



TESTIMONY OF GLBTQ LEGAL ADVOCATES & DEFENDERS
Special Commission on Facial Recognition – Public Comment
July 30, 2021

Senator Eldridge, Representative Day, and members of the Special Commission on Facial Recognition. My name is Anthony Lombardi, and I am a legal fellow at GLBTQ Legal Advocates & Defenders, New England’s leading legal advocacy organization for rights of LGBTQ+ people and people living with HIV. GLAD writes to provide comment about the use of facial recognition technology in Massachusetts. We respectfully ask that the Commission recommend the legislature strengthen existing facial recognition law to ensure Massachusetts residents and visitors are shielded from discriminatory surveillance and other harms.

We believe this technology will create problems, not solve them, and that ordinary people will be hurt along the way. The misapplication of facial recognition technology in perpetuating racial and gender biases is well-documented;¹ as such, we write to provide additional context to illustrate the clear dangers that the implementation of this technology poses for members of the LGBTQ+ community. GLAD adamantly opposes any practice that perpetuates racial, gender, and/or economic injustice and urges this Commission to carefully consider all of the privacy and equity concerns raised, including from our peer organizations such as the ACLU of Massachusetts.

The most apparent and egregious failure of facial recognition software for LGBTQ+ people is its focus on sorting faces as only “male” and “female” when there is in fact a wide diversity of characteristics which people choose to stereotype as “male” or “female.” Facial recognition also routinely fails to correctly identify transgender people. These pose substantial and serious equity concerns for our residents and our visitors.² A review of four facial recognition programs concluded that the software failed to correctly identify the gender of transgender men in over one-

¹ See, e.g., Larry Hardesty, *Study finds gender and skin-type bias in commercial artificial-intelligence systems*, MIT NEWS (Feb. 11, 2018), <https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212#:~:text=artificial%2Dintelligence%20systems-.Study%20finds%20gender%20and%20skin%2Dtype%20bias%20in%20commercial%20artificial,percent%20for%20dark%2Dskinned%20women>; Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS MACHINE LEARNING RSCH. 1 (2018) (demonstrating discrepancy of over 30% in error rates between identifying light-skinned men and dark-skinned women); Tate Ryan-Mosley, *The new lawsuit that shows facial recognition is officially a civil rights issue*, MIT TECH. REV. (Apr. 14, 2021) (highlighting wrongful arrest of Black man based on erroneous placement of Detroit Police Department facial recognition system and similar false arrests against Black men).

² A review of relevant research did not clarify at what stage of transition, if any, these technologies fail to distinguish between cisgender (“a person who identifies and expresses a gender that is consistent with the culturally defined norms of the sex they were assigned at birth”) and transgender (individuals “whose gender identity does not match their assigned sex and generally remains persistent, consistent, and insistent over time”) individuals. See Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 Pediatrics 1 (Oct. 4, 2018), <https://pediatrics.aappublications.org/content/pediatrics/142/4/e20182162.full.pdf>.

third of cases, whereas the programs correctly identified other men almost all of the time.³ Further, facial recognition algorithms universally fail to correctly identify the gender of individuals who identify neither as male or female - an error rate of 100%.⁴ These categorical errors are not acceptable.

This fundamental flaw in technology design has severe implications for transgender people. Disclosure of transgender identity (such as presenting an ID that does not reflect one's gender identity or outward gender expression) exposes individuals to a range of negative outcomes, from denial of employment, housing, and public benefits to harassment and physical violence.⁵ The high error rate of facial recognition programs could lead to the unwarranted disclosure of a person's transgender identity without their consent, exposing them to disparate treatment or harassment.⁶ A person's decision to tell another person that they are transgender is theirs alone; facial recognition denies them that agency.

Further, research suggests that facial recognition technology can be used in a way to identify, target, and catalog individuals based on their *presumed* sexual orientation, oftentimes inaccurately.⁷ This raises considerable privacy concerns: if previously undisclosed status is gathered or inaccurately presumed by government officials, or if that information is distributed to the public without that individual's consent (for example, as a result of a data breach) members of

³ See Lisa Marshall, *Facial recognition software has a gender problem*, UNIV. CO. BOULDER (Oct. 8 2019), <https://www.colorado.edu/today/2019/10/08/facial-recognition-software-has-gender-problem>. See also Morgan Kalus Scheuerman et al., *How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis and Image Labeling Services*, UNIV. CO. BOULDER, 144:26 (Nov. 2019), <https://dl.acm.org/doi/pdf/10.1145/3359246> (finding that computer classifications in binary gender (male/female) performed worse with images of transgender images than cisgender images, could not correctly identify if someone did not have a non-binary (neither male/female) identity, and that while labeling in the programs could allow for gender neutrality, they still made use of coding gender performance (i.e., the expression of gender) in a binary way).

⁴ As the American Academy of Pediatrics notes, there is a vast diversity of gender identities that exists in the human experience, and the term "Gender diverse" has widely been adopted to refer to people with gender behaviors, appearances, or identities that are incongruent with those culturally assigned to their birth sex. See Rafferty et al., *supra* note 2.

