at stake. Specifically, the Supreme Court has upheld such suspicionless drug testing for employees in safety sensitive jobs such as airline pilot, locomotive engineer, and bus and truck driver. In such instances, the government's important interest in public safety overwhelms the individual interest in privacy that the Fourth Amendment seeks to protect. Here, the State has no similarly important public interest to protect; welfare drug testing simply serves no overwhelming public interest.

Senate Bill 149 seems to acknowledge the need for individualized suspicion by stating that a drug test shall be ordered "when reasonable suspicion exists" (p. 11, line 39), but some of the information that the bill would allow in determining reasonable suspicion underscores how subjective that determination can be, including factors like a person's demeanor and missed appointments.

While the constitutional merits of such a loose understanding of reasonable suspicion may be debatable, other provisions as they apply to applicants or recipients of public assistance are more clearly problematic.

First, the language in subsection 4 (p. 12-13) suggests that any individual designated to receive benefits on behalf of a minor whose parent has been disqualified will be subject to a drug test, notwithstanding the lack of any suspicion that the designated individual uses drugs. In other words, the designated individuals are subject to suspicionless testing, simply by virtue of the fact that they know someone who failed a drug test. That requirement seems clearly unconstitutional because the State has no special need to drug test representative payees, and there can be no reasonable suspicion based on guilt by association.

Second, the language in page 14, subsection 6 (lines 9-12) would seem to say that the results from a positive test can be used in a subsequent criminal prosecution. Using the fruits of a search conducted on anything less than probable cause (i.e. mere reasonable suspicion) in the context of a criminal case is constitutionally suspect. In all of the Supreme Court cases in which the challenged drug testing scheme was upheld, the Court considered the fact that the government was not intending to use the results for law enforcement purposes, thereby justifying the suspension of normal Fourth Amendment protections.

The provisions related to unemployment compensation are likewise problematic (p. 27). First, state legislation is arguably premature given pending promulgation by the U.S. Labor Department of guidelines for drug testing of unemployment claimants. These guidelines are being developed in response to federal legislation enacted by the Congress last year that will allow states to require unemployment claimants only in certain occupations to pass a drug test and are supposed to be issued later this year.

Second, at several points the language in the unemployment compensation provisions is not clear, beginning with what precipitates a drug test that then requires participation in a substance abuse treatment program. Also, the bill refers to withholding benefits from those who have tested positive but refuse to enter treatment. But it is not clear if those who go willingly are entitled to receive benefits while they are in treatment and who is responsible for paying for the treatment. Is the state subsidizing the cost, or will unemployed people be required to pay for treatment?

Again, because some of its provisions are constitutionally suspect, some are premature, and some are just confusing, I urge you to not advance this bill.