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FAVORABLE - HB 338 – Criminal Procedure – Facial Recognition Technology
– Requirements, Procedures, and Prohibitions
Written Testimony of National Lawyers Guild-National Police Accountability
Project, Keisha James, Staff Attorney
Judiciary Committee – February 13, 2024

Dear Chair Clippinger, Vice Chair Bartlett, and Judiciary Committee Members,

Thank you for the opportunity to provide comment on this important issue. The National Lawyers Guild National Police Accountability Project ("NPAP") is a nonprofit organization dedicated to holding law enforcement and corrections officers accountable to constitutional and professional standards. We urge a favorable report on HB 338, a bill that will limit how law enforcement agencies can use the results generated by facial recognition technology.

The government's use of facial recognition technology raises a number of serious concerns: the breadth of people impacted by the technology,¹ the misuse of the technology for widespread surveillance,² the inaccuracy of facial recognition systems,³ and racial biases in both police practices and facial recognition algorithms.⁴ These concerns directly implicate our free speech and freedom of association rights under the First Amendment,⁵ our right to be free from

¹ Alex Pasternack, *Police Body Cameras Will Do More Than Just Record You*, Fast Company (Mar. 3, 2017), available at <u>https://www.fastcompany.com/3061935/police-body-cameras-livestreaming-face-recognition-and-ai</u> (researchers estimate that the faces of 117 million people in the U.S. have already been captured and stored in searchable federal, state, or local databases).

 $^{^{2}}$ Id.

³ Jennifer Lynch, *Face Off: Law Enforcement Use of Face Recognition Technology*, Electronic Frontier Foundation, at 6-7 (April 20, 2020), available at <u>https://www.eff.org/wp/law-enforcement-use-face-recognition</u> ("Face recognition systems vary in their ability to identify people, and no system is 100 percent accurate under all conditions....Technical issues endemic to all face recognition systems mean false positives will continue to be a common problem for the foreseeable future.").

⁴ *Id.* at 9-10 ("The false-positive risks...will likely disproportionately impact African Americans and other people of color. Research...found that face recognition misidentified African Americans and ethnic minorities, young people, and women at higher rates than whites, older people, and men, respectively. Due to years of well-documented racially-biased police practices, all criminal databases—including mugshot databases—include a disproportionate number of African Americans, Latinos, and immigrants.") (internal citations omitted); *see also* Pasternack, *supra*, n.1 ("The faces of certain races and ethnic groups have proved difficult for some facial recognition algorithms, raising the risk of false positives that reinscribe existing biases in the criminal justice system.").

⁵ Lynch at 8, *supra*, n.3 ("Face recognition and the accumulation of easily identifiable photographs implicate free speech and freedom of association rights and values under the First Amendment, especially because face-



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unreasonable searches and seizures under the Fourth Amendment,⁶ and our due process rights.⁷

There are also issues presented by plans for future use of facial recognition technology in policing, including departments buying body-worn cameras from manufacturers that provide face recognition in their cameras and allow for remote access to cameras⁸ and generating images of a person based on a police sketch or a DNA sample.⁹

Without meaningful limitations on its use, law enforcement agencies will continue to use facial recognition technology in increasingly invasive and inaccurate ways. By adopting HB 338, Maryland would be taking a step in the right direction to limit the impact of this harmful technology.

HB 338 will prohibit the use of facial recognition for live or real-time identification (a problem that will become increasingly prevalent as more companies integrate facial recognition features into their cameras). The bill will prevent the results of facial recognition technology from being used in criminal and delinquency proceedings and require the results to be supported by independent evidence when being used to establish probable cause. Further, law enforcement officers and employees will only be permitted to use facial recognition technology to investigate certain serious crimes.

identifying photographs of crowds or political protests can be captured in public, online, and through public and semipublic social media sites without individuals' knowledge.")

⁶ Pasternack, *supra*, n. 1 ("[C]onstant video footage from body-worn cameras could enhance the ability of the police to monitor anyone who passes in front of a camera lens 'without the individual basis for suspicion constitutionally required to justify a police search.' In essence, simply walking past a police officer could legally become an encounter.").

⁷ Lynch at 10, *supra*, n. 3 ("False positives can alter the traditional presumption of innocence in criminal cases by placing more of a burden on suspects and defendants to show they are not who the system identifies them to be. This is true even if a face recognition system offers several results for a search instead of one; each of the people identified could be brought in for questioning, even if there is nothing else linking them to the crime."). ⁸ Lynch at 21-22, *supra*, n. 3; *see also* Pasternack, *supra*, n. 1.

⁹ Lynch at 22-23, *supra*, n. 3.



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The bill also accounts for law enforcement transparency, accountability, and oversight, as recommended by subject matter experts.¹⁰ Law enforcement agencies with service contracts for facial recognition technology will be required to complete an annual audit to ensure compliance with the bill's requirements and produce an annual report with information about their use of the technology.

Maryland will not be alone in considering and imposing important limitations on the use of facial recognition technology. Cities across California, Louisiana, Maine, Massachusetts, Minnesota, Oregon, Pennsylvania, Washington, and Wisconsin have considered or enacted legislation limiting or banning the use of facial recognition technology.¹¹ Last year, after Baltimore's moratorium on facial recognition expired, Baltimore's City Council considered legislation that would limit the types of crimes face recognition could be used to investigate, prohibit it from being used at protests, and establish specialized training and oversight requirements for its use.¹²

We urge you to make a favorable report on HB 338. Thank you, again, for the opportunity to provide comment on this important issue.

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¹⁰ Lynch at 27, *supra*, n. 3 ("All database transactions—including face recognition input, access to and searches of the system, data transmission, etc.—should be logged and recorded in a way that ensures accountability. Privacy and security impact assessments, including independent certification of device design and accuracy, should be conducted regularly."); Lynch at 28, *supra*, n. 3 ("Government entities that collect or use face recognition must be subject to meaningful oversight from an independent entity. Individuals whose data are compromised by the government or the private sector should have strong and meaningful avenues to hold them accountable.").

¹¹ See, e.g., Electronic Frontier Foundation, Bans, bills, and moratoria, available at

https://www.eff.org/aboutface/bans-bills-and-moratoria#main-content (a non-comprehensive list of legislation). ¹² See, e.g., David Collins, Baltimore City seeks to regulate facial recognition technology, WBAL-TV 11 (Nov. 15, 2023), available at https://www.wbaltv.com/article/baltimore-city-facial-recognition-technology-bill-

<u>considered/45851909</u>; Christian Olaniran and Paul Gessler, *Baltimore City seeks to regulate facial recognition technology*, WJZ News (Nov. 15, 2023), available at <u>https://www.cbsnews.com/baltimore/news/baltimore-city-council-to-hold-first-public-hearing-on-facial-recognition-bill/</u>.