



# Questions?

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TEAA  
Summer  
Conference

Employee Drug Testing  
*Down the Rabbit Hole*  
Sheila Gladstone  
Lloyd Gosselink Rochelle & Tutwiler, P.C.

# Employee Drug Testing *Down the Rabbit Hole*

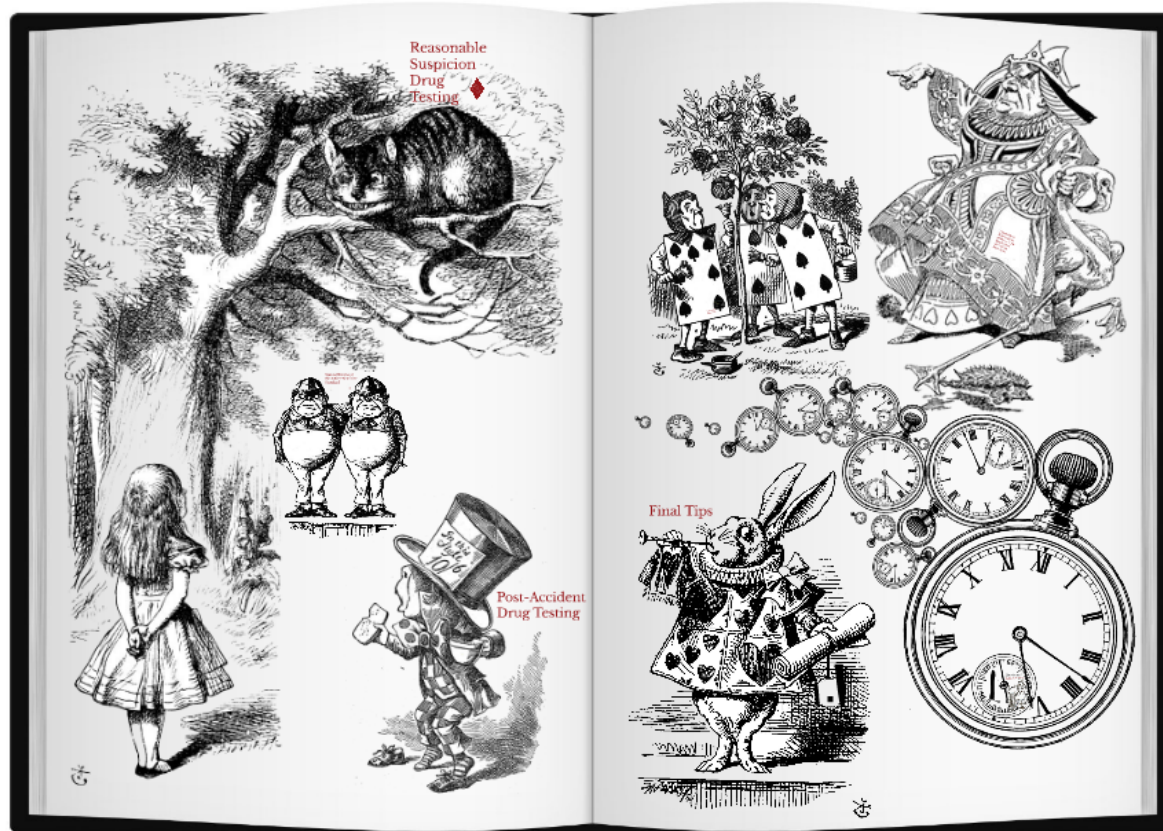
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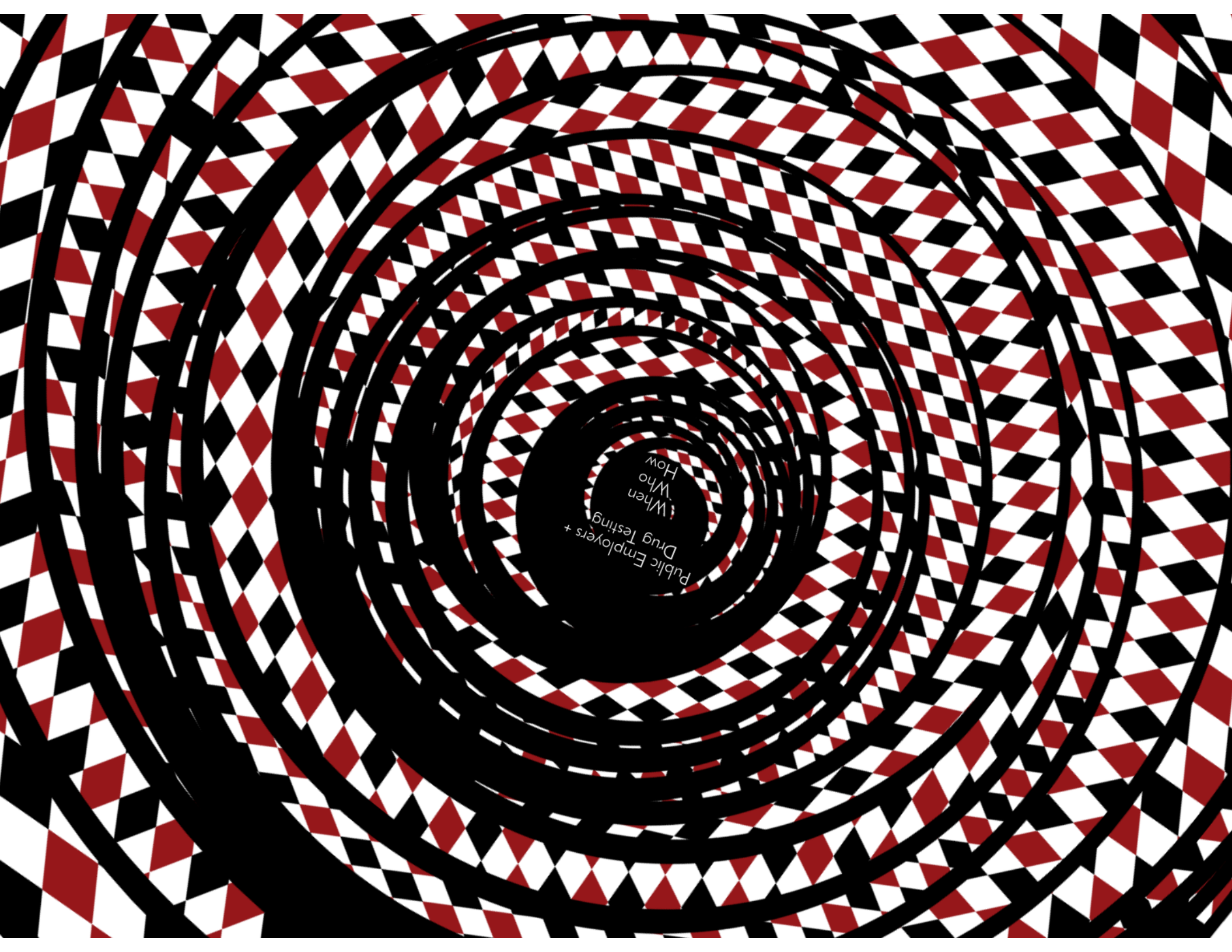
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June 16, 2016

