

United States Senate

March 25, 2024

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

We write to commend the Federal Trade Commission (FTC) on its recent action against Rite Aid for its discriminatory and invasive use of facial recognition technology in its pharmacy stores. The Rite Aid complaint and settlement illustrate the unique threats that facial recognition and other biometric identification systems pose for Black communities, communities of color, and low-income individuals. As locations in every sector — from pharmacies to amusement parks to sports stadiums — increasingly employ facial recognition systems, the FTC has a responsibility to use every available tool to protect consumers and prevent discriminatory surveillance. As facial recognition technology proliferates across industries, we encourage the FTC to continue its recent robust enforcement using the full range of its regulatory authority.

The continued proliferation and unchecked use of facial recognition technology poses serious risks for individual privacy and civil liberties. Biometric information — such as one's fingerprints, facial vector, or iris scan — is sensitive data, and once misused can create long-term harmful impacts. Studies show facial recognition algorithms misidentify people of color and women at higher rates than white, male faces.¹ Although vendors have reported that their facial recognition systems have become more accurate, recent tests from the National Institute of Standards and Technology show that accuracy is still lower on images that are low quality, blurry, obscured, or taken from the side or in poor light — images that are often used as reference images for facial recognition systems at public stores, venues, and other establishments.²

Beyond inaccuracy, facial recognition tools also deeply invade individual privacy, already causing a serious impact on communities of color and low-income individuals. These systems are more likely to be deployed in Black, Brown, immigrant, and low-income communities, contributing to increased surveillance, over-policing, and interference with individual civil rights.³ For example, individuals who believe they are being surveilled are less

¹ National Institute of Standards and Technology, *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software* (Dec. 19, 2019), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software>; Larry Hardesty, *Study finds gender and skin type bias in commercial artificial-intelligence systems*, MIT News (Feb. 11, 2018), <https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212>.

² National Institute of Standards and Technology, *Face Recognition Technology Evaluation (FRTE) Part 2: Identification* (Jan. 22, 2024), https://pages.nist.gov/frvt/reports/1N/frvt_1N_report.pdf.

³ Nicol Turner Lee & Caitlin Chin-Rothmann, *Police surveillance and facial recognition: Why data privacy is imperative for communities of color*, Brookings Institute (Apr. 12, 2022), <https://www.brookings.edu/articles/police->

likely to engage in activities protected by the First Amendment.⁴ Law enforcement officers have also falsely arrested at least six individuals due to an inaccurate facial recognition match, all of whom were Black.⁵ In 2021, a Black teenager was barred from entering a skating rink due to a false identification match.⁶ And a recent report uncovered a 2022 incident where police used false facial recognition results to arrest an individual, who was then assaulted while detained.⁷

Although law enforcement's use of facial recognition systems is deeply concerning, facial recognition tools have continued to proliferate in other aspects of our society — often to the surprise of the public.⁸ Grocery stores,⁹ retail chains,¹⁰ stadiums,¹¹ airports,¹² amusement parks,¹³ housing developments,¹⁴ and even schools have all begun to use these surveillance tools, often without notice to or the consent of those impacted by the technology.¹⁵ The lack of federal standards around the use of facial recognition technology, especially in places of public accommodation, means people are increasingly unable to move, assemble, or appear in public spaces without being tracked and identified. Additionally, the use of facial recognition technology can contribute to discriminatory denials of service in places of public accommodation, preventing people from receiving vital services such as prescriptions.

[surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/](#); Douglas MacMillian, *Eyes on the poor: Cameras, facial recognition watch over public housing*, Wash. Post (May 16, 2023), <https://www.washingtonpost.com/business/2023/05/16/surveillance-cameras-public-housing/>.

⁴ Jennifer Lynch, *Clearview AI—Yet Another Example of Why We Need A Ban on Law Enforcement Use of Face Recognition Now*, Electronic Frontier Foundation (Jan. 31, 2020), <https://www.eff.org/deeplinks/2020/01/clearview-ai-yet-another-example-why-we-need-ban-law-enforcement-use-face>.

⁵ Kashmir Hill, *Eight Months Pregnant and Arrested After False Facial Recognition Match*, N.Y. Times (Aug. 6, 2023), <https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html>.

⁶ Randy Wimbley & David Komer, *Black teen kicked out of skating rink after facial recognition camera misidentified her*, Fox 2 Detroit (July 14, 2021), <https://www.fox2detroit.com/news/teen-kicked-out-of-skating-rink-after-facial-recognition-camera-misidentified-her>.

⁷ Drew Harwell, *Man uses Macy's, saying false facial recognition match led to jail assault*, Wash. Post (Jan. 22, 2024), <https://www.washingtonpost.com/technology/2024/01/22/facial-recognition-wrongful-identification-assault/>.

⁸ Kashmir Hill, *Which Stores Are Scanning Your Face? No One Knows*, N.Y. Times (Mar. 10, 2023), <https://www.nytimes.com/2023/03/10/technology/facial-recognition-stores.html>.

⁹ Kristie Keleshian, *Facial recognition technology used at New York supermarkets raises some questions about privacy*, CBS News (Mar. 18, 2023), <https://www.cbsnews.com/newyork/news/new-york-city-grocery-stores-supermarkets-facial-recognition-cameras/>.

¹⁰ Rebecca Heilweil, *From Macy's to Albertsons, facial recognition is already everywhere*, Vox (July 19, 2021), <https://www.vox.com/2021/7/15/22577876/macys-fight-for-the-future-facial-recognition-artificial-intelligence-stores>.

