

Bill as
Introduced

HB 499 - AS AMENDED BY THE HOUSE

7Apr2021... 0247h

2021 SESSION

21-0023
04/11

HOUSE BILL **499**

AN ACT relative to the use of face recognition technology.

SPONSORS: Rep. McGuire, Merr. 29; Rep. M. Smith, Straf. 6; Rep. Berch, Ches. 1; Rep. Hopper, Hills. 2; Rep. T. Lekas, Hills. 37; Rep. Merchant, Sull. 4; Sen. Reagan, Dist 17

COMMITTEE: Executive Departments and Administration

AMENDED ANALYSIS

This bill permits the state to use face recognition technology if it has a warrant supported by probable cause.

Explanation: Matter added to current law appears in *bold italics*.
Matter removed from current law appears [~~in brackets and struck through~~].
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT relative to the use of face recognition technology.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 New Subdivision; Breaches of the Peace; Face Recognition Technology Prohibited. Amend
2 RSA 644 by inserting after section 22 the following new subdivision:

3 Face Recognition Technology Prohibited

4 644:23 Definitions. In this subdivision:

5 I. "Face recognition technology" means an automated or semi-automated process that assists
6 in identifying or tracking an individual or capturing information about an individual, based on the
7 physical characteristics of an individual's face. It does not include the process by which an
8 individual visually identifies another individual by viewing a representation of the individual on a
9 computer, video recording, photograph or other media.

10 II. "State" means any department, agency, bureau, or administrative unit of the state of
11 New Hampshire, including any city, town, county, school district, or municipal entity therein.

12 644:24 Use of Face Recognition Technology; Requirements. The state shall only use face
13 recognition technology if it has a search warrant supported by probable cause and signed by a
14 neutral and detached magistrate.

15 644:25 Evidence Inadmissible.

16 I. Any data or information collected or derived from the state's own use of face recognition
17 technology in violation of this subdivision shall be inadmissible in any trial, hearing, or other
18 proceeding in or before any court or regulatory agency in the state of New Hampshire.

19 II. Any evidence derived from data or information collected from any use of face recognition
20 technology in violation of this subdivision shall be inadmissible in any trial, hearing, or other
21 proceeding in or before any court or regulatory agency in the state of New Hampshire, unless
22 sufficiently attenuated from the original violation, including but not limited, to an affirmative
23 showing that no state official had requested, facilitated, or otherwise caused the use of face
24 recognition technology by an entity other than the state as defined above.

25 2 Drivers' Licenses; Use of Facial Recognition Technology Prohibited. RSA 263:40-b is repealed
26 and reenacted to read as follows:

27 263:40-b Use of Face Recognition Technology Prohibited. The department shall not allow access
28 to any of its digital representations of faces by any face recognition technology nor shall the
29 department use face recognition technology. No state agency, other than the department, shall
30 create or maintain a searchable database of face images.

31 3 Effective Date. This act shall take effect 60 days after its passage.

Committee Minutes

SENATE CALENDAR NOTICE
Executive Departments and Administration

Sen Sharon Carson, Chair
Sen John Reagan, Vice Chair
Sen Denise Ricciardi, Member
Sen Kevin Cavanaugh, Member
Sen Suzanne Prentiss, Member

Date: April 7, 2021

HEARINGS

Wednesday	04/14/2021	
(Day)	(Date)	
Executive Departments and Administration	REMOTE 000	9:00 a.m.
(Name of Committee)	(Place)	(Time)
9:00 a.m. HB 141-FN	allowing a county to exempt its chief administrative officer from compulsory participation in the retirement system.	
9:15 a.m. HB 369-FN	relative to the use of physical agent modalities by occupational therapists.	
9:30 a.m. HB 499	relative to the use of face recognition technology.	
9:45 a.m. HB 128	adding notification requirements to the weather modification statute.	
10:00 a.m. HB 190	relative to financial disclosures by legislators.	
10:15 a.m. HB 283	proclaiming April 11, 2021 as Wentworth Cheswill Day.	
10:30 a.m. HB 456	relative to the disclosure of information from vital records.	

Committee members will receive secure Zoom invitations via email.

Members of the public may attend using the following links:

1. Link to Zoom Webinar: <https://www.zoom.us/j/95957001117>
2. To listen via telephone: Dial (for higher quality, dial a number based on your current location): 1-301-715-8592, or 1-312-626-6799 or 1-929-205-6099, or 1-253-215-8782, or 1-346-248-7799, or 1-669-900-6833
3. Or iPhone one-tap: +13017158592,,95957001117# or +13126266799,,95957001117#
4. Webinar ID: **959 5700 1117**
5. To view/listen to this hearing on YouTube, use this link:
<https://www.youtube.com/channel/UCjBZdtrjRnQdmg-2MPMiWrA>

6. To sign in to speak, register your position on a bill and/or submit testimony, use this link:
<http://gencourt.state.nh.us/remotecommittee/senate.aspx>

The following email will be monitored throughout the meeting by someone who can assist with and alert the committee to any technical issues: remotesenate@leg.state.nh.us or call (603-271-6931).

EXECUTIVE SESSION MAY FOLLOW

Sponsors:

HB 141-FN

Rep. Rung
Rep. Cushing

Rep. Edgar
Rep. Levesque

Rep. Petrigno
Rep. Weston

Rep. Meuse
Sen. Sherman

HB 369-FN

Rep. McGuire

Rep. M. Pearson

Sen. Reagan

HB 499

Rep. McGuire
Rep. T. Lekas

Rep. M. Smith
Rep. Merchant

Rep. Berch
Sen. Reagan

Rep. Hopper

HB 128

Rep. Aron
Rep. Sylvia

Rep. Potucek
Sen. Ward

Rep. Allard
Rep. T. Lekas

Rep. Howard
Rep. Nunez

HB 190

Rep. Gordon

Rep. Wall

HB 283

Rep. DiLorenzo
Rep. Cushing
Rep. Gay

Rep. Mangipudi
Rep. Petrigno
Sen. Perkins Kwoka

Rep. Read
Rep. Harriott-Gathright

Rep. Cahill
Rep. B. Griffin

HB 456

Rep. L. Ober
Sen. Carson

Rep. Umberger

Rep. McGuire

Rep. Leishman

Cameron Lapine 271-2104

Sharon M Carson
Chairman

Senate Executive Departments and Administration Committee

Cameron Lapine 271-2104

HB 499, relative to the use of face recognition technology.

Hearing Date: April 14, 2021

Time Opened: 9:30 a.m.

Time Closed: 10:51 a.m.

Members of the Committee Present: Senators Carson, Reagan, Ricciardi, Cavanaugh and Prentiss

Members of the Committee Absent : None

Bill Analysis: This bill permits the state to use face recognition technology if it has a warrant supported by probable cause.

Sponsors:

Rep. McGuire

Rep. M. Smith

Rep. Berch

Rep. Hopper

Rep. T. Lekas

Rep. Merchant

Sen. Reagan

Who supports the bill: Ross Connolly (AFPNH), Albert Scherr, Sarah Chu (Innocence Project), Representative Marjorie Smith (Strafford – District 6), Senator John Reagan (District 17), Nicholas Thomas, Dan McGuire, Neal Kurk, Representative Alicia Lekas (Hillsborough – District 37), Elliot Axelman, Bill Alleman, Eric Pauer, Alexandra Mennella, and Alvin See.

Who opposes the bill: 71 people signed up in opposition to the bill. Full sign in sheet available upon request.

Who is neutral on the bill: None.

