February 21, 2017

Mr. Thomas Yager
Chief, FMCSA Driver and Carrier Operations Division;
Office of Carrier, Driver and Vehicle Safety Standards
Federal Motor Carrier Safety Administration

Submitted via regulations.gov

Notice of Application for Exemption and Request for Comments:

Controlled Substances and Alcohol Use and Testing: J.B. Hunt Transport, Inc., Schneider National Carriers, Inc., Werner Enterprises, Inc., Knight Transportation, Inc., Dupre Logistics, Inc. and Maveric Transportation, LLC Application for Exemption

Federal Motor Carrier Safety Administration: Docket No. FMCSA-2017-0002

Dear Mr. Yager:

On behalf of the undersigned civil rights and social justice organizations, we write to oppose the petition filed by several truck companies seeking exemptions from the drug testing regulations administered by the Department of Transportation (DOT) and Federal Motor Carrier Safety Administration (FMCSA). If granted, the exemptions would permit the companies to test a hair specimen of a prospective driver in lieu of urine, in order to screen for substance abuse. As organizations dedicated to securing civil rights, promoting equal opportunity in the workplace, and eliminating race and national origin discrimination, we oppose this petition and object to the federal government sanctioning the use of an unreliable testing method that can produce false positive results for African Americans and others with similar hair texture.

The federal government has a responsibility to ensure that its regulations treat all persons equitably and fairly. This principle must apply to all standards that individuals are required to meet in order to gain and maintain work, including passing a federally-required drug test. For decades, DOT has adhered to the 1991 Congressional mandate calling on DOT to follow HHS Guidelines in creating drug testing standards and that acknowledged the need to "ensure that no individual is harassed by being treated differently from other individuals…"[1] Now, several truck companies seek to circumvent this Congressional mandate by imposing a pre-employment hair drug test on their applicants before HHS has issued hair testing guidelines. This deviation from historical process was rejected by Congress in December 2015 when it adopted section 5402 of the FAST Act, permitting DOT hair tests *only after* HHS has issued hair testing guidelines. For this reason and those detailed below, we respectfully urge FMCSA to reject this petition.

It is the considered judgment of the majority of independent research toxicologists that hair testing cannot reliably determine whether the illicit drug found in a specimen comes from ingestion. This fatal flaw is due in part to a number of factors unrelated to drug use that confound hair test results, including hair color, texture, and the applicant's grooming practices. In 2010, University of Utah Professor of Pharmacology

[1] PL 102-143 Title V. Sec. 2(6), Omnibus Transportation Employee Testing Act of 1991 Act, Enacted October 28, 1991

and Toxicology Douglas E. Rollins[2] wrote that among the main findings of his research on drug incorporation into hair is that certain drugs, such as "cocaine, codeine, morphine, phencyclidine, amphetamine, methamphetamine,"[3] bind to melanin, the pigment that gives human hair its color. He found that the same amount of those drugs consumed by a person with black hair and a person with red hair will yield concentrations 20 times greater in black hair than in red hair.[4]

Experiments performed by research toxicologist Robert E. Joseph, Jr. and others found this discrepancy in drug incorporation to be even starker when considering African American hair. They found that cocaine binds to African American male hair 50-fold times more than to white female blond hair, adding to the "mounting evidence" of bias in hair testing.[5]

The unreliability of hair testing is also due in part to the contamination of hair by drugs in the environment. To date, there is no consensus in the scientific community that any available method can completely remove the drugs absorbed into hair as a result of passive exposure. As a result, hair tests are incapable of accurately distinguishing drug use from contamination. It is, therefore, possible, and studies have so demonstrated, that someone can test positive on a hair test for a drug that s/he did not ingest.[6]

J. Michael Walsh, an expert in workplace drug detection technologies and former Executive Director of the President's Drug Advisory Council under President George Bush, wrote in an expert report that "hair-shaft damage increases drug binding whether from actual drug-use or passive exposure," and that African American hair is "more susceptible to damage from cosmetic treatments and chemicals..."[7]

These flaws have real life consequences creating a racial disparity in hair test results. Eight tenured African American Police officers, one cadet, and one applicant who falsely tested positive on hair tests required for hire and continued employment with the Boston Police Department filed suit in 2003 alleging that the Department's hair testing program had a disparate impact on African Americans in violation of the 1964 Civil Rights Act. Providing eight years of results from the hair testing program, the plaintiffs demonstrated a statistically significant difference in the rates at which the African American officers tested positive for cocaine compared to white officers.

