

Winter 2022

Defrosting the Chill: How Facial Recognition Technology Threatens Free Speech

Kirsten E. Roy

Candidate for Juris Doctor, Roger Williams University School of Law, 2022

Follow this and additional works at: https://docs.rwu.edu/rwu_LR



Part of the [Criminal Law Commons](#), [First Amendment Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Roy, Kirsten E. (2022) "Defrosting the Chill: How Facial Recognition Technology Threatens Free Speech," *Roger Williams University Law Review*: Vol. 27: Iss. 1, Article 9.

Available at: https://docs.rwu.edu/rwu_LR/vol27/iss1/9

This Notes and Comments is brought to you for free and open access by the School of Law at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized editor of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Defrosting the Chill: How Facial Recognition Technology Threatens Free Speech

Kirsten E. Roy*

INTRODUCTION

Law enforcement's increased use of facial recognition technology (FRT) to aid investigations has sparked a nationwide conversation about the costs and benefits of such advanced technology.¹ With FRT use on the rise, the implications of its use concerns legal scholars, activists, and politicians alike because the software is known to misidentify people of color, women, and other marginalized groups at a disproportionately high rate.² For example, in 2018, the American Civil Liberties Union (ACLU) ran members of

* Candidate for Juris Doctorate, Roger Williams University School of Law, 2022. A special thank you to Professor Hassel for her guidance throughout the writing process. I would also like to thank my parents and Sam for their unending love, encouragement, and support—thank you for always believing in my success!

1. See Ashley Deeks & Shannon Togawa Mercer, *Facial Recognition Software: Costs and Benefits*, LAWFARE (Mar. 27, 2018, 9:00 AM), <https://www.lawfareblog.com/facial-recognition-software-costs-and-benefits> [<https://perma.cc/4YFN-JASA>]; cf. Malkia Devich-Cyril, *Defund Facial Recognition*, THE ATLANTIC (July 5, 2020), <https://www.theatlantic.com/technology/archive/2020/07/defund-facial-recognition/613771/> [<https://perma.cc/2Y4J-LB28>] (facial recognition technology used to surveil Black activists and journalists).

2. *Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology*, ACLU (Feb. 17, 2021), <https://www.aclu.org/press-releases/aclu-civil-rights-groups-call-biden-halt-federal-use-facial-recognition-technology> [<https://perma.cc/2SKW-B6ED>].

Congress's faces through Amazon's facial recognition software, "Rekognition," and the technology incorrectly identified twenty-eight lawmakers as people who had committed crimes.³ In another study, the Massachusetts Institute of Technology found that FRT algorithms falsely matched Black women between twenty and thirty-five percent of the time, while matching white men's faces correctly almost every time.⁴ In 2019, the United States Government released its own findings on FRT and concluded that FRT is most effective when used on white men as it misidentifies people of color, women, children, and the elderly at disproportionately high rates.⁵ As a result of these disparities and concerns over bias, IBM, Microsoft and Amazon have suspended the sale of FRT to law enforcement.⁶ Many jurisdictions in the United States banned law enforcement's use of FRT citing the potential civil liberty violations.⁷ The consensus is clear—if law enforcement agencies are to use advanced technology like FRT, it must be highly accurate—there is no room for error.

Even if FRT worked seamlessly and did not misidentify its subsets at a disproportionate rate, the "Orwellian" slippery slope that could follow from such advanced technology is cause for concern.⁸ The ACLU is at the forefront of calls to defend against the threat of FRT, advocating for Congress and the Biden Administration to take immediate action to protect First Amendment and privacy rights.⁹ The ACLU maintains that FRT "threatens our expectation of privacy and its pervasive use chills our associational, speech, and

3. Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots*, ACLU (Jul. 26, 2018, 8:00 AM), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazon-face-recognition-falsely-matched-28> [<https://perma.cc/S59W-DPFT>].

4. Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACH. LEARNING RSCH. 77, 87 (2018).