Summary of testimony presented in support:

Representative Marjorie Smith

Strafford – District 6

- Representative Smith is a co-sponsor of HB 499 and introduced HB 499 on behalf of Representative Carol McGuire, who was not present.
- Rep. Smith said that House Executive Departments and Administration spent a significant amount of time in 2020 producing an amended bill on facial recognition technology (FRT) that passed the Committee and the House and was then assigned to House Judiciary, which

killed the bill. Rep. Smith said that that was her most significant disappointment as Chair of House Judiciary.

- Rep. Smith said that a careful application by trained professionals makes FRT a positive law enforcement tool. She said that misuse of FRT is a grave harm, especially for women and people of color.
- Rep. Smith said that she worked with Rep. McGuire on an amendment that minimizes harm and maximizes benefit with a uniform warrant requirement.
- Rep. Smith said that she is appalled, when she watches British police dramas, at the invasion of privacy with block-by-block surveillance systems.
- Rep. Smith said that the amended HB 499 is easier to understand and easier for police to use. She said that warrants are common and easily obtained and strike a balance between using FRT and concerns about privacy.
- Senator Prentiss asked if there are cases in New Hampshire of FRT being misused. If not, she asked how HB 499 came about.
 - Rep. Smith said that HB 499 came about because FRT is being marketed as a great new innovation in policing but there is concern about problems from misuse. She said she wanted to make sure New Hampshire could continue its respect for privacy and get ahead of any egregious incidents in the state.
- Senator Prentiss clarified that there has not been misuse or issues with FRT in New Hampshire.
 - Rep. Smith said that she would say that that was correct generally, but she has not been involved in detailed testimony. She said that FRT is a great time to employ “trust but verify”. She said that there have been problems across the country that have been troublesome.
- Senator Prentiss asked about warrants being required for the use of FRT.
 - Rep. Smith said that HB 499 does not limit the use of FRT at all. She said that HB 499 recognizes the roles of all branches of government and requires police who want to use FRT to receive a warrant. She said that time should be taken to ensure FRT is being done the right way. Rep. Smith said that the Committee would hear testimony from policy industry lobbyists who will argue that HB 499 is an invasion of police rights. She said that the General Court exists to ensure that all public officials function within the appropriate structure.
- Senator Cavanaugh said that he was curious about HB 499 and asked if it would ban situations where a crime is captured on a CCTV camera, the image is zoomed in on, and the perpetrators are identified.
 - Rep. Smith said that that was not correct. Referencing the manhunt for the bombers of the 2013 Boston Marathon attack, she said that the images came from private businesses, which would still be able to do whatever they wanted within their space. She said that HB 499 addresses public officials who need a warrant in order to balance the rights of the citizens with carrying out their public obligations. Rep. Smith said that HB 499 is not a major limitation on the ability of police to do what they believe is right.
- Senator Ricciardi asked about legally obtained images and expressed a concern that HB 499 may inhibit helping victims of sex trafficking.
 - Rep. Smith said that she was aware of where Senator Ricciardi’s question came from. She said that there is no documentation of any case where requiring police to behave responsibly and get a warrant has led to the outcomes Senator Ricciardi described. She said that FRT technicians will say that it cannot be relied on for women and people of color, for some unknown reason. She said there have been many cases across the country.

- Senator Carson said that HB 499 as amended included municipalities, school districts, and counties. She asked if no political subdivision could use FRT without a warrant.
 - Rep. Smith said that that was correct, as HB 499 only applies to the public sector and applies to everyone who occupies a position of public trust. She said that warrants are accessible to everyone and might mean that the wrong door will not be broken down.
- Senator Carson said that HB 499 only applies to the State and not private businesses. She said that nothing in HB 499 would stop a private business from recording someone and using FRT to track known shoplifters, for example. She asked if there should be a notification that people are being filmed in the store and FRT is being used.
 - Rep. Smith said that her focus was on the responsibility of the public sector.
- Senator Carson said that there are many cameras on the highways in New Hampshire. She asked if there is a driver going 100mph on the highway, putting people at risk, would police be able to use the cameras on the highway to identify the driver or would they need to go to a judge for a warrant.
 - Rep. Smith said that New Hampshire has laws that say highway tollbooth cameras cannot take pictures of drivers, only license plates. She also said that radar guns check the speed of the car, not the speed of the driver. She said she did not see it as an inconvenience to get a warrant.
- Senator Carson asked if Rep. Smith was aware of any cases where any New Hampshire citizen had been harmed due to FRT.
 - Rep. Smith said that she was personally not aware.
- Senator Prentiss asked what the average turnaround time for a warrant is.
 - Rep. Smith said that they can be done quickly. She deferred a more specific answer.
- Senator Ricciardi referenced a report from the National Institute for Science and Technology which said that FRT is 99% accurate and is more often used for leads than arrests.
 - Rep. Smith said that anyone can find sources to support what they want to hear.

Representative Terry Roy

Rockingham – District 32

- Addressing Representative Berch’s comments, Representative Roy said that HB 499 is not retroactive and pending cases would not be dismissed.
- Rep. Roy said that HB 499 is not about situations where police find a computer that has images on it, because they would know whose computer it is. He said that it is about whether or not police can access databases with pictures of individuals.
- Rep. Roy said that the standard for warrants is probable cause, more likely than not. He said that as a law enforcement officer, he’s been able to get warrants at 3 AM. He said that warrants take 15 minutes to an hour to receive. He said it is not a high bar to meet.
- Rep. Roy said that if an officer can’t meet the bar of more likely than not then they should not be getting a warrant to run someone’s photograph through a database.
- Rep. Roy said that he wants to stay ahead of technology, rather than fall behind. He said he wants to put guardrails in place. He said New Hampshire citizens want to know that a judge has looked at the situation before their picture is put in an international database.
- Senator Prentiss asked for clarification on the timing of getting a warrant.
 - Rep. Roy said that it can take minutes up to an hour. He said judges are always on call and the main factor is how long it takes to type out the requirements for a warrant. He said that a targeted application would be quicker than a fishing process.

- Senator Prentiss said that the question is over whether or not a warrant is needed before a face is scanned into a FRT database or after it's been scanned. She said that a delay could hamper police from bringing in someone who is known to be a problem and it may defeat the purpose of FRT by having to wait.
 - Rep. Roy said that it is difficult to make an analogy to FRT because it is new. He said that it is easier to search a person's car or home and then, once they realize criminal activity has occurred, get a warrant. He said he couldn't imagine a situation where it is such an emergency that police could not wait an hour to get a warrant. He said that if they can't meet the burden for a warrant, perhaps the case needs to be developed more. Rep. Roy said that people's faces may be recorded simply for being scanned against a database. He cautioned the Committee to put safeguards in place for emerging technology.
- Senator Prentiss asked what the difference is between using FRT and when a police officer pulls someone over and runs their license plate, which produces a driver's history and potential warrant history.
 - Rep. Roy said that the main difference is that when an officer runs a license plate, they know who they are dealing with. He said they would only run a face through RFT if they did not know who an individual was. Rep. Roy said that there were no guardrails in place to stop police from setting up an alert for any time a face appears on any connected network of cameras. He said that if police have a picture of an individual and have probable cause that they are involved in a crime and want to run the picture through a database they should be able to articulate that to a judge for a warrant.
- Speaking for a second time, Rep. Roy addressed Senator Ricciardi's question about agency access to databases they maintain. He said that the NSA has metadata on every phone call, email, and text message but cannot access it without a warrant, either from a FISA court or a traditional court.
- Speaking for a second time, Rep. Roy said that in the event of terrorism, HB 499 would not affect federal agents working in New Hampshire, since HB 499 only applies to New Hampshire law enforcement officers.

