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July 20, 2021

Submitted via electronic mail (Arya.Hariharan@mail.house.gov)

Chairwoman Sheila Jackson Lee
House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

Ranking Member Andy Biggs
House of Representatives
171 Cannon House Office Building
Washington, DC 20515

**RE: July 13, 2021 Subcommittee on Crime, Terrorism, and Homeland Security
Hearing on Law Enforcement Use of Facial Recognition Technology**

Dear Chairwoman Jackson Lee and Ranking Member Biggs:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we submit this letter for the record in connection with the July 13, 2021 hearing held by the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security titled "Facial Recognition Technology: Examining Its Use by Law Enforcement."

LDF is the nation's first and foremost civil rights legal organization devoted to racial justice. Since its founding in 1940, LDF has worked at the national, state, and local levels to achieve racial justice and eliminate structural barriers for African-Americans in the areas of criminal justice, economic justice, education, and political participation.¹ As part of that work, LDF has forged longstanding partnerships with advocates, activists, and attorneys to challenge and reform unlawful and discriminatory policing practices across the country, including law enforcement's use of technology and automation in a racially discriminatory manner.²

¹ *About Us*, NAACP LDF, <https://www.naacpldf.org/about-us/>; see also, *Shepherd v. Florida*, 341 U.S. 50 (1951) (reversing the convictions of Black men falsely accused of raping a white woman in 1949 after sheriff's deputies brutally beat the men to force them to falsely confess).

² See e.g., *LDF Sends Letter Expressing Concerns Over NYPD's Compliance with the P.O.S.T. Act*, NAACP LDF (February 24, 2021), <https://www.naacpldf.org/news/ldf-sends-letter-expressing-concerns-over-nypds-compliance->

With this extensive experience, we submit this letter to highlight the disproportionate threat that facial recognition technology imposes on communities of color when used by law enforcement. Due to the concerns highlighted below, law enforcement agencies should not be authorized to use facial recognition technology.

1. Both Historically and in Present-Day, Law Enforcement Practices Have Disproportionately Criminalized Black and Brown Communities

There is a history of police surveilling and racially targeting Black people and communities of color in the United States. Today, law enforcement practices continue to produce racial disparities and police violence towards communities of color.

The first police forces in the United States were infamously formed to patrol enslaved people and preserve the system of slavery.³ Throughout our history, American law enforcement forces have used state power to track, monitor and control the lives and movements of Black people.⁴ Specifically, police have enforced segregation and Jim Crow laws, supported the disenfranchisement of Black Americans, and used their power and tools to inflict brutal force, unlawfully arrest, and criminalize Black and Brown communities.⁵ These decades-long patterns

[with-the-post-act/](https://www1.nyc.gov/assets/adstaskforce/downloads/pdf/ADS-Public-Forum-Comments-NAACP-LDF.pdf); *Testimony of Janai Nelson before the NYC Automated Decision Systems Task Force* (April 30, 2019), <https://www1.nyc.gov/assets/adstaskforce/downloads/pdf/ADS-Public-Forum-Comments-NAACP-LDF.pdf>; *Public Comment on the NYPD’s Draft Impact & Use Policies for the Criminal Group Database and Social Network Analysis Tools* (February 25, 2021), https://ccrjustice.org/sites/default/files/attach/2021/02/Written%20Comment%20on%20NYPD%27s%20Draft%20a%20nd%20Use%20Policies%20for%20the%20Gang%20Database%20and%20Social%20Network%20Analysis%20Tools_BXD_CCR_LAS_LDF.pdf (joining Bronx Defenders, Center for Constitutional Rights, and the Legal Aid Society to address the impact and use of the NYPD’s Criminal Group Database and Social Network Analysis Tools).

³ Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017), <https://time.com/4779112/police-history-origins/> (“In the South, however, the economics that drove the creation of police forces were centered not on the protection of shipping interests but on the preservation of the slavery system.”); *The History Of Policing And Race In The U.S. Are Deeply Intertwined*, NPR (June 13, 2020), <https://www.npr.org/2020/06/13/876628302/the-history-of-policing-and-race-in-the-u-s-are-deeply-intertwined>.

⁴ See Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, AMERICAN BAR ASSOCIATION (January 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/; Jill Lepore, *The Invention of Police*, THE NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> (“Progressive-era policing criminalized blackness . . . police patrolled Black neighborhoods and arrested Black people disproportionately; prosecutors indicted Black people disproportionately; juries found Black people guilty disproportionately; judges gave Black people disproportionately long sentences.”).