5. See Karen Hao, *A U.S. Study Confirms Most Face Recognition Systems are Racist*, TECH. REV. (Dec. 20, 2019), <https://www.technologyreview.com/2019/12/20/79/ai-face-recognition-racist-us-government-nist-study/> [<https://perma.cc/S59W-DPFT>].

6. See Devich-Cyril, *supra* note 1.

7. *Id.*

8. *See id.*

9. See generally *Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology*, *supra* note 2; Letter from Kate Ruane, Senior Legis. Couns., ACLU, to President Biden (Feb. 16, 2021).

privacy rights unlike any technology previously deployed.”¹⁰ In a coalition letter to President Biden, the ACLU’s Senior Legislative Counsel Kate Ruane explained that FRT is responsible for the false arrests of Black men and “[the technology] disproportionately misidentifies and misclassifies people of color, trans people, women and other marginalized groups.”¹¹ Ruane argued that the Biden Administration must address FRT as an “important first step” to keep with its commitment to addressing racial inequality.¹²

This Comment will focus on FRT as it relates to the First Amendment and the expression of such constitutionally protected activities. In Part I, this Comment will highlight the rise of social media activism, explain how it creates a unique risk for law enforcement agencies to abuse FRT, and provide an overview of the chilling effect doctrine to the First Amendment. In Part II, this Comment will argue that law enforcement’s use of FRT threatens to chill protected speech and thus, the utilization of FRT on individuals exercising constitutionally protected activities violates the First Amendment to the United States Constitution. This Comment will then analyze whether the chilling effect gives rise to a legally cognizable injury and weigh the chilling FRT constitutional implications against the benefits of its use. Lastly, this Comment will argue that the executive or legislature must act and heavily regulate FRT to mitigate any chilling effect on individuals exercising their First Amendment rights.

I. BACKGROUND

A. *The Rise of Social Media Activism*

It is no secret that social media usage is widespread in the United States, but over the last decade, social media use has increased across all age demographics.¹³ The Pew Research Center

10. *Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology*, *supra* note 2.

11. Letter from Kate Ruane to President Biden, *supra* note 9.

12. *Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology*, *supra* note 2.

13. *Social Media Use Has Grown Dramatically*, PEW RSCH. CTR. (Mar. 27, 2018), https://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/ft_18-03-23_socialmediaprivacy/ [<https://perma.cc/RCG9-APXX>].

conducted a study about the growth of social media from 2006 to 2018, finding that the vast majority of Americans use social media every day.¹⁴ Americans turn to social media for a variety of reasons: connecting to friends and family, staying up-to-date about current events, and more recently, political activism. Given that two-thirds (67%) of Americans read the news on social media,¹⁵ it is no surprise that Americans have turned to online platforms for political debate and discussion.

In recent years, Americans utilized social media to engage in activism. As of 2017, roughly half of Americans used social media to discuss political and social issues.¹⁶ As a result of the COVID-19 pandemic, Americans spent more time at home in 2020 and consequently, more time on social media. Activists utilized social media platforms like Twitter, Facebook, Instagram, and TikTok to advocate for political and social change. For example, after a Minneapolis police officer, Derick Chauvin, killed George Floyd, a forty-six-year-old Black man from Minneapolis, activists utilized social media platforms to protest systemic racism in the United States and called for police reform.¹⁷ The horrific video sparked outrage across the globe, causing millions to advocate for police accountability; express their solidarity with the Black community; and organize protests through social media. Clearly, Americans have a powerful tool at their disposal to raise awareness and instigate change.¹⁸ The strength of this movement not only forced Americans to see the ubiquity of systemic racism in the United States, it also highlighted

14. *See id.*

15. *News Use Across Social Media Platforms 2017*, PEW RSCH. CTR. (Sept. 7, 2017), <https://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> [<https://perma.cc/3GBB-GC24>].

16. *Activism in the Social Media Age*, PEW RSCH. CTR. (July 11, 2018) <https://www.pewresearch.org/internet/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/> [<https://perma.cc/UL4G-WZ7T>].