Sarah Chu

Innocence Project

- Ms. Chu said that the Innocence Project does policy work on improving the valid, reliable, and just application of police technology.
- Ms. Chu said that she supports HB 499 as amended and views it as a starting point since, without it, FRT would proceed unregulated.
- Ms. Chu recommended that the General Court enhance the legislation in the future to make sure it is limited in scope and matches scientific, racial justice, and societal goals.
- Ms. Chu said that the National Police of Scotland and Axon Corporation do not use FRT.
- Ms. Chu recommended that an advisory group be convened to explore the complicated issues involved, especially how to prevent wrongful accusations and how to hold the government accountable.

Albert Scherr

Professor, UNH Law

- Mr. Scherr is a former public defender in New Hampshire.
- Mr. Scherr said that the larger issue involved with HB 499 is to what extent there is privacy in public spaces. He said it is a developing issue that the Supreme Court is considering through the scope of the 4th Amendment. He said that attaching a GPS device to the underside of a car requires a warrant.
- Mr. Scherr said that FRT is not yet reliable and is not “prime time” technology.
- Mr. Scherr said that no one wants a police department to see a face on the street, scan the face through a database, find out who the person is, and then spend the entire day tracking them.
- Mr. Scherr said that FRT can be a valuable tool and HB 499 creates a compromise between privacy issues and the value of an investigative tool.
- Mr. Scherr said that warrants can be obtained quickly in New Hampshire and technology is being developed where officers can get warrants using their smartphones and not need to actually appear before a judge. He said that if there is an emergency where there needs to be a quick scan due to a crisis, that process would be exempt from needing a warrant anyway.
- Referencing testimony from Rep. Berch, Mr. Scherr said that all pending cases would not be dismissed because HB 499 is not retroactive.
- Mr. Scherr said that if a police officer has a photo of a victim of abuse and the victim appears to be a minor, every judge would issue a warrant to search it.
- Senator Ricciardi asked if there were any other circumstances where a warrant would be required for a police agency to search records that the agency itself created and maintains.
 - Mr. Scherr said that it would depend on the circumstances and the type of record. He said that records involving genetic profiles would probably need a warrant.
- Senator Ricciardi, referencing concerns raised about the accuracy of FRT, cited news articles about the FBI using FRT to identify and capture individuals who took part during the January 6th breach of the United States Capitol and asked about the accuracy of FRT in that situation.
 - Mr. Scherr that that FRT depends on who is being tracked and can be either reliable or unreliable. He said that no one would say FRT is reliable in every circumstance but the January 6th breach of the United States Capitol was a circumstance where it would be reliable. He said that it is unknown to the public if warrants were used by the FBI in the process of using FRT for the individuals involved on January 6th. Mr. Scherr said that in every case around the January 6th breach of the United States Capitol, law enforcement had an image of an unknown individual taking part in criminal activity. He said that nothing in HB 499 would have impeded the investigation of the events on January 6th.

Ross Connolly

Deputy State Director, AFP-NH

- Mr. Connolly said that he supports the original HB 499 and the amended HB 499. He said that the original HB 499 had more leeway for law enforcement officers.
- Mr. Connolly said that FRT has been used improperly by police in other jurisdiction, especially when there is no meaningful human review of FRT's results.
- Mr. Connolly said that police would be able to use FRT if there is an emergency situation, since that is a standard common law practice.
- Mr. Connolly urged the Committee to create proper guardrails for FRT.

Summary of testimony presented in opposition:

Representative Paul Berch

Cheshire – District 1

- Representative Berch said that he is a sponsor of HB 499 and supports the original bill but opposes the amended bill.
- On the issue of accuracy for people of color and women, Rep. Berch said that FRT has improved over time. He said that current studies indicate the issues raised by Rep. Smith are gone.
- Rep. Berch said that warrants are not easily obtained and judges have standards for issuing them.
- Rep. Berch was a public defender in Vermont for over 30 years.
- Rep. Berch said that both the original HB 499 and the amended HB 499 require warrants; the question is over when to go to a judge and ask for a warrant. He said under the current system, law enforcement officers would take a picture of a child in a sexually explicit position, run it through a database, identify the child, and then go a judge for a warrant. Under the amended HB 499, officers would have to take the picture to a judge, say that it may be a sexually exploited child and ask for a warrant to search through FRT to confirm, and a judge may decline.
- Rep. Berch said that a warrant should be obtained, but the question is when.
- Rep. Berch said that pedophiles are mobile and understand the internet and will go wherever they think they will have the most slack. He said that if it becomes widely known that police in New Hampshire cannot use FRT for internet crimes against children, New Hampshire will become a prime destination for pedophiles.
- Rep. Berch said that the original HB 499 was based on proposed federal legislation sponsored by Senator Chris Coons of Delaware and Senator Mike Lee of Utah. He said that the original HB 499 required a warrant to conduct ongoing, targeted surveillance, defined as 72 hours or more for a specific person. He said that the original HB 499 does not handcuff police.
- Rep. Berch said that if HB 499 passes as amended, all pending pedophilia cases in New Hampshire that used FRT will be dismissed.

Jake Parker

Security Industry Association

- Mr. Parker said that while he supports addressing concerns raised by others, HB 499 would ban any public sector use of FRT.
- Mr. Parker said that there is no distinction in HB 499 between surveillance usage and routine identification usage. He said that there are a lot of requirements for FRT in New Hampshire in HB 499 that cannot realistically be met.
- Mr. Parker said that HB 499 would require a warrant to search a suspect's picture through a mugshot database but not to search a list of their physical attributes through a similar database,
- Mr. Parker said that HB 499 has no exceptions to address emergencies and sex trafficking issues. He said 15,000 children have been rescued in the last four years using FRT.
- Mr. Parker said that a blanket prohibition on FRT would preclude the ability to develop the

better qualities of FRT.

John Bryfonski

Chief of Police, Bedford; NH Chiefs of Police Association

- Mr. Bryfonski has been the Chief of Police in Bedford for 10 years.
- Mr. Bryfonski said that HB 499 is a roadblock, precluding the use of FRT by law enforcement officers, and other agencies, as a tool to protect citizens.
- Mr. Bryfonski said that his officers and detectives show that the warrant process takes hours and days as it becomes harder to find a judge. He also said that it takes hours to fill out the forms for a warrant even in routine cases.
- Mr. Bryfonski said that the requirements for warrants are for an officer to provide particular information of a particular place or time to be searched and what for. He said that FRT is used for leads in cases where individuals are unknown or to identify the victims of crime, child pornography, or human trafficking. Mr. Bryfonski said that HB 499 would block the used of FRT in those situations.
- Mr. Bryfonski said that FRT has been used to identify persons of interest during “silver alert” situations.
- Mr. Bryfonski said that the National Institute of Science and Technology determined that there are situations where FRT is 99% accurate, especially when there is human intervention to determine if the FRT is correct, which is when a warrant would be obtained.