⁵ See Waxman, *supra* note 3; see generally, ELIZABETH K. HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S (2021).

of discrimination and violence at the hands of law enforcement sparked widespread protests against police brutality in the early 1960s, throughout the 20th century, and they continue today.⁶

Racially discriminatory police practices are still prevalent.⁷ While former Minneapolis police officer Derek Chauvin’s callous murder of George Floyd and the subsequent widespread public outcry drew the nation’s attention to deep-seated racism in policing, many other victims of discriminatory police violence remain unknown. Numerous U.S. Department of Justice (DOJ) investigations, state and federal courts findings, and reports have documented patterns of unconstitutional, unlawful, and/or racially discriminatory policing practices.⁸ Police killings are the sixth leading cause of death in Black men,⁹ and people of color make up 46% of all arrests and 57% of all those incarcerated nationwide.¹⁰

Facial recognition technology risks exacerbating these racially discriminatory policing practices by expanding the reach of law enforcement into Black and Brown communities using unreliable and faulty technology. If law enforcement is permitted to continue using these technologies, it will perpetuate and likely increase the systemic racism reflected in historic and current policing practices.

⁶ The Watts Riots of the 1960s are a glaring example of uprisings that spawned from police violence. See Morgan Jerkins, *She Played a Key Role in the Police Response to the Watts Riots. The Memory Still Haunts Her—But Black History is Full of Haunting Memories*, TIME (August, 3, 2020), <https://time.com/5873228/watts-riots-memory/>.

⁷ Radley Balko, *There’s overwhelming evidence that the criminal justice system is racist. Here’s the proof.*, WASHINGTON POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#DrugWar>.

⁸ See e.g., *Davis v. City of N.Y.*, 10 Civ. 0699 (SAS) (S.D.N.Y. May. 5, 2011); *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* (March 4, 2018), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; Civil Rights Division, U.S. Department of Justice, *Investigation of the Baltimore City Police Department* (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download>; Civil Rights Division, U.S. Department of Justice, *Investigation of the New Orleans Police Department* (March 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf; Civil Rights Division, U.S. Department of Justice, *LAPD Notice of Investigation Letter* (May 8, 2000), <https://www.justice.gov/crt/lapd-notice-investigation-letter>.

⁹ See Frank Edwards et. al., *Police: Sixth-leading cause of death for young Black men*, University of Michigan (Aug. 5, 2019), <https://news.umich.edu/police-sixth-leading-cause-of-death-for-young-black-men/>.

¹⁰ *2019 Crime in the U.S. Report: Arrests by Race and Ethnicity*, U.S. Department of Justice (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-43>.

2. Law Enforcement Use of Facial Recognition Technology Risks Disproportionally Exposing Black and Brown People to Misidentification and Perpetuates Heightened Surveillance of Their Communities

Communities of color are over-policed,¹¹ and law enforcement officers have far too much discretion¹² with insufficient oversight.¹³ Permitting law enforcement officers and agencies to use facial recognition technology risks exacerbating already existing racial inequities and the disparate criminalization of Black and Brown people.¹⁴ Already, police have used other forms of technology and automation to disproportionately target Black and Brown communities, reiterating historical

¹¹ See sources cited *supra* note 8; Drew Desilver et al., *10 things we know about race and policing in the U.S.*, PEW RESEARCH CENTER (June 3, 2020) <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/> (“Black adults are about five times as likely as whites to say they’ve been unfairly stopped by police because of their race or ethnicity.”).

¹² See e.g., DOJ investigative report into the Ferguson Police Department (March 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (noting the influx of police arrests of Black residents for charges within the officer’s discretion; “Ferguson police ‘persistently exercise[d] discretion to the detriment of African Americans’”); see also Jeffrey S. Nowacki, *Police discretion, organizational characteristics, and traffic stops: An analysis of racial disparity in Illinois*, 21 INTERNATIONAL JOURNAL OF POLICE SCIENCE AND MANAGEMENT 1, 4-16 (2019), <https://journals.sagepub.com/doi/pdf/10.1177/1461355719832617> (noting similar trends of increased police traffic stops and subsequent charges on African American motorists, when the stop or charge relied upon police discretion, prompting the phrase “driving while Black”).

¹³ See Degroff & Cahn, *An Early Assessment of Community Control of Police Surveillance Laws*, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT (February 10, 2021), <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/602430a5ef89df2ce6894ce1/1612984%20485653/New+CCOPS+On+The+Beat.pdf> (noting that while some local and state ordinances have begun to require oversight on police use of technology, compliance is limited, and noting the lack of a governing and uniform oversight guidance); see also, Petition at 3, *Amnesty International v. N.Y.C. Police Department* (N.Y.S. filed July 15, 2021), <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/60f0cf1946c0d74f87da1cc7/1626394396185/Verified+Petition.pdf> (suing New York City Police Department over the agency’s refusal to disclose public records about its acquisition of facial recognition technology and other surveillance tools); see also, Leandra Bernstein, *America has 18,000 police agencies, no national standards; experts say that’s a problem*, WJLA (June 9, 2020), <https://wjla.com/news/nation-world/america-has-18000-police-agencies-no-national-standards-experts-say-thats-a-problem>.