17. Jon Emont & Philip Wen, *How Protests Over George Floyd's Killing Spread Around the World*, WALL ST. J. (June 11, 2020, 10:02 AM), <https://www.wsj.com/articles/social-media-helps-spur-global-protests-over-george-floyds-death-11591880851> [<https://perma.cc/EJX4-HTCW>].

18. *See* Shira Ovide, *How Social Media Has Changed Civil Rights Protests*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/06/18/technology/social-media-protests.html> [<https://perma.cc/Z4V7-JXH3>].

the need for police reform which led to action.¹⁹ The United States House of Representatives, for example, recently passed the George Floyd Justice in Policing Act, which aims to reform policing.²⁰ The bill, if passed by the United States Senate, will address issues with policing practices and law enforcement accountability.²¹ The George Floyd Justice in Policing Act illustrates how social media activism can enact actual change. Following the summer of 2020, social media has become a prominent platform for American political discussion.²²

For those who want to facilitate change, social media is an incredibly powerful means to accomplish that goal.²³ For example, during the 2020 election cycle most candidates utilized social media to further their campaigns. Political figures turned to social media platforms to reach their constituents about issues and encouraged

19. *E.g.*, George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

20. *Id.* (“[The George Floyd Justice in Policing Act] addresses a wide range of policies and issues regarding policing practices and law enforcement accountability for law enforcement misconduct, to enhance transparency and data collection, and eliminate discriminatory policing practices. The bill facilitates federal enforcement of constitutional violations by state and local law enforcement.”) If passed, the bill will create a Nation Police Misconduct Registry; lower the criminal intent standard required to convict a police officer from willful to knowing or reckless; alter qualified immunity for law enforcement officers in civil actions; permit the Department of Justice to investigate discriminatory police practices; and establish a framework for addressing racial profiling at the federal, state, and local level. *Id.*

21. *See id.*

22. *See* Kalhan Rosenblatt, *A Summer of Digital Protest: How 2020 Became the Summer of Activism Both Online and Offline*, NBC (Sept. 26, 2020), <https://www.nbcnews.com/news/us-news/summer-digital-protest-how-2020-became-summer-activism-both-online-n1241001> [https://perma.cc/6A48-FBAV].

23. *See* Amy B. Wang, *Taylor Swift’s Endorsement of Democrats is Followed by a Spike in Voter Registration*, WASH. POST (Oct. 9, 2018), <https://www.washingtonpost.com/arts-entertainment/2018/10/09/taylor-swifts-endorsement-democrats-causes-spike-voter-registrations/> [https://perma.cc/P4QN-WZM9]. Before the 2018 primary election, Taylor Swift weighed in on politics and caused a spike voter registration among eighteen- to twenty-nine-year-olds. Within forty-eight hours of Swift’s Instagram post, 169,000 new voters registered to vote in their respective states. *See generally* Taylor Swift (taylorswift), INSTAGRAM (Oct. 7, 2020), <https://www.instagram.com/p/BopoXpYnCes/> [https://perma.cc/C7ZC-9KQH].

people to vote.²⁴ And notably, on both sides of the aisle, Americans utilized their social media platforms to raise awareness and support their candidates.²⁵

While social media serves as an important platform for political discussion, for all Americans, a July 2020 survey revealed that Black Americans are most likely to use social media to engage in political activism in the United States.²⁶ Along with Black Americans, Hispanic and Asian Americans are more likely to utilize social media activism than their white counterparts.²⁷ This disparity is likely a result of marginalized groups' desire to call for political and social change to address the inequities directly impacting their communities.²⁸ In sum, social media activism is an important, effective, and efficient way for many Americans to exercise their First Amendment rights and it is particularly important to mitigate any threat FRT poses to social media activism because today, most political debate and discussion takes place online.

