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**STATEMENT OF
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**BEFORE THE
COMMITTEE ON PUBLIC SAFETY
NEW YORK CITY COUNCIL**

**FOR A HEARING CONCERNING,
OVERSIGHT – DNA COLLECTION AND
STORAGE IN NYC**

**PRESENTED
February 25, 2020**

Good morning, my name is Albert Fox Cahn, and I serve as the Executive Director for the Surveillance Technology Oversight Project (“S.T.O.P.”). S.T.O.P. advocates and litigates for New Yorkers’ privacy, fighting discriminatory surveillance. I call on the Council to address the NYPD’s abusive DNA surveillance policies.

Currently, police coerce and trick innocent New Yorkers into handing over their genetic code. The risks are greatest for children, who are least able to assert their right to refuse a DNA test. New Yorkers of color are particularly at risk as the NYPD increases DNA dragnets. The Department’s inadequate privacy protections mean that when New Yorkers are tricked or forced to hand over their DNA, they may endure a lifetime of biological tracking. Despite recent reforms, many will remain on the city’s burgeoning DNA database, even when they are completely innocent or even a crime victim.

I therefore ask the council to withhold any funding for the NYPD DNA surveillance programs until appropriate safeguards have been implemented.

(I) Coercive and Covert Collection

New York Law fails to protect our city’s children. In theory, police cannot forcibly take a DNA sample from a person without a warrant.¹ In practice, however, this restriction is entirely hollow. The NYPD undermines our fundamental rights by either coercing New Yorkers, including children, to voluntarily “consent” to providing a DNA sample, or secretly collecting a sample without any notice. These unethical tactics violate our state and federal constitutional rights against police searches.²

A. Coercion

The NYPD’s coercive DNA sampling techniques reveal a broad array of civil rights abuses. They include (1) grilling the teenage niece of a suspect about her family’s immigration status; (2) threatening to “lose” an arrestee’s casefile to delay their release from custody; and (3) keeping New Yorkers jailed on minor unrelated marijuana charges until they agree to provide a DNA sample.³

B. Deception

In other instances, the NYPD secretly collects DNA samples without any notice. Offering a witness a cigarette or soda can be pretext to sample DNA from the cigarette butt or can.⁴ Officers prefer these tricks to asking for consent, since these tests can be harder to contest in court.⁵ This is because,

¹ See *Maryland v. King*, 569 U.S. 435 (2013) (holding that DNA swabs are searches under the meaning of the Fourth Amendment, and justifying warrantless searches only under the specialized circumstances of a person who has already been legally arrested).

² *Id.*

³ Jan Ransom & Ashley Southall, *N.Y.P.D. Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html>.

⁴ See *id.*; George Joseph, *How Juveniles Get Caught Up in the NYPD’s Vast DNA Database*, GOTHAMIST (Jan. 10, 2019), <https://gothamist.com/news/how-juveniles-get-caught-up-in-the-nypds-vast-dna-dragnet>.

⁵ Joseph, *supra* note 4 (quoting a retired officer as saying that “consent always opens up a can of worms”).

appallingly, some courts have held that New Yorkers throw away their genetic privacy as easily as they discard a coke bottle.

Both methods are particularly concerning when applied to children. Do we seriously expect a child to resist an officer's coercive demand for a DNA sample as he grills her about her family's immigration status? Or to carefully weigh her Fourth Amendment rights when deciding whether to drink a bottle of soda? This legal fiction isn't just applied to sixteen and seventeen-year olds, but to children as young as twelve.⁶ They may not be old enough to ride in the front seat of a car,⁷ but they still can consent to a lifetime of genetic surveillance.

(II) Discriminatory Dragnets

We are not merely concerned about *how* DNA samples are collected, but also from *whom* they are collected. The NYPD employs race-based dragnets, sweeping neighborhoods door-to-door for people of a particular race. In one case, police collected DNA samples from 360 black men based on only their race and gender.⁸ The NYPD's "knock-and-spit" campaign relies on the same broken logic as stop-and-frisk, but only with more invasive searches.⁹

(III) Indefinite Retention of Data

Once the NYPD acquires a DNA sample through coercion or manipulation, it enters it into the New York City Office of the Chief Medical Examiner's massive DNA database. Already, the database compromises the genetic identities of over 82,000 New Yorker's, and the numbers are only growing.¹⁰ And, unlike the official New York State database, which only contains the genetic information of convicted criminals, the city's database retains the genetic data of all New Yorkers who provide a sample, even if they are wrongly accused. The Legal Aid society estimates that of the 82,000 entries in the database, 31,000 are from people who were wrongly suspected.¹¹

Shockingly, the NYPD's DNA surveillance intentionally evades the limits Albany set when it authorized a DNA database in the first place. State law tried to prevent many of the NYPD's abusive

⁶ Ransom & Southall, *supra* note 3.