¹⁴ See generally Degroff & Cahn, *supra* note 13; see also Radley Balko, *There’s overwhelming evidence that the criminal justice system is racist. Here’s the proof.*, WASHINGTON POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#DrugWar>.

trends. For example, predictive policing tools,¹⁵ drones,¹⁶ license plate readers,¹⁷ aerial surveillance,¹⁸ surveillance cameras,¹⁹ and shot spotters,²⁰ have all been used disproportionately against, and resulted in heightened surveillance, over-policing, and/or increased arrest or incarceration, of communities of color.²¹

Furthermore, law enforcement use of facial recognition technology has resulted in the wrongful incarceration of people of color. Facial recognition algorithms frequently are unable to recognize or misidentify individuals with darker skin, features often associated with Black individuals, women, and people who are transgender or nonbinary, resulting in increased error rates in the technology's application to these groups.²² In fact, a report by the National Institute of Standards and Technology found that Black and Asian individuals may be between ten and up to *one hundred* times more likely to be misidentified by facial recognition technology than white

¹⁵ Rachel Levinson-Waldman and Erica Posey, *Court: Public Deserves to Know How NYPD Uses Predictive Policing Software*, THE BRENNAN CENTER (Jan. 26, 2018), <https://www.brennancenter.org/blog/court-rejects-nypd-attempts-shield-predictive-policingdisclosure>; see also Will Douglas Heaven, *Predictive Policing Algorithms are Racist. They Need to be Dismantled*, MIT TECHNOLOGY REVIEW (July 17, 2020), <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/>.

¹⁶ Faine Greenwood, *How to regulate police use of drones*, BROOKINGS (September 24, 2020), <https://www.brookings.edu/techstream/how-to-regulate-police-use-of-drones/> (describing law enforcement's use of drones to spy on alleged drug deals and homeless encampments, and to arrest three Black Lives Matter protesters).

¹⁷ George Joseph, *What Are License-Plate Readers Good For? Automatic plate-readers catch few terrorists or violent criminals, but do plenty of harm to low-income communities of color*, BLOOMBERG NEWS (August 5, 2016), <https://www.bloomberg.com/news/articles/2016-08-05/license-plate-readers-catch-few-terrorists-but-lots-of-poor-people-of-color>.

¹⁸ Denise Lavoie, *Court finds Baltimore aerial surveillance unconstitutional*, ASSOCIATED PRESS (June 24, 2021), <https://apnews.com/article/baltimore-courts-503b2eb629abf94c25edf4111baf64bd>.

¹⁹ Surveillance city: NYPD can use more than 15,000 cameras to track people using facial recognition in Manhattan, Bronx and Brooklyn, AMNESTY INTERNATIONAL (June 3, 2021), <https://www.amnesty.org/en/latest/news/2021/06/scale-new-york-police-facial-recognition-revealed/> (NYC's cameras are concentrated in neighborhoods with 54% Black and 30% Hispanic populations).

²⁰ Todd Feathers, *Gunshot-Detecting Tech Is Summoning Armed Police to Black Neighborhoods*, VICE (July 19, 2021), <https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black-neighborhoods?fbclid=IwAR3W9CjNaIQVLHk8JrutFG85RKIwHYcBAfuqTRVv5iSziwkh-uyC4sa43gg> (finding that ShotSpotter frequently generates false alerts and deployed almost exclusively in non-white neighborhoods).

²¹ Rashida Richardson, et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 NYU L. REV. 192 (2019), <https://www.nyulawreview.org/wpcontent/uploads/2019/04/NYULawReview-94-Richardson-Schultz-Crawford.pdf>.

²² Tom Simonite, *The Best Algorithms Struggle to Recognize Black Faces Equally*, WIRED (July 22, 2019), <https://www.wired.com/story/best-algorithms-struggle-recognize-black-faces-equally/>; Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU (July 26, 2018), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28>; Joy Buolamwini, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, in 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1, 1–15 (2018), <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>.

men, depending on the algorithm used.²³ In the policing context, these misidentifications are particularly dangerous because they can result in false arrests and wrongful incarceration.²⁴

Additionally, despite an algorithm’s inaccuracy in identifying people of color, when using facial recognition technologies, law enforcement officers are able to submit *any* photo of an unidentified person to a facial recognition algorithm.²⁵ This may include a poor and low-quality security camera photo, social media photos covered with filters, hand-drawn composite and artist sketches, and even police-edited photos where officers have digitally inserted, removed, or edited facial features.²⁶ This calls into question the credibility of the photos used and compounding the risk of misidentification.

²³ See Patrick Grother et al., *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, NATL. INST. STAND. TECHNOL. INTERAG. INTERN. REP. 8280, 2 (December 2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf> (evaluating 189 software algorithms from 99 developers on their ability to correctly identify individuals in 1) one-to-one matching and 2) one-to-many matching, two of the most common uses of facial recognition technology); see also Nat’l Inst. of Standards & Tech., *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software* (Dec. 19, 2019), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software>.

²⁴ See e.g. Complaint at 1, *Williams v. City of Detroit*, No. 2:19-cv-12538 (E.D. Mich. Mar. 24, 2021), ECF No. 1 https://www.aclumich.org/sites/default/files/field_documents/001_complaint_1.pdf (Mr. Williams’ lawsuit against the City of Detroit due to wrongful arrest using facial recognition technology); Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, NEW YORK TIMES (updated Jan, 6, 2021), <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html>; Elisha Anderson, *Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn’t Commit*, DETROIT FREE PRESS (July 11, 2020), <https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-recognition-detroit-michael-oliver-robert-williams/5392166002/>.