B. *Law Enforcement Use of FRT*

With the rise of social media activism, unrestricted use of FRT presents a unique risk to Americans who want to use their online platforms to raise awareness for political and social change. FRT is powered by advanced algorithms which can recognize distinct features of human faces and find matches almost instantly.²⁹ These algorithms utilize databases containing hundreds of thousands of images.³⁰ With one-half of Americans already in FRT databases and one in four police departments using FRT as a part of

24. *E.g.*, Joe Biden (@JoeBiden), TWITTER (Nov. 3, 2020, 6:46 AM), <https://twitter.com/joebiden/status/1323592258617188352?lang=en> [<https://perma.cc/BJ5E-5M7T>].

25. See Tom Murse, *How Social Media Has Changed Politics*, THOUGHTCO. (Aug. 29, 2019), <https://www.thoughtco.com/how-social-media-has-changed-politics-3367534> [<https://perma.cc/6FCG-TWUH>].

26. Brooke Auxier, *Social Media Continues to be Important Political Outlets for Black Americans*, PEW RSCH. CTR. (Dec. 11, 2020), <https://www.pewresearch.org/fact-tank/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/> [<https://perma.cc/RC92-49F5>].

27. *Id.*

28. *Id.*

29. Devich-Cyril, *supra* note 1.

30. *Id.*

routine investigations,³¹ the potential scope of this technology is alarming to activists, politicians, and legal scholars alike.³² The problem is that facial recognition companies utilize images from government databases and social media without the knowledge or consent of the subjects.³³ The FBI, for example, has a facial recognition database with 641 million images of people's faces pulled from passports and driver's licenses.³⁴ Clearview AI powers its FRT database with photos from social media sites, in violation of those companies' terms of service.³⁵ Legal experts and civil rights advocates argue that using facial images to power a technology the government can use for mass surveillance is dangerous as there are significant privacy concerns at issue and potential infringement of constitutionally protected activity.³⁶ As a result of the significant privacy concerns and constitutional implications of FRT, jurisdictions across the country are taking steps to mitigate any potential threat to civil liberties.

Without knowledge, consent, or even a legitimate reason, law enforcement agencies can use FRT to match individuals to images derived from the Department of Motor Vehicle (DMV) database or platforms like Facebook, Instagram, and Twitter.³⁷ There is growing concern that FRT is a weapon for law enforcement against protestors.³⁸ Activists and journalists argue that sharing movements on social media is adding fuel to the fire and making it much easier for the government to monitor political organizations without evidence of an actual threat.³⁹ For example, Black Lives Matter

31. *Id.*

32. *See id.*

33. *Id.*

34. *Id.*

35. *Id.*; see also Kashmir Hill, *The Secretive Company that Might End Privacy as We Know it*, N.Y. TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html> [<https://perma.cc/4ABM-KWUJ>].

36. *Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology*, *supra* note 2.

37. *See* Devich-Cyril, *supra* note 1; Hill, *supra* note 35.

38. *See Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology*, *supra* note 2.

39. *See* Madeleine Aggeler, *Face of a Dissident: As Images from Protests Circulate Online, Some Fear that Individuals Will Become Targets*, THE CUT

activists recently urged photojournalists and private citizens to avoid sharing photographs of protestors' faces at demonstrations.⁴⁰ Law enforcement agencies could use images from demonstrations to identify the participants, which in turn could result in further surveillance, harassment, or arrest of groups that historically experienced the same.⁴¹ Without restrictions in place to protect social media activism, such surveillance via FRT could further drive brutal policing and suppression of unpopular political minorities, especially Black activists who historically have faced unlawful surveillance from the government.⁴²

Law enforcement agencies have used FRT to investigate and surveil protestors in the past,⁴³ but the scope of this use is unknown as agencies are not required to disclose the use of FRT in court documents.⁴⁴ At the recent demonstrations against police brutality following the death of George Floyd, law enforcement agencies across the country logged 270 hours of surveillance of protestors in

(June 24, 2020), <https://www.thecut.com/2020/06/face-of-a-dissident.html> [https://perma.cc/ES6P-RVVY].