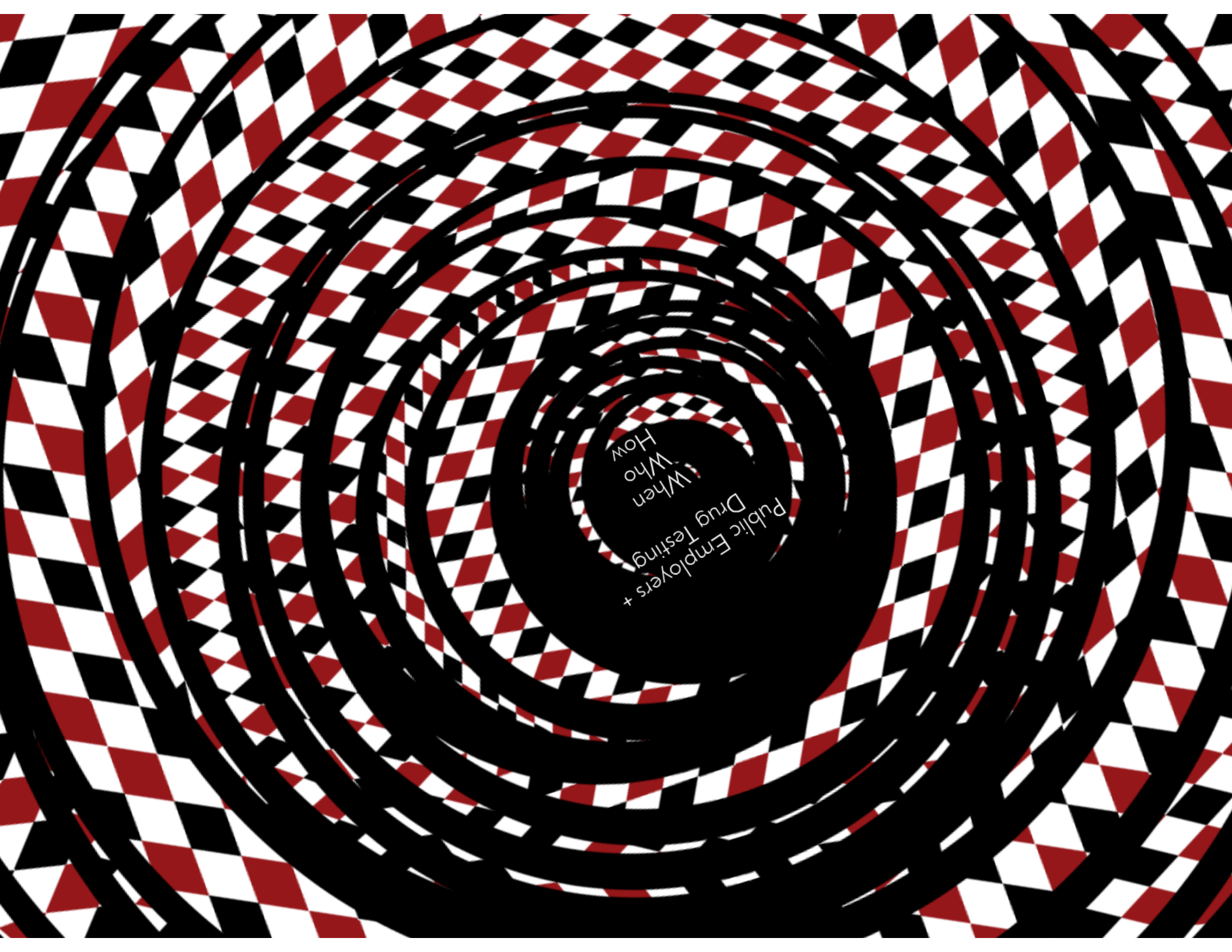
Reasonable  
Suspicion  
Drug  
Testing







Public Employers +  
Drug Testing  
When  
Who  
How



Public Employers +  
Drug Testing  
When  
Who  
How





# Public Employers + Drug Testing

When  
Who  
How

Reasonable  
Suspicion  
Drug  
Testing



Special Agent  
for Safety Services  
Inspector



Post-Accident  
Drug Testing



Final Tips

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# Special Need and the Safety-Sensitive Standard