Neutral Information Presented: None.

cml

Date Hearing Report completed: April 19, 2021

Speakers

Senate Remote Testify

Executive Departments and Administration Committee Testify List for Bill HB499 01

Support: 13 Oppose: 69 Neutral: 0 Total to Testify: 7

<u>Name</u>	<u>Email Address</u>	<u>Phone</u>	<u>Title</u>	<u>Representing</u>	<u>Position</u>	<u>Testify</u>
Connolly, Ross	rconnolly@afphq.org	603.530.1151	A Lobbyist	Americans for Prosperity New Hampshire	Support	Yes
Levesque, Brian	blevesque@merrimacknh.gov	603.860.4478	A Member of the Public	Myself	Oppose	Yes
Parker, Jake	jparker@securityindustry.org	Not Given	A Member of the Public	Security Industry Association	Oppose	Yes
Scherr, Albert	albert.scherr@law.unh.edu	603-828-6515	A Member of the Public	Myself	Support	Yes
Chu, Sarah	schu@innocenceproject.org	Not Given	A Member of the Public	Innocence Project	Support	Yes
Berch, Paul	pberch@myfairpoint.net	603.399.4960	An Elected Official	Myself	Oppose	Yes
smith, marjorie	Not Given	Not Given	An Elected Official	Myself	Support	Yes
Reagan, Senator John	Not Given	Not Given	An Elected Official	Senate District 17	Support	No
Sullivan, Patrick	Patsully@comcast.net	603.716.6808	A Member of the Public	Myself	Oppose	No
Thomas, Nicholas	nicholas.w.thomas@uconn.edu	Not Given	A Member of the Public	Myself	Support	No
garnett, ronald	soup31314@yahoo.com	603.236.1637	A Member of the Public	Myself	Oppose	No
McGuire, Dan	danmcguire@gmail.com	603.782.4918	A Member of the Public	Myself	Support	No
Marshall, Steven	smarshall@smarshall.us	603.340.0849	A Member of the Public	Myself	Oppose	No
West, Devin	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Krauss, Richard	rkrauss301@gmail.com	Not Given	A Member of the Public	Myself	Oppose	No
Byam, Zachary	zdbyam@marlboroughnh.org	603.876.3311	A Member of the Public	Myself	Oppose	No
Amadon, Roger	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
kurk, neal	Not Given	Not Given	A Member of the Public	Myself	Support	No
Sargent, Elizabeth	esargent@sheehan.com	603-568-0213	A Lobbyist	NH Association of Chiefs of Police	Oppose	No
Connelly, Andrew	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Russell, Timothy	chieftimrussell@hotmail.com	603.748.4834	A Member of the Public	Myself	Oppose	No

KRAFTON, DAWN	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Shupe, Jessica	jshupe@exeternh.gov	Not Given	A Member of the Public	Myself	Oppose	No
Marquis, Eric	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Gioia, Ashley	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Bagan, Michael	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Jeanne, McFadden	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
DiGaetano, Scott	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Krafton, Colby	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Russo, Steven	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Crowley, Timothy	tcrowley@atkinson-nh.gov	978.888.3248	A Member of the Public	Myself	Oppose	No
Patten, Gregory	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Estey, Holly	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Axelman, Elliot	afu.axelman@gmail.com	732.674.2355	A Member of the Public	Myself	Support	No
Nightingale, Jonathan	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Noyes, David	pdchief@wvpublicsafety.com	603.236.8809	A Member of the Public	Myself	Oppose	No
Lewis, Gerald	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Burke, Brian	brburke@comcast.net	Not Given	A Member of the Public	Myself	Oppose	No
Wallin, Stephen	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Sargent, Benjamin	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Tarleton, Matt	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Prentice, Thomas	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Lindbom, Dan	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Fisher, Gary	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Spillane, Chris	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Hankard, Stephen	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Fisher, Brenda	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Fisher, Nicolas	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Wallace, Andrew	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Alleman, Bill	gencourt@allemanse.com	Not Given	A Member of the Public	Myself	Support	No
Pauer, Eric	secretary@BrooklineGOP.org	603.732.8489	A Member of the Public	Myself	Support	No
Morency, Peter	Not Given	Not Given	A Member of the Public	Myself	Oppose	No

Garone, Edward	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Berube, Aaron	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Wunderlich, Robert	chiefrh@yahoo.com	803.759.0735	A Member of the Public	Myself	Oppose	No
Madore, Walter	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Dennis, Charles	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Osgood, Bradley	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Reams, Mark	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Bean Burpee, Anthony	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Wilfred, Libby	wilfreddlibby@gmail.com	941.628.3155	A Member of the Public	Myself	Oppose	No
Brackett, Albert	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Monier, Steve	srm47@comcast.net	603.387.8595	A Member of the Public	Myself	Oppose	No
Mennella, Alexandra	amennella1@protonmail.com	16466109858	A Member of the Public	Myself	Support	No
Mitchell, Taylor	t93mitch@yahoo.com	603.785.1834	A Member of the Public	Myself	Oppose	No
Shagoury, Andrew	tboropd@worldpath.net	603.569.8695	A Member of the Public	Myself	Oppose	No
See, Alvin	absee@4Liberty.net	Not Given	A Member of the Public	Myself	Support	No
Goldstein, David	dgoldstein@franklinnh.org	16039989782	A Member of the Public	Myself	Oppose	No
salois, david	davidts@comcast.net	Not Given	A Member of the Public	Myself	Oppose	No
Carpenter, Timothy	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
McDowell, Joseph	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
maille, christine	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Blurton, Jeffrey	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Connelly, Christopher	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Pickering, John	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Clay, Donald	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Lester, Scott	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Lord, Brian	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Chase, Mark	mchasecpd@metrocast.net	603.253.9756	A Member of the Public	Myself	Oppose	No
Connelly, Joanne	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Samson, Edward	Not Given	Not Given	A Member of the Public	Myself	Oppose	No
Laurent, Tara	tlaurent@greenlandpd.us	603.431.4624	A Member of the Public	Greenland Police Department	Oppose	No

Testimony

Cameron Lapine

From: Mindy Huddleston <MHuddleston@scramsystems.com>
Sent: Monday, April 26, 2021 6:54 PM
To: Sharon Carson
Cc: Cameron Lapine; Deborah Chroniak
Subject: NH HB499 -- Amendment Requested

Dear Senator Carson,

The intent of House Bill 499 is great, but may create negative consequences to public safety and local government budgets.

The use of facial recognition to verify a person's identity is prevalent in community corrections. Technologies like remote alcohol testing for alcohol-involved offenders and app-based community supervision for lower-risk individuals have facial recognition/verification imbedded in them. These technologies are commonly ordered by judges and utilized by community corrections. A broad moratorium on facial recognition requiring use only by search warrant would prevent their use and would also do the following:

- Preclude the use of certain jail diversion programs that rely on technology for supervision and monitoring purposes. Without these technology-driven programs, offenders could spend more time in jail.
- Prohibit the use of virtual, remote check-ins and court-ordered remote supervision tools critical to maintaining public safety and reducing jail populations.
- Reduce public safety by necessitating the reallocation of personnel to conduct labor-intensive manual review of offender photographs for verification purposes.

Please consider amending the bill to allow for the use of technologies that have facial recognition/verification embedded in them. The suggested amendment (in green) is:

Line 7: It does not include the use of one-to-one facial recognition technology to verify or authenticate a person's identity or the process by which an individual visually identifies another individual by viewing a representation of the individual on a computer, video recording, photograph or other media.

If you have questions, please contact me.

Regards,

Mindy



Mindy Huddleston | Director, Government and Industry Relations
mobile (703) 786-6390

scramsystems.com | [SCRAM Blog](#) | [Sobering Up Blog](#)



MAKING A DIFFERENCE

**TESTIMONY OF SARAH CHU
SR. ADVISOR ON FORENSIC SCIENCE POLICY
INNOCENCE PROJECT
SUPPORT FOR HOUSE BILL 499**

AN ACT relative to the use of face recognition technology.
**New Hampshire Executive Departments and Administration Committee
APRIL 14, 2021**

The Innocence Project is a nonprofit organization that exonerates the wrongfully convicted and works to reform the criminal justice system to prevent future injustice. We respectfully submit this testimony in support of HB499 as amended as a starting point for facial recognition technology (FRT) regulation. We recognize that without HB499, FRT in all its forms would proceed unregulated in New Hampshire. We urge the Legislature to continue its deliberations with regard to FRT and further enhance this legislation in the future to assure that this technology is appropriately limited and that its implementation acknowledges the scientific, privacy, surveillance, and racial justice risks it poses.

