



STATE PRIVACY AND SECURITY COALITION

Subject: An Act in relation to the field testing of mobile telephones and portable electronic devices (S.2306/A.3955)

Position: Oppose

Distracted driving is a behavior that puts the safety of drivers, passengers and pedestrians at risk. The National Highway Traffic Safety Administration (NHTSA) defines distracted driving as any activity that could divert a person's attention from the operation of a motor vehicle – this includes using a phone, eating, drinking, grooming, smoking, attending to child passengers, using a navigation system, or adjusting radio or vehicle controls.¹

Persons who engage in distracted driving create a serious public safety hazard (but distracted driving is the cause of a relatively small proportion of injuries and deaths caused by motor vehicle collisions²). This bill, however, would broadly expand the authority of police officers to engage in the search and seizure of electronic devices in the possession of those suspected of distracted driving. The seized devices would then be tested to determine their use by drivers suspected of distracted driving.

This legislation has been introduced in the absence of evidence that this police procedure will prevent distracted driving, or car accidents caused by distracted driving. There is no question, however, that this proposed law would authorize police to obtain sensitive personal information in violation of the constitutional protections against search and seizure.

For this reason, the NYCLU, Electronic Frontier Foundation, TechNet, and the State Privacy and Security Coalition must oppose this proposal, notwithstanding the legitimate public safety concerns the bill seeks to address.

This legislation (S.2306/A.3955) would allow law enforcement officers at the scene of an accident or collision to request that a driver surrender his or her mobile phone or portable electronic device for the purpose of field testing the device. The test involves the use of

¹ Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *Distracted Driving 2015*, 1 (2017), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812381>.

² The most recent NHTSA report on Distracted Driving states that “[t]en percent of fatal crashes, 15 percent of injury crashes, and 14 percent of all police-reported motor vehicle traffic crashes in 2015 were reported as distraction-affected crashes.” Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *Distracted Driving 2015* 1 (2017), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812381>.

technology that is still in development to determine whether the driver had used a phone or other electronic device at or near the time of the accident or collision. If the test demonstrates an electronic device was in use at or near the time of the accident or collision, the test results may be used as evidence that a cell phone or electronic device was used while a vehicle was in motion, in violation of New York law.³

The bill provides that persons who operate a motor vehicle in New York State are deemed to have given implied consent for such field testing. Refusal to surrender an electronic device for field testing results in the immediate suspension and subsequent revocation of a driver's license for at least a year, and a \$500 civil penalty. Drivers who refuse to surrender their devices for field testing are entitled to a hearing that is limited to determining whether a driver was informed about the consequences before refusing to surrender a device for field testing. The bill provides no meaningful opportunity for the driver to challenge the accuracy or legitimacy of the field test or the test results.

Absence of evidence that field testing will reduce accidents

There is an absence of evidence that demonstrates field testing at the site of an accident or collision will reduce accidents caused by distracted driving. Use of a cellphone or other portable device, is only one of many distractions that diverts a driver's attention from his or her primary responsibility. In fact, the most recent NHTSA report on distracted driving states that in 2015 only 14 percent of all fatal distraction-affected crashes cite cell phone use as the cause of a driver's distraction.⁴ While this does not minimize the severity of this issue, it does illustrate the limited effect of this legislative proposal.

Particularly when law enforcement is capable of obtaining evidence of whether a driver used a cellphone through less invasive means. For instance, law enforcement and researchers have long been able to use cell phone call and text message records to verify phone use near or during an accident.⁵ This alternative practice allows law enforcement and potential litigants to effectively obtain the same evidence necessary to demonstrate a violation of Vehicle and Traffic laws, without encroaching on the driver's privacy interest in his or her phone.

Accuracy and privacy concerns associated with the lack of field testing technology

Though the sponsor's memorandum for S.2306/A.3955 states that the electronic scanning device that would be used to perform the field test will not scan content, the technology does not yet

³ N.Y. Veh. & Traf. Law § 1225-c (McKinney); N.Y. Veh. & Traf. Law § 1225-d (McKinney).

⁴ Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *Distracted Driving 2015*, 1 (2017), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812381>.

⁵ See, e.g. AT&T, *February 2017 Transparency Report* (2017), <http://about.att.com/content/dam/csr/Transparency%20Reports/Feb-2017-Transparency-Report.pdf> (showing aggregate data on criminal and civil legal demands for user data); Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 NEW ENG J. MED 7 (1997)(analyzing billing records to determine if a driver used cellphone at or near collision); Suzanne McEvoy, et al., *Role of Mobile Phones in Motor Vehicle Crashes Resulting in Hospital Attendance: A Case-crossover Study*, BR MED J. (2005)(analyzing consumer phone records provided by telecommunications network to determine phone use during collision).

exist, so there is no way to confirm accuracy or ensure that the technology is not scanning or collecting data on the device. The mobile data forensics company, Cellebrite, which is developing this technology, suggests that “an officer would connect a person's phone to their laptop or other device and detect only the operating system logs, which would provide information about touchscreen use and whether someone was typing at the time of a crash.”⁶

However, even when operating system logs are limited to detecting specific activities, it is still possible for the scan to yield inaccurate results by detecting applications or programs that are functioning in the background (e.g. navigation application) or inadvertently capture content (e.g. user ID associated with the detected event).⁷ These concerns regarding consumer privacy rights and the accuracy of the field testing technology are exacerbated by the fact that the bill relies on broad definitions of use,⁸ which includes phone activity that the field testing technology may not be able to distinguish (e.g. whether a passenger was using the device rather than the driver).