⁷ *Child Passenger Safety, Children Ages 10 to 14 Years*, N.Y. ST. DEP'T HEALTH, https://www.health.ny.gov/prevention/injury_prevention/children/fact_sheets/preteens_10-14_years/child_passenger_safety_10-14_years.htm (last visited Feb. 21, 2020).

⁸ Jan Ransom & Ashley Southall, *'Race-Biased Dragnet': DNA from 360 Black Men Was Collected to Solve Vetrano Murder, Defense Lawyers Say*, N.Y. TIMES (Mar. 31, 2019), <https://www.nytimes.com/2019/03/31/nyregion/karina-vetrano-trial.html>.

⁹ Andrew Whalen, *NYPD's 'Knock-and-Spit' DNA Database Makes You a Permanent Suspect*, NEWSWEEK (Feb. 11, 2019), <https://www.newsweek.com/police-dna-database-nypd-swab-testing-collection-new-york-1326722>.

¹⁰ Ransom & Southall, *supra* note 3.

¹¹ Aaron Randle, *Why the N.Y.P.D.'s DNA Database Has Some People Worried*, N.Y. TIMES (Aug. 16, 2019), <https://www.nytimes.com/2019/08/16/nyregion/newyorktoday/nypd-dna-database.html>.

practices,¹² but the city’s “rogue”¹³ database operates outside the law, without any statutory authorization.¹⁴ Yet, the OCME continues to not only operate its database, but to insist that it’s exempt from state privacy protection, a position that has often proved unconvincing in court.¹⁵

Often, New Yorkers have no realistic way out of the OCME database. Most of us have no idea if our DNA is being tracked. And, even if we do somehow find out, we then need to seek an order from a court; far too onerous a process for most New Yorkers.

NYPD officers frequently hide the fact that the DNA samples they collect will be uploaded to a database.¹⁶ So, even when a person acquiesces to DNA testing during an investigation, they often assume that the DNA will only be used in connection with that case. Then, of course, there are those who don’t even know that their DNA has been tested, let alone uploaded to a sprawling database. As a result, 31,000 innocent New Yorkers are subjected to a perpetual genetic lineup, having their DNA compared to investigative samples hundreds or thousands of times every year.¹⁷

In response to public outcry, the NYPD recent announced modest reforms, including “audits” of the OCME database and easier opt-out options.¹⁸ These reforms acknowledge the civil rights abuses that opponents have decried for years, but they are too little, too late. The NYPD simply cannot be trusted to maintain an unofficial DNA database, operating outside the bounds of state law.

(IV) Likelihood of Wrongful Arrests, DNA’s Failures

The NYPD’s DNA database places New Yorkers in a perpetual DNA lineup, not just robbing them of their medical privacy, but increasing their risk of wrongful arrest. At its outset, DNA evidence brought added certainty to the criminal justice system, but new, questionable forms of DNA analysis create significant risk of false arrest and even wrongful conviction.

In one case, a man spent six months in prison for burglary and homicide after his skin cells were found on the victim’s body. It was later discovered that the man never even set foot in the victim’s house, and instead his DNA was inadvertently transferred there on the equipment of first responders.¹⁹ This horrifying type of mistake is all too common. An average person sheds 50 million skin cells a day and 91% of objects in public places have a detectable amount of DNA on them.²⁰ In short: we live in a

¹² N.Y. EXEC. LAW § 995 *et seq.*

¹³ Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES (June 12, 2013), <https://www.nytimes.com/2013/06/13/us/police-agencies-are-assembling-records-of-dna.html>.

¹⁴ *Id.*

¹⁵ *People v. K.N.*, 2018NY031674, 2018 WL 6132289 at *9 (N.Y. Crim. Ct. Nov. 14, 2018).

¹⁶ *See* Joseph, *supra* note 4.

¹⁷ Randle, *supra* note 11.

¹⁸ Edgar Sandoval, *N.Y.P.D. to Remove DNA Profiles of Non-Criminals from Database*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/20/nyregion/dna-nypd-database.html>.

¹⁹ Katie Worth, *Framed for Murder by His Own DNA*, PUB. BROADCASTING SERV.: FRONTLINE (April 19, 2018), <https://www.pbs.org/wgbh/frontline/article/framed-for-murder-by-his-own-dna>.

²⁰ *Id.*

world that is covered by other people's DNA, which can easily be transferred from one place to another. So, as you touch the table in front of you, you may not just be depositing your own DNA, but the DNA of the person who rode the subway before you this morning, the store clerk who stocked your milk, and the cashier who handed you your change.

