May 26, 2020

The Honorable Lorena Gonzalez,
State Capitol, Room 2114
Sacramento, California 95814

Re: OPPOSE AB 2261 As Amended May 12, 2020

Dear Assemblymember Gonzalez:

Our diverse coalition of civil rights organizations writes to express strong opposition to AB 2261. The proposed amendments of May 12 do not change our opposition. AB 2261 remains a threat to civil rights and will waste money, make us less safe, and do more harm to communities being disproportionately affected by the economic and health impacts of COVID-19.

As advocates working closely with people most acutely impacted by this unprecedented pandemic – people of color, individuals who are incarcerated or in ICE custody, people experiencing homelessness, and workers, among others – we are witnessing firsthand how the disproportionate harms marginalized communities face every day are exacerbated during moments of crisis. It is therefore more critical than ever that California adopt appropriate measures to protect communities from discriminatory and invasive measures, including face surveillance. AB 2261 will exacerbate the racial, gender, and socioeconomic inequities the pandemic has exposed and is not an effective response to our current public health crisis. In stark contrast, AB 2261's endorsement of invasive surveillance threatens to divert money from vital public health resources precisely at a moment where we should be heavily investing in them. We should not be giving companies and governments a green light to use facial recognition to track individuals, deny economic opportunities, and further marginalize communities.

Technology companies may promise theoretical and unproven public health benefits, but the reality is that facial recognition is already being used to harm Californians in ways this bill does not address. ICE is taking advantage of state and private facial recognition systems to target immigrants. Police have used it to target people of color. Governments are using it to oppress religious minorities and discourage free expression.[1] The threat of more harms has grown as companies like Clearview AI secretly build massive face recognition databases and provide them to businesses, police, and ICE to assist its aggressive targeting of immigrants. We must resist efforts by unscrupulous companies to capitalize on the public health crisis to promote their biometric surveillance systems.

AB 2261 opens the door to the use of facial recognition to deprive Californians of healthcare, economic opportunity, and basic services. AB 2261 authorizes the use of biased facial recognition to deny access to jobs, financial services, employment, health care, and even basic necessities, so long as these denials receive human review. The bill creates a legal framework under which businesses could turn people away based on a scan of their face. Moreover, authorizing facial recognition will incentivize the creation of secretive blacklists to exclude people from stores, entertainment venues, and public life.[2] This bill will cause harm at exactly the wrong time, as Californians seek critical health services and battle a prolonged housing crisis. No person should be denied access to a job, housing, or healthcare because of how they look. The legislature should be working to open, not close, additional doors that help Californians to access services and economic opportunity during this crisis.

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[1] Catie Edmundson, ICE Used Facial Recognition to Mine State Driver's License Databases, New York Times, July 7, 2019, https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html; Russell Brandom, *Facebook, Twitter, and Instagram surveillance tool was used to arrest Baltimore protestors*, Verge, Oct. 11, 2016, https://www.theverge.com/2016/10/11/13243890/facebook-twitter-instagram-police-surveillance-geofeedia-api; Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, New York Times, Apr. 11, 2019, https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html.

[2] *See, e.g.*, Susie Cagle, *This ID Scanner Company is Collecting Sensitive Data on Millions of Bar-goers*, Medium OneZero, May 29, 2019, https://onezero.medium.com/id-at-the-door-meet-the-security-company-building-an-international-database-of-banned-bar-patrons-7c6d4b236fc3.

This bill creates a legal framework for denial of services using facial recognition. The ambiguity of the proposed amendments fails to prevent this real harm. The bill is contradictory and unclear, allowing any establishment to refuse service to any customer who refused to join their facial recognition database as long as the establishment believes that using facial recognition is "directly necessary for the provision of that service." This language unilaterally allows a business to decide whether to deny service to people who, for whatever legitimate reason, do not wish to be tracked and identified in a database.

AB 2261 is a waste of limited government resources. Facial recognition has been criticized as a "colossal waste of money,"[3] with local governments spending hundreds of thousands of dollars on systems that have failed to demonstrate tangible improvements to public safety.[4] While government agencies waste money acquiring and maintaining facial recognition technology, AB 2261 also requires an ongoing compliance audit that places an additional burden on taxpayers. As a result, the costs to implement and maintain facial recognition systems long-term will likely outweigh any purported public safety benefits. As the State of California grapples with the uncertainty and instability created by the COVID-19 pandemic, it is critical that investment in vital public health resources is prioritized over further spending on facial recognition.

AB 2261 will make California communities less free and less safe. The bill allows governments to identify, locate, and track people using facial recognition, a technology that gives governments the unprecedented power to spy on us wherever we are — identifying us at protests, doctor's appointments, political rallies, places of worship, and more. Immigrants who worry their face will be scanned into a database accessible to ICE when they go past public buildings are less likely to use essential government services. Muslim-Americans concerned about face-scanning surveillance near their neighborhood mosque may avoid exercising their First Amendment rights. AB 2261 authorizes face surveillance that will make our communities less safe, even as a growing number of California police agencies recognize it doesn't increase public safety. In January, more than two dozen San Diego-area police agencies terminated a seven-year-old facial recognition program after it failed to produce a single documented arrest or criminal prosecution.[5]

AB 2261 green lights the widespread use of biased and inaccurate facial recognition. AB 2261 allows companies to sell governments and private actors access to facial recognition systems they know to be biased on the basis of race, gender, age, and disability status. Facial recognition has been repeatedly demonstrated to be less accurate

[3] Erin Durkin, *New York school district's facial recognition system sparks privacy fears*, The Guardian, May 31, 2019, https://www.theguardian.com/technology/2019/may/31/facial-recognition-school-new-york-privacy-fears.