40. *Id.*

41. *Id.*

42. See Devich-Cyril, *supra* note 1.

43. In 2015, Baltimore police used FRT to identify protestors by linking images to social media profiles. See Kevin Rector & Alison Knezevich, *Maryland's Use of Facial Recognition Software Questioned by Researchers*, *Civil Liberties Advocates*, BALTIMORE SUN (Oct. 18, 2016, 12:01 AM), <https://www.baltimoresun.com/news/crime/bs-md-facial-recognition-20161017-story.html> [https://perma.cc/3X4C-F6ER]. More recently, FRT has been used to identify protestors in Washington, D.C. and Miami. Justin Jouvenal & Spencer S. Hsu, *Facial Recognition Used to Identify Lafayette Square Protester Accused of Assault*, WASH. POST (Nov. 2, 2020, 1:45 PM), https://www.washingtonpost.com/local/legal-issues/facial-recognition-protests-lafayette-square/2020/11/02/64b03286-ec86-11ea-b4bc-3a2098fc73d4_story.html [https://perma.cc/TH67-4L2T]; Connie Fossi & Phil Prazan, *Miami Police Used Facial Recognition Technology in Protester's Arrest*, NBC MIAMI (Aug. 17, 2020, 7:14 PM), <https://www.nbcmiami.com/investigations/miami-police-used-facial-recognition-technology-in-protesters-arrest/2278848/> [https://perma.cc/UY5D-Y42X].

44. Lauren Feiner & Annie Palmer, *Rules Around Facial Recognition Technology and Policing Remain Blurry*, CNBC (June 14, 2021, 10:52 AM), <https://www.cnbc.com/2021/06/12/a-year-later-tech-companies-calls-to-regulate-facial-recognition-met-with-little-progress.html> [https://perma.cc/2ALT-SU4U]. *But cf.* NEW YORK CITY, N.Y., CODE § 14-188(b) (2020).

fifteen different cities.⁴⁵ The impact and scope of this surveillance combined with police wearing body cameras equipped with FRT is concerning, especially when law enforcement agencies are not required to disclose the use of FRT. Referencing public safety concerns, law enforcement agencies justify their surveillance because some demonstrations have turned violent in the past and thus, the agencies are conducting surveillance to prevent crime.⁴⁶ This justification is anything but persuasive as without regulation, or a requirement that investigators use FRT only when there is a credible threat, there is room for abuse of FRT and surveillance of politically unpopular groups in the United States.

Successful use of FRT in recent investigations will likely result in an expansion of FRT use among law enforcement agencies.⁴⁷ Without regulation of FRT, and consideration for the disproportionate harm to communities of color, the risk of abuse is high.⁴⁸ For centuries, Black Americans and other unpopular political groups were subject to unfair and unlawful treatment, especially from those entrusted with the honor of protecting their communities.⁴⁹ Congress has also raised concerns about the FBI's unlawful surveillance of Black people.⁵⁰ For example, at a 2018 Congressional hearing to discuss the FBI's "Black Identity Extremist" designation, U.S. Representative Karen Bass of California argued that the term

45. Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html> [<https://perma.cc/7AL4-JFPP>].

46. *E.g.*, Fossi & Prazan, *supra* note 43.

47. Following the January 6, 2021, attack on the U.S. Capitol, FRT was used to identify those involved and experts warn the success will lead to expanded use. Johana Bhuiyan, *Facial Recognition May Help Find Capitol Rioters—But It Could Harm Others, Experts Say*, L.A. TIMES (Feb. 4, 2021), <https://www.latimes.com/business/technology/story/2021-02-04/facial-recognition-surveillance-capitol-riot-black-and-brown-communities> [<https://perma.cc/UM8P-65ZF>].