Disparate impact of field testing enforcement

S.2306/A.3955 gives law enforcement officer’s discretion to request that a driver submit his or her phone for field testing. Such discretion can result in selective enforcement based on an officer’s explicit or unconscious bias,⁹ and research confirms the likelihood of this problem. Department of Justice data shows that Black drivers have a disproportionate number of interactions¹⁰ with law enforcement at traffic stops.¹¹ Moreover, when officers have discretion, they are more likely to perform consent searches when the driver was Black.¹² Therefore, allowing law enforcement officers to have discretion regarding the use of field testing will invite unnecessary bias and selective enforcement, which will ultimately reduce the efficacy of the field testing practice.

Fourth Amendment Requires Law Enforcement to Obtain A Warrant For Field Testing

The field testing authorized by S.2306/A.3955 directly implicates a fundamental privacy interest for drivers in New York State. Until it is possible to prove that the field testing technology is not capable of scanning or collecting content, drivers will continue to have a privacy interest in their

⁶ Kelly Wallace, *Driving While Distracted: Is the Textalyzer the new Breathalyzer*, CNN, Sept. 2, 2016, <http://www.cnn.com/2016/09/02/health/distracted-driving-textalyzer/>.

⁷ Harold F. Tipton & Micki Krause, *Information Security Management Handbook*, 787-8 (5th ed. 2003).

⁸ N.Y. Veh. & Traf. Law § 1225-c (1)(c) (McKinney); N.Y. Veh. & Traf. Law § 1225-d (2)(b) (McKinney).

⁹ See, e.g. Joe Davidson, *Implicit bias training seeks to counter hidden prejudice in law enforcement*, WASH. POST, Aug. 16, 2016, https://www.washingtonpost.com/news/powerpost/wp/2016/08/16/implicit-bias-training-seeks-to-counter-hidden-prejudice-in-law-enforcement/?utm_term=.919d5b776182 (describing Department of Justice’s efforts to increase and improve implicit bias training for law enforcement).

¹⁰ Interactions includes stops, tickets and searches conducted by law enforcement.

¹¹ U.S. Dep’t of Just., Bureau of Just. Stat., *Police Behavior during Traffic and Street Stops, 2011* (2013), <https://www.bjs.gov/content/pub/pdf/pbtss11.pdf> (finding relatively more Black drivers were pulled over in traffic stops than White drivers and Black and Latino drivers were ticketed and searched at higher rates than White drivers).

¹² Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES, Oct. 24, 2015, <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> (stating “[i]n the four states that track the results of consent searches, officers were more likely to conduct them when the driver was black, even though they consistently found drugs, guns or other contraband more often if the driver was white.”)

cellphones or other portable devices to remain free from warrantless searches by law enforcement. The Supreme Court has recognized this privacy interest in two recent cases.

In *Riley v. California*, the Supreme Court held that the Fourth Amendment requires law enforcement to obtain a warrant to search the content of a cellphone.¹³ In determining whether a search of a cellphone was exempted from the Fourth Amendment warrant requirements, the Court assessed “the degree to which it [the search] intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”¹⁴ The Court ultimately recognized that cellphones contain a broad array of private information so “[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”¹⁵ The majority in *Riley* also noted that cloud computing and technological advances improving the processes of obtaining a warrant have minimized the legitimacy of the governmental interests.

In a more recent and analogous decision, *Birchfield v. North Dakota*, the Court examined the reasonableness of a search in light of the availability of a less invasive alternative. The Court held that the Fourth Amendment does not permit warrantless blood tests incident to arrest for drunk driving because of the intrusive nature of a blood test.¹⁶ Considering that in *Riley* the Court recognized a privacy interest in the cellphone, and that law enforcement is capable of obtaining similar evidence of distracted driving through less invasive means,¹⁷ it is fair to assume that field testing authorized by S.2306/A.3955 would violate the Fourth Amendment rights of drivers in New York State.

Therefore, based on the Court’s holdings in *Riley* and *Birchfield*, the Fourth Amendment requires that law enforcement obtain a warrant prior to performing a field test on a driver’s cellphone or other portable device at the site of a collision or accident.

Alternatives to S.2306/A.3955

Car manufacturers are in constant competition to integrate new technologies into motor vehicles, and while some of these technologies can serve to enhance safety (e.g. collision avoidance system), most new auto technologies function as additional distractions to drivers and passengers. As a result, a growing number of states have sought to address distracted driver behavior through statewide prohibitions. Fourteen states, the District of Columbia, Puerto Rico, Guam and the Virgin Islands have banned handheld cell phone use,¹⁸ and forty-six states, the

¹³ *Riley v. California*, 134 S.Ct. 2473 (2014).

