December 6, 2021

VIA FEDERAL eRULEMAKING PORTAL,
http://www.regulations.gov

Department of Homeland Security
Attn: Science & Technology Directorate
3801 Nebraska Ave. NW
Washington, D.C. 20016

ACLU

AMERICAN CIVIL LIBERTIES UNION

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Deborah N. Archer
President

Anthony D. Romero
Executive Director

RE: DHS S&T Information Collection Request (ICR) to conduct
survey on "Public Perceptions of Emerging Technologies"
(Docket No. DHS-2021-0015)

The American Civil Liberties Union writes in response to the
Department of Homeland Security Science & Technology Directorate's (S&T)
information collection request regarding the creation of a survey to assess
public opinion about its use of "AI in general and facial recognition in
particular," including for functions such as "customs and border protection,
transportation security, and investigations" where it states it has already
piloted such technology.

The ACLU opposes any efforts by DHS to expand its use of facial
recognition technology. DHS's contemplated survey is premised on the belief
that if the Department could just "understand[] how the public perceives
these technologies," it could "gain[] public support for DHS's use of these
technologies." 86 Fed. Reg. 61285. However, the problem with DHS's use of
facial recognition technology is not an insufficient understanding of how
unpopular it is; the problem is that law enforcement use of facial recognition
technology causes serious harm by leading to racially disparate arrests and
investigations and facilitating pervasive government surveillance.

A survey is quite unnecessary. DHS already has access to a long and
well-documented public record — consisting of news articles and editorials,[1]

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[1] *See, e.g.,* Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. Times (June 24,
2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html;
Press Release, *Washington Post Calls for Federal Moratorium on Facial Recognition*,
EPIC (June 3, 2021), https://epic.org/washington-post-calls-for-federal-moratorium-
on-facial-recognition.

information from civil society,[2] academic research,[3] government research,[4] expert testimony,[5] congressional debates,[6] public comments,[7] as well as first-hand accounts[8] — regarding problems posed by facial recognition technology and artificial intelligence. Most notably with regard to facial recognition technology, the extensive record details the harms that are abiding and intrinsic to the technology, both when it fails and when it works. Facial recognition algorithms are well-known for having higher misidentification rates for Black people, people of color, women, and children, which has led to false arrests and mistaken incarceration.[9] Facial classification algorithms,

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[2] *See, e.g.,* The Fight to Stop Face Recognition Technology, ACLU, https://www.aclu.org/news/topic/stopping-face-recognition-surveillance; Press Release, *Ban Dangerous Facial Recognition Technology that Amplifies Racist Policing* (Jan. 26, 2021), https://www.amnesty.org/en/latest/press-release/2021/01/ban-dangerous-facial-recognition-technology-that-amplifies-racist-policing; Ban Face Surveillance Campaign, EPIC, https://epic.org/campaigns/ban-face-surveillance; *Now Is the Time: Tell Congress to Ban Federal Use of Face Recognition*, EFF (June 24, 2021), https://www.eff.org/deeplinks/2020/06/now-time-tell-congress-ban-federal-use-face-recognition.

[3] *See, e.g., NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, NIST (Dec. 19, 2019), https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software; K.S. Krishnapriya et al., *Characterizing the Variability in Face Recognition Accuracy Relative to Race* (2019), https://arxiv.org/abs/1904.07325.

[4] *See, e.g.*, John J. Howard, Yevgeniy B. Sirotin & Jerry L. Tipton, *Quantifying the Extent to which Race and Gender Features Determine Identity in Commercial Face Recognition Algorithms*, Dep't Homeland Sec. Sci. & Tech. (May 2021), https://www.dhs.gov/sites/default/files/publications/quantifying-commercial-face-recognition-gender-and-race_updated.pdf.

[5] *See, e.g.,* Hearings: Facial Recognition Technology: Examining Its Use by Law Enforcement, Subcomm. on Crime, Terrorism, and Homeland Sec. (July 13, 2021), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4635.

[6] *See, e.g,* Press Release, *Senators Markey, Merkley Lead Colleagues on Legislation to Ban Government Use of Facial Recognition, Other Biometric Technology*, Sen. Ed Markey (June 15, 2021), https://www.markey.senate.gov/news/press-releases/senators-markey-merkley-lead-colleagues-on-legislation-to-ban-government-use-of-facial-recognition-other-biometric-technology.

[7] *See, e.g.,* ACLU Comment on NIST's Proposal for Managing Bias in AI (Sep. 10, 2021), *available at* https://www.aclu.org/letter/aclu-comment-nists-proposal-managing-bias-ai; Coalition Letter Signed by Over 50 Groups to President Biden on Use of Facial Recognition Technology (Feb. 16, 2021), *available at* https://www.aclu.org/letter/coalition-letter-president-biden-use-facial-recognition-technology.

[8] ACLU, Wrongfully Arrested Because Face Recognition Can't Tell Black People Apart, YouTube (June 24, 2020), https://www.youtube.com/watch?v=Tfgi9A9PfLU&t=1s.

[9] Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. Times (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html; Elisha Anderson, *Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn't Commit*, Detroit Free Press (July 20, 2020), https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-

which can purportedly be used to assess anything from an individual's emotional state to their level of threat in a crowd, also suffer from serious — and seriously biased — error rates.[10] Concerns would persist even if these issues were resolved: an expanded apparatus of facial recognition technology makes possible a totalizing and inescapable network of mass surveillance, which poses irreconcilable threats to constitutional freedoms including freedom of association and speech, due process protections, and privacy. Any expansion of DHS's use of facial recognition technology is untenable and dangerous.

DHS's own deployments of facial recognition technology underscore the urgency and seriousness of these concerns. Its deployments have been plagued by data breaches,[11] complaints that U.S citizens are not adequately informed of their right to opt out and that opt-outs for U.S. citizens are not honored in practice,[12] concerns that biometric pilot programs open the door to hidden checkpoints and watchlists,[13] and outcry about the Department's use

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recognition-detroit-michael-oliver-robert-williams/5392166002; Lindsey Barrett, *Ban Facial Recognition Technologies for Children—and for Everyone Else*, 26 B.U.J. Sci. & Tech. L. 223, (Aug. 22, 2020), https://www.bu.edu/jostl/files/2020/08/1-Barrett.pdf.
[10] *See, e.g.*, Joy Buolamwini et al., *Gender* Shades, MIT Media Lab, https://www.media.mit.edu/projects/gender-shades/overview; Lauren Rhue, *Racial Influence on Automated Perceptions of Emotions* (Dec. 6, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281765; Kate Crawford, *Artificial Intelligence Is Misreading Human Emotion*, The Atlantic (Apr. 27, 2021), https://www.theatlantic.com/technology/archive/2021/04/artificial-intelligence-misreading-human-emotion/618696/; Madhumita Murgia, *Emotion Recognition: Can AI Detect Human Feelings from a Face?*, Fin. Times (May 11, 2021), https://www.ft.com/content/c0b03d1d-f72f-48a8-b342-b4a926109452.
[11] *Review of CBP's Major Cybersecurity Incident During a 2019 Biometric Pilot*, Off. Inspector Gen. (Sept. 21, 2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-71-Sep20.pdf.
[12] *E.g.*, Shaw Drake, *A Border Officer Told Me I Couldn't Opt Out of the Face Recognition Scan. They Were Wrong.*, ACLU (Dec. 5, 2019), https://www.aclu.org/news/immigrants-rights/a-border-officer-told-me-i-couldnt-opt-out-of-the-face-recognition-scan-they-were-wrong; *Facial Recognition: CBP and TSA Are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues*, U.S. Gov't Accountability Off. (Sept. 2, 2020), https://www.gao.gov/products/gao-20-568.
[13] Jay Stanley, *U.S. Customs and Border Protection's Airport Face Recognition Program*, ACLU (Feb. 2020), https://www.aclu.org/sites/default/files/field_document/aclu_whitepaper_-_cbp_airport_face_recognition_1_0.pdf; Comment of Civil Society Organizations in Opposition to 85 Fed. Reg. 74162, Docket No. USCBP-2020-0062, RIN 1651-AB12, Doc. No. 2020-24707, Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States, ACLU (Dec. 21, 2020), https://www.aclu.org/sites/default/files/field_document/comment_re_cbp_face_surveill ance_nprm_final.pdf. *See also* Amy Harmon, *As Cameras Track Detroit's Residents, a Debate Ensues Over Racial Bias*, N.Y. Times (July 8, 2019), https://www.nytimes.com/2019/07/08/us/detroit-facial-recognition-cameras.html.

of the highly controversial face surveillance vendor Clearview AI,[14] among other issues. DHS appears to be aware of these problems, but a survey is not the way to address well-founded public opposition to its deployment of facial recognition and artificial intelligence technology. Rather, the Department must actually grapple with the foundational problem of racism and pervasive surveillance posed by its use of the technology.

Rather than gather self-justifying survey data, DHS should cease all efforts to expand deployment of facial recognition technology, and take to heart the already well-known concerns about the technology.

If you have any questions, please contact Kate Ruane at KRuane@aclu.org.

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Respectfully submitted,

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Speech, Privacy, and Technology
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[14] Chris Mills Rodrigo, *Pressure Mounts on DHS to Stop Using Clearview AI Facial Recognition*, The Hill (Apr. 19, 2021), https://www.msn.com/en-us/news/politics/pressure-mounts-on-dhs-to-stop-using-clearview-ai-facial-recognition/ar-BB1fOvQZ.