# The Fourth Amendment Controls

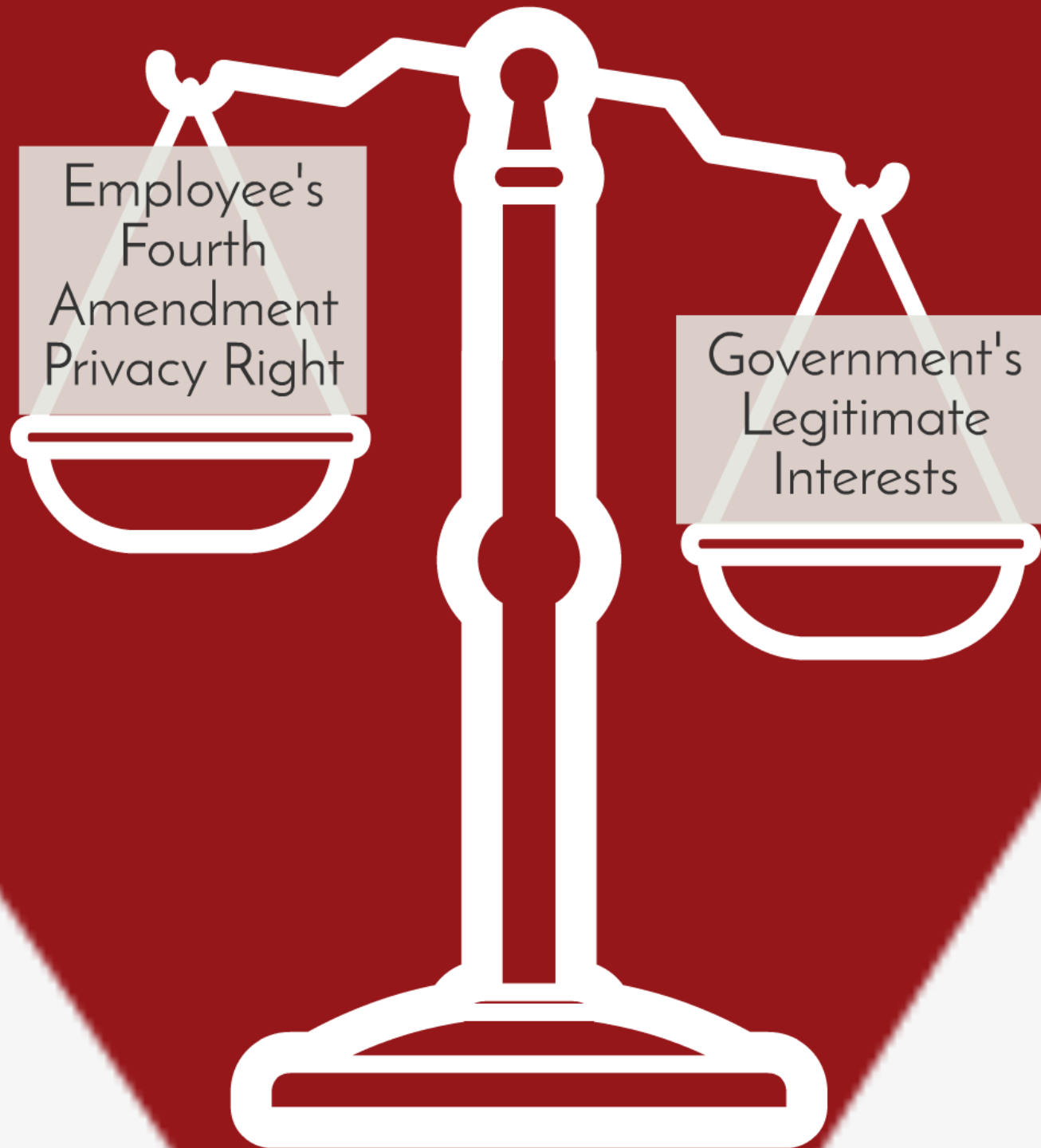
Collection of bodily samples **by the government** is considered a search & is protected by the Fourth Amendment



Government employers may drug test if they can show a "special need" or "reasonable suspicion."

*Skinner v. Railway Labor Executives' Ass'n.*





Employee's  
Fourth  
Amendment  
Privacy Right

Government's  
Legitimate  
Interests

# Special Need and the Safety-Sensitive Standard





# Safety-Sensitive Positions and the *Skinner* Standard



"Special Needs" from *Skinner*

- safety-sensitive positions
- high-security positions
- positions involving the detection of illegal drugs

To perform the drug test, the governmental employer must have a compelling interest.