²⁵ See Clair Garvey, *Garbage In, Garbage Out: Facial Recognition on Flawed Data*, GEORGETOWN CENTER ON LAW AND PRIVACY (May 16, 2019), <https://www.flawedfacedata.com/> (noting that NYPD and other agencies have used 3D software to “complete,” “normalize” and/or rotate partial images of faces that are turned away from the camera to run a search using facial recognition technology).

²⁶ *Id.* (citing examples of policing conducting a Google search for Black features and manually adding them onto the photo and also noting that, because the algorithm cannot distinguish between the parts of the face that were in the original photo and the parts that were either computer generated or added in by a detective, the original photo could represent 60% of a suspect’s face, and yet the algorithm could return a possible match assigned a 95% confidence rating, suggesting a high probability of a match to the detective running the search); see also NYPD, *Real Time Crime Center FIS Presentation: Partial Face* (Sept. 17, 2018), Document pp. 025423, 025466 https://drive.google.com/file/d/18yVMSMABlqcE_nAlGf9XRlUnik8xWOH_/view (“The goal was to create an image which highlighted the pronounced facial features of the suspect in this image. [Hairline, Forehead, Brows, and Nose]. The FIS Investigator utilized the head of [redacted] in the previous case mentioned because of the similarities to the hairline and forehead. Both photos were combined within the Photoshop software and a Virtual Probe was created.”); Brendan F. Klare et al., *Matching Forensic Sketches to Mug Shot Photos*, 33 IEEE TRANSACTIONS ON PATTERN ANALYSIS AND MACHINE INTELLIGENCE 639, 645 (March 2011) (addressing the difficulty of using forensic sketches with facial recognition because “[f]orensic sketches are often an incomplete and poor portrayal of the subject’s face.”).

There are no defined limits on how or when in their investigative processes law enforcement agencies may use these misidentifications or “possible” matches from facial recognition technology to identify, apprehend, or arrest suspects. And even if an agency specifies in its departmental policy that returned matches from facial recognition technology must be coupled with additional evidence corroborating the assumed identity, there are no federal guidelines on what additional evidence is needed before police can arrest the “identified” person from the search.²⁷ Accordingly, in many instances people of color are being subjected to wrongful criminal arrest and prosecution due to faulty and discriminatory identifications using facial recognition technology.²⁸ While Mr. Robert Williams testified during the hearing about his harrowing wrongful arrest and detention resulting from police use of facial recognition technology, we do not know how many other people have been similarly impacted.²⁹ Coupling the risk and harms of facial recognition technology inaccurately identifying communities of color, with the racial biases and discrimination already reflected in law enforcement and the criminal legal system more broadly, makes law enforcement’s use of this technology particularly dangerous for Black and Brown communities.³⁰

Even if facial recognition technology accurately identified people of all races, ethnicities, and genders, it is still too dangerous to permit its use by law enforcement. Increasingly, law enforcement agencies use tools that facilitate mass surveillance, such as networks of cameras and drones, in predominantly Black and Brown neighborhoods and cities.³¹ Complex networks of

²⁷ Lauren Feiner and Annie Palmer, *Rules Around Facial Recognition and Policing Remain Blurry*, CNBC (June 12, 2021), <https://www.cnbc.com/2021/06/12/a-year-later-tech-companies-calls-to-regulate-facial-recognition-met-with-little-progress.html> (Discussing how Congress has not passed any laws regulating police use of facial recognition technology in the year since Amazon, Microsoft, and IBM committed to halting the sale of facial recognition software to police departments).

²⁸ See sources cited *supra* note 24.

²⁹ See Facial Recognition Technology: Examining its Use By Law Enforcement, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, 117 Cong. (July 13, 2021) (Testimony of Robert Williams), <https://docs.house.gov/meetings/JU/JU08/20210713/113906/HMTG-117-JU08-Wstate-WilliamsR-20210713.pdf> (Williams, a Black man, testified that police arrested him at his home and held him in jail for over 30 hours based on an erroneous facial recognition identification).

³⁰ See Degroff & Cahn, *supra* note 13; BRIAN JEFFERSON, *DIGITIZE AND PUNISH: RACIAL CRIMINALIZATION IN THE DIGITAL AGE* (2020), <https://www.jstor.org/stable/10.5749/j.ctvz0h9s7> (highlighting the increased number of Black people registered in police databases and therefore exposed to increased criminalization; “[d]igital databases, not detention centers . . . are becoming the leading edge of criminal justice in the United States. While more than 2 million people are incarcerated . . . the Bureau of Justice Statistics estimates that 100,596,300 names are stored in criminal history databases. In some cities, 80 percent of the black male population is registered in these databases.”); see also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 139 (2017) (“[R]acial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact but also to the violence of serious bodily injury and death.”).

