ACLU of Massachusetts
One Center Plaza, Suite 850
Boston, MA 02108
617-482-3170
www.aclum.org

November 21, 2022

Joint Committee on the Judiciary
Sen. James Eldridge & Rep. Michael Day, Chairs

SUPPORT H.1728 & S.927
An Act to Implement the Recommendations of the
Special Commission on Facial Recognition Technology

Dear Chairs Day and Eldridge,

The ACLU of Massachusetts offers its strongest support for H.1728 and S.927, legislation implementing the recommendations of the Special Commission to Evaluate Government Use of Facial Recognition Technology in the Commonwealth.[1] We ask that the committee again report this legislation favorably, as you did last session, and swiftly coordinate its final passage into law.

The commission's recommendations and the legislation to enact them represent many years of deliberation, research, discussion, and compromise-seeking by a diverse group of stakeholders including lawmakers, civil rights advocates, and law enforcement. They improve upon existing law and strike the right balance among competing societal interests, including privacy, civil rights, and community safety. The wisdom of the approach laid out in the commission recommendations and enacting legislation has been recognized by other states and federal lawmakers that have advanced proposals based on the Massachusetts commission's work. Maine and Montana have passed state laws that tack closely to the commission's recommendations and California Representative Ted Lieu has filed similar federal legislation. Now, it's time to ensure Massachusetts residents also benefit from the expertise of the Special Commission by putting these critical reforms into law.

Under your leadership, the commission concluded that facial recognition technology can be a beneficial law enforcement tool, but use of the technology must be accompanied by appropriate legal guardrails. Improperly regulated, facial surveillance technologies pose unprecedented threats to basic civil rights and civil liberties. Racial, gender, and age bias in facial recognition algorithms[2] and misplaced human trust in technology[3] can result in grave harm to individuals,

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[1] The commission's final report is available here: https://frcommissionma.com/
[2] See National Institute of Standards and Technology, Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects, Patrick Grother, Mei Ngan, Kayee Hanaoka, December 2019. https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf
[3] Howard JJ, Rabbitt LR, Sirotin YB (2020) Human-algorithm teaming in face recognition: How algorithm outcomes cognitively bias human decision-making. PLoS ONE 15(8): e0237855. https://doi.org/10.1371/journal.pone.0237855

families, and communities. Indeed, nationwide there has been a steady rash of cases in which police misuse of facial recognition has led to wrongful arrests; in every single case the victim of the wrongful arrest was a Black person,[4] and in every case, no state law governed police use of facial recognition or created standards to guide its responsible use. But wrongful arrests and the mistrust in law enforcement they fuel are only two of the many harms that flow from police use of facial recognition without proper regulation. In China and Russia, we see stark warnings about a future in which biometric surveillance is used to keep track of every person's every public movement, from the moment they leave home in the morning until the moment they return at night, facilitating the mass tracking and repression of journalists, dissidents, opposition politicians, and ordinary citizens.

The Special Commission's recommendations and implementing legislation, which faithfully adheres to the four corners of the recommendations, address these threats and gaps in existing state law by applying a comprehensive regulatory framework to guide law enforcement use of this powerful technology. The key recommendations follow:

- **Warrant requirement**. Current law asks police to demonstrate only that a facial recognition search is "relevant and material" to a criminal investigation before obtaining a court order to conduct a search – an extremely low threshold. The gold standard of American justice, the probable cause warrant, protects both the integrity of criminal investigations and the rights of Massachusetts residents, ensuring this powerful technology will never be used to surveil people who are not suspected of criminal activity. Police would not be required to obtain a warrant in emergency situations.
- **Centralization.** To prevent misuse, abuse, and wrongful arrests, facial recognition searches should only be performed by law enforcement officials with specialized training, using approved technology. The recommendations and legislation centralize the use of facial recognition at the State Police, facilitating professionalization, oversight, accountability, and transparency. Other police departments in the state can ask the State Police's facial recognition unit to perform searches on their behalf, either with a warrant or pursuant to one of the enumerated exceptions to the warrant requirement.
- **Due process protections.** Another way to prevent misuse, abuse, and wrongful arrests is to require police to provide notice and discovery information to criminal defendants describing how facial recognition was used in a criminal investigation leading to an arrest. Courts and defense attorneys play important roles in our justice system, and they should have the information they need to evaluate the role facial recognition technology plays in each case.
- **Prohibit mass surveillance and emotion analysis.** Government officials in Massachusetts should never use facial recognition technology to conduct mass surveillance or to make inferences about a person's emotional state. The recommendations and legislation prohibit the use of the technology for these purposes,

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[4] Kashmir Hill, "Eight months pregnant and arrested after a false facial recognition match," August 6, 2023, New York Times. https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html

preventing the dystopian scenarios we see unfolding in Russia and China from happening here.

These balanced reforms were endorsed by a diverse group of commissioners including those representing then-Attorney General Maura Healey, the Massachusetts State Police, the NAACP, the Mass Bar Association, the ACLU, the Senate President, the Senate Minority Leader, the Speaker of the House of Representatives, the Committee for Public Counsel Services, and then-Governor Charlie Baker.

Massachusetts lawmakers first considered legislation dealing with facial recognition technology in 2019. Since then, thanks largely to the work of this committee, both chambers have advanced comprehensive legislation to the Governor's desk. Unfortunately, former Governor Charlie Baker rejected those reforms in 2020. The subsequent compromise resulted in the enactment of the existing statutory foundation and the creation of the legislative commission. Last session, the House passed legislation to implement the commission's recommendations; identical legislation sits before you today. We respectfully urge the committee to forward this bill with a favorable report and thank you and your staff for your dedicated and thoughtful work on this critical issue over the past four years.