(1) maintain the integrity of workers in executing their essential mission

(2) enhance public safety; or

(3) protect truly sensitive information, such as national security secrets

*Harmon v. Thornbrugh*

# Safety/Security - Sensitive Positions



- Civilian engineers working for U.S. Navy with top security clearance
- Custodian at elementary school
- Crew leader in Public Works Department, drove pickup trucks, transported crew of workers, operated heavy groundskeeping equipment, worked with pesticides, and worked in high-risk traffic areas on highway medians
- Positions that require CDL or otherwise regulated by the U.S. Department of Transportation ("DOT")
- Sanitation department workers operating dump trucks in positions that do not require a CDL and are not otherwise covered by DOT regulations



- Elevator mechanic
- Industrial equipment mechanic
- Candidates for state office
- Power distribution maintainers
- Sanitation employee responsible for enforcement of public health and sanitation laws
- Library page

If safety-sensitive, eligible for random, suspicion-less drug testing

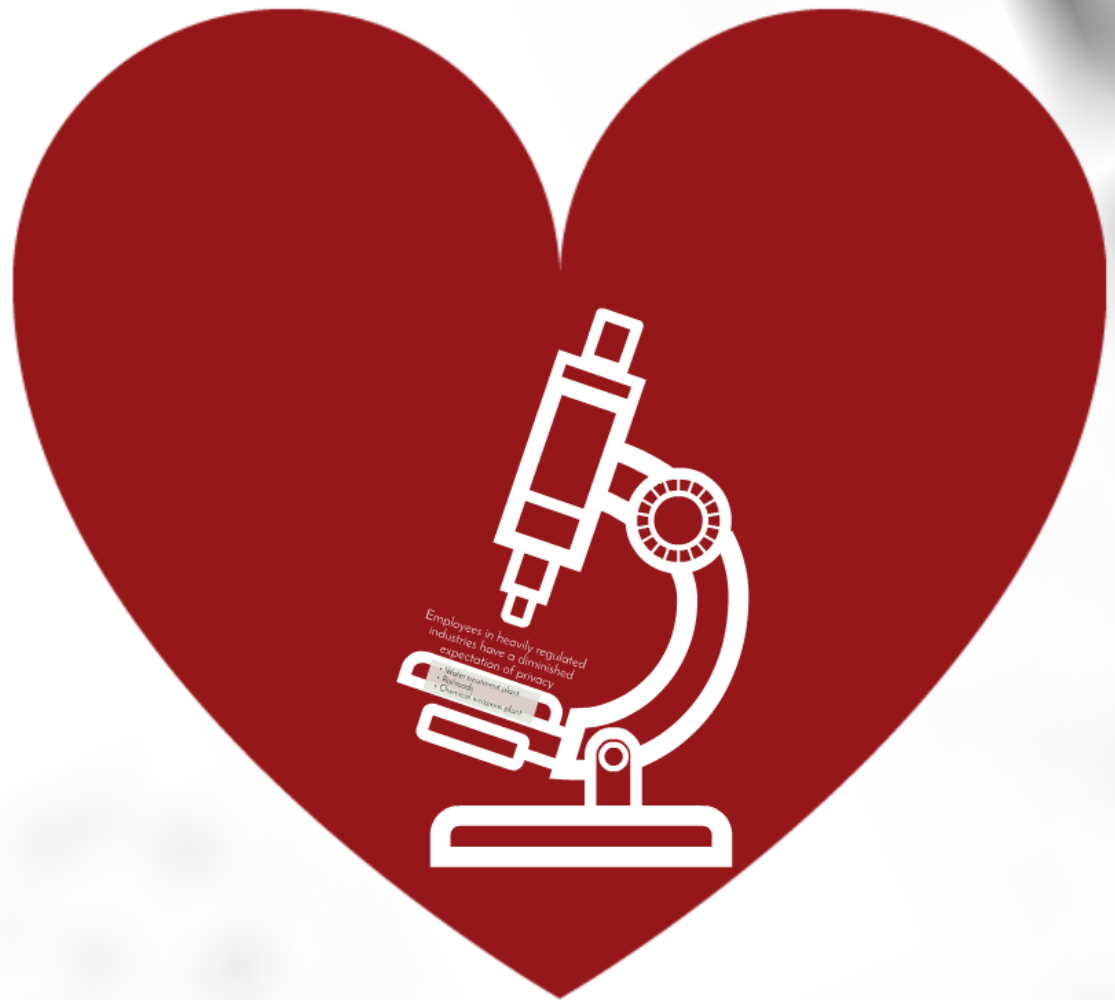




Diminished  
Expectation  
of Privacy for  
Employees of  
Certain  
Industries




# Diminished Expectation of Privacy for Employees of Certain Industries





Employees in heavily regulated industries have a diminished expectation of privacy

