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Toward Justice in Technology

Written Testimony of Tinuola Dada
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Council of the District of Columbia
Committee on the Judiciary & Public Safety

Public Hearing on
2021-2022 Metropolitan Police Department Performance Oversight

February 17, 2022

Dear Chairman Allen and Members of the Committee on the Judiciary & Public Safety,

Thank you for the opportunity to testify for the 2021-2022 Metropolitan Police Department Performance Oversight Hearing.

My name is Tinuola Dada and I am a Ward 1 resident and a Policy Analyst at Upturn, a DC-based nonprofit organization that works to advance justice in the use of technology. I am writing to testify about MPD's use of mobile device forensic tools — tools that allow police to extract and search a cellphone for every text, photo, piece of location data, online search history, and more. Since 2017, MPD has spent more than $150,000 obtaining these kinds of tools.[1]

My testimony is based on more than three years of research on law enforcement's use of mobile device forensic tools (*report attached*).[2]

Critically, our research found that many police departments often rely on people's consent to search cellphones, rather than obtaining a warrant. In these cases, this means no judicial oversight or legal limitations on the scope of the search, or how the data is later used. While police consent searches are troubling in any context, consent searches of cellphones underscore the power and information asymmetries between law enforcement and the public.

Given the vast amounts of information stored on our phones today and the invasive extraction and search capabilities of mobile device forensic tools, **we believe the Council should, at**

[1] This number comes from the DC Vendor Portal and a search of "Cellebrite" in the "Supplier" field. The purchase order numbers are PO564567, PO586831, PO604870, PO628900, and PO653165. *See* https://vendorportal.dc.gov/DCPayments.
[2] Upturn, *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones* (October 2020), https://www.upturn.org/reports/2020/mass-extraction.

minimum, move to ban consent searches of cellphones in DC, if not all consent searches outright.[3]

Consent searches are frequent and widespread. While little national data on the prevalence of consent searches exists, multiple scholars have estimated that consent searches comprise more than 90% of all warrantless searches by police.[4] Our research shows that consent searches are especially prevalent in cellphone extractions. In Harris County, TX, 53% of all cell phone searches conducted by the Sheriff's Office were consent searches. Between 2018 and 2019, over half of the phones extracted by the Denver Police Department were consent searches. And nearly one third of the phones the Seattle Police Department sought to extract data from were consent searches. Unfortunately, we do not have the numbers in DC — nor many other critical details about how MPD uses these tools — because MPD continues to stonewall our FOIA request from February 2019, more than three years ago.[5]

Consent searches are a legal fiction, and they are almost always coercive. While the Supreme Court has held that consent cannot be "coerced, by explicit or implicit means,"[6] the notion that someone can actually feel free to walk away from an interaction with police ignores reality. Recent data from California's Racial and Identity Profiling Advisory (RIPA) Board shows that 95 percent of individuals consent to a search when asked by an officer. People of color are especially unlikely to feel free to refuse consent.[7] As one scholar noted, "many African Americans, and undoubtedly other people of color, know that refusing to accede to the authority of the police, and even seemingly polite requests—can have deadly consequences."[8]

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[3] This recommendation is in line with what the DC Police Reform Commission recommended to the Council. *See* DC Police Reform Commission, *Decenter Police To Improve Public Safety: A Report of the DC Reform Commission*, April 1, 2021, 21 ("The Council … should prohibit consent searches, given that voluntary consent is an oxymoron in the policing context and that residents, especially in over-policed communities, rarely feel sufficiently free and safe to voluntarily consent.")

[4] Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FL. L. REV. 509, 511 (2016) (observing that "multiple scholars have estimated that consent searches comprise more than 90% of all warrantless searches by police . . . .")

[5] Upturn filed a FOIA Appeal (2019-163) with the Mayor's Office of Legal Counsel on June 5, 2019 due to MPD's ongoing delay. The Mayor's Office of Legal Counsel resolved the appeal on June 28, 2019. That office "remand[ed] this matter to MPD with the directive that MPD promptly produce … non-exempt portions of records it identifies as responsive to your request, consistent with DC FOIA." That decision relied, in part, on MPD's response on June 17, 2019, which indicated that "[t]he department is presently processing [the] request and it is expected that a response will be sent to him this week." It has been 990 days since the MPD said to the Mayor's Office of Legal Counsel that the responsive records would be sent to Upturn.

