

MEMORANDUM

Date: July 10, 2020

To: All Assembly Members, New York State Assembly; All Senators, New York State Senate

From: Albert Fox Cahn, Esq., Executive Director

Re: The Surveillance Technology Oversight Project Memorandum in Support of S8448-C/A10583-B and S8450-B/A10500-B

The Surveillance Technology Oversight Project, Inc. (“S.T.O.P.”) litigates and advocates for New Yorkers’ privacy, fighting suspicionless, warrantless surveillance. We write in support of Senate Bill S8448C, Senate Bill S8450B, Assembly Bill A10583B, and Assembly Bill A10500B, which would protect New Yorkers’ contact tracing data and help our state fight the COVID-19 pandemic.

Contact Tracing Depends on Public Trust and Participation

Contact tracing can take many forms, everything from traditional phone interviews and in-person visits, to new automated exposure notification systems that use untested and invasive technologies. Whichever approach we use, successful COVID-19 contact tracing depends on participation from the majority of New Yorkers.¹ But many will refuse to cooperate with contact tracers if they fear their information can be used against them by police, especially in the over-policed communities of color hit hardest by COVID-19.² Without these crucial bills, contact tracing data will be resold to the highest bidder and scoured by law enforcement, and it will all be at the price of public health.

Unregulated Contact Tracing is a Privacy Time Bomb

Unregulated contact tracing will enable Silicon Valley startups to make millions at the cost of our health and privacy. Without new legislation, the NYPD and other law enforcement agencies would be able to subpoena or buy a detailed location history for millions of New Yorkers.³ Alarming, U.S. Immigration and Customs Enforcement (“ICE”) could use information-sharing arrangements

¹ Sidney Fussell & Will Knight, *The Apple-Google Contact Tracing Plan Won’t Stop Covid Alone*, WIRED (Apr. 4, 2020), <https://www.wired.com/story/apple-google-contact-tracing-wont-stop-covid-alone>.

² Alice Miranda Olstein & Mohana Ravindranath, *Getting it Right: States Struggle with Contact Tracing Push*, POLITICO (May 17, 2020), <https://www.politico.com/news/2020/05/17/privacy-coronavirus-tracing-261369> (“Still, the biggest hurdle remains getting people to agree to monitoring on an unprecedented scale”).

³ Kelly Servick, *Covid-19 Contact Tracing Apps Are Coming to a Phone Near You. How Will We Know Whether They Work?*, SCIENCE (May 21, 2020), <https://www.sciencemag.org/news/2020/05/countries-around-world-are-rolling-out-contact-tracing-apps-contain-coronavirus-how>.

with the NYPD to access this same data,⁴ making our claims of being a “sanctuary city” into a lie.⁵ If we allow ICE to drive immigrant New Yorkers into the shadows, it will not only betray the values of this State; it will dramatically set back our effort to test, track, and treat every COVID-19 patient.⁶

Existing Laws Leave New Yorkers at Risk

Existing laws allow widespread sharing of contact tracing data. The Federal Health Information Portability and Accountability Act (“HIPAA”) allows significant data sharing with both government and private entities. For law enforcement, including ICE, HIPAA merely requires a subpoena to access data.⁷ But many of the health startups that are marketing new, unproven contact tracing technologies are exempt from HIPAA protections because they are not medical providers.⁸

Similarly, New York privacy laws allow contact tracing data to be accessed by both police and private parties.⁹ Companies could make millions from our contact tracing data,¹⁰ putting profits over public health. Many are already wary about contact tracing, especially new, unproven, and profit-driven solutions. If we want to reassure New Yorkers, it will take a lot more than the promises of the tech giants that misled us about privacy so many times before

These bills are important privacy protections, but they are also essential public health safeguards. If we fail to stop contact tracing data from being abused, if we fail to reassure the public that contact tracing is safe, more New Yorkers will die. We urge you, in the strongest possible terms, to pass S8448C, S8450B, A10583B, and A10500B.

Thank you for the opportunity to submit this comment and for your consideration.

Respectfully submitted,

/s _____
Albert Fox Cahn
Executive Director

⁴ Albert Fox Cahn, *Surveillance by Sanctuary Cities Is Helping ICE Track Undocumented Immigrants*, NBC NEWS: THINK (July 9, 2019), <https://www.nbcnews.com/think/opinion/surveillance-sanctuary-cities-helping-ice-track-undocumented-immigrants-ncna1027981>; Beth Fertig, *ICE Complains About NY'S Sanctuary City Policies After Making 82 Arrests*, GOTHAMIST (Sept. 27, 2019), <https://gothamist.com/news/ice-complains-about-nys-sanctuary-city-policies-after-making-82-arrests>.

⁵ Emma Whitford, *How Safe Is 'Sanctuary' for New York City Immigrants?*, Gothamist (Jan. 27, 2017), <https://gothamist.com/news/how-safe-is-sanctuary-for-new-york-city-immigrants>.

⁶ E.g., Sara L.M. Davis, *Contact Tracing Apps: Extra Risks for Women and Marginalized Groups*, HEALTH & HUM. RTS. J. (Apr. 29, 2020), <https://www.hhrjournal.org/2020/04/contact-tracing-apps-extra-risks-for-women-and-marginalized-groups> (noting migrant workers in Singapore did not install contact tracing applications over concerns that collected data would be given to police and immigration agencies).

⁷ 45 C.F.R. § 164.512 (2020).

⁸ Jessica Davis, *Apple, Google Address COVID-19 Contract Tracing App Privacy Concerns*, HEALTH IT SEC. (Apr. 27, 2020), <https://healthitsecurity.com/news/apple-google-address-covid-19-contract-tracing-app-privacy-concerns>.

⁹ See *HIPAA Preemption Charts*, N.Y. Dep't of Health (Oct. 15, 2002), https://www.health.ny.gov/regulations/hipaa/pdf/hipaa_preemption_charts.pdf.

¹⁰ Sue Halpern, *Can We Track Covid-19 and Protect Privacy At the Same Time?*, NEW YORKER (April 27, 2020), <https://www.newyorker.com/tech/annals-of-technology/can-we-track-covid-19-and-protect-privacy-at-the-same-time>.