The potential ubiquity of facial recognition technology (FRT)

As defined by HB499, "face recognition technology is the automated or semi-automated process that assists in identifying or tracking an individual or capturing information about an individual, based on the physical characteristics of an individual's face. It does not include the process by which an individual visually identifies another individual by viewing a representation of the individual on a computer, video recording, photograph or other media." This definition does not specify if the images used for FRT analysis will be limited to still images or if they can be applied to video. Police departments in Manchester and Portsmouth have already expanded their networks of surveillance cameras,¹ which can be integrated with FRT technology to conduct live surveillance that can track individuals through this network. This proposal, however, does not specifically limit the use of FRT to still image comparisons only, thereby perhaps unintentionally potentially permitting the use of video footage from live surveillance to be applied to FRT. HB499 is also silent on the

¹ JENNIFER CROMPTON, *Police seek greater access to surveillance cameras* (2019), <https://www.wmur.com/article/police-seek-greater-access-to-surveillance-cameras/27048341> (last visited Apr 10, 2021).

potential use of FRT on the state's wide network of public and private video cameras, such as state traffic cameras and Ring doorbells. Additionally, HB499 would benefit with a data retention policy and for the images and video that will be captured in FRT investigations or surveillance use.

The science of facial recognition technology (FRT) is at question

FRT has been demonstrated by National Institute of Standards and Technology (NIST) scientists to provide unreliable results that can potentially falsely identify women, the young, the old, and people of color.² Given that facial recognition uses algorithmic technology to identify a person from a digital image, it has the unique distinction of impacting cases through two of the greatest contributors to the 375 wrongful convictions overturned by DNA evidence – misapplied forensic science and eyewitness misidentification.³ We also know from NIST scientists that algorithms that have not been trained on databases representative of a community are incapable of providing accurate results. These pitfalls are true of any biometric recognition technology and before governments can justify the use of any technology in the justice system, it must first demonstrate that it can produce valid and reliable results.

The concern regarding the reliability of FRT has led the National Police of Scotland⁴ and the Artificial Intelligence & Policing Technology Ethics Board of Axon, the nation's largest provider of police body cameras,⁵ to decline to integrate facial recognition technology into their public safety practices. The National Police of Scotland declared that "The use of live facial recognition technology would be a radical departure from Police Scotland's fundamental principle of policing by consent" and delayed their planned implementation of the technology in 2026.⁶ In addition to its scientific frailties, Axon raised the concern that

² PATRICK GROTH, *Face Recognition Vendor Test Part 3: Demographic Effects* (2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf> (last visited Dec 19, 2019).

³ To date, the work of the Innocence Project, along with other innocence organizations and lawyers around the country, has led to the exoneration of hundreds of individuals based on new evidence of actual innocence, including DNA and other scientific evidence. These injustices demonstrated that the eyewitness misidentification and the misapplication of forensic science is a leading cause of wrongful conviction, having played a role in the cases of 69 percent and 43 percent, respectively, of the 375 wrongfully convicted people in the United States who have been exonerated by DNA testing, and nearly a quarter of the over 2,700 people who were exonerated by DNA or by other means.

⁴ BBC News, *"No justification" for facial recognition*, BBC News, February 11, 2020, <https://www.bbc.com/news/uk-scotland-51449166> (last visited Feb 13, 2020).

⁵ AXON AI & POLICING TECHNOLOGY ETHICS BOARD, *First Report of the Axon AI & Policing Technology Ethics Board* (2019), https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5d9df18e9b1895351ceea85f/1570632083376/Axon_Ethics_Report_vfinal-English.pdf (last visited Feb 13, 2020).

⁶ BBC News, *supra* note 5.

the ethical, legal, and community implications for facial recognition technology have not been sufficiently contemplated to support ethical and responsible use.⁷

Unresolved ethical, legal, and social implications of FRT

In our work, we have seen the harm caused by new technologies that lack external oversight to assess accuracy. However, oversight is also needed to measure adverse effects on people of color, privacy interests, and other human rights. Facial recognition and other biometric surveillance technologies raise ethical, legal, and social issues of privacy, surveillance, and racial justice beyond the question of their scientific application. If New Hampshire will not support a moratorium on FRT and chooses to move forward, it must understand the risks posed by this technology.

- **Wrongful arrests.** Recently, FRT systems have contributed to three known wrongful arrests in Michigan and New Jersey, leading to avoidable pretrial detention.⁸ Because FRT is considered an investigative technology, police are not required to provide notice to people accused of crime that FRT was used in their case. Consequently, the number of FRT-initiated wrongful arrests of innocent people is unknown. This early stage of the investigation is critical as it is the phase where police may lock in on an innocent defendant, designate them as the suspect, and tunnel vision and other cognitive biases can overshadow the process.⁹
- **Inequitable databases.** We recognize that New Hampshire passed a law prohibiting the use of FRT in motor vehicle department databases,¹⁰ however, driver's license databases are the most equitable source of images for FRT. Mugshot or other social service databases may exacerbate existing social and racial disparities. Additionally, people who are already present in offender databases are already well-documented and the use of these databases limits policing to people already known to law enforcement.

⁷ Rick Smith, *The Future of Face Matching at Axon and AI Ethics Board Report* | Axon, AXON.COM (2019), <https://www.axon.com/news/ai-ethics-board-report> (last visited Feb 13, 2020).

⁸ Kashmir Hill, *Wrongfully Accused by an Algorithm*, THE NEW YORK TIMES, June 24, 2020, <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html> (last visited Jun 25, 2020); Kashmir Hill, *Flawed Facial Recognition Leads To Arrest and Jail for New Jersey Man* - *The New York Times*, NEW YORK TIMES, December 29, 2020, <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html> (last visited Apr 10, 2021); Elisha Anderson, *Controversial Detroit facial recognition got him arrested for a crime he didn't commit*, DETROIT FREE PRESS, July 10, 2020, <https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-recognition-detroit-michael-oliver-robert-williams/5392166002/> (last visited Oct 26, 2020).

⁹ MARK GODSEY, *BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS* (2017).

¹⁰ NH Rev Stat § 263:40-b (2015).

- **Lack of accountability.** If FRT brings harm upon a person, there should be a process in place to file a complaint or for the law enforcement or crime laboratory users to disclose the problem to an independent entity in an external agency for investigations or review. If a harm is verified through the investigative process, which should consist of a root cause analysis and corrective action, a system should be established to disseminate the notice of the problem to all affected individuals and criminal process stakeholders. A system should be in place to assess how software updates or patches may impact the testing process as a whole and whether the present-day changes could have impacted historical results.¹¹
- **NH constitutional right to privacy.** FRT raises the questions of “How much of public life do we deem private?” and “What is the line between public safety and surveillance?” These questions must be contemplated in the context of the Granite State’s Constitutional Amendment Concurrent Resolution 16 (CACR 16) “providing that an individual’s right to live free of governmental intrusion is natural, essential, and inherent.”

Additional recommendations to safeguard scientific, privacy, surveillance, and racial justices risks

The Innocence Project recognizes that policymakers in New Hampshire intend to serve public safety and deeply value the privacy rights of its residents. Requiring a judicial warrant that substantiates each use of FRT and making unwarranted use of FRT inadmissible is an important start. However, we believe that a more comprehensive regulatory framework is necessary to protect individual freedoms and ensure the accuracy of public safety investigations.