¹¹ Kaleigh Rogers, *That Time the Super Bowl Secretly Used Facial Recognition Software on Fans*, Vice (Feb. 7, 2016), <https://www.vice.com/en/article/kb78de/that-time-the-super-bowl-secretly-used-facial-recognition-software-on-fans>; Mack DeGeurin, *Everything We Know About the Facial Recognition Scandal at Madison Square Garden*, Gizmodo (Jan. 30, 2023), <https://gizmodo.com/madison-square-garden-facial-recognition-what-we-know-1850041475>.

¹² Christine Chung, *Facial Recognition: Coming Soon to an Airport Near You*, N.Y. Times (Feb. 18, 2024), <https://www.nytimes.com/2024/02/18/travel/facial-recognition-airports-biometrics.html>.

¹³ Alison Fox, *Disney World Is Testing Facial Recognition Technology for Entry to Magic Kingdom*, Travel + Leisure (Mar. 24, 2021), <https://www.travelandleisure.com/travel-news/disney-world-facial-recognition-entry>.

¹⁴ Tanvi Misra, *The Tenants Fighting Back Against Facial Recognition Technology*, Bloomberg (May 7, 2019), <https://www.bloomberg.com/news/articles/2019-05-07/when-facial-recognition-tech-comes-to-housing>.

¹⁵ Davey Alba, *Facial Recognition Moves Into a New Front: Schools*, N.Y. Times (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/business/facial-recognition-schools.html>.

The FTC has rightfully been aggressive in addressing companies' discriminatory or invasive use of facial recognition systems, particularly with the *Rite Aid* settlement. For more than a decade, the Commission has been providing guidance on best practices related to uses of facial recognition technologies.¹⁶ Additionally, over the past five years, the Commission has taken strong steps to crack down on misleading and invasive use of facial recognition systems. In 2019, for example, the FTC fined Facebook \$5 billion for a variety of privacy violations and set requirements that the company provide "clear and conspicuous notice" of its use of facial recognition.¹⁷ In 2021, the FTC required Everalbum — a photo app that misled its customers about its use of facial recognition — to obtain express consent before using biometric identifier tools.¹⁸ And last year, the FTC released a policy statement advising that the Commission "is committed to combatting unfair or deceptive acts and practices related to the collection and use of consumers' biometric information and the marketing and use of biometric information technologies."¹⁹

Most importantly, in the FTC's recent enforcement action against Rite Aid, the Commission found that Rite Aid's use of facial recognition systems in its pharmacies led to thousands of false identifications, resulting in individuals being wrongfully searched, accused of shoplifting, and even expelled from stores.²⁰ Furthermore, Rite Aid did not disclose its use of this technology and even discouraged employees from informing customers of its use.²¹ Finally, Rite Aid disproportionately deployed facial recognition tools in neighborhoods with a plurality of people of color.²² This invasive and discriminatory use of facial recognition technology is unacceptable. The Commission's action against Rite Aid is an important signal that it is closely watching the use of facial recognition systems in public spaces.²³

¹⁶ Federal Trade Commission, *Facing Facts: Best Practices for Common uses of Facial Recognition Technologies*, (Oct. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies/121022facialechrpt.pdf>.

¹⁷ Press Release, Federal Trade Commission, FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (Jul. 24, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook>.

¹⁸ Press Release, Federal Trade Commission, FTC Finalizes Settlement with Photo App Developer Related to Misuse of Facial Recognition Technology (May 7, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/05/ftc-finalizes-settlement-photo-app-developer-related-misuse-facial-recognition-technology>.

¹⁹ Press Release, Federal Trade Commission, FTC Warns About Misuses of Biometric Information and Harm to Consumers (May 18, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-warns-about-misuses-biometric-information-harm-consumers>.

²⁰ Statement of Commissioner Alvaro M. Bedoya On *FTC v. Rite Aid Corporation & Rite Aid Headquarters Corporation*, Federal Trade Commission (Dec. 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023190_commissioner_bedoya_riteaid_statement.pdf.

²¹ Eduardo Medina, *Rite Aid's A.I. Facial Recognition Wrongly Tagged People of Color as Shoplifters*, N.Y. Times (Dec. 21, 2023), <https://www.nytimes.com/2023/12/21/business/rite-aid-ai-facial-recognition.html>.

²² *Id.*

²³ Ben Winters, *FTC's Strong Rite Aid Enforcement Order Is a Warning to Companies Using Biometric AI Systems*, Electronic Privacy Information Center (Feb. 15, 2024), <https://epic.org/ftcs-strong-rite-aid-enforcement-order-is-a-warning-to-companies-using-biometric-ai-systems/>.

The Honorable Chair Khan

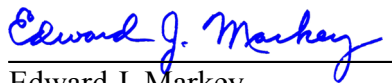
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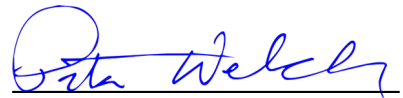
Although FTC enforcement does not replace congressional action to safeguard the public's privacy and civil liberties, we commend the Commission for its work to address facial recognition technologies' threat to communities of color. Companies should not be surprised by these enforcement actions, as the risks and harms of facial recognition are well-known. The public cases of misidentification and discriminatory deployment demonstrate that the technology has a disproportionate impact on communities of color and low-income individuals. The FTC is right to use its jurisdiction and powers to prevent these threats to our civil rights and liberties. We urge the Commission to continue to take all necessary steps, including robust enforcement and investigatory measures, to combat these harms, and we stand ready to assist you with this work.

Thank you for your attention to this important matter.

Sincerely,



Edward J. Markey
United States Senator



Peter Welch
United States Senator



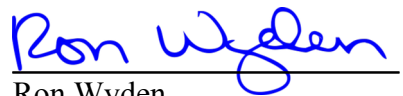
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