



## Testimony for the Senate Finance Committee

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### SB 857 Facial Recognition Services - Moratorium

#### FAVORABLE

TONI HOLNESS  
PUBLIC POLICY DIRECTOR

AMERICAN CIVIL  
LIBERTIES UNION  
OF MARYLAND

MAIN OFFICE  
& MAILING ADDRESS  
3600 CLIPPER MILL ROAD  
SUITE 350  
BALTIMORE, MD 21211  
T/410-889-8555  
or 240-274-5295  
F/410-366-7838

FIELD OFFICE  
6930 CARROLL AVENUE  
SUITE 610  
TAKOMA PARK, MD 20912  
T/240-274-5295

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS  
JOHN HENDERSON  
PRESIDENT

DANA VICKERS SHELLEY  
EXECUTIVE DIRECTOR

ANDREW FREEMAN  
GENERAL COUNSEL

The ACLU of Maryland urges a favorable report on SB 857. As amended, SB 857 would create a task force to study the use of facial recognition technology by the government.

The use of facial recognition technology in Maryland raises at least five concerns: (1) the database is populated by driver license and arrest photos; (2) flaws in the technology disproportionately affect communities of color; (3) deployment of the technology during First Amendment protected activity has a chilling effect; (4) there are no rules governing law enforcement's access to the database; and (5) the Maryland database has not been audited since its establishment.

The flaws inherent in the facial recognition system coupled with inappropriate deployment of the system demands greater oversight and limitations on its use.

#### **I. What is Facial Recognition technology?**

Facial recognition systems are built on computer programs that analyze images of human faces for the purpose of identifying them. The programs take a facial image, measure characteristics such as the distance between the eyes, the length of the nose, and the angle of the jaw, and create a unique file called a template. Using templates, the software then compares that image with another image and produces a score that measures how similar the images are to each other.<sup>1</sup>

#### **II. Maryland has been using Facial Recognition technology since 2011**

In March 2011, Maryland initiated a system populated by arrest photos. In December of that same year, Maryland executed a memorandum of understanding with the FBI to launch a Facial Recognition Pilot Program and gain access to the national repository of arrest photos. In 2013, the system

<sup>1</sup> American Civil Liberties Union, Q&A On Face-Recognition (available at <https://www.aclu.org/other/qa-face-recognition>, last accessed Feb. 27, 2017).

further enrolled photos from the Motor Vehicle Administration into the database.

Currently, the database, the Maryland Image Repository System (MIRS), includes over 7 million driver's license and other MVA photos and over 3 million arrest photos. Maryland law enforcement can also request searches of the FBI's mug shot database of 24.9 million photos.<sup>2</sup>

### **III. The population of the Maryland database with drivers' license and arrest photos raises concerns**

The use of drivers' license photos sweeps up law abiding Marylanders into a database used for criminal investigation purposes. These persons have not engaged in any wrongdoing that would justify their inclusion in a criminal investigatory database. Moreover, the collection of information about swaths of Marylanders who are not suspected of committing any crime raise serious privacy concerns.

Equally problematic is the use of arrest photos in the facial recognition database. Many persons are arrested, without charge or conviction—this is disproportionately the case for persons of color, who are arrested at higher rates than whites.<sup>3</sup> Due to the lack of auditing and policies in Maryland, it is unclear whether persons who are arrested but not charged or convicted have their photos expunged from the facial recognition database. The stark racial disparities in who is arrested but not charged in Maryland (overwhelmingly people of color in Baltimore) reinforce the problem of including arrest photos in the database, and highlight the need to impose meaningful regulation

### **IV. Facial Recognition technology has a chilling effect when deployed during First Amendment protected activity**

The use of this technology during First Amendment protected activity, such as peaceful public demonstrations, threatens to chill the exercise of these rights. Persons will simply be less willing to publicly demonstrate if demonstrating subjects them to this intrusive level of surveillance. This is especially concerning in light of recent revelations regarding Geofeedia, a social media monitoring software that has been used by law enforcement agencies and was used in Maryland.<sup>4</sup> The software allows law enforcement to employ facial recognition software to identify faces in photographs of demonstrations posted on social media and cross-reference them with photos of persons with open warrants. Use of facial recognition in this context has obvious chilling effects on the exercise of First Amendment freedoms. A recent study shows that individuals' internet use patterns change substantially when they perceive that they are being monitored.<sup>5</sup> And the choice of which demonstrations will

<sup>2</sup> Perpetual Lineup, Center on Privacy & Technology at Georgetown Law, 2016 (available at <https://www.perpetuallineup.org/jurisdiction/maryland>).

<sup>3</sup> *Id.*

<sup>4</sup> Kevin Rector and Alison Knezevich, Baltimore Sun, Social media companies rescind access to Geofeedia, which fed information to police during 2015 unrest (Oct. 11, 2016). Available at <http://www.baltimoresun.com/news/maryland/crime/bs-md-geofeedia-update-20161011-story.html>

<sup>5</sup> Jonathan W. Penny, Chilling Effects: Online Surveillance and Wikipedia Use, 31 Berkeley Tech. L.J. (September 2016), available at [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2769645](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2769645).

trigger the deployment of the facial recognition technology raises concerns about the targeted use against communities of color.

#### **V. African Americans are at greater risk of being mistakenly identified**

Studies show that facial recognition algorithms in use by U.S. law enforcement are statistically worse at identifying Black faces than white faces. As a result, because police investigate the closest match, the software puts innocent Black people at higher risk of police investigation than innocent white people.<sup>6</sup>

#### **VI. Rules governing access to the facial recognition database are non-existent**

The fact that no policies governing the operation of the state's facial recognition system were produced to in response to the public records requests by the authors of a 2016 Georgetown report, and state officials' own comments on the lack of any standards governing access to the database,<sup>7</sup> highlight a key problem. In the absence of any rules, and in the absence of a probable cause standard, the database can be (and apparently has been) used in racially discriminatory ways, and can be (and apparently has been) used to target demonstrators who are disfavored by police. The lack of rules also raises the prospect of widespread deployment of real-time face tracking by fixed cameras, which would be an Orwellian nightmare.

#### **VII. Maryland's system has never been audited**

Since its launch in 2011, Maryland's facial recognition system has never been audited. This means that Maryland's system could be flawed in the functioning of the technology; the population of photos; and the deployment of the technology—without any accountability. In turn, law enforcement's use of the technology remains practically unknown to the public and worse, unregulated.

For the foregoing reasons, limitations and oversight must be established to govern the use of facial recognition technology. We urge a favorable report on SB 857.

<sup>6</sup> Clare Garvie and Jonathan Frankle, Facial-Recognition Software Might Have a Racial Bias Problem, *The Atlantic* (Apr. 7, 2016), available at <http://www.theatlantic.com/technology/archive/2016/04/the-underlying-bias-of-facial-recognition-systems/476991/>.

<sup>7</sup> See *here* a video of a WBAL reporting that Maryland law enforcement agents do not need probable cause prior to accessing the face recognition system. The report is *here* <https://www.youtube.com/watch?v=xrZT9RuJWp4&feature=youtu.be>.