³¹ See AMNESTY INTERNATIONAL, *supra* note 19 (noting that NYC’s cameras are concentrated in neighborhoods with 54% Black and 30% Hispanic populations); see also Noah Urban et al., *A Critical Summary of Detroit’s Project Green*

thousands of cameras span entire neighborhoods, allowing for the police monitoring of an individual’s every move the moment they step outside their homes.³² Adding facial recognition to these already-invasive law enforcement tools permits the identification of nearly all persons in the surveilled area and allows police to record individuals’ daily routines, associations, locations, and movements—all without having any individualized suspicions of criminal activity in violation of the Constitution.³³ For example, the Fourth Circuit recently considered the use of the Baltimore Police Department’s aerial surveillance system that “track[ed] every movement’ of every person outside in Baltimore” and was akin to ““attaching an ankle monitor’ to every person in the city.”³⁴ For the Baltimore residents living in neighborhoods, police now had ““an intimate window’ into each person’s associations and activities.”³⁵ The Court found that, because the aerial surveillance technology “enable[d] police to deduce from the whole of individuals’ movements,” the agency’s accessing of its data amounted to a warrantless search, violating the Fourth Amendment.³⁶

Law enforcement agencies have also used the heightened surveillance abilities that facial recognition technology provides to target Black activists who speak out about biased policing and police brutality, such as members of Black Lives Matter groups.³⁷ In fact, six federal law enforcement agencies reported using facial recognition technology for criminal investigations related to the 2020 nationwide protests against police brutality.³⁸ In August 2020 for example,

Light and its Greater Context, DETROIT COMMUNITY TECHNOLOGY PROJECT (June 9, 2019), https://detroitcommunitytech.org/system/tdf/librarypdfs/DCTP_PGL_Report.pdf?file=1&type=node&id=77&force= (“There is a legitimate fear regarding what [facial recognition] would look like in a majority black city such as Detroit.”); Timothy Williams, *Can 30,000 Cameras Help Solve Chicago’s Crime Problem?*, NEW YORK TIMES (May 26, 2018), <https://www.nytimes.com/2018/05/26/us/chicago-police-surveillance.html> (“It’s now been normalized for these [low-income] communities to be under constant surveillance, which contributes to the criminalization of people.”).

³² See AMNESTY INTERNATIONAL, *supra* note 19; *see also* *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, No. 20-1495, 2021 U.S. App. LEXIS 18868 (4th Cir. June 24, 2021) (finding the Baltimore Police Department’s surveillance system violates the Fourth Amendment because persistent surveillance of outdoor movements invades people’s reasonable expectation of privacy).

³³ *Leaders of a Beautiful Struggle*, *supra* note 32; *see also* Amy Harmon, *As Cameras Track Detroit’s Residents, a Debate Ensues About Racial Bias*, NEW YORK TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/us/detroit-facial-recognition-cameras.html>.

³⁴ *Id.* at 24.

³⁵ *Id.* at 36 (explaining that “allowing the police to wield this power unchecked is anathema to the values enshrined in our Fourth Amendment.”).

³⁶ *Id.* at 4, 34.

³⁷ Jordan Williams, *Watchdog: Six Federal Agencies Used Facial Recognition Software to ID George Floyd Protesters*, THE HILL (June 29, 2021), <https://thehill.com/policy/technology/560805-watchdog-6-federal-agencies-used-facial-recognition-software-to-id-george>.

³⁸ See United States Government Accountability Office, *Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks* GAO-21-518 at 17-18 (June 2021), <https://www.gao.gov/assets/gao-21-518.pdf> (“Following the death of George Floyd while in the custody of the Minneapolis, Minnesota police department on May 25, 2020, nationwide civil unrest, riots, and protests occurred. Six

officers used facial recognition technology to cross-reference footage from protests with online images to identify Derrick Ingram, a Black activist who led a protest against police brutality in June 2020.³⁹ This resulted in over 50 police officers surrounding Ingram’s apartment and according to him, officers deployed drones, police dogs and two helicopters for several hours before leaving.⁴⁰ While police surveillance and violence against Black protestors is not new,⁴¹ law enforcement’s ability to identify protestors at the scale that facial recognition allows is a new and dangerous phenomenon. Law enforcement’s unfettered use of this technology during protests risks chilling protected First Amendment activity of targeted groups which frequently include religious and ethnic minorities,⁴² and subjects them to a greater risk of police harm.⁴³

Overall, law enforcement’s use of facial recognition technology creates a great risk that communities of color will increasingly be wrongly identified and subject to disparate criminal enforcement or a “surveillance state” where law enforcement monitors and tracks their movements, associations *en masse*, and chills their dissent.

agencies told us that they used images from these events to conduct facial recognition searches during May through August 2020 in order to assist with criminal investigations.”).

³⁹ Aristos Georgiou, *Black Lives Matter Activist Hunted by NYPD Facial Recognition Technology*, NEWSWEEK (August 8, 2020), <https://www.newsweek.com/black-lives-matter-activist-hunted-facial-recognition-technology-1525335>.

