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To: Members of the Economic Affairs Interim Committee

From: Katie Kinsey, Staff Attorney, The Policing Project at NYU School of Law

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Re: HJ 48 – Written Comments on the Need to Regulate Ongoing Law Enforcement Use of Face Recognition Technology

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Members of the Economic Affairs Interim Committee:

Thank you for the opportunity to submit testimony at this hearing to address government use of face recognition technology (FRT) in Montana. My name is Katie Kinsey, I am a staff attorney at the Policing Project at New York University School of Law, an organization dedicated to partnering with communities, policymakers, police, and technology companies across the country to bring democratic accountability to policing. By democratic accountability we mean that the public has a voice in setting transparent, ethical, and effective policing policies **before** the police act. This hearing is a great example of democratic accountability in action, and I am grateful to participate.

Having reviewed this committee's draft bill to regulate government use of FRT, it is clear that you already have thought deeply about the thorny issues raised by this technology. We have as well. Over the past year, we convened a diverse group of stakeholders (including law enforcement, civil liberties advocates, and technology vendors) for hours of discussion on law enforcement use of FRT. These discussions cemented our belief that if law enforcement is going to continue to use FRT, there must be comprehensive legislation in place to help ensure use of this technology improves public safety and does not involve violations of fundamental rights.

To help guide legislative bodies considering regulating police use of FRT, we have developed a checklist of minimum regulatory guidelines. We were heartened to see many of these essential guidelines echoed in your draft bill. We have provided a copy of this checklist to the committee as a resource for your consideration.

In my testimony today, I want to make three overarching points:

1. Unregulated law enforcement use of FRT is a recipe for harm. If law enforcement agencies in Montana are going to continue to use FRT, Montana should join more than a dozen states in passing legislation that establishes guardrails on agencies' use.

2. The public deserves to know whether law enforcement's use of FRT actually makes the public safer. If this body authorizes law enforcement use of FRT, it should be authorized only for a limited pilot phase during which time its impact on public safety—both its advantages as well as its harms and risks—can be evaluated.

3. It is our view that to facilitate the responsible use of FRT, its use should occur though a single agency. In that way, officials can be trained properly and necessary protocols developed and observed. This also would facilitate an assessment of whether FRT improves public safety and at what cost.

I. If law enforcement is going to use FRT, its use must be strictly regulated

As this committee's work has revealed, law enforcement agencies in Montana are using FRT despite there being no laws in place to regulate this use. Police use of FRT without any guardrails raises serious concerns, namely:

- **Accuracy and bias issues:** Because of inadequate or nonexistent testing, the accuracy of FRT as used by law enforcement is entirely unproven. Research continues to show that FRT can be less accurate when attempting to identify women, the elderly, and especially people with darker skin. Already, unregulated law enforcement use of FRT has contributed to misidentifications that resulted in false arrests. Although testing under laboratory conditions shows some improvement in the quality of FRT algorithms, we are entirely in the dark about how this technology operates under real conditions. The two are not comparable and one cannot assume the performance in the laboratory tells us much about performance under actual law enforcement conditions. There are very real risks here.

- **Risks to free expression:** Police have used FRT to target individuals exercising their First Amendment rights, raising serious concerns about creating chilling effects on constitutionally protected activity.

- **Privacy risks:** FRT supercharges current police surveillance capabilities by facilitating searches of databases of millions of faces (including social media images scraped from the internet without individuals' consent) in a matter of seconds. Combined with ever-increasing networks of public and private surveillance cameras, FRT can enable governmental surveillance and tracking with unthinkable speed at an unprecedented scale, with no ability to opt out. After all, you can't leave your face at home. History makes clear that without meaningful legislation reining in police use of FRT—including explicitly banning FRT for real-time or historical tracking—there will be misuse.

Concerns like these have led lawmakers in states like Colorado and Utah to pass legislation limiting law enforcement's use of this powerful technology. In short, Montanans will be safer if you pass legislation like the draft bill in front of this committee.

II. Legislation should limit use to a pilot phase during which public safety impact is assessed

At the Policing Project, our evaluation of any policing technology starts with a basic question: will the public benefit from the use of this tool? If a technology has identifiable, concrete benefits then we can begin to address costs and ways to mitigate them before it is used.

Current law enforcement use of FRT has inverted this analytical process – applying a deploy first, assess benefit later (if ever) approach. The public deserves to know whether this technology actually works, and agencies that use (or want to use) this tool should bear the burden to proof to show that it does. What is needed is a full accounting of how FRT is being used, and an evaluation of the technology's impact on public safety. This evaluation should include a real commitment to stop use if the public safety benefits do not outweigh the costs, or the most serious costs – such as those to racial justice interests – cannot be mitigated.

As our checklist makes clear, legislation can facilitate meaningful assessment of FRT's public safety impact by requiring comprehensive data collection on agency use during a pilot period. The careful, transparent data collection envisioned will enable an assessment of benefits and costs and, in turn, public safety impact.

III. Centralize FRT use in a single state agency

We strongly recommend that this body consider centralizing FRT use in a single state agency that is subject to public oversight rather than permit individual agencies to conduct their own searches. Centralization offers a number of benefits and protections. It would facilitate the comprehensive data collection and assessment needed during the pilot phrase and enable easier auditing and oversight of agency use rather than placing these administrative burdens on individual agencies. It also would enable consistent training standards and use protocols and consolidate expertise. Other states are embracing this approach. For example, a Massachusetts legislative commission tasked with evaluating law enforcement use of face recognition in that state recently recommended centralization, finding that it "will promote efficiency, ensure consistency, improve training and foster more accountability and transparency."[1] In short, ensuring that FRT use occurs under one (publicly accountable) roof, where the same rules and procedures apply, will make it easier to monitor for and protect against abuse and misuse.

Thank you again for the opportunity to testify today. The matter you are considering is extremely consequential. We would be happy to provide any other information that could be useful.

[1] Final Report, Special Commission to Evaluate Government Use of Facial Recognition Technology in the Commonwealth, at 31-32 (March 14, 2022), https://frcommissionma.files.wordpress.com/2022/03/fr-com-final-report-appendices-3.14.22.pdf.