- o **Prohibit** possession and use of all remote biometric surveillance technologies, which include video surveillance that uses automated algorithms to detect face, ear, voice, gait, other physical characteristics, as well as the use of these automated algorithms used to infer emotions, associations, activities, or locations of individuals.
- o **Tightly limit** exceptions in the use of FRT.
 - Use FRT only in violent felony investigations.
 - Use FRT only in conjunction of still images.

¹¹ Jeanna Matthews, *Patterns and Anti-Patterns, Principles and Pitfalls: Accountability and Transparency in AI*, 41 AI MAGAZINE (2020), <https://aaai.org/ojs/index.php/aimagazine/article/view/5204>.

- If FRT was used against a person accused of crime, statute should require disclosure by police to the individual.
- **Centralize use and accountability.**
 - Limit use of FRT only to the state police. This funnels requests through one source so they can be centrally monitored.
 - Limit image databases to only driver's license images and/or FBI facial database images
 - Only state police may make requests to search the database.
 - Centralizing the database prevents the use of technologies like Clearview AI (which uses more intrusive social media data) and prevents the use of databases that exacerbate social and racial disparities like mugshot or social service databases.
 - Centralizing use also limits the state to the use of only one FRT system. FRT systems vary greatly in accuracy and reliability. If a problem arises with the technology, a central system permits rapid resolutions.
 - Require data collection at each point of use, documentation of the disposition of the investigation, and annual reporting to the legislature in order to track and monitor its use.
- Establish a system to receive complaints regarding harm generated by FRT, a process for investigating the allegation, correcting any problems identified, and notifying all individuals impacted by the harm. A process should also be established to test how software updates and patches impact FRT analyses.

Lastly, we encourage the Legislature to convene an advisory group of representatives from criminal legal system practitioners (police, prosecutors, defenders), experts (technologists, scholars with an expertise in law, privacy, surveillance, and racial justice), and community stakeholders (public interest groups, affected community groups)¹² to provide feedback and advise on future oversight measures, especially given the open questions regarding database use and constitutional privacy. The regulation we are seeking prevents government expansion and intrusion while ensuring that Granite Staters can enjoy public safety, privacy, and equity. Powerful technologies require proportionate oversight to ensure their responsible use. The Innocence Project acknowledges the Legislature's

¹² Eric L. Piza, Sarah P. Chu & Brandon C. Welsh, *Surveillance, Action Research, and Community Oversight Boards: A Proposed Model for Police Technology Research*, in *THE GLOBALIZATION OF EVIDENCE-BASED POLICING. INNOVATIONS IN BRIDGING THE RESEARCH-PRACTICE DIVIDE* (Eric L. Piza & Brandon C. Welsh eds., Forthcoming).

interest in establishing a regulatory framework for FRT and look forward to future discussions to expand this framework in such a way that it more reliably prevents wrongful suspicion of innocent people, safeguards constitutional rights to privacy, and holds the government accountable to its limited and transparent use.

CONTACT:

Beth Powers

State Campaign Director, Innocence Project

epowers@innocenceproject.org



April 13, 2021

Senator Sharon Carson
Chair
New Hampshire State Senate
Executive Departments and Administration Committee
Concord, New Hampshire

RE: Opposition to HB 499 – Restricting the Use of Facial Recognition Technology

Dear Senator Carson and Members of the Committee:

On behalf of the Security Industry Association (SIA) I am writing to express our concerns with HB 499 under consideration by the Committee. SIA is a nonprofit trade association representing businesses providing a broad range of security products and services across the U.S., including companies with business operations in New Hampshire. Among our members are the leading developers of facial recognition software available in the U.S. and many firms incorporating this technology into a wide variety of safety and security applications.

We believe all technology products must only be used for purposes that are lawful, ethical, and non-discriminatory. Since many advanced technologies offer both tremendous benefits and the potential for misuse, we support measures ensuring facial recognition it is only used for appropriate purposes and in acceptable ways.¹ While we support the intention to establish safeguards for government use of the technology, after reviewing the bill as recently amended, we have the following concerns.

The bill would ban nearly all public sector use of facial recognition regardless of specific application and potential public benefit. The requirement that government entities can only use facial recognition technology “if it has a search warrant,” means that all uses outside criminal cases are prohibited. This ignores many widespread and non-controversial uses of the technology that are unrelated to policing. Often the technology is used to help a user authenticate their identity where there is an existing requirement related to government facilities, services and programs. It allows for example, an employee to securely verify their identity to access a secured space, network or government issued electronic device. Additionally, the definition of “face recognition technology” is so broad it appears to encompass use of many social media applications used for communication with the public.

The search warrant requirement conflicts with existing warrant requirements in New Hampshire, preventing law enforcement from using the technology effectively. The bill’s requirement that the technology can only be used with a search warrant ignores how facial recognition is currently used. Over the past decade, U.S. law

¹ See SIA’s recommendations - <https://www.securityindustry.org/report/sia-principles-for-the-responsible-and-effective-use-of-facial-recognition-technology/>

enforcement agencies have successfully used facial recognition for a comparison search of records **when the identity of the subject is unknown**, typically at the beginning stages of an investigation. The purpose is to generate leads only, and not to make a positive identification. Unlike fingerprint and DNA matching, any potential facial recognition match result is not considered evidence. Further investigation by other means is necessary to establish probable cause. Additionally, warrant procedures laid out in the State of New Hampshire Law Enforcement Manual² a search is defined as “when a governmental official intrudes upon a person’s reasonable expectation of privacy or when law enforcement officers intrude upon a person’s private property.” And in addition to other requirements, a warrant application must identify the person subject to a search. For these reasons, longstanding investigative uses of facial recognition would not meet the basic conditions for a search warrant.

Searching databases of arrest records, as well as publicly available information on the internet, is something police departments routinely do every day, whether or not assisted by facial recognition. When the technology is not available, investigators will search arrest records for example, by physical traits such as race and gender, as well as arrest history and other info, to narrow down search fields before a visual examination of the photos in the records. Additionally, in nearly every state including New Hampshire, mugshot photos and other arrest data are publicly available. Not only would the bill require a warrant for one method – but not others – for the same records search, it could require an agency to essentially serve a warrant “on itself” to analyze records both created and held by the agency, while any member of the community can review the same data without restriction.

There are no exceptions that would allow use in public safety emergencies, to help rescue missing children and sex trafficking victims. There is no provision in the bill for allowing facial recognition in emergency situations involving terrorist threats, amber/silver alerts, helping suicidal persons, and in other exigent circumstances, including where no crime has occurred, but it is essential to identifying unknown persons. There is no exception for routine uses of the technology to help identify crime victims, such as deceased persons. Additionally, there is no provision for use of the technology to help identify and locate victims of child sexual exploitation. One such program, the Spotlight tool made available to law enforcement by the Thorn organization, reports that over 15,000 children in North America have been rescued³ with help of the technology in the last several years.

Calls for banning facial recognition technology are based in part on misconceptions regarding its performance. Concerns raised about facial recognition have focused on its accuracy in the law enforcement context, a very important issue. The oft-repeated claim is that the technology is inherently less accurate in matching photos of black and female subjects, ***across the board***. This is not an accurate representation of the current state of the science. The National Institute of Standards and Technology (NIST), the leading scientific authority worldwide on the accuracy of facial recognition algorithms, found in its Demographic Effects report in 2019 that the leading facial recognition technologies⁴ among nearly 200 it tested had “undetectable” differences in accuracy across racial groups, and extremely high accuracy overall after testing them against millions of images. At the same time, lower performing algorithms did show measurable differences in performance. a critical issue that must be addressed through continual accuracy improvements. In context, however, many had overall accuracy rates that

² <https://www.doi.nh.gov/criminal/documents/law-enforcement-manual.pdf>

³ <https://www.securityindustry.org/2020/07/16/facial-recognition-success-stories-showcase-positive-use-cases-of-the-technology/>

⁴ <https://www.securityindustry.org/report/what-nist-data-shows-about-facial-recognition-and-demographics/>

exceeded 99%. Additionally, the fact is the leading technologies as measured by NIST are the most highly utilized in today's government and law enforcement applications.