¹⁴ *Riley v. California*, 134 S.Ct. 2473, 2484 (2014).

¹⁵ *Riley v. California*, 134 S.Ct. 2473, 2495 (2014).

¹⁶ *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

¹⁷ See Supra note 5.

¹⁸ California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, Washington, West Virginia. Governors Highway Safety Association, *Distracted Driving Laws by State*, (2017), <http://www.ghsa.org/state-laws/issues/Distracted-Driving>; Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., *Driver Electronic Device Use in 2015* (2016), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812326>.

District of Columbia, Puerto Rico, Guam and the Virgin Islands have banned text messaging.¹⁹ While it is still too early to assess the efficacy of these statewide prohibitions,²⁰ it is important for legislators to consider that both the problem and solutions may be inherent in technology.

Just as new technologies have created more distractions for drivers, emerging technology can also be effective in altering driver behavior – perhaps more effective than legal deterrents. There are a number of free or affordable cellphone and tablet applications that eliminate common sources of distraction by disabling a driver’s ability to use the device when the car is in motion, employing pre-configured responses for calls or texts, or training drivers to avoid the use of electronic devices while driving.²¹ In fact, the most recent NHTSA guidelines on distracted driving encourages cellphone and device makers to develop a “driver mode” interface that would lock out applications or functions that do not meet a task acceptance criteria (e.g. navigation applications).²²

Furthermore, Nassau County has created a voluntary distracted driver education program that uses a distracted driving application.²³ The program is offered to drivers charged with prohibited use of a cell phone or electronic device in exchange for a plea that provides for a reduced charge and lower penalty.²⁴ Drivers that participate in the program agree to purchase, install and use the required cellphone application for at least 90 days. The application disables all other applications and programs on the device, employs voice commands, and generates detailed reports about driver performance.²⁵ At the end of the 90 day period the application sends Nassau County a report of performance and the report is provided to the court to determine successful

¹⁹ Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Governors Highway Safety Association, *Distracted Driving Laws by State*, (2017), <http://www.ghsa.org/state-laws/issues/Distracted-Driving>; Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., *Driver Electronic Device Use in 2015* (2016), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812326>.

²⁰ Anne T McCartt, David G. Kidd & Eric R. Toeh, *Driver Cellphone and Texting Ban in the United State: Evidence of Effectiveness*, Ann. Adv. Automot. Med. (2014) (summarizing existing publication on the effects of statewide bans and finding that it is unclear if the laws are having the desired effects on safety); Rutgers University Transportation Research Center, *Final Report: Effects of New Jersey’s Cell Phone and Text Ban*, 35 (2013) (finding that cellphone related crashes have increased since New Jersey’s cellphone ban law was implemented).

²¹ See, e.g., AT&T Drive Mode Home Page, <https://www.att.com/gen/press-room?pid=23185> (automatically blocks phone talking and texting when vehicle is moving at 15 MPH); LifeSaver Home Page, <https://lifesaver-app.com/> (automatically locks phone while vehicle is in motion); Mojo Home Page, <https://gotruemotion.com/> (monitors driver behavior and rewards safer driving with points that can be redeemed to win cash and prizes).

²² NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., VISUAL-MANUAL NHTSA DRIVER DISTRACTION GUIDELINES FOR PORTABLE AND AFTERMARKET DEVICES 61-71 (2016), <https://www.regulations.gov/document?D=NHTSA-2013-0137-0059>.

²³ Nassau County Traffic & Parking Violation Agency, *Distracted Driver Education Program (DDEP)* (2017), <https://www.nassaucountyny.gov/DocumentCenter/View/16684>.

²⁴ Nassau County Traffic & Parking Violation Agency, *Distracted Driver Education Program (DDEP)* (2017), <https://www.nassaucountyny.gov/DocumentCenter/View/16684>.

²⁵ Cellcontrol Nassau County Distracted Driver Education Program Home Page, <https://www.cellcontrol.com/nassaucounty>.

completion.²⁶ The program was launched in June 2016; therefore it is too soon to evaluate its effectiveness. However, preliminary research on distracted driving applications and coordinated public education campaigns have shown a strong, positive correlation between these efforts and a reduction in accidents.²⁷

Conclusion

Instead of creating a law that compromises constitutionally protected privacy rights and that is unlikely to alter driver behavior, lawmakers would be better advised to incentivize the use of tech applications that prevent distracted driving, and to develop voluntary driver education programs that cause driver's to avoid dangerous driving practices involving electronic devices.

²⁶ Cellcontrol Nassau County Distracted Driver Education Program Home Page, <https://www.cellcontrol.com/nassaucounty>.

²⁷ See, e.g., Jim Carter, *Sharing the It Can Wait Message Could Prevent a Crash, Save a Life*, AT&T CONSUMER BLOG, Jan. 08, 2014, <http://consumerblogarchive.att.com/consumerblog/story/a7793065> (describing a high correlation to crash reductions and a coordinated driver education campaign and distracted driver cellphone application).