February 20, 2020

House Innovation, Technology &
Economic Development Committee
Washington State Legislature
416 Sid Snyder Avenue Southwest
Olympia, Washington 98504

Sent Via Email Only

Re: *Engrossed Substitute Senate Bill 6280, Sections 12 and 11; Tracking Washingtonians Without a Warrant, Continuing to Roll Out Biased Face Surveillance Before the Task Force Has Had a Chance to Make Recommendations*

Dear Chair Hudgins and Committee Members,

We write to express our grave concerns that Section 12 of Engrossed Substitute Senate Bill (ESSB) 6280 is too vague to protect Washingtonians' constitutional rights against unreasonable government intrusion into individuals' private affairs, in violation of the Fourth Amendment of the United States Constitution and the greater protections provided by Article 1, Section 7 of the Washington State Constitution. ESSB 6280 should explicitly require a search warrant issued on probable cause for any "ongoing surveillance" conducted through a "facial recognition service," and the language addressing the "exigent circumstances" exception to a warrant should be removed.

Additionally, in order for this bill to be accountable to communities historically targeted by surveillance technologies, it is important that ESSB 6280 incorporate a moratorium on use of facial recognition services until the legislative task force established by Section 11 has completed its work and the legislature has had an opportunity to take action on its recommendations.

ACLU
AMERICAN CIVIL LIBERTIES UNION
Washington

P.O. Box 2728
Seattle, WA 98111-2728
(206) 624-2184
aclu-wa.org

Tana Lin
Board President

Michele Storms
Executive Director

1. *Ongoing surveillance requires a warrant.*

It is well established that technologies that extend the ability to visually track people beyond what an individual agent could detect through his or her senses constitute government trespass into private affairs and require a search warrant under Article 1, Section 7 of the Washington State Constitution. *State v. Jackson*, 150 Wn.2d 251, 259-264, 76 P.3d 217 (2003) (use of Global Positioning System, or "GPS," tracking devices on cars).

> The intrusion into private affairs made possible with a GPS device is quite extensive as the information obtained can

> disclose a great deal about an individual's life. For example, the device can provide a detailed record of travel to doctors' offices, banks, gambling casinos, tanning salons, places of worship, political party meetings, bars, grocery stores, exercise gyms, places where children are dropped off for school, play, or day care, the upper scale restaurant and the fast food restaurant, the strip club, the opera, the baseball game, the 'wrong' side of town, the family planning clinic, the labor rally. In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life.

Id. at 262. *See also*, *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994) (use infrared thermal detection devices to detect heat escaping from homes). This principle was recently affirmed by the Washington State Supreme Court in *State v. Muhammad*, 194 Wn.2d 577, 451 P.3d 1060 (2019) (finding that cell phone users have an expectation of privacy in real-time cell-site location information (CSLI)).

ACLU
AMERICAN CIVIL LIBERTIES UNION
Washington

The vague and ambiguous "court order" currently referenced in Section 12 is inadequate to meet the Washington State constitutional requirement of a search warrant before deploying invasive technologies like facial recognition services.

2. *The exigent circumstances exception cannot excuse a warrantless, ongoing surveillance for forty-eight hours.*

Warrantless searches are per se unreasonable under the Washington State Constitution. *Muhammad*, 194 Wn.2d at 596 (citing *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). "Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement. … The State bears the burden to show an exception applies." *Id*.

Section 12 currently proposes to obviate the need for a warrant if a law enforcement agency "reasonably determines that an exigent circumstance exists" and allows such warrantless surveillance to continue for up to forty-eight hours. No justification exists for granting such an extended period of time to be free from the constitutional requirement of a warrant before conducting a search. Law enforcement officers have been able to obtain search warrants from on-call judges for decades in this state.

As a preliminary matter, the language of Section 12 confuses two separate and distinct legal concepts. Paragraph (1) references the *community caretaking function*, while subparagraph (1)(b) references

exigent circumstances. The community caretaking function is wholly unrelated to the criminal investigation duties of law enforcement, is focused on rendering emergency aid, and applies when:

> (1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury,
> (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and
> (3) there was a reasonable basis to associate the need for assistance with the place searched.

State v. Boiselle, 194 Wn.2d 1, 14, 448 P.3d 19 (2019). The exigent circumstances exception, on the other hand, specifically addresses law enforcement officers investigating a crime. *Id*. at 27-28; see also *U.S. v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006).

> We have identified five circumstances that could be termed exigent: hot pursuit, fleeing suspect, danger to arresting officer or the public, mobility of a vehicle to be searched, and mobility or destruction of evidence. … Six factors further guide our analysis of whether exigent circumstances exist: (1) the gravity or violent nature of the offense with which the suspect is to be charged, (2) whether the suspect is reasonably believed to be armed, (3) whether there is reasonably trustworthy information that the suspect is guilty, (4) a strong reason to believe the suspect is on the premises, (5) a likelihood that the suspect will escape if not quickly apprehended, and (6) entry is made peaceably. … Every factor need not be present, but they must show that officers needed to act quickly.

Muhammad, 194 Wn.2d at 597 (citing *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010), and *State v. Cuevas Cardenas,* 146 Wash.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002)).

Exceptions to the constitutional requirement for a search warrant are carefully limited in scope, and exigent circumstances can only extend to the point in time at which an officer has a reasonable opportunity to make a phone call to seek a search warrant. Law enforcement officers who are deploying ongoing surveillance via facial recognition services are not the officers who might be in hot pursuit of a fleeing suspect or facing immediate danger from a suspect in an unsecured location they're trying to enter. Officers deploying surveillance have time to make a phone call and secure a search warrant.

3. ***Section 12's attempt to establish a "reasonableness" standard for finding exigent circumstances contradicts established case law setting the constitutional standard at "clear and convincing."***

Washington courts have already determined that "[a]ny exceptions to the warrant requirement are to be drawn carefully and interpreted jealously, with the burden placed on the party asserting the exception." *State v. Grinier,* 34 Wn.App. 164, 168, 659 P.2d 550 (1983). "Accordingly, the State bears the burden of demonstrating ***by clear and convincing evidence*** that exigent circumstances justified a warrantless search. *City of Seattle v. Pearson*, 192 Wn.App. 802, 811, 369 P.3d 194 (2016) (citing *State v. Garvin,* 166 Wn.2d 242, 250, 207 P.3d 1266 (2009)) (emphasis supplied).

ACLU
AMERICAN CIVIL LIBERTIES UNION
Washington

Section 12's language proposing to obviate the need for a warrant if a law enforcement agency "reasonably determines that an exigent circumstance exists" runs afoul of the constitutional threshold already set by Washington's courts.

4. ***The Legislature should establish a moratorium on further deployment of face surveillance technologies until the task force created by Section 11 has completed its work.***

By including a task force to study and provide recommendations to the legislature, ESSB 6280 takes an important step toward meaningful inclusion of directly impacted Washingtonians in decision-making about the use of facial recognition technologies in their communities. The recommendations of the task force are due September 30, 2021, and the legislature will be able to take action on them in the 2022 session. In the meantime, the legislature should impose a moratorium on use of these technologies to avoid potential privacy violations and other harms while the task force does its work.

Sincerely,

Eric González Alfaro
Legislative Director

Alison Holcomb
Political Director