⁴⁰ *Id.*; see also Adrienne Green, *The Room Where It Happened: Derrick Ingram is still shut inside the Hell’s Kitchen apartment the police tried to invade*, NEW YORK MAGAZINE (May 25, 2021), <https://nymag.com/intelligencer/2021/05/derrick-ingram-nypd-standoff.html> (describing the 5 hour encounter and noting that though police later charged Ingram with third degree assault, it was reduced to a misdemeanor and eventually dismissed), and Katie Shepherd, *An artist stopped posting protest photos online to shield activists from police. Then, he was arrested.*, WASHINGTON POST (August 3, 2020), <https://www.washingtonpost.com/nation/2020/08/03/philadelphia-arrest-protest-photos/> (describing others targeted by police after police used facial recognition technology to identify them from footage derived from protests).

⁴¹ Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAGAZINE (July 27, 2017), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/> (“Aggressive dispersion tactics, such as police dogs and fire hoses, against individuals in peaceful protests and sit-ins were the most widely publicized examples of police brutality in that era. But it was the pervasive violent policing in communities of color that built distrust at a local, everyday level.”).

⁴² Klen Klippenstein, *Leaked FBI Documents Reveal Bureau’s Priorities Under Trump*, THE YOUNG TURKS (August 8, 2019), <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR> (“The documents, . . . reference a mysterious plan to mitigate the threat of ‘Black Identity Extremists’ with a program codenamed ‘IRON FIST’ involving the use of undercover agents.”).

⁴³ See Facial Recognition Technology (I): Its Impact on Our Civil Rights and Liberties: Hearing Before the Committee on Oversight and Reform, 116th Cong., at 5–6 (2019) (statement of Andrew G. Ferguson, Professor of Law, University of the District of Columbia, David A. Clarke School of Law); *id.* at 7–9 (statement of Clare Garvie, Senior Associate, Georgetown University Law Center, Center on Privacy & Technology); *id.* at 9–11 (statement of Neema Singh Guliani, Senior Legislative Counsel, American Civil Liberties Union).

3. Law Enforcement’s Expansive Use of Facial Recognition Technology is Largely Hidden, Allowing Police to Collect, Disclose, and Run an Individual’s Personal Information Against Multiple Databases Without Their Knowledge, Implicating Privacy Concerns and Leaving Impacted Victims Unable to Contest or Remedy Resulting Harms

The opacity surrounding facial recognition technology—its creation, and the boundaries (or lack thereof) on its use—largely leaves the public in the dark about its use.⁴⁴ Additionally, because law enforcement agencies publicly report little to no information about officers’ searches or use of technology, this also creates an obstacle in accessing information about the extent of law enforcement use of facial recognition technology.

At least one facial recognition technology company, Clearview AI, mines public platforms and/or photo databases, such as social media platforms and security footage for the datasets supporting its technology—all without the captured person’s knowledge or consent.⁴⁵ A person’s face could be used to create and train a facial recognition algorithm without them ever uploading a photo or consenting to its use.⁴⁶ When facial recognition technology is then shared with law enforcement agencies, police may run hundreds of thousands of searches for an identification, using any photo, against a broad range of available databases, without those in the database ever being informed of law enforcements’ access to these photos, or use of such searches.⁴⁷ If the technology correctly identifies the individual, their identifying biometric information is then available for use across multiple law enforcement agencies, at the discretion of police, at the push

⁴⁴ See Feiner and Palmer, *supra* note 27; see also Andrew Wyrick, *NYPD sued for refusing to disclose records about facial recognition use*, DAILY DOT (July 21, 2020), <https://www.dailydot.com/debug/nypd-facial-recognition-lawsuit-stop/>.

⁴⁵ Kashmir Hill, *The Secretive Company That Might End Privacy As We Know It*, NEW YORK TIMES, (Updated March 18, 2021), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html>; see also Drew Harwell, *This facial recognition website can turn anyone into a cop – or a stalker*, WASHINGTON POST (May 14, 2021), <https://www.washingtonpost.com/technology/2021/05/14/pimeyes-facial-recognition-search-secrecy/>; James Moore, *Facial recognition under scrutiny as Clearview AI’s practices ruled illegal in Canada*, IFSEC GLOBAL (Feb. 16, 2021), <https://www.ifsecglobal.com/video-surveillance/facial-recognition-under-scrutiny-as-clearview-ais-practices-ruled-illegal-in-canada/> (the Canadian government ruled that Clearview’s collection of biometric information from its citizens without their knowledge or consent is illegal).

⁴⁶ See e.g., Joseph Goldstein and Ali Walker, *She Was Arrested at 14. Then Her Photo Went to a Facial Recognition Database.*, NEW YORK TIMES (August 1, 2019), <https://www.nytimes.com/2019/08/01/nyregion/nypd-facial-recognition-children-teenagers.html>.

