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**Testimony of the New York Civil Liberties Union  
to  
The New York City Council Committees on Public Safety and Justice System  
regarding  
Oversight of DNA Collection and Storage in New York City.**

**February 25, 2020**

The New York Civil Liberties Union (NYCLU) respectfully submits the following testimony with respect to the New York City Council's Joint Hearing of the Committees on Public Safety and Justice System, regarding much-needed oversight of the collection and storage of DNA material in New York City.

**I. Introduction.**

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 180,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, through an integrated program of litigation, legislative advocacy, public education and community organizing. The NYCLU fights for the constitutional rights of all New Yorkers to be free from unreasonable searches, to maintain their genetic privacy, and to ensure a police force that respects the liberties and legal rights of members of its community.

The government's collection and maintenance of DNA samples implicates New Yorkers' constitutional rights to privacy, due process, reasonable search and seizure, and equal protection. Unfortunately, the collection and use of DNA by the NYPD and the New York City Office of the Chief Medical Examiner (OCME)—including surreptitious collection, the widespread collection of DNA from minors, and the maintenance of a rogue municipal database in violation of state law—run contrary to city, state, and constitutional law. And the City's continual neglect in setting policies governing the collection and use of New Yorkers' DNA is flatly unacceptable. At issue is New Yorkers' most personal information: their genetic blueprints, which can reveal everything from family relationships to ancestry to propensity for medical conditions, and hold the promise of revealing even more as technology develops further. The City's current policies (or lack thereof) are wildly inadequate given the weighty constitutional interests at stake.

A hearing into these important issues is long overdue. We thank the Committee for holding this hearing, and urge the Council to move quickly by making the long overdue policy changes needed to bring the City’s DNA collection in line with the law.

## **II. The Council Must Ensure that All City DNA Collection, Storage, and Use Complies with the Law.**

A core component of the NYCLU’s work is protecting New Yorkers’ right to be free from discriminatory and unwarranted searches or seizures by law enforcement. Given the severe implications for the misuse of our genetic data,<sup>1</sup> all DNA collection at the municipal level must be subject to meaningful rules and oversight. In New York City, such oversight requires, at a minimum, addressing and banning the current improprieties in our municipal DNA policies.

State law sets forth substantive and procedural rules that set conditions and circumstances for the use of DNA information.<sup>2</sup> Furthermore, the Right to Know Act requires that any “voluntary” DNA samples be collected only with clear informed consent (including explicit information about the right not to consent). Collection, storage, and use of DNA that falls outside of these laws – including the OCME’s “rogue” database, surreptitious swab collection, and the indiscriminate collection of minors’ DNA – must be banned and all improperly collected DNA must be completely purged. The current, unregulated use of New Yorker’s DNA is totally improper and amounts to what Legal Aid has rightly called “genetic stop and frisk.” Furthermore, in 2017 an independent review of the source code of a DNA analysis tool used by the office of the chief medical examiner raised serious questions about its validity, including whether the code may have been intentionally skewed to create more matches.<sup>3</sup>

The NYPD recently announced plans to remove DNA profiles of “Non-Criminals” from its rogue database, and says it will start expunging some of the 82,000 people in the database

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<sup>1</sup> The public has reason to be gravely concerned about the ways in which genetic databases could be misused by government entities. As Congress has recognized, government actors throughout American history have forcibly sterilized people based on perceived genetic “defects,” including “mental disease, epilepsy, blindness, and hearing loss,” and have discriminated against Black people in everything from marriage to employment because of perceptions about their DNA. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110–233, § 2, 122 Stat. 881 (2008), as amended Pub. L. No. 111–256, § 2(j) (2010). More recently, in the immigration context, the federal government has sought to consider immigrants’ health information to assess their likelihood to need certain forms of assistance. Our history warrants concerns about the misuse of our genetic data.

<sup>2</sup> N.Y. Exec Law Art. 49-B.

<sup>3</sup> Lauren Kirchner, *Thousands of Criminal Cases in New York Relied on Disputed DNA Testing Techniques*, PROPUBLICA (2017), <https://www.propublica.org/article/thousands-of-criminal-cases-in-new-york-relied-on-disputed-dna-testing-techniques> (last visited Jan 16, 2020).

who have never been convicted of a crime.<sup>4</sup> But these (still vague) half-measures merely confirm the urgent need for third-party oversight and accountability for the NYPD's use of its community's DNA. The very existence of the OCME rogue database is unlawful, and NYPD cannot cure the illegality of its database by adopting "rules" that are similar to, but different from and inferior to, those set forth in NYS Executive Law Article 49-B and its regulations.