- 
- Water treatment plant
  - Railroads
  - Chemical weapons plant





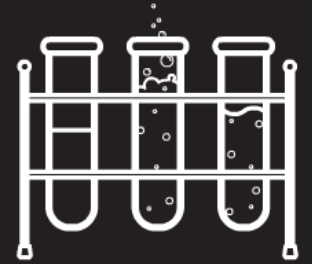
Testing Job Applicants

## Testing Job Applicants

*Across-the-board* drug testing of applicants is *unconstitutional*

Must be a *safety- or security-sensitive* position for pre-hire drug testing

- *Chandler v. Miller*
- *Lanier v. City of Woodburn*
- *Am. Fed'n of State County & Mun. Employees Council 79 v. Scott*



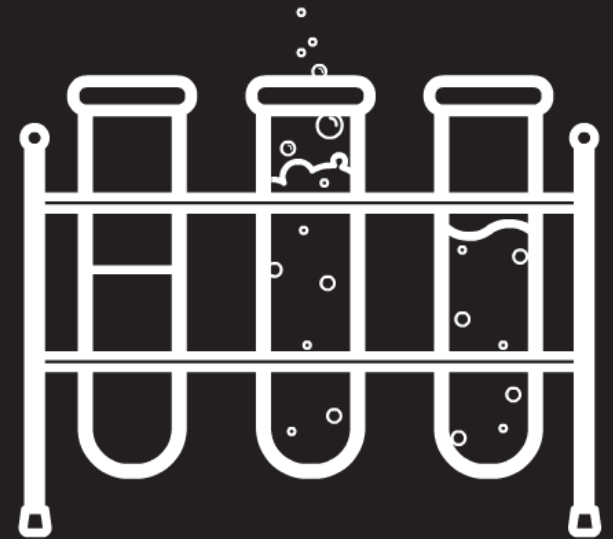
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# Reasonable Suspicion Drug Testing



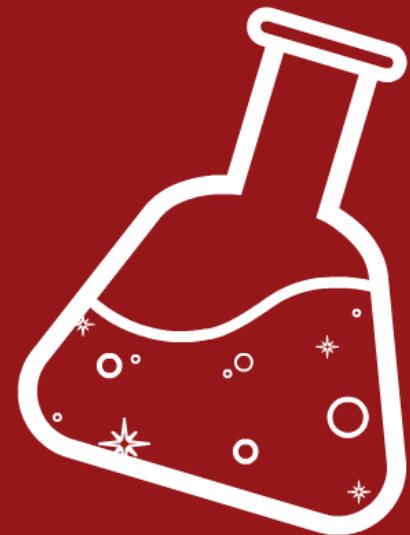
# Reasonable Suspicion Drug Testing

Government employers may test *any employee* if reasonable suspicion of drug abuse while on the job.

Reasonable suspicion: "observable phenomena, such as direct observation of drug use or possession and/or physical symptoms of being under the influence of a drug"

A gut feeling or rumor is not enough.