There is little public support for banning or heavily restricting responsible uses of this technology. In 2020, leading independent polling firm Schoen Cooperman Research conducted the most comprehensive nationwide poll⁵ yet on Americans' views of facial recognition technology. The survey found 68% of Americans believe facial recognition can make society safer, 70% believe it is accurate in identifying people of all races and ethnicities and 66% of believe law enforcement's use of facial recognition is appropriate. The results are consistent with other recent polling⁶ that indicates little public support for banning or heavily restricting this important technology.

We believe the blanket prohibition on facial recognition technology imposed by HB 499 precludes the opportunity to develop responsible policies that could both limit potential uses of concern and preserve the benefits it provides. We strongly urge the Committee not to approve this legislation in its current form, and on behalf of SIA and its members we stand ready to provide any additional information or expertise needed as you consider these issues.

Respectfully,



Jake Parker

Senior Director, Government Relations
Security Industry Association
jparker@securityindustry.org
www.securityindustry.org

⁵ <https://www.securityindustry.org/report/u-s-public-opinion-research-on-the-support-of-facial-recognition/>

⁶ <https://netchoice.org/media-press/americans-want-facial-recognition-use-by-law-enforcement-improved-but-not-banned/>

STATEMENT BY ALBERT SCHERR
PROFESSOR OF LAW, UNH FRANKLIN PIERCE SCHOOL OF LAW
SENATE EXECUTIVE DEPARTMENTS & ADMINISTRATION COMMITTEE
HOUSE BILL 499
ARIL 15, 2021

I have been on the faculty at UNH Law for over 25 years and, prior to that, I was a public defender in New Hampshire for 13 years. I teach, write and lecture about privacy issues in the criminal justice system. I have been involved in the criminal justice system in New Hampshire for almost 39 years and have worked closely and on a bipartisan basis with many legislators on criminal justice reform issues. In particular, I worked closely with then Representative Neal Kurk on what became Part I, Article 2b of the New Hampshire Constitution, NH's constitutional amendment on privacy. Recently, I chaired the Portsmouth Police Commission's sub-committee on bodycams, tasked with deciding whether the Portsmouth Police Department should adopt bodycams.

As always, I make this statement in my individual capacity, and the opinions I am expressing are solely mine and are not those of either UNH Franklin Pierce School of Law or of the University of New Hampshire. I appreciate the opportunity to provide this statement to this committee and ask you to vote *Ought to Pass* on HB 499.

THE EVER-INCREASING WAVE OF 21ST CENTURY TECHNOLOGY I have been involved in the criminal justice system in New Hampshire long enough to have witnessed the transition from 20th century technology like fingerprints, pen registers, wiretaps and house searches to 21st century technology like surreptitious DNA harvesting, geolocation cellphone searches and Global Positioning System (GPS) surveillance. Facial surveillance systems are another, newer installment of 21st century technology that, like others, focuses much more on the acquisition of intangible information than physical objects.

Facial surveillance technology allows the government, if it so desires, to track your whereabouts in public; to capture a digital representation of your face; to store your digital face in a database with millions of others forever and to search it whenever they wish for whatever purpose they wish. Currently, it is estimated that 117 million American adults – approximately half of all American adults - are in a law enforcement face recognition network.

Effectively, this technology allows the police to replace live and photo-lineup eyewitness identification procedures that are well-regulated in terms of reliability, suggestiveness and other issues by tight constitutional due process and right to counsel concerns with an unregulated, freestyle artificial intelligence system driven by technician-generated algorithms.

The use of facial recognition technology implicates several concerns, constitutional as well as practical. In this statement, I intend to discuss the constitutional concerns and then to focus primarily on the paramount practical concern with facial recognition technology: its verified unreliability. In essence, putting aside the very real legal concerns, permitting this technology does not make practical sense.

CONSTITUTIONAL CONCERNS WITH FACIAL RECOGNITION TECHNOLOGY

Constitutionally, 20th century technology was regulated reasonably well by the U.S. Supreme Court's interpretation of the 4th Amendment and the NH Supreme Court's interpretation of Part I, Article 19 of the New Hampshire Constitution. Though both read like they protect our privacy in physical objects or locations, the courts have worked hard to adapt the language to circumstances where the invasion of privacy was not technically physical but rather a collection-of-non-tangible-information.

The 21st Century has brought vastly more sophisticated technologies to the table. Several of those technologies implicate privacy-in-public issues. Let me speak of one U.S. Supreme Court case that captures the problem that courts have been confronting with 21st century technology, particularly with acquiring personal information from someone in a public place. In *U.S. v. Jones*, the Washington D. C. police put a GPS tracking device on the bottom of Jones's SUV. They suspected him of being a drug dealer and wanted to track his whereabouts. They then tracked him for 10 days and acquired a wealth of information about his daily habits in public. The issue in the case was whether the police needed a search warrant to place the GPS on the SUV to gather the public-whereabouts information.

The U.S. Supreme Court said yes, the police needed a search warrant as Jones had a 4th Amendment reasonable expectation of privacy even in his public whereabouts as gathered by the police. This is a very important decision that explicitly protects a version of publicly-available personal information.

There is no question that if a police officer had simply tailed Jones in the old-fashioned way, no 4th Amendment privacy interest would have been implicated. But, a high-tech tailing that collected the same publicly-available information received 4th Amendment protection. Acquisition by the police of a digital representation of one's face and its placement in a massive database implicates the same 4th Amendment concerns. The use of such a digital representation to track someone's whereabouts similarly invokes the 4th Amendment. And, in New Hampshire it also invokes Part I, Article 2b, the state's newest constitutional amendment protecting information privacy

What's even more concerning is that the use of any digital facial representation with the database is unreliable.

FACIAL SURVEILLANCE TECHNOLOGY & THE NOT-READY-FOR-PRIME-TIME PROBLEM

New Hampshire is not the first to contemplate banning this invasive technology. Nationally, several municipalities have already banned facial surveillance technology, including San Francisco & Oakland in California and Cambridge and Somerville in Massachusetts. Internationally, the European Union is seriously considering a five-year pause in the use of facial surveillance technology. My understanding is other municipalities and the States of New York and Massachusetts are also considering full or partial bans.

The primary issue in these jurisdictions has been the unreliability of facial surveillance technology. A recent federal report from the National Institute of Standards & Technology (NIST) found that the technology was unreliable when used to identify people of

color, women, the elderly and youth. What's more, its unreliability included both false positives and false negatives.

Specifically, it found that "false positives are higher in women than in men and are higher in the elderly and the young compared to middle-aged adults. Regarding race, we measured higher false positive rates in Asian and African American faces relative to those of Caucasians. There are also higher false positive rates in Native American, American Indian, Alaskan Indian and Pacific Islanders. These effects apply to most algorithms, including those developed in Europe and the United States." Not infrequently, these false positive rates were of an order of magnitude or more greater. In one instance, it found that Asian and African American faces were sometimes misidentified 100 times more than their white counterparts.

Beyond such state and municipality regulatory efforts, businesses have assessed the reliability and usefulness of facial recognition technology. Axon Corporation is one of the leading providers of police-technology in the United States. For example, they provide bodycam technology to many police departments, including some in New Hampshire. As a part of their commitment to corporate responsibility, they have an Artificial Intelligence (AI) and Policing Technology Ethics Board.