Furthermore, there is simply no substitute for public, robust oversight of a technology that changes and evolves rapidly. While the NYPD's existing abuses of genetic storage and testing must be stopped and corrected, the Council also has a duty to establish an oversight mechanism to prevent against *future* abuses. Just last month, the New York Times reported on localities' use of "rapid DNA" analysis machines – called a "magic box" for local police.<sup>5</sup> But new technological developments – with such weighty implications for New Yorkers' privacy and due process rights – must be vetted and properly used, or else they simply become another "black box" of technology, used outside of all public oversight and accountability. New Yorkers expect and deserve responsible policies governing the use of their genetic material, and the representatives on this Council must supply them.

#### **a. The City Council Must Ban the OCME's Unlawful "Linkage" Database**

In Executive Law Article 49-B, lawmakers developed a comprehensive – and exclusive – statutory regime governing testing and data-banking of DNA samples. This body of law balances the rights of individuals and the interests of law enforcement and contains clear provisions designed to limit abuse of our genetic material.

Unfortunately, the OCME has established a so-called "Linkage Database" (or "suspect elimination database") completely outside of this state law.<sup>6</sup> This rogue DNA databank maintains a broad array of both arrestee samples and "elimination samples," a vast category of DNA records capturing the information of suspects, crime scene bystanders, and anyone else police ask to provide a biological specimen. For example, in the investigation of a homicide the police may well collect elimination samples from many individuals who are not suspects. As a result, much of the information maintained in the Linkage Database comes from people who have never been convicted of, or charged with, or even suspected of, a crime.

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<sup>4</sup> Edgar Sandoval, *NYPD to Remove DNA of Non-Criminals from Database*, New York Times (Feb. 20, 2020), available at <https://www.nytimes.com/2020/02/20/nyregion/dna-nypd-database.html>.

<sup>5</sup> Heather Murphy, *Coming Soon to a Police Station near You: The DNA 'Magic Box'*, New York Times (Jan. 21, 2019), available at <https://www.nytimes.com/2019/01/21/science/dna-crime-gene-technology.html>.

<sup>6</sup> Noah Manskar, *Concerns About NYC's DNA Database Spur Demand for a Hearing*, Patch.com (Aug. 21, 2019), available at <https://patch.com/new-york/new-york-city/concerns-nycs-dna-database-spur-demand-hearing>.

Reports suggest that the NYPD's collection for samples to enter into this database have been secretive and racially discriminatory.<sup>7</sup>

The Linkage Database does not conform itself to state law standards for DNA record maintenance and use. For example, stories suggest that DNA profiles remain in the Linkage Database indefinitely; there is no policy for purging such profiles from the system. The database also permits DNA material that was provided pursuant to court order in a criminal proceeding to be used for totally unrelated investigative purposes. There are no privacy protections for individuals whose genetic information is contained in the database, and the database exists without any independent oversight. Absent any controls, samples within it can be analyzed for information far beyond that provided by standard investigative comparisons.<sup>8</sup> The lack of regulation also means that there are no limits on use of existing sample for "familial searches."<sup>9</sup>

Partial-match and familial-searching DNA analysis techniques are used to identify blood relatives of an individual whose genetic material is stored in a database, such that criminal suspicion will attach to innocent persons due merely to their biological relation to a person whose DNA is in the state's databank. By definition, then, these techniques introduce imprecision, the potential for error, and the risk of sweeping innocent people into criminal investigations. Scientists and scholars have warned that use of DNA evidence to conduct familial searching is highly susceptible not only to human error, but to fraud and abuse.<sup>10</sup>

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<sup>7</sup> Jan Ransom and Ashley Southall, *Race-Biased Dragnet: DNA from 360 Black Men Was Collected to Solve Vetrano Murder, Defense Lawyers Say*, New York Times (March 31, 2019), available at <https://www.nytimes.com/2019/03/31/nyregion/karina-vetrano-trial.html>.

<sup>8</sup> Where testing is not limited to standard 20-loci STR analysis, DNA material can be mined for a wealth of information, including a subject's skin pigmentation, bio-geographical origin, gender, and eye color, but also sensitive information about a host of medical diseases, behavioral and medical predispositions, and even potential indicators of sexual orientation.