⁴⁷ Katie Canales, *Thousands of US police officers and public servants have reportedly used Clearview’s controversial facial recognition tech without approval*, BUSINESS INSIDER (April 6, 2021), <https://www.businessinsider.com/clearview-ai-facial-recognition-thousands-police-departments-2021-4>; *S.T.O.P. Condemns NYPD for 22K Facial Recognition Searches*, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT (Oct. 23, 2020), <https://www.stopspying.org/latest-news/2020/10/23/stop-condemns-nypd-for-22k-facial-recognition-searches>.

of a button.⁴⁸ The FBI revealed that it has access to over 400 million photos for face matching, including the driver's license databases of over fifteen states and passport application photos.⁴⁹ And just last year, Immigration and Customs Enforcement (ICE) used facial recognition technology to mine millions of drivers' license photos without the license-holders' knowledge, allowing for a broad targeting of immigrants.⁵⁰ Since few states restrict or prohibit ICE's access to personally identifying data, and the majority allow law enforcement officials to request similar searches against their driver's license databases,⁵¹ these intrusive warrantless searches occur in most states.⁵² The combination of facial recognition technologies incorporating publicly available photo datasets and law enforcement's unrestricted use of the technology exposes people to government identification and tracking⁵³ without their knowledge, and largely without independent oversight.⁵⁴

Additionally, there is very little data collected and made publicly available about the activities of individual law enforcement officers or agencies, including their use of facial recognition technology, that would permit public oversight. For example, data or information is not uniformly collected or shared publicly about officers or agencies' use of facial recognition technology to search databases and identify individuals.⁵⁵ The public does not know the demographic characteristics of persons searched, the justification for each search, what technology was used, how the search was conducted, or the outcomes of searches.⁵⁶ Subsequently, individuals

⁴⁸ Alfred Ng, *Police Say They Can Use Facial Recognition, Despite Bans*, THE MARKUP (January 28, 2021), <https://themarkup.org/news/2021/01/28/police-say-they-can-use-facial-recognition-despite-bans> (explaining that the current patchwork of local bans on facial recognition technology still allows law enforcement agencies to easily share information gathered via facial recognition technology).

⁴⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-267, FACE RECOGNITION TECHNOLOGY: FBI SHOULD BETTER ENSURE PRIVACY AND ACCURACY (May 2016), <https://www.gao.gov/assets/680/677098.pdf>.

⁵⁰ Catie Edmundson, *ICE Used Facial Recognition to Mine State Driver's License Databases*, NEW YORK TIMES (July 9, 2017), <https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html>.

⁵¹ See Testimony Before the Comm. on Oversight and Reform, House of Representatives, *Facial Recognition Technology: DOJ and FBI Have Taken Some Actions in Response to GAO Recommendations to Ensure Privacy and Accuracy, But Additional Work Remains* GAO-19-579T at 2, 5-6 (2019) (statement of Gretta L. Goodwin), <https://www.gao.gov/assets/gao-19-579t.pdf> (since 2011 the FBI has logged more than 390,000 facial recognition searches of federal and local databases, including state DMV databases).

⁵² See Edmundson, *supra* note 50.

⁵³ Ryan Mac et al., *Clearview's Facial Recognition App Has Been Used By The Justice Department, ICE, Macy's, Walmart, And The NBA*, BUZZFEED NEWS (February 27, 2020), <https://www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement>.

⁵⁴ Clare Garvie, *Garbage In, Garbage Out: Face Recognition On Flawed Data*, GEORGETOWN CENTER ON LAW AND PRIVACY (May 16, 2019), <https://www.flawedfacedata.com> ("There are no rules when it comes to what images police can submit to face recognition algorithms to generate investigative leads.").

⁵⁵ See *supra* note 32.

⁵⁶ See Garvie, *supra* note 54 ("The NYPD made 2,878 arrests pursuant to face recognition searches in the first 5.5 years of using the technology [,] Florida law enforcement agencies . . . run on average 8,000 searches per month of the Pinellas County Sheriff's Office face recognition system, [but] many other agencies do not keep close track of how many times their officers run face recognition searches and whether these searches result in an arrest.").

have little room to understand the extent that facial recognition played in law enforcement activity, recourse to challenge its use, or the ability to contest abuses or errors.⁵⁷

Law enforcement’s unfettered use of facial recognition technology allows for an expansive reach that raises serious privacy concerns because it allows law enforcement officials to collect, disclose, and use an individual’s personal information from multiple databases without their knowledge.⁵⁸ As explained above, the burden of this harm falls disproportionately on Black and Brown communities.

4. Law Enforcement Officers and Agencies Should Not Be Permitted to Use Facial Recognition Technology

In the wake of the murder of George Floyd and the resulting outcry, much remains to be done to end systemic racism⁵⁹ and police violence in our public safety systems. Law enforcement’s use of facial recognition technology cannot be addressed without a reckoning of the systemic racism and police violence in our current public safety systems in the United States. Until we transform our public safety systems, law enforcement’s use of facial recognition technology will only exacerbate the systemic harm that officers and agencies cause to communities of color even without such technology.