[4] Ali Winston, *Facial recognition, once a battlefield tool, lands in San Diego County,* Reveal, November 7, 2013, https://www.revealnews.org/article/facial-recognition-once-a-battlefield-tool-lands-in-san-diego-county/
[5] DJ Pangburn, *San Diego's massive, 7-year experiment with facial recognition technology appears to be a flop*, Fast Company, January 9, 2020, https://www.fastcompany.com/90440198/san-diegos-massive-7-year-experiment-with-facial-recognition-technology-appears-to-be-a-flop.

when used against Black people, people of Asian descent, and women. [6] Members of the California legislature and the California Congressional delegation have experienced this disproportionate error rate firsthand in tests comparing them against mug-shot databases.[7] Many systems also misgender transgender and nonconforming people, and some even purport to identify a person's sexual orientation, relying on and perpetuating harmful stereotypes about physical appearance. The use of biased facial recognition allowed by AB 2261 will have serious ramifications for Californians, inviting their mistreatment and harm by businesses and governments. Black and Asian people are placed at greater risk of disproportionate wrongful identifications, false arrests, and use of force. Transgender individuals may be misgendered and unable to key services. For these reasons and more, 82% of likely 2020 California voters agree that the government should not be able to monitor and track them using their faces and other biological features.[8]

AB 2261 does not protect Californians from Clearview and other face recognition companies seeking to profit from this health crisis. Clearview has built a massive facial recognition database without our consent and has provided it to ICE, police agencies, big businesses, and countries with explicit anti-LGBTQ laws. [9] Clearview is currently using the COVID-19 crisis as an opportunity to sell a product that public health experts do not want and that invites greater harm to civil rights.[10] Clearview has brought the threats of unrestricted face recognition into clear focus. Yet, AB 2261 ignores this problem, failing to meaningfully protect Californians from companies that want to profit from face surveillance.

The proposed amendments slightly revise the proposed standard by which a company may put a person into a corporate database without that person's consent – from "reasonable suspicion" that the person was engaged in criminal activity to "probable cause to believe the person has committed or attempted to commit a serious criminal offense." While these amendments appear to restrict how a company could add someone to their database, the use of "probable cause" when applied to private companies and their employees, rather than law enforcement officers, will be vague and problematic, creating years of confusing

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[6] Last December, the National Institute of Standards and Technology released results for a comprehensive study of facial recognition systems finding that African American and Asian people were up to 100 more times likely to be misidentified than white men, depending on the algorithm and use case. Drew Harwell, *Federal study confirms racial bias of many facial-recognition systems, casts doubt on their expanding use*, Washington Post, Dec. 19, 2019, https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/.

[7] Natasha Singer, *Amazon's Facial Recognition Wrongly Identifies 28 Lawmakers*, A.C.L.U. Says, New York Times, July 26, 2018, https://www.nytimes.com/2018/07/26/technology/amazon-aclu-facial-recognition-congress.html.

[8] *California Statewide Survey: Poll Results of Likely 2020 Presidential Voters*, David Binder Research, https://www.aclunc.org/docs/DBR_Polling_Data_On_Surveillance.pdf.

[9] Ryan Mac, Caroline Haskins, Logan McDonald, *Clearview's Facial Recognition App Has Been Used By The Justice Department, ICE, Macy's, Walmart, And The NBA,* Buzzfeed, Feb. 27, 2020, https://www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement.

[10] *Controversial tech company pitches facial recognition to track COVID-19*, NBC News, April 27, 2020, https://www.nbcnews.com/now/video/controversial-tech-company-pitches-facial-recognition-to-track-covid-19-82638917537.

litigation while businesses continue to push their invasive practices at the expense of privacy that cannot be regained.

AB 2261 is exactly the wrong solution during a public health crisis. AB 2261 will waste money, make us less safe, and do more harm to communities being disproportionately affected by the economic and health impacts of COVID-19. We strongly oppose AB 2261 and urge you to ensure that any legislative action on facial recognition protects – rather than undermines – the safety, rights, and economic opportunity of all.

Signed,

ACLU of California
ACT for Women and Girls
AI Now Institute
Alliance San Diego
Anti Police-Terror Project
Asian Americans Advancing Justice- CA
California Employment Lawyers Association
California Federation of Teachers, Local 1931
California Immigrant Policy Center
Coalition on Homelessness
Color of Change
Community Advocates for Just and Moral Governance
Contra Costa Immigrant Rights Alliance
Contra Costa Organizing for Action
Council on American-Islamic Relations, California Chapter
Data for Black Lives
East Bay Community Law Center
Electronic Frontier Foundation
Ella Baker Center
Employee Rights Center
Ensuring Opportunity
Fight for the Future
Freedom for Immigrants
Fresno Barrios Unidos
Greenlining Institute
Hollywood NOW
ICE Out of Marin
IFPTE- Local 20
Immigrant Legal Resource Center
Indivisible CA: StateStrong
Indivisible East Bay
Indivisible Los Gatos
Indivisible Sausalito
Indivisible SF

Indivisible South Bay LA
Inner City Struggle
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Legal Aid at Work
Media Alliance
Media Justice
Mijente
NAACP- San Jose/Silicon Valley
National Association of Criminal Defense Lawyers
National Lawyers Guild, Los Angeles Chapter
Oakland Privacy
Partnership for the Advancement of New Americans
Pillars of the Community
Privacy Rights Clearinghouse
Public Advocates
San Francisco Public Defender - Racial Justice Committee
San Francisco Public Defender's Office
Secure Justice
Showing Up for Racial Justice Marin
Showing Up for Racial Justice San Diego
SIREN Bay Area
South Bay People Power
Starting Over, Inc.
Students Deserve Justice
Tenth Amendment Center
The LGBTQ Center Long Beach
TRUST SD Coalition
We the People San Diego County

Cc: Assemblymember Ed Chau