April 13, 2020

The Honorable Ed Chau
California State Capitol, Room 5016
Sacramento, CA 95814

Dear Assemblymember Chau:

As scholars who study information technologies or their social and political effects, we write to express our strong opposition to AB 2261. The bill would undermine civil rights, harm public safety, and pave the way for a future where governments are given too much power—power to track people, deny them fundamental opportunities, and deprive them of essential freedoms that are central to a vibrant democratic society.

Facial recognition poses an unprecedented threat to privacy and civil liberties.

As two of the authors of this letter have forcefully argued, facial recognition technology represents an unprecedented threat to privacy and civil liberties.[1] Ubiquitous, automated facial recognition is well suited for discriminating against people of color, targeting political activists, and supporting militaristic and authoritarian modes of government.[2] There is little doubt that adopting an artificial-intelligence supported infrastructure of networked cameras that are connected to databases of known faces will further erode privacy in public and allow for government agents to perform large-scale identification, tracking, and behavioral analysis of populations.[3] We believe this automated surveillance apparatus poses such deep threats to society that the harms far outweigh any possible benefits it could provide.

Simply put, the risks of pervasive facial recognition are extraordinary, and AB 2261 fails to protect affected communities from those risks.

Weak restrictions pave the way for pervasive deployment of facial-recognition infrastructure.

In our opinion, slight restrictions like those in AB 2261 will fail to stop the ever-creeping sprawl of face-scanning infrastructure. Crucially, the bill's basic assumptions about consent, notice, and choice as they pertain to facial and other biometric surveillance are faulty. The use of informed consent as a regulatory mechanism for surveillance and data practices has proven to be a widely acknowledged failure.[4] Even if, hypothetically, people were given maximum control for providing consent, they still would be overburdened

[1] Evan Selinger & Woodrow Hartzog, *Opinion | What Happens When Employers Can Read Your Facial Expressions?*, The New York Times, October 17, 2019, https://www.nytimes.com/2019/10/17/opinion/facial-recognition-ban.html (last visited Mar 11, 2020).

[2] Jennifer Lynch, *Face Off, Law Enforcement Use of Facial Recognition Technology*, Report of the Electronic Frontier Foundation, February 2018 (available at https://www.eff.org/files/2018/02/15/face-off-report-1b.pdf); Sahil Chinoy, *The Racist History Behind Facial Recognition*, The New York Times (July 10, 2019), https://www.nytimes.com/2019/07/10/opinion/facial-recognition-race.html; Steve Lohr, *Facial Recognition is Accurate, if You're a White Guy*, The New York Times (Feb. 9, 2018), https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html; Joy Boulamwini, *When the Robot Doesn't See Dark Skin*, The New York Times (June 21, 2018), https://www.nytimes.com/2018/06/21/opinion/facial-analysis-technology-bias.html.

[3] Clare Garvie, Facial recognition threatens our fundamental rights, The Washington Post (July 19, 2018), https://www.washingtonpost.com/opinions/facial-recognition-threatens-our-fundamental-rights/2018/07/19/a102703a-8b64-11e8-8b20-60521f27434e_story.html.

[4] Woodrow Hartzog, *User Agreements Are Betraying You*, Medium (2019), https://onezero.medium.com/user-agreements-are-betraying-you-19db7135441f (last visited Mar 11, 2020).

when trying to meaningfully exercise it at scale.[5] Unfortunately, AB 2261 relies on these broken regulatory defaults by permitting private entities to deploy facial recognition technology in public with little more than a posted sign.[6] Furthermore, AB 2261 grants governments the overly-broad latitude of being able to identify people in public without going through any check-and-balance process whatsoever.[7] Consequently, under AB 2261, Californians will be forced to assume that they can no longer maintain their anonymity in public, because they might be identified everywhere they go. As a result, their ability to freely live their lives in public—attend religious services, seek medical treatment, join political protests, exercise their freedom of speech and association, and so much more—will be severely compromised.

Human involvement cannot mitigate the wrongful applications of the technology.

We are also seriously concerned about AB 2261's reliance on human review to protect people from the harms of facial recognition. AB 2261 permits a government or company to use biased facial recognition systems to deny people access to jobs, financial services, employment, health care, and even basic necessities. Indeed, the bill only requires that a person with potentially minimal training be kept in the decision-making loop. This is a grave mistake. While human oversight sounds sensible in the abstract, in reality the record on human involvement in the use of facial recognition technology is far from reassuring. In one striking example, officers from the New York Police Department used an image of the actor Woody Harrelson in an attempt to find someone who apparently resembled the actor.[8] The scholarly literature on how automation impacts human judgment suggests that AB 2261 will be a disaster for vulnerable people because humans are prone to misinterpreting the outputs of automated systems, placing too much trust in them, and deferring to automated suggestions in unexpected and potentially harmful ways.[9] Research documents how automated decisions about housing, lending, and service provision compounds the burden on poor Americans made responsible to dispute complex technical errors.[10]

We hope that the legislature will take the threat of facial recognition seriously. Facial recognition technology threatens to translate who we are and everywhere we go into trackable information that can be instantly stored, shared, and analyzed. Since the future of human autonomy depends upon facial recognition technology being restricted before the systems become too entrenched in our lives, we must oppose AB 2261.

Sincerely,

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[5] Woodrow Hartzog, Privacy and the Dark Side of Control, IAI TV - Changing how the world thinks (2017), https://iai.tv/articles/privacy-the-dark-side-of-control-auid-882 (last visited Mar 11, 2020).
[6] AB 2261, Draft Section 1798.310(d), as of the date of this letter.
[7] AB 2261, Draft 1798.360(a), imposing no restrictions on identifying people unless a government entity is engaged in "ongoing surveillance."
[8] Drew Harwell, *Police have used celebrity look-alikes, distorted images to boost facial-recognition results, research finds*, Washington Post, https://www.washingtonpost.com/technology/2019/05/16/police-have-used-celebrity-lookalikes-distorted-images-boost-facial-recognition-results-research-finds (last visited Mar 11, 2020).
[9] Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249 (2008), https://openscholarship.wustl.edu/law_lawreview/vol85/iss6/2.
[10] Virginia Eubanks. 2017. *Automating Inequality*. New York: St Martin's Press.

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cc: Members and Committee Staff, Assembly Privacy and Consumer Protection Committee
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