[6] Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

[7] Racial & Identity Profiling Advisory Board, *Racial & Identity Profiling Advisory Board Annual Report 2022* (January 2022), 100.

[8] Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 242-243 (2001). ("Given this sad history, it can be presumed that at least for some persons of color, any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm.") Indeed, as another scholar argued, the "consent search doctrine is the handmaiden of racial profiling." *See* George C. Thomas III, T*errorism, Race and a New Approach to Consent Searches*, 73 Miss. L. J. 525, 542 (2003).

As a result, consent searches have far reaching harms. Law enforcement can do almost anything with data extracted from a cellphone after someone consents. In the vast majority of jurisdictions across the country, there's no limit on how long an agency can store data extracted from phones pursuant to consent, or when and how law enforcement could re-examine a cellphone extraction.[9] Notably, the Wisconsin Supreme Court recently held that cellphone evidence obtained from a consent search in one jurisdiction can be shared with other law enforcement agencies pursuing unrelated investigations, without needing new legal authorization.[10]

Moreover, absent specific prohibitions, law enforcement could copy data from someone's phone, like their contact list, and add that information into a far-reaching police surveillance database. For instance, it's easy to imagine MPD using data extracted from mobile phones as evidence to place people in their "gang database," given the low bar for individuals and their information to be added to such databases. This matters not only to the owner of the phone, but to all of their friends and family, who are at risk of increased police contact.

Warnings are not enough. The warning requirement in the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 does not sufficiently ensure that consent searches are voluntary. That warning requires officers to inform the "subject of the search [that they are] being asked to voluntarily, knowingly, and intelligently consent to a search."[11] Such a warning does nothing to disclose the nature of an invasive cellphone search. The burden to limit the scope of a consent search still falls on the person being searched. This puts DC residents in an impossible position: only they can limit a search of their cellphone, but most residents don't even have a rough idea of the power of the tools that MPD uses to extract and analyze data from phones.

But even warnings about the kind of search to be performed do little to ensure that consent searches are voluntary, informed, or limited. A recent study designed "specifically to examine the psychology of consent searches" demonstrates the ineffectiveness of such warnings in limiting consent searches. Participants were brought into a lab and presented with "a highly invasive request: to allow an experimenter unsupervised access to their unlocked smartphone."[12] The researchers found that participants who received a warning about their right to refuse the search were just as likely to comply with the search.[13] This is also consistent with a much earlier analysis

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[9] United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020).
[10] *State v. Burch*, 2021 WI 68, 961 N.W.2d 314 (Wis. 2021).
[11] D.C. Code 23-526 (a)(1)(A), *available at* https://code.dccouncil.us/us/dc/council/acts/24-128.
[12] Roseanna Sommers, Vanessa K. Bohns, The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance, 128 Yale L. J. 1962, 1980 (2019)
[13] Roseanna Sommers, Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. 2000 (2019).

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of data collected from the Ohio Highway Patrol on motor vehicle stops, which found no decrease in consent rates after a law requiring warnings was introduced.[14]

Banning consent searches is not a new suggestion.[15] Nor is it a perfect solution, as it's easy for law enforcement to obtain a search warrant. But banning consent searches of cellphones can help limit police discretion, limit the coercive power of police, and begin to rein in MPD's use of these tools. **Accordingly, the Council should — at minimum — ban the use of consent searches of cellphones, if not all consent searches.**

Thank you for the opportunity to submit this testimony.

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[14] Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349 (2001) (Examined highway stops in Ohio between 1987 and 1997. During that time period, the state introduced a law requiring police to inform motorists that they were free to leave before requesting consent. Lichtenberg found no decrease in consent rates among motorists before versus after the reform was adopted.)

[15] For example, the New Jersey Supreme Court outlawed consent searches during traffic stops where no reasonable suspicion exists. *See* State v. Carty, 170 N.J. 632, 790 A.2d 903 (2002). As did the Minnesota Supreme Court. *See* Minnesota v. Mustafaa Naji Fort, 660 N.W.2d 415 (Minn. 2003).The California Highway Patrol banned its use of consent searches as part of a broader class action lawsuit brought because of racial profiling. *See* Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000). And in Rhode Island, by law, "[n]o operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."*See* Title 31, General Laws entitled "Motor and Other Vehicles,"31-21.2-5, *available at* https://law.justia.com/codes/rhode-island/2014/title-31/chapter-31-21.2/section-31-21.2-5/