⁵ Sandy E. James et al., NAT'L CTR. TRANSGENDER EQUAL., *The Report of the 2015 U.S. Transgender Survey* 89-90 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁶ As the Williams Institute notes, nearly half of all LGBT people lack protections from discrimination in employment, education, housing, public accommodations, and credit. Kerith J. Conron & Shoshana K. Goldberg, WILLIAMS INST., *LGBT People in the US Note Protected by State Non-Discrimination Statutes* (Apr. 2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/>. Even in states like Massachusetts where LGBTQ individuals are protected by law, many LGBTQ Americans still routinely experience violence, threats or harassment because of their sexuality or gender identity. Joe Neel, *Poll: Majority of LGBTQ Americans Report Harassment, Violence Based on Identity*, NPR (Nov. 21, 2017), <https://www.npr.org/2017/11/21/565327959/poll-majority-of-lgbtq-americans-report-harassment-violence-based-on-identity> (finding that 57% of LGBTQ Americans had personally experienced slurs, and 51% had or knew a friend or family member who had experienced violence because they are LGBTQ).

⁷ Yilun Wang & Michal Kosinski, *Deep Neural Networks Are More Accurate Than Humans at Detecting Sexual Orientation From Facial Images*, 114 J. PERSONALITY & SOC. PSYCH 246 (2018) (suggesting that computers have higher predictive accuracy than human judgment, posing a "threat to the privacy and safety of gay men and women"). Such research has been widely criticized and deemed controversial, at best.



the LGBTQ+ community face a very real threat of harassment, discrimination, or violence.⁸ This threat may be particularly acute for members of the LGBTQ+ community who are also individuals of color or indigenous.⁹ We are not alone among LGBTQ organizations in expressing concerns about the weaponization of facial recognition technology to target members of the community, including transgender people.¹⁰

Solving the current failures of facial recognition, even if it were possible, would not make it any more suitable for use by public entities, including law enforcement. Discrimination against transgender individuals remains widespread. Relative to the general population, LGBTQ+ people are more likely to experience homelessness¹¹ or to engage in sex work because of job discrimination and hostility,¹² exposing them to frequent interactions with law enforcement and the criminal legal system. These contacts place LGBTQ+ people at a heightened risk of abuse from the use of this technology. Given the racial and gender biases and stereotypes upon which this technology relies, there is a particular equity concern for LGBTQ+ individuals of color, and *all* BIPOC people, for that matter.

The threats of misidentification posed by facial recognition for *all* individuals, and especially LGBTQ+ people and LGBTQ+ people of color, speak to the urgency of the issue. In December 2020, Governor Baker signed into law “An Act Relative To Justice, Equity And Accountability In Law Enforcement In The Commonwealth,” an omnibus police reform legislation. The law, codified in Chapter 253 of the Acts of 2020, contains several provisions pertaining to government agencies’ use of facial recognition technology, but falls short of the necessary guardrails on the use of this technology by all public agencies. GLAD understands that multiple bills in the current legislative session, including H.135, An Act To Regulate Face Surveillance, sponsored by Representatives Rogers and Ramos, and S.47, An Act To Regulate

⁸ Besides the discrimination that LGBTQ+ individuals may face in housing, employment, credit, and other areas of life highlighted above, it is well established that LGBTQ+ individuals are frequently targeted for violence and harassment on the basis of their sexual orientation or gender identity. FBI Nat. Press Off., *FBI Releases 2019 Hate Crime Statistics* (Nov. 16, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-hate-crime-statistics> (noting that 16.7% of hate crimes victims were targeted because of the offenders’ sexual orientation bias).

⁹ *See id.* (57.6% of 2019 hate crimes victims were targeted because of the offenders’ race/ethnicity/ancestry bias).

¹⁰ Drew Anderson, *GLAAD and HRC call on Stanford University & responsible media to debunk dangerous & flawed report claiming to identify LGBTQ people through facial recognition technology*, GLAAD, HUM. RTS. CAMPAIGN (Sept. 8, 2017) <https://www.glaad.org/blog/glaad-and-hrc-call-stanford-university-responsible-media-debunk-dangerous-flawed-report> (cautioning that this line of research “could serve as weapon to harm both heterosexuals who are inaccurately outed, as well as gay and lesbian people who are in situations where coming out is dangerous”).

¹¹ M.H. Morton et al., *Missed Opportunities: Youth Homeless in America*, CHAPIN HALL UNI. CHI., (2017), https://voicesofyouthcount.org/wp-content/uploads/2017/11/ChapinHall_VoYC_NationalReport_Final.pdf (finding that LGBTQ young adults had a 120 percent higher risk of reporting homelessness compared to youth who identified as heterosexual and cisgender).

¹² Erin Fitzgerald et al., NAT’L CTR. TRANSGENDER EQUAL., *Meaningful Work: Transgender Experiences in the Sex Trade* (Dec. 2015), https://transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf (finding that approx. 11% of transgender survey respondents had engaged in sex work, and that Black, Black Multiracial, and Hispanic or Latino/a respondents had the highest rate of sex trade participation overall (39.9%, 33.2%) in comparison to those identifying as “White only” (6.3%)).



Face Surveillance, sponsored by Senator Creem, seek to address the gaps in existing law. you to consider bills H.135 and S.47 when you decide on further regulations of the use of biometric surveillance technology by government entities All of us deserve the right to live openly and freely without the threat of surveillance or cataloging of our identities and movements by public entities and officials in the ordinary course.

Thank you for your consideration.

Sincerely yours,

Anthony Lombardi, Esq.
Legal Fellow
GLBTQ Legal Advocates & Defenders
Alombardi@glad.org
18 Tremont Street, Suite 950
Boston, MA 02108