Recognizing these dangers, multiple cities across the country⁶⁰ have rightfully implemented a complete ban on law enforcement’s use of facial recognition technology.⁶¹ San Francisco’s “Stop Secret Surveillance Ordinance” warned of its propensity to “exacerbate racial injustice and threaten our ability to live free of continuous government monitoring.”⁶² Similarly, Maine enacted the country’s strongest statewide facial recognition law, banning the use of the technology in most areas of government, and explicitly applying the ban to law enforcement

⁵⁷ Aaron Mak, Facing Facts: A case in Florida demonstrates the problems with using facial recognition to identify suspects in low-stakes crimes, SLATE (January 25, 2019), <https://slate.com/technology/2019/01/facial-recognition-arrest-transparency-willie-allen-lynch.html>.

⁵⁸ See e.g., Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2921 (2002) (outlining privacy protections for citizens’ personal information); see also GAO Report, *supra* note 51 (discussing the privacy implications of federal agencies use of facial recognition technology).

⁵⁹ See sources cited *supra* note 8 (listing multiple DOJ investigation and federal and state court decisions, all finding racially discriminatory police practices in police departments across the country).

⁶⁰ David Gutman, *King County Council bans use of facial recognition technology by Sheriff’s Office, other agencies*, SEATTLE TIMES (June 1, 2021), <https://www.seattletimes.com/seattle-news/politics/king-county-council-bans-use-of-facial-recognition-technology-by-sheriffs-office-other-agencies/>.

⁶¹ *Ban Facial Recognition Map: Bans*, FIGHT FOR THE FUTURE, <https://www.banfacialrecognition.com/map/>.

⁶² Sarah Emerson, *San Francisco Bans Facial Recognition Use by Police and the Government*, VICE (May 14, 2019), <https://www.vice.com/en/article/wjvxxb/san-francisco-bans-facial-recognition-use-by-police-and-the-government>.

agencies.⁶³ At least 7 states have prohibited some law enforcement use⁶⁴ and multiple other jurisdictions have imposed at least a moratorium on law enforcement's use of facial recognition technology.⁶⁵ Amazon, Microsoft, and IBM, stopped selling facial recognition technology to law enforcement agencies.⁶⁶ These governmental and private actions to cease supporting law enforcement use of facial recognition were taken due to concerns regarding the legitimate dangers of such use. The federal government should follow suit.

Conclusion

Allowing law enforcement agencies to use this invasive and faulty technology threatens to exacerbate, and effectively ignores the documented dangers of systemic racism in America's law enforcement.⁶⁷ We must not equip law enforcement with the tools to weaponize data and technology against our communities, particularly when such use reinforces racial bias and discriminatory conduct. We urge this Subcommittee to address police accountability, brutality, and the over-policing of Black and Brown communities before authorizing law enforcement use of facial recognition technology. Attempts to address law enforcement's use of facial recognition technology must confront and first end racially disparate policing practices that have been found in agencies nationwide and the police violence disproportionately experienced by communities of color.

Thank you for considering these recommendations. We look forward to continuing to work with this Subcommittee on this critical issue of law enforcement use of facial recognition technology. If you have any questions, please contact Katurah Topps, Policy Counsel, at

⁶³ L.D. 1585 (H.P. 1174), An Act to Increase Privacy and Security by Regulating the Use of Facial Surveillance Systems by Departments, Public Employees and Public Officials (June 17, 2021) <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1174&item=2&snum=130>.

⁶⁴ Julie Carr Smyth, *States Push Back Against Use of Facial Recognition by Police*, U.S. NEWS AND WORLD REPORT (May 5, 2021), <https://www.usnews.com/news/politics/articles/2021-05-05/states-push-back-against-use-of-facial-recognition-by-police>; Susan Crawford, *Facial Recognition Laws Are (Literally) All Over the Map*, WIRED (Dec. 16, 2019), <https://www.wired.com/story/facial-recognition-laws-are-literally-all-over-the-map/> (“California joined New Hampshire and Oregon in prohibiting law enforcement from using facial recognition and other biometric tracking technology in body cameras. Illinois passed a law that permits individuals to sue over the collection and use of a range of biometric data, including fingerprints and retinal scans as well as facial recognition technology. Washington and Texas have laws similar to the one in Illinois, but don't allow for private suits.”).

⁶⁵ *Ban Facial Recognition Map: Other Laws, State & Local*, FIGHT FOR THE FUTURE, <https://www.banfacialrecognition.com/map>.

⁶⁶ Rebecca Heilweil, *Big tech companies back away from selling facial recognition to police. That's progress.*, VOX (June 11, 2020), <https://www.vox.com/recode/2020/6/10/21287194/amazon-microsoft-ibm-facial-recognition-moratorium-police>.

⁶⁷ Emily Kwong, *Short Wave: Why Tech Companies Are Limiting Police Use of Facial Recognition*, NATIONAL PUBLIC RADIO (Feb. 18, 2021), <https://www.npr.org/2021/02/17/968710172/why-tech-companies-are-limiting-police-use-of-facial-recognition>.



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cc: Members of the Subcommittee on Crime, Terrorism, and Homeland Security