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Public Comment from the New Jersey Institute for Social Justice on the Attorney General’s Proposed Regulations for Law Enforcement’s Use of Facial Recognition Technology

Acting Attorney General Matthew J. Platkin:

My name is Brooke Lewis, and I am Associate Counsel for Criminal Justice Reform at the New Jersey Institute for Social Justice ("the Institute"). I am writing to provide public comment on the proposed regulation of law enforcement’s use of facial recognition technology on behalf of the Institute.

The Institute uses cutting-edge racial and social justice advocacy to empower people of color by building reparative systems that create wealth, transform justice and harness democratic power – from the ground up – in New Jersey.

Following the murder of George Floyd, the summer of 2020 saw a racial reckoning that prompted cities and states across the nation to usher in meaningful police reforms. New Jersey, however, was not among them.

For years, New Jersey communities have fought for meaningful police accountability in the form of banning law enforcement chokeholds, empowering civilian oversight boards with subpoena power, ending qualified immunity and making police discipline transparent. These calls have gone unanswered.

To transform public safety, New Jersey must create meaningful police accountability while also making deep investments in community resources such as community-based responders to address behavioral health crises, community-based violence interrupters, restorative justice hubs, quality education and housing.¹

Accordingly, we strongly urge you to ban the use of facial recognition technology by law enforcement for several reasons. First, the proposed regulations would inject racialized facial recognition technology into New Jersey’s criminal justice system which already has staggering racial
disparities. Second, facial recognition technology is fundamentally flawed when used to identify people of color. Third, facial recognition technology has been used to target protestors of color. Fourth, New Jersey has resisted standard transparency and accountability measures, making it a dangerous place to allow facial recognition technology. Fifth, other jurisdictions have recognized these problems and banned facial recognition technology.

1. These proposed regulations would inject racialized facial recognition technology into New Jersey’s criminal justice system which already has staggering racial disparities.

While everyone suffers from unaccountable policing, New Jersey’s Black communities bear the brunt. In New Jersey, for example, a Black person is more than three times more likely to have police force used against them than a white person. New Jersey also has the highest Black to white youth and adult incarceration disparity rates, with a Black adult over 12 times more likely to be incarcerated than a white person, and a Black child nearly 18 times more likely to be incarcerated than their white peers, despite committing most offenses at similar rates.

Endorsing the use of facial recognition technology – which is both embedded with racial bias and employed in a discriminatory manner – by law enforcement will only further compound and reinforce the staggering racial disparities throughout New Jersey’s criminal justice system.

2. Facial recognition technology is fundamentally flawed when used to identify people of color.

Racial bias is embedded in facial recognition technology’s very design. This technology is alarmingly inaccurate when used to identify women and people with darker skin tones. In fact, Black women are particularly vulnerable to being misidentified by facial recognition technology, with one study showing an error rate 34% higher for females with darker skin compared to males with lighter skin.

In addition to the racially disparate risk for misidentification, Black people are also far more likely to be disproportionately represented in law enforcement photo databases due to racially discriminatory policing practices. Facial recognition technology uses photos including mug shots, driver’s license photos, and state-issued identification photos, to determine people’s identity. As a result, the use of facial recognition technology can further contribute to the over-policing and mass surveillance of Black people. This should be especially concerning in New Jersey, where in the predominantly Black communities of Camden and Newark, police surveillance is already pervasive.

3. Facial recognition technology has been used to target protestors of color.

Facial recognition technology poses a threat to the First Amendment right to protest, especially for Black activists. In 2015, facial recognition technology was used to identify and arrest people who participated in protests against the death of Freddie Gray, a Black man who sustained spinal cord injuries while in police custody. More recently, during the 2020 protests in New York City,
a Black protester was identified by facial recognition technology and arrested for assaulting a police officer after allegedly shouting into the officer’s ear with a bullhorn. The capacity for facial recognition technology to monitor protests in this manner will have a chilling effect on First Amendment activities. Late last year, following advocacy led by the Institute and the ACLU of New Jersey, the Office of the Attorney General issued an important directive protecting the First Amendment right to record police conduct. Legitimizing the use of facial recognition technology would be out of step with New Jersey’s progress in ensuring law enforcement practices fully respect First Amendment rights.

4. **New Jersey has resisted standard transparency and accountability measures, making it a dangerous place to allow facial recognition technology.**

New Jersey communities are denied basic tools – like access to police disciplinary records and strong civilian oversight – to hold law enforcement accountable. Following the police murder of George Floyd, Garden State advocates joined the nation in fighting for foundational police accountability measures. These common-sense reforms include banning law enforcement chokeholds, creating strong civilian oversight boards, eliminating qualified immunity and making police discipline records public. But, unlike many other cities and states, New Jersey has yet to enact any community-driven police reforms, leaving our state lagging behind in law enforcement transparency and accountability. Instead, New Jersey has actually undermined accountability efforts by fast-tracking a bill that allows officers to review body-camera footage prior to writing reports and making statements. It would be dangerous to introduce facial recognition technology – which raises its own oversight challenges – in New Jersey, where law enforcement resists standard transparency and accountability practices.

5. **Other jurisdictions have recognized these problems and banned facial recognition technology.**

Facial recognition technology poses serious threats to civil liberties that are disproportionately felt by Black communities. Recognizing that regulations cannot sufficiently mitigate the harms, Boston, Minneapolis, San Francisco and Vermont have already banned the use of facial recognition technology. A complete ban is especially necessary in New Jersey, where Black communities are over-policed and there is fierce opposition to law enforcement oversight and accountability.

Facial recognition technology is racially discriminatory and will further contribute to the over-policing of Black communities. With New Jersey advocates still fighting for basic police accountability in the form of banning chokeholds, strong civilian oversight, ending qualified immunity and transparent police discipline, the Attorney General should refrain from legitimizing facial recognition technology. Instead, the Attorney General should make the decision that will protect communities of color and that decision is to ban the use of such technology across our state.

Thank you for your consideration.


9 id.

10 id.

11 id.


*See Facial recognition technology is a direct assault on privacy and civil liberties*, NJ.COM (Mar. 9, 2022), https://www.nj.com/opinion/2022/03/facial-recognition-technology-is-a-direct-assault-on-our-privacy-and-civil-liberties-opinion.html.