*American Federation of Government Employees v. Martin*







## Post-Accident Drug Testing



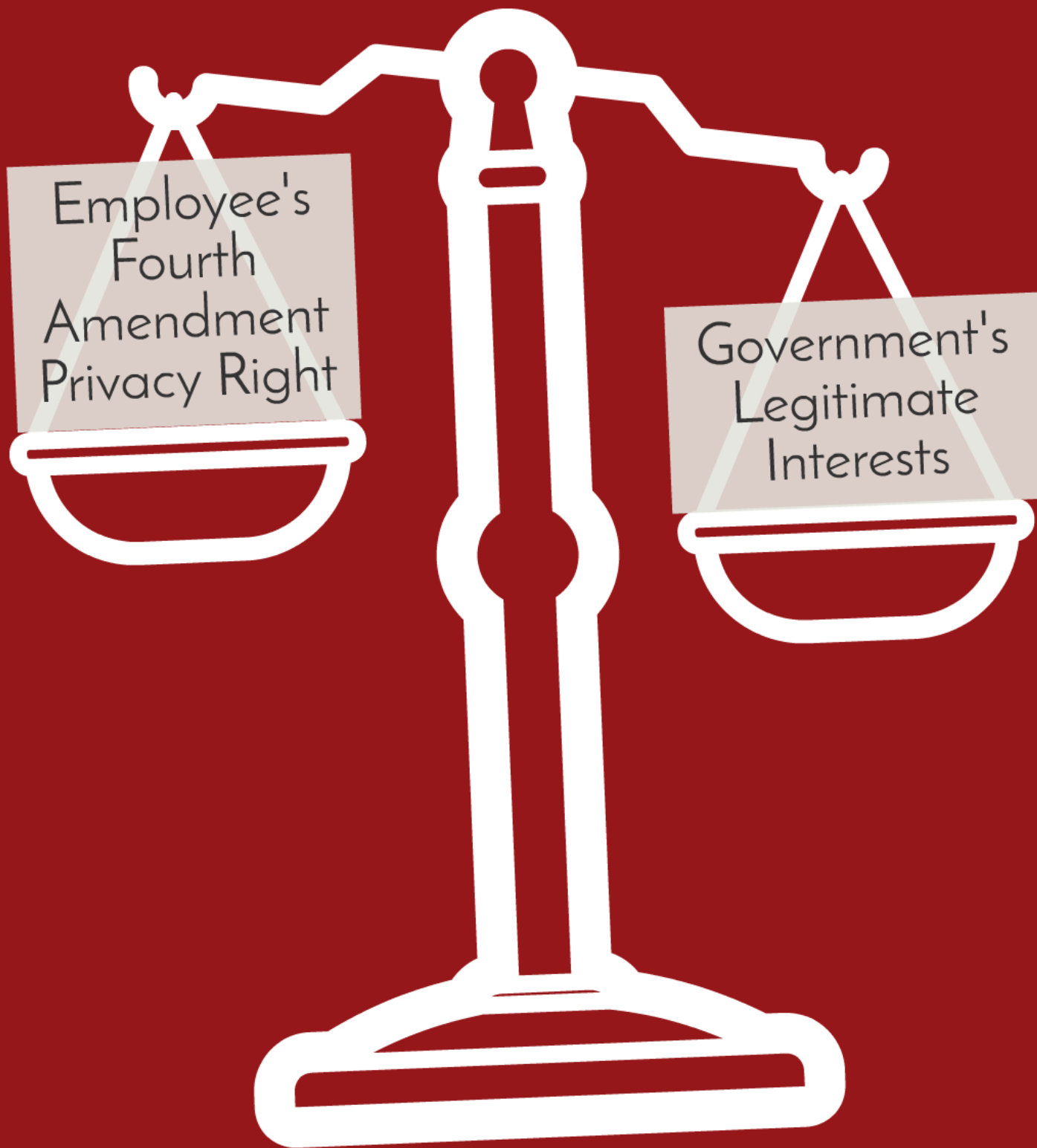
# Post-Accident Drug Testing

- Government "must show at a minimum that the events triggering testing meet some threshold of severity in terms of **potential harm and actual personal injury or property damage**"
- Testing should only cover **employees who may have caused the accident**
- Simply suffering workplace injury **not enough**



Final Tips





Employee's  
Fourth  
Amendment  
Privacy Right

Government's  
Legitimate  
Interests





Consider  
nature of  
the work  
& safety  
concerns

# Drug-testing policy in employment handbook

## Drug Testing

### Policy

- Policy applies equally
- Sets out triggering events for post-accident and reasonable suspicion drug testing
- References positions subject to random drug testing
- Employers should audit positions to ensure they qualify as safety- or security-sensitive

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