As the NYPD has expanded DNA surveillance, it's gone beyond the limits of the reliable testing, investigating small and corrupted samples that dramatically increase the risk of errors. In some cases, the NYPD has used DNA samples that are just 14 picograms;²¹ that's roughly the amount of DNA in two skin cells.²² Even worse, they rely on probabilistic DNA software, which uses proprietary code²³ to speculate what the DNA pattern of a suspect will look like, based on a contaminated sample from multiple individuals.²⁴

The NYPD's software creates such a high error rate that their DNA drag nets will almost inevitably find someone who is a false "match."²⁵ With tens of thousands of New Yorkers constantly having their DNA examined, error rates of even a hundredth of a percent would typically lead to a false positive, but the actual error rates can be astronomically higher.

Amid these serious accuracy concerns, the NYPD recently abandoned one DNA technology which it had used for decades to convict thousands of people.²⁶ Yet, rather than ending unreliable indiscriminate DNA testing, it continues to collect DNA at an astounding rate. It continues to test DNA quantities as small as 38 picograms, or 7 skin cells.²⁷ And the new technology it uses to test the DNA, STRMix, may be no more accurate than the old technology it replaced. Like other private DNA testing algorithms, it is a black box; defendants and their attorneys are unable to read the code or training data.²⁸ That means we don't know how it works, how accurate it is, or whether it is biased against defendants of color.

²¹ Lauren Kirchner, *Traces of Crime: How New York's DNA Techniques Became Tainted*, N.Y. TIMES (Sept. 4, 2017).

²² See Christiane Bäumer et al., *Exploring DNA Quality of Single Cells for Genome Analysis with Simultaneous Whole-Genome Amplification*, SCI. REP. (May 10, 2018), <https://www.nature.com/articles/s41598-018-25895-7> (stating that the average human cell contains six picograms of DNA).

²³ STRMIX, NONDISCLOSURE AND CONFIDENTIALITY AGREEMENT 1 (2019) ("STRmix is the exclusive licensee of a forensic software product known as STRmix™, as well as other privileged, confidential, and/or secret information related thereto.").

²⁴ Kirchner, *supra* note 21.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Jason Tashea, *Defense Lawyers Want to Peek Behind the Curtain of Probabilistic Genotyping*, AM. BAR ASS'N: ABA J. (Dec. 1, 2017),

http://www.abajournal.com/magazine/article/code_of_science_defense_lawyers_want_to_peek_behind_the_curtain_of_probabil.

The sad truth is that the NYPD's racially-biased dragnets and vast genetic databases give us little in return for the massive invasion of privacy. In exchange for our most intimate data, New Yorkers are given little more than a hefty price tag and a heightened risk of wrongful arrest.

(V) Reforms

S.T.O.P. fully supports efforts to stem these invasive and discriminatory DNA practices. We actively back state legislation to ban all unofficial DNA databases,²⁹ including a broader ban on biometric surveillance.³⁰ We also urge the Council to restrict any use of city funds in furtherance of this bias biometric surveillance regime.

One vital reform of the NYPD's DNA surveillance is the Public Oversight of Surveillance Technologies ("POST") Act.³¹ The POST Act would require that the NYPD all surveillance technology (including DNA surveillance systems) along with its policies protecting the data they collect.

The POST Act is admittedly a modest response; the NYPD can continue using DNA sampling and testing by complying with modest protections against waste, discrimination, and misuse. Nonetheless, the Act is still need, as it would enable New Yorkers to learn how their genetic information is being taken and used.

We were grateful for the committee and Chair Donovan's support of the POST Act, but we are disappointed that in the two months since the bill was heard, it has yet to be voted upon. We call on Speaker Johnson to stand with an overwhelming majority of this Council and bring the POST forward for a vote. I thank you for giving me the opportunity to address these urgent issues, and I look forward to working with the Committee to safeguard the rights of all New Yorkers in the months and years to come.

²⁹ See, e.g., S.B. 6009, 2019–2020 Sess. (N.Y. 2019) ("An Act to amend the executive law, in relation to the establishment of a single computerized state DNA identification index and requiring municipalities to expunge any DNA record stored in a municipal DNA identification index.").

³⁰ See S.B. 7572, 2019–2020 Sess. (N.Y. 2020) ("An Act to amend the executive law, in relation to prohibiting the use of biometric surveillance technology by law enforcement; establishing the biometric surveillance regulation task force; and providing for the repeal of certain provisions upon expiration thereof.").

³¹ *INT 0487-2018*, N.Y.C. COUNCIL (Feb. 14, 2018),

<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3343878&GUID=996ABB2A-9F4C-4A32-B081-D6F24AB954A0>.