In 2014, the US Court of Appeals for the First Circuit found unanimously that the Department hair drug test had an adverse and disparate impact on African Americans and that "we can almost be certain that the

2 Douglas E. Rollins is an Emeritus Professor of Pharmacology and Toxicology at the University of Utah Health Science Center and former Director of the University's Center of Human Toxicology. He has considerable experience researching illicit drug incorporation into hair.

3 Douglas E. Rollins, Expert Report for the Plaintiffs, May 27, 2010, submitted 01/12/2015 in United States District Court for the District of Massachusetts in *Jones et al. v. City of Boston et al.* 1.05-cv,-11832DPW at 17.

4 *Id.*

5 Robert E. Joseph, Jr. et al., In Vitro Binding Studies of Drugs to Hair: Influence of Melanin and Lipids on Cocaine Binding to Caucasoid and Africoid Hair, Journal of Analytical Toxicology, Vol. 20, October 1996, page 343, 344.

6 Jeri D. Ropero-Miller and Peter R. Stout, Analysis of Cocaine Analytes in Human Hair: Evaluation of Concentration Ratios in Different Hair Types, Cocaine Sources, Drug-User Populations, and Surface-Contaminated Specimens, Final Report Submitted to DOJ, January 2009.

7 J. Michael Walsh, Expert Report filed for the Plaintiffs, US District Court of Massachusetts, Ronnie Jones et al v. City of Boston et al, page 10.

difference in outcomes associated with race over that [eight year] period cannot be attributed to chance alone."[8]

The inherent bias in hair testing is not just a pesky quirk of the system that can be worked out in the field; it is an unacceptable defect that can unfairly jeopardize a person's ability to earn a livelihood. And in November 2008, after four years of careful evaluation, the Department of Health and Human Services (HHS) did not approve hair to be an alternative specimen for employment drug testing, stating that further research was needed to address the "significant scientific, legal, and public policy concerns" about hair testing.[9]

In 1992, a Revised Consensus Opinion of the Society of Forensic Toxicologists was issued, reaffirming that "hair analysis alone is not a sufficient technology for workplace drug testing." The revised opinion continues, stating that "[t]he reporting of a positive result based upon a single or replicate immunoassay is not acceptable in situations where any adverse action is reasonably anticipated. Adverse consequences should not be imposed upon an individual based solely upon unconfirmed immunoassay results obtained from the analysis of hair as well as any other biological specimen." The Society of Forensic Toxicologists has issued no further position statements on this issue.[10]

While efforts to improve hair analysis continue, FMCSA must not accept claims purporting to have solved hair testing's flaws until HHS has made a determination. This extends to a late 2016 publication that asserts that the presence of certain cocaine metabolites demonstrate cocaine use.[11] Similar previous claims have been disproven, even those asserted by organizations seen as leaders in this space. We urge FMCSA to rely on the HHS experts for determining which specimens are suitable for federal drug tests, just as the agency has done for decades.

A method shown to be capable of causing false positive, racially disparate results has no place in federal workplace testing. For all the reasons set forth above, we respectfully urge FMCSA to reject this petition.

Sincerely,

ACLU
Drug Policy Alliance
Jewish Alliance for Law and Social Action (JALSA)
Lawyers' Committee for Civil Rights and Economic Justice
Lawyers' Committee for Civil Rights Under Law
The Leadership Conference on Civil and Human Rights
Massachusetts Association of Minority Law Enforcement Officers (MAMLEO)
NAACP
National Workrights Institute

[8] Ronnie Jones et al. v. City of Boston et al., No 12-2280 (1st Cir. 2014), at 11. (Kayatta, J.)
[9] Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, Mandatory Guidelines for Federal Workplace Drug Testing Programs, Revised Guidelines. November 25, 2008, 73 FR 228, page 71858.
[10] Ex. O-78 (Revised SOFT Consensus Statement, 1992).
[11] Madeline Montgomery et al., Letter to the Editor, Journal of Analytical Toxicology, 2016.