The Board "operates independently from the company and is made up of experts in the fields of AI, computer science, privacy, law enforcement, civil liberties, and public policy. The Board advises Axon around ethical issues relating to the development and deployment of AI-powered policing technologies and works to ensure these technologies ultimately serve the communities where they will be used."

Significantly, based on recommendations from this independent Board, Axon made the decision that it was not good business for them to make facial recognition technology a part of their bodycam packages they were selling to police departments. They said:

"Face recognition technology is not currently reliable enough to ethically justify its use on body-worn cameras. At the least, face recognition technology should not be deployed until the technology performs with far greater accuracy and performs equally well across races, ethnicities, genders, and other identity groups. Whether face recognition on body-worn cameras can ever be ethically justifiable is an issue the Board has begun to discuss, and will take up again if and when these prerequisites are met."

<https://www.policingproject.org/axon-fr>

Appreciate carefully what Axon has decided. They make money off technology packages they sell to police departments. They would make more money off packages that include facial-recognition technology. Nonetheless, they have decided not to include that technology in the packages they sell *because facial recognition technology is not currently reliable enough to ethically justify its use on body-worn cameras. Its use is not good business for them.*

HB 499 is a moderate approach to facial recognition technology. It says simply, to use FRT you must have a search warrant supported by probable cause and issued by a neutral and detached magistrate. It recognizes the value of FRT in criminal investigations and it protects an individual's privacy rights in the same way those rights are protected as to other invasive investigative tools. It does not place an undue burden on the police. They are completely familiar and at ease with the process for obtaining a search warrant, a process that is becoming more and more efficient and fast with the advent of technology.

Unlike the representations of some in opposition to HB 499, this proposal does not impede the investigation of sexual predators or the search for abducted children. If the police have a picture of someone as they are abducting a child, that information is a sufficient basis for the issuance of a search warrant to identify the abductor as HB 499 requires. If they have a picture of an unknown sexual predator sexually abuses one who appears to be under age, they have probable cause to get a search warrant to use FRT to identify the victim and the predator.

CONCLUSION

New Hampshire needs to confront the constitutional privacy issues that face recognition and surveillance technology raises. Those constitutional concerns are adequately addressed by HB 499, a common-sense, middle-ground approach to FRT. I ask you to vote *Ought to Pass* on the HB 499.

Voting Sheets

**Senate Executive Departments and
Administration Committee
EXECUTIVE SESSION RECORD
2021 Session**

Bill # HB 499

Hearing date: 4-14-21

Executive Session date: 5-19-21

Motion of: ITL Vote: 5-0

Committee Member	Present	Made by	Second	Yes	No
Sen. Carson, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Reagan, Vice Chair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Ricciardi	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Cavanaugh	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Prentiss	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: Consent Vote: 5-0

Committee Member	Present	Made by	Second	Yes	No
Sen. Carson, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Reagan, Vice Chair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Ricciardi	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Cavanaugh	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Prentiss	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: _____ Vote: _____

Committee Member	Present	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Reagan, Vice Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Ricciardi	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Cavanaugh	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Prentiss	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Reported out by: Sen. Cavanaugh

Notes: _____

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Thursday, May 20, 2021

THE COMMITTEE ON Executive Departments and Administration

to which was referred **HB 499**

AN ACT relative to the use of face recognition technology.

Having considered the same, the committee recommends that the Bill

IS INEXPEDIENT TO LEGISLATE

BY A VOTE OF: 5-0

Senator Kevin Cavanaugh
For the Committee

This bill permits the state to use face recognition technology if it has a warrant supported by probable cause. The Committee heard testimony that raised concerns about the potential impact HB 499 would have on counties and municipalities. The Committee also heard that HB 499 could have a negative impact on the ability of law enforcement to conduct investigations into, and prosecute cases against, child sex offenders and human traffickers. For these reasons, the Committee felt it was best to recommend Inexpedient to Legislate on HB 499.

Cameron Lapine 271-2104

FOR THE CONSENT CALENDAR

EXECUTIVE DEPARTMENTS AND ADMINISTRATION

HB 499, relative to the use of face recognition technology.

Inexpedient to Legislate, Vote 5-0.

Senator Kevin Cavanaugh for the committee.

This bill permits the state to use face recognition technology if it has a warrant supported by probable cause. The Committee heard testimony that raised concerns about the potential impact HB 499 would have on counties and municipalities. The Committee also heard that HB 499 could have a negative impact on the ability of law enforcement to conduct investigations into, and prosecute cases against, child sex offenders and human traffickers. For these reasons, the Committee felt it was best to recommend Inexpedient to Legislate on HB 499.

General Court of New Hampshire - Bill Status System

Docket of HB499

Docket Abbreviations

Bill Title: (New Title) relative to the use of face recognition technology.**Official Docket of HB499.:**

Date	Body	Description
1/11/2021	H	Introduced (in recess of) 01/06/2021 and referred to Executive Departments and Administration HJ 2 P. 51
2/3/2021	H	==RECESSED== Public Hearing: 02/11/2021 10:45 am Members of the public may attend using the following link: To join the webinar: https://zoom.us/j/91078617911 / Executive session on pending legislation may be held throughout the day (time permitting) from the time the committee is initially convened.
2/11/2021	H	==CONTINUED== Public Hearing: 02/18/2021 11:00 am Members of the public may attend using the following link: To join the webinar: https://zoom.us/j/97238685330 / Executive session on pending legislation may be held throughout the day (time permitting) from the time the committee is initially convened.
2/26/2021	H	Executive Session: 02/26/2021 10:00 am Please click the link below to join the webinar: https://zoom.us/j/92827099402
3/5/2021	H	Committee Report: Ought to Pass with Amendment #2021-0247h (Vote 17-1; CC) HC 18 P. 13
4/7/2021	H	Amendment #2021-0247h : AA VV 04/07/2021 HJ 5 P. 26
4/7/2021	H	Ought to Pass with Amendment 2021-0247h: MA VV 04/07/2021 HJ 5 P. 26
4/7/2021	H	Reconsider (Rep. Osborne): MF VV 04/07/2021 HJ 5 P. 50
4/7/2021	S	Introduced 04/01/2021 and Referred to Executive Departments and Administration; SJ 11
4/7/2021	S	Remote Hearing : 04/14/2021, 09:30 am; Links to join the hearing can be found in the Senate Calendar; SC 19
5/20/2021	S	Committee Report: Inexpedient to Legislate; Vote 5-0; CC; 05/27/2021; SC 25
5/27/2021	S	Inexpedient to Legislate, MA, VV === BILL KILLED ===; 05/27/2021; SJ 17

NH House

NH Senate

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: HB 499

Senate Committee: ED-A

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

Final docket found on Bill Status

Bill Hearing Documents: {Legislative Aides}

Bill version as it came to the committee

All Calendar Notices

Hearing Sign-up sheet(s)

Prepared testimony, presentations, & other submissions handed in at the public hearing

Hearing Report

Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

___ - amendment # _____ ___ - amendment # _____

___ - amendment # _____ ___ - amendment # _____

Executive Session Sheet

Committee Report

Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

___ - amendment # _____ ___ - amendment # _____

___ - amendment # _____ ___ - amendment # _____

Post Floor Action: (if applicable) {Clerk's Office}

___ Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

___ Enrolled Bill Amendment(s)

___ Governor's Veto Message

All available versions of the bill: {Clerk's Office}

___ as amended by the senate ___ as amended by the house

___ final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:

Cameron M. Jafine
Committee Aide

7/20/21
Date

Senate Clerk's Office AC