48. *Id.*

49. Wendi C. Thomas, *The Police Have Been Spying on Black Reporters and Activists for Years. I Know Because I'm One of Them.*, PROPUBLICA (June 9, 2020), <https://www.propublica.org/article/the-police-have-been-spying-on-black-reporters-and-activists-for-years-i-know-because-im-one-of-them> [<https://perma.cc/PMZ2-ZXP3>].

50. *See* Complaint at 1–2, 6, 9–10, Center for Media Justice et. al. v. Federal Bureau of Investigation, 3:19-cv-01465 (N.D. Cal. Mar. 21, 2019).

used in the FBI's assessment "could be applied to 'all protestors demonstrating [to] end police violence against Black people.'"⁵¹ The FBI's conduct and intentions, coupled with advanced FRT, has chilling constitutional implications if it is not addressed. Using FRT on activists will threaten free speech as the software's disproportionate harm to communities of color has the potential to further perpetuate the suppression of the Black voice and other marginalized groups, through the fear of punishment for their association with politically unpopular ideologies.⁵²

C. *The Chilling Effect Defined*

The right to engage in political dissent is undoubtedly fundamental to democracy: the First Amendment states, "Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people peaceably to assemble."⁵³ The First Amendment protects an individual's speech and expressions from government surveillance whether the intrusion is direct or indirect.⁵⁴ A chilling effect occurs when an individual is deterred from exercising free speech, protected by the First Amendment, as a result of government action or laws specifically directed at the protected activity.⁵⁵

A chilling effect is a severe threat to a healthy democracy because it has the power to diminish the public's perception of the government and the political process.⁵⁶ The mere perception of government surveillance can chill an individual's expression of constitutionally protected speech and association.⁵⁷ A chilling effect occurs, for example, when an activist decides to not attend a political event because the association with an unpopular political group could lead to unlawful surveillance, retaliation, or punishment.⁵⁸ When an individual refrains from engaging in otherwise protected speech because of perceived governmental intrusion, this is

51. *Id.* at 10.

52. *See* Devich-Cyril, *supra* note 1.

53. U.S. CONST. amend. I.

54. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 689–90 (1978).

55. *Id.* at 693.

56. *See id.* at 691.

57. *See id.* at 693.

58. *See id.* at 685 n.2.

sufficient to establish a chilling effect.⁵⁹ A chilling effect occurs when an individual alters his or her behavior because of a government action.⁶⁰ For example, in *Meese v. Keene*, the Court concluded that the plaintiff demonstrated “more than a subjective chill” and evidence of “specific present objective harm or a threat of specific future harm” because the plaintiff would suffer personal, political, and professional harm impacting his ability to get re-elected if the government designated his films as political propaganda.⁶¹

Even so, plaintiffs alleging a chill to free speech can rarely demonstrate standing to challenge the government action.⁶² Pursuant to Article III, Section 2 of the United States Constitution, federal courts can only hear cases that arise out of an actual case or controversy,⁶³ meaning a cause of action does not arise simply because an individual or group dislikes a government action. Therefore, a party seeking to challenge a government action for its chilling effect on free speech must have suffered an injury in fact, or the invasion of a legally protected interest that is “concrete and particularized” and “actual or imminent”; that the defendants’ challenged acts caused the injury; and a likelihood that a favorable decision will redress the injury.⁶⁴ When the government infringes on an individual’s First Amendment protections, this phenomenon gives rise to a legally cognizable injury.⁶⁵ While a chilling effect is undoubtedly an invasion of a constitutionally protected interest, “the difficulty [is] . . . convincing courts to recognize these consequences as constitutionally cognizable injuries-in-fact that give rise to justifiable controversies as a matter of law.”⁶⁶ A party alleging a chilling effect cannot satisfy the Article III standing requirement

59. *Id.* at 713.

60. *Id.* at 689.

61. *Meese v. Keene*, 481 U.S. 465, 472–73 (1987) (quoting *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Ca. 1983)).