<sup>9</sup> The FBI describes the process of familial searching as follows: "Familial searching is an additional search of a law enforcement DNA database conducted after a routine search has been completed and no profile matches are identified during the process. Unlike a routine database search which may spontaneously yield partial match profiles, familial searching is a deliberate search of a DNA database conducted for the intended purpose of potentially identifying close biological relatives to the unknown forensic profile obtained from crime scene evidence." See FBI.gov, "Familial Searching," available at <https://www.fbi.gov/services/laboratory/biometric-analysis/codis>.

<sup>10</sup> Erin Murphy, "Relative Doubt: Familial Searches, of DNA Databases," 109 Michigan Law Review 292, 297-298, 317 (2010); and Lindsey Weiss, "All in the Family: A Fourth Amendment Analysis of Familial Searching," the Selected Works of Lindsey Weiss, at 8 (2008), available at [http://works.bepress.com/lindsey\\_weiss/2](http://works.bepress.com/lindsey_weiss/2). STR typing analyzes genetic markers at 20 sites, or loci, on the genomic strand. The analysis involves identification of the number of times these markers appear at a specific locus. At each locus analysts measure two repeated strands of markers – or alleles – one inherited from the father, the other from the mother. Counting these repetitions at each of the thirteen loci provides 40 discrete measurements that can help to distinguish one individual from another. A search of 40 alleles has a high probability of identifying a single match. A partial match policy uses fewer loci as a basis for typing the genetic identity of individuals.

DNA databanks have the ability to point not just to individuals but to entire families, including relatives who are not even suspected of having committed any crime. Clearly, this poses serious issues of privacy and fairness.

Because the OCME database includes the DNA samples of over 32,000 individuals whose profiles are not in the regulated state DNA bank, the pool of individuals subject to this problematic “partial” DNA analysis is massively expanded. And because those samples disproportionately include DNA from individuals whose DNA has been collected surreptitiously, without any court order, lawful process, or even knowledge on the individual’s part, and appears to reflect disproportionate sampling of Black people, the privacy and equal protection risks of using this DNA in unregulated partial-match analysis or familial testing are greater.

The City must ban the OCME’s rogue database to ensure compliance with state law. Alternatively, should the council permit the OCME database to continue operating, it must at a minimum pass a law to ban familial matching and partial sample testing.

**b. Surreptitious DNA Collection Violates State Law and the Right to Know Act.**

It has been reported that the NYPD routinely collects DNA samples in an orchestrated surreptitious manner through straws, bottles, or even cigarettes, without the knowledge or consent of the searched individual and without a court order. The NYPD not only harvests DNA in a surreptitious manner from adults who are charged with crimes—they also take DNA from those who are merely brought in for questioning, and even from children they trick into providing it.<sup>11</sup> In interrogation rooms, officers will sometimes offer arrestees bottles of water and cigarettes, not as a gesture of sympathy, but as a surreptitious method of acquiring the DNA suspects subsequently “abandon” in precinct trash cans or ashtrays—or, perhaps even more egregiously, that officers directly grab from individuals’ hands. Their DNA samples are then processed into profiles and entered into the OCME “Linkage Database” without their knowledge.

New York Civil Rights Law 79(l) Part 2(a) requires informed consent for all genetic testing and provides that findings cannot be disclosed without the individual’s consent unless they are ordered by the court or authorized specifically by state law.<sup>12</sup> And the Right to Know Act’s “consent to search” provision requires officers to provide people information about their right

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<sup>11</sup> See, e.g. Jan Ransom and Ashley Southall, *NYPD Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database*, New York Times (Aug. 15, 2019), available at <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html> and Joseph Goldstein, *Before Lifting DNA, Meticulous Protocol*, (Aug. 28, 2012), available at <https://www.nytimes.com/2012/08/29/nyregion/dna-evidence-in-police-interrogation-rooms-requires-bleach.html>.

<sup>12</sup> New York Civil Rights Law § 79-l, part 4(b).

to refuse searches and document these requests. Surreptitious DNA collection flies in the face of these laws.

The secretive processes by which the NYPD obtains DNA from innocent people runs counter to good governance principles and threatens the privacy of all New York City residents and visitors. The Council must act to stop the NYPD's surreptitious collection of DNA, which violates state law, the Right to Know Act, and our constitutional right to privacy.

