To: Assembly Judiciary Committee
Date: February 28, 2019
Re: Opposition to AB200

ACLU
AMERICAN CIVIL LIBERTIES UNION
Nevada

601 S. RANCHO DRIVE
SUITE B11
LAS VEGAS, NV 89106
P/702.366.1536
F/702.366.1331
ACLUNV@ACLUNV.ORG

1325 AIRMOTIVE WAY
SUITE 202
RENO, NV 89502
P/775.786.1033
F/775.786.0805

WWW.ACLUNV.ORG

Dear Chairman Yeager and Members of the Assembly Judiciary Committee:

The ACLU of Nevada (ACLUNV) writes in opposition to AB 200 which would authorize law enforcement to use an "investigative technology device" to determine whether a driver was using a handheld device at the time of a traffic accident. Distracted drivers create a serious public safety hazard and we applaud the bill sponsor for working to address this important policy concern. However, this bill would allow law enforcement to utilize experimental technology to obtain information without a warrant, thereby infringing on the Fourth Amendment and privacy rights of Nevadans.

The Fourth Amendment to the U.S. Constitution protects citizens against unlawful searches and seizures. For centuries, a warrant based on probable cause has been the framework through which highly intrusive searches are conducted. The Supreme Court in *Riley v. California* ruled that police must get a warrant to search a phone even when a suspect has been arrested because of the vast range and detail of personal information that can be revealed by a phone search.[1]

AB 200 would allow police to access a driver's phone without a warrant by creating an "implied consent" to search. The ACLUNV strongly opposes this concept. Under this proposal, the police could search a phone even where there is no arrest which directly undermines the decisions of our nation's highest court.

The proponents of AB 200 submitted a white paper by Ric Simmons, a former prosecutor and regular contributor to the Federalist Society.[2] The white paper contends that "Textalyzer" technology is constitutionally viable because it is "minimally intrusive," qualifies as reasonable under the "special needs" exception to searches, and because the field test is a "binary search" to conclude only whether the individual "was violating the law or not."[3] We respectfully disagree.

First, for Fourth Amendment purposes, any search of the contents of a phone implicates the strong privacy concerns articulated by the Supreme Court in *Riley*. That decisions involved two consolidated cases. While one of them involved police viewing photos and other content on a smart phone, the other involved an older-model flip phone, where police merely pushed two buttons and viewed an entry in the call log. The Court made

[1] *Riley v. California*, 573 U.S. 373 (2014).
[2] Ric Simmons, (Feb. 28, 2019, 11:00 A.M.), https://fedsoc.org/contributors/ric-simmons.
[3] Ric Simmons, *White Paper on the constitutionality of: Authorizing the Use of Textalyzers After a Car Accident,* 6, 11 (Feb. 28, 2019). .

clear that even that limited search of a discrete piece of information triggered the full protections of the Fourth Amendment and required a search warrant.[4]

Furthermore, the Supreme Court in *Riley* explained that, because searches of cell phones implicate privacy concerns that are unprecedented due to the incredible volume and variety of private data on our phones, a warrant is required to search those phones. It rejected the government's argument that older Fourth Amendment doctrines, such as the search-incident-to-arrest doctrine, can be mechanically extended to newer digital-age searches. The Supreme Court reiterated this point just last term in *Carpenter v. United States,* where it required a warrant for cell phone location data and rejected mechanical extension of the "third-party doctrine." The attempt to extend the special needs exception to cover cell phone searches runs afoul of the Supreme Court's strong position that newer digital-age searches require robust protections, including search warrants.[5]

Finally, the Textalyzer search is not a "binary search" and the white paper inaptly analogizes the technology to breathalyzer tests. Having a high blood alcohol content while driving is inherently criminal activity, and a breathalyzer test is designed only to determine blood alcohol content and thus indicates definitively whether a person is violating the law. Although texting-while-driving is a violation, determining that a person's phone was used in the recent past is not necessarily evidence of guilt. A passenger could have been using the phone, the driver could have been texting while parked shortly before getting into the crash, or the driver might have been operating the phone using voice commands in full compliance with the law. The Textalyzer cannot be limited to only discovering evidence of criminal activity, and thus the scope of the search is not nearly as narrow as asserted.

In summary, legal justification for utilizing this experimental technology is based on unproven assumptions. There is no reason to believe that this technology will reliably function the way it is advertised on the hundreds of models of cell phones that people use. If the device obtains information beyond what is advertised, or if it damages or alters data on the phone, the rationale presented for defending the law fails.

Nevada should reject being a testing ground for experimental, constitutionally suspect technology.

Sincerely,

s//Holly Welborn
Policy Director
ACLU of Nevada

[4] *See Riley*, 573 U.S. at 376.
[5] *Carpenter v. U.S.* 138 S.Ct. 2206, 2263 (2018).