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Members of the Finance Committee
Senate of Virginia
General Assembly Building
Capitol Square
Richmond, VA 23219

Attention:
Sen. Walter A. Stosch, Chair
Sen. Charles J. Colgan
Sen. Janet D. Howell
Sen. Richard L. Saslaw
Sen. Thomas K. Norment
Sen. Emmett W. Hanger, Jr.
Sen. John C. Watkins
Sen. Yvonne B. Miller
Sen. Henry L. Marsh, III
Sen. L. Louise Lucas
Sen. Stephen D. Newman
Sen. Frank M. Ruff, Jr.
Sen. Frank W. Wagner
Sen. Ryan T. McDougle
Sen. Jill Holtzman Vogel

Re: ***Senate Bill 6 – Drug Testing for Welfare Recipients***

Dear Senators:

The Rutherford Institute[1] has grave concerns about the constitutionality of Senate Bill 6, which would require low-income individuals in need of public assistance to submit to a "screening" for substance abuse conducted by government officials.

To the extent that this screening is done without any basis for individualized suspicion and involves procedures that intrude upon an individual's physical privacy, such as urine testing, the Institute believes that the law would constitute an infringement of the Fourth Amendment's guarantee against unreasonable searches and seizures. Thus, we ask that Senate Bill 6 either be amended to ensure that the specified screening involves no intrusion upon subjects' physical privacy, or that it be rejected.

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[1] The Rutherford Institute is a civil liberties organization that provides free legal representation to those whose civil rights are threatened or infringed.

The Fourth Amendment to the United States Constitution requires government agencies to respect "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures."[2] This restraint bars the government from undertaking a "search" of an individual without some form of individualized suspicion unless the situation falls within some recognized "special needs" exception.[3]

Without question, the collection and testing of urine is considered a "search" for Fourth Amendment purposes.[4] Thus, where such tests are required of a person who has done nothing to warrant individualized suspicion of drug use, courts will closely examine the competing private and public interests advanced to determine whether or not a "special need" justifies the intrusion of the individual's bodily privacy.[5]

A 1997 Supreme Court decision, *Chandler v. Miller*, indicates that the contexts in which suspicionless drug testing will be upheld based upon a special need exception are few and far between.[6] In that case, the Court struck down a Georgia law requiring candidates for high public offices to submit certification that they had passed drug tests performed by their own physicians.[7] Of course, the drug screening mandated by the bill currently before you (if physically invasive) would represent a considerably more significant invasion of personal privacy, inasmuch as the screening would be performed by government agents rather than private physicians selected by the subjects themselves.

No precedent of which the Institute is aware establishes an individual's socio-economic status or income level as a justification for the significant, physical invasion of privacy involved in a drug test of bodily fluids. Indeed, the very idea that a person's financial need diminishes his or her basic civil rights is repugnant to a society in which all persons, rich and poor, are seen as equals before the law.

Where government officials and providers of public assistance have particular reason to suspect—based on behavior, credible reports, etc.—that a recipient may be using illegal substances, such individualized suspicion provides a legal basis to insist that the person submit to drug testing as a condition of receiving further benefits. In the absence of such individualized suspicion, however, The Rutherford Institute finds no legitimate justification for the erosion of Fourth Amendment rights for the poor that would be occasioned by physically invasive screening methods. Because Senate Bill 6 does not specify the type of initial screening that is mandated, we are concerned that it might be interpreted to allow methods that would transgress the boundaries established under Fourth Amendment jurisprudence.

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[2] United States Constitution, Amendment IV.
[3] *Chandler v. Miller*, 520 U.S. 305, 308 (1997).
[4] *See id.*, 520 U.S. at 313 (*citing Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989)).
[5] *Id.* at 314.
[6] 520 U.S. 305 (1997).
[7] *Id.*

While the Institute appreciates the desire of our elected officials to ensure that public dollars are not misspent, we are ever wary that, as Justice Brandeis once explained, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[8] Now that you are armed with this information, we hope that you will ensure that Senate Bill 6 is either amended to ensure that screening does not entail physical invasions of privacy or rejected altogether.

Sincerely yours,

John W. Whitehead
President

[8] *Olmstead v. United States*, 277 U.S. 438, 479 (1928).