**c. The Collection of Juvenile DNA without Informed Parental Consent is Unlawful.**

In addition to surreptitious DNA collection, the NYPD is notorious for including the DNA of children in its rogue database.<sup>13</sup> Our DNA is immutable, and collection from children implicates their privacy rights—not to mention the rights of family members, including those who have not even been born yet—for the rest of their lives. This is a significant infringement on these children's civil rights. DNA profiles of children should *never* be used to populate unregulated databases, period.

Even where the collection of DNA is done properly and pursuant to state law, minors cannot provide, and should never be asked to provide, legal consent to the irrevocable act of providing their DNA for analysis. In *People v. K.N.*, 2018 WL 6132289 (Crim. Ct. N.Y.C. November 11, 2018), Judge Sandra Roper recognized the scientific literature establishing that psychosocial, psychological and cognitive brain development of children distinguishes them from adults and rules that the signed consent for buccal swab collection in the case was deemed involuntary by virtue of the defendant's age – in violation of the child's Fourth Amendment rights against unlawful search and seizure.

The council must act to ban the collection of children's DNA by the NYPD in any case without explicit permission of a (fully informed) parent or guardian, or a court order signed by a judge.

**III. The City must pass the POST Act to ensure independent oversight of the NYPD's use of DNA.**

The impropriety of the NYPD's protocols for the use of our biological data is unfortunately not limited to the realm of DNA. To take one ignominious example, the NYPD built a giant facial recognition database and has been loading thousands of arrest photographs of children and teenagers into it.<sup>14</sup>

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<sup>13</sup> See George Joseph, *How Juveniles Get Caught Up in the NYPD's Vast DNA Dragnet*, Gothamist.com (Jan. 10, 2019), available at <https://gothamist.com/news/how-juveniles-get-caught-up-in-the-nypds-vast-dna-dragnet>.

<sup>14</sup> See e.g. Joseph Goldstein & Ali Watkins, *She Was Arrested at 14. Then Her Photo Went to a Facial Recognition Database*, N.Y. Times, Aug. 1, 2019, <https://www.nytimes.com/2019/08/01/nyregion/nypd-facial-recognition-children-teenagers.html>; see

The NYPD uses numerous forms of powerful, invasive, and covert surveillance technologies to police New York City's streets and residents every day. These surveillance technologies can capture vast amounts of information about the places we visit, people we communicate with, the frequency of those communications, where we are located inside our home, our most recent social media post – and even what lies within our genetic material.

To date, most of what we know regarding the NYPD's use of surveillance technologies is based on costly FOIL litigation by the NYCLU and other organizations, investigative journalism, and inquiries by the criminal defense community. Notably, this information is not regularly reported by the NYPD, nor is it easily obtainable from other government agencies or officials. It is long past time for the Council to grab the reins and ensure that the NYPD's surveillance and search policies comply with the law and our constitutional values. The Council must pass Intro. 487, the Public Oversight of Surveillance Technology ("POST") Act.

Under the POST Act, prior to utilizing any new surveillance technology, the NYPD will be required to disclose its intended use policy, describing basic information about what the technology is, what rules the Department will adhere to, how the Department will safeguard private information against misuse, and whether the information gathered on New Yorkers will be shared with other public or private entities. Any DNA databank used by the NYPD would be covered by the Act, and require NYPD to provide an overview of its collection, storage, and use protocols for any DNA collection system.

This basic oversight mechanism is critical to ensuring that New York is living up to its commitment to protect our genetic material from hare-brained genetic searches, badly designed databases, and abusive DNA collection practices.

More than a dozen jurisdictions have already passed surveillance transparency laws and there are more than 30 active efforts across the country to enact similar measures.<sup>15</sup> As more and more cities outpace New York and prove that they can make transparency work, our City Council is falling behind in its duty to protect the privacy and bodily integrity of its residents. The Council must act, pass the POST Act, and demonstrate that is committed to building trust with the community rather than permitting the NYPD's ongoing and improper secrecy surrounding its DNA collection and other surveillance technologies.

#### **IV. Conclusion.**

The current moment demands that New York City strengthen its policies for oversight and regulation of the collection of New Yorker's most precious data – their DNA. We thank

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*also* Clare Garvie, Georgetown Law Center on Privacy & Technology, *Garbage In, Garbage Out: Face Recognition on Flawed Data*, (2019), <https://www.flawedfacedata.com/>.

<sup>15</sup> ACLU, *Community Control Over Police Surveillance*, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance> (last accessed Dec. 17, 2019).

the Council for providing a forum to address these concerns, and urge immediate action to ban the rogue database and ensure all collection and use of New Yorker's DNA complies with the law and constitution.