62. Scott Michelman, *Who Can Sue Over Government Surveillance*, 57 UCLA L. REV. 71, 81 (2009).

63. U.S. CONST. art. III, § 2.

64. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

65. While there is consensus among courts that invasions of privacy from being spied on are injurious, “plaintiffs have difficulty establishing that they are, in fact, being spied on” for purposes of standing. Michelman, *supra* note 62, at 79.

66. *Id.* at 81.

unless the injury is fairly traceable to the government action at issue. If an individual or group can only speculate as to whether surveillance will occur, this is insufficient to establish standing.⁶⁷ As such, without a credible threat of injury arising from government surveillance, a party does not have standing to challenge a government action causing a chilling effect.⁶⁸

Courts have concluded that the mere speculation that surveillance could occur is insufficient to establish standing.⁶⁹ For example, in *Amnesty International v. Clapper*, the Second Circuit first held—only to later be overruled—that a group of journalists and attorneys defending terror suspects had standing based on their reasonable fear of surveillance.⁷⁰ The Second Circuit reasoned that the journalists' and attorneys' fear was reasonable and based on a "realistic understanding of the world."⁷¹ Moreover, the plaintiffs had taken financial measures to evade the surveillance authorized by the 2008 Foreign Intelligence Surveillance Act (FISA) which the Second Circuit explained, strengthened their claim.⁷² The ruling traced the plaintiffs' fears directly to the FISA, asserting that "[the plaintiffs'] legitimate professions make it quite likely that their communications will be intercepted if the government . . . exercises the authority granted by the FISA amendment."⁷³ The Second Circuit reasoned that an individual's reasonable fear that the government will monitor his or her communication is sufficient to establish standing under Article III of the Constitution.⁷⁴ The Supreme Court later overruled this decision and disagreed with the Second Circuit's reasoning, concluding that the plaintiffs lacked standing to challenge the FISA amendment.⁷⁵ The Court reasoned that merely alleging an objectively reasonable likelihood that the government would intercept the plaintiffs' communications at some point in the future under a provision of the FISA does not

67. *Id.* at 89.

68. *Id.*

69. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410–11 (2013).

70. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 139 (2d Cir. 2011), *rev'd*, 568 U.S. 398 (2013).

71. *Id.*

72. *Id.* at 140.

73. *Id.* at 139.

74. *Id.* at 122.

75. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013).

demonstrate Article III standing because the injury is not fairly traceable to the provision at issue.⁷⁶ The Court further explained that the plaintiffs inflicted financial harm on themselves based on a fear of hypothetical surveillance that was not actually imminent.⁷⁷ As such, the Court found a lack of standing because the plaintiffs could only speculate as to whether any interception would be under the FISA provision or some other authority.⁷⁸

Where a party merely alleges that a government action caused a chilling effect because the party refrained from exercising protected speech, without facts to support present objective harm or imminent specific harm, the allegation does not give rise to an injury in fact.⁷⁹ As Chief Judge Bazelon of the D.C. Circuit wrote, “[not] every plaintiff who alleges First Amendment chilling effect and shivers in court has thereby established a case or controversy”⁸⁰ because, without the likelihood of an actual chill, the issue will not give rise to a justiciable controversy.⁸¹ In *Laird v. Tatum*, for example, the Court explained that “[mere] allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific harm.”⁸² The Court dismissed the case because the plaintiffs failed to prove a cognizable injury from the potential use of data collected by agents at public political meetings and protests.⁸³ The issue is that it is nearly impossible to determine which protected activities an individual might take part in if there was not government surveillance, beyond the individual’s perception.⁸⁴ In sum, most courts conclude that subjective chills, perceived by the plaintiff, are “too ephemeral or idiosyncratic to constitute an injury.”⁸⁵ However, these arguments

76. *Id.*

77. *Id.* at 416.

78. *Id.* at 412–14.

79. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

80. *Nat’l Student Ass’n v. Hershey*, 412 F.2d 1103, 1113–14 (D.C. Cir. 1969).

81. *Id.*

82. *Laird*, 408 U.S. at 13–14.

83. See *id.*

84. Sunny Skye Hughes, *U.S. Domestic Surveillance After 9/11: An Analysis of the Chilling Effect on First Amendment Rights in Cases Filed against the Terrorist Surveillance Program*, 27 CAN. J.L. & SOC’Y 399, 404 (2012).

85. Michelman, *supra* note 62, at 81.

fail to consider that the government's records are often confidential and plaintiffs are thus unable to obtain sufficient evidence to establish the government was monitoring their expression of constitutionally protected speech.⁸⁶

While it is insufficient to merely allege that a specific government action has a subjective chilling effect on speech or association, courts have concluded that a plaintiff can satisfy the injury-in-fact requirement when the chilling effect "arises from an objectively justified fear of real consequences."⁸⁷ For example, "the . . . requirement [may be satisfied] by showing a credible threat of prosecution."⁸⁸ Plaintiffs have also successfully established standing based on a chilling effect when they have taken steps to protect communications from government surveillance to ensure privacy.⁸⁹ For example, in *Presbyterian Church v. United States*, members of the church argued that they suffered legally cognizable harm because Immigration and Naturalization Service (INS) agents wore listening devices to church meetings to monitor a specific movement.⁹⁰ The Court reasoned that the plaintiffs suffered a legally cognizable injury because members canceled church activities, withdrew their financial contributions and participation, and were "less open" during prayer and confession services.⁹¹ As such, the plaintiffs had standing because they had suffered concrete injuries while undertaking efforts to circumvent tangibly oppressive government surveillance.⁹²

The fear of government surveillance increases when the individual associates with politically unpopular groups, because for these political minorities, the threat of unlawful surveillance and other forms of punishment is much more likely.⁹³ The Supreme

86. *See id.*

87. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1182 (10th Cir. 2010).

88. *Id.*

89. *See Presbyterian Church v. United States*, 870 F.2d 518, 521–23 (9th Cir. 1989).

90. *See id.* at 520.

91. *Id.* at 521–22.

92. *See id.* at 522.

93. *See Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 556–57 (1963).

Court recognized this distinction in *Gibson v. Florida Legislative Investigation Committee*, emphasizing that:

[A]ll legitimate organizations are the beneficiaries of these [constitutional] protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and “chilling” effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.⁹⁴

When a government action deters a politically unpopular group from engaging in the free exercise of constitutionally protected speech, the chilling effect is much more actual.⁹⁵ For example, in *Gibson*, the Court was particularly concerned with the Florida Legislative Investigation Committee’s motive for demanding the NAACP’s membership records, referencing the “intense resentment and opposition of the politically dominant white community.”⁹⁶ The Court concluded that the Committee “laid no adequate foundation for its direct demands upon officers and records of a wholly legitimate organization for disclosure of its membership; [and] had neither demonstrated nor pointed out any threat to the State [stemming from the NAACP or its agenda].”⁹⁷ The Committee sought the NAACP’s records of membership because the association allegedly had ties to communism, a politically unpopular ideology, and the underlying reason for demanding the membership records was, presumably, to monitor and suppress the collective voice of a legitimate organization that challenged white supremacy and advanced racial justice.⁹⁸ Politically unpopular groups are more at risk of having their voice suppressed because their views do not align with political majorities and thus, it is important to consider any chilling

94. *Id.*

95. *See id.* at 557.

96. *Id.*

97. *Id.* at 555.

98. *See id.* at 555–56.

effect affecting political minorities to preserve and protect the free expression of constitutionally protected speech.⁹⁹

For the purposes of this Comment, the framework of the chilling effect analysis will proceed as follows. First, a chilling effect occurs when a government action will potentially “limit a citizen’s perceived freedom in the exercise of their First Amendment rights.”¹⁰⁰ This includes government policies or actions that authorize surveillance of free speech, expression, and association. Second, the chilled activity must have “genuine social utility,” such as political debate, protest, and other communications related to encouraging the democratic process.¹⁰¹