OPPOSE EXPANDING THE SURVEILLANCE STATE

To members of the Virginia House of Delegates and the Virginia Senate:

I write to you today on behalf of the ACLU of Virginia, Justice Forward Virginia, Marijuana Justice, National Association of Criminal Defense Lawyers, Virginia Student Power Network, and 2LOVE LLC to oppose **Senate Bill 741** and **House Bill 1339**, which would allow Virginia State Police, local law enforcement agencies, and campus police to use facial recognition technology for criminal investigations.

In principle, we oppose any use of facial recognition software by law enforcement. Technologies like this are disproportionately used in Black and Brown communities and, despite what vendor test data claims, facial recognition technology has been shown to be more inaccurate in identifying Black and Brown people, especially when the photo is grainy, when the lighting is bad, and when the suspect is not looking directly at the camera. While vendors may claim to have solved these problems in test under ideal conditions, we are unaware of any widespread testing under real-life conditions that confirms these claims.

When used by police in criminal investigations, facial recognition technology can, and has, led to wrongful arrests and civil rights violations. For example, [Mr. Rober Williams](#), a Black man in Detroit, MI has his life turned upside down when he was falsely accused based on the use of facial recognition technology. As a result of this case, a federal lawsuit is making its way through the court system that claims the police violated Mr. Williams' Fourth Amendment and civil rights. Passing SB 741/HB 1339 opens the door for law enforcement agencies to use this invasive technology at the risk of innocent Virginians getting entangled in the system and exposing police departments to costly lawsuits for the abuse of the technology.

In addition, we are seriously concerned that the bill permits law enforcement officers to use facial recognition technology without getting a warrant, which would at least provide notice that the technology was being used. Giving law enforcement access to an expansive database of photos and people's identities without a warrant signed by a judge is reckless, invasive, and ripe for abuse. Without a warrant, there is no documented justification that there is a need to use facial recognition technology.

Moreover, there is no meaningful oversight of technology's use. The preparation of a report of unauthorized access is left to the same police departments that grant access. The Class 3 misdemeanor penalty for officers who misuse the database is unlikely to serve as a deterrent. And, there is no accountability mechanism for

departments that omit or misreport data. As a result, there is no *meaningful* transparency or accountability over law enforcement's use of this highly invasive tool.

Even though the technology received a 98 percent accuracy score from the National Institute of Standards and Technology (NIST), their testing methodologies do not take into account the reality of its use in the field. NIST does not test the algorithms that law enforcement use, only what the technology vendor submits, which fails to take into account the impact of human review and bias. NIST's testing databases are significantly smaller than law enforcement's, which leads to differences in algorithmic accuracy and demographic bias. Last, NIST has not evaluated demographic performance on images most used by law enforcement, such as surveillance images that are lower in quality and prone to errors. Despite the technology's test scores within a controlled and relatively small database, we have no idea how these algorithms actually perform against the vast databases to which law enforcement agencies have access; nor do we know how accurately they will perform with people of different races, gender, age, and other demographic identifiers.

In closing, facial recognition software is an inherently authoritarian software that makes all of us less safe and less free. By expanding the surveillance state in the name of public safety, this technology will serve to deter people from fully engaging with public life. That's why the General Assembly banned facial recognition technology in 2021, with strong bipartisan support.

For all the reasons above, this bill moves Virginia in the wrong direction. **We urge you to vote NO on SB741 and HB 1339.**

Yours sincerely,

ACLU of Virginia
Justice Forward Virginia
Marijuana Justice
National Association of Criminal Defense Lawyers
Virginia Student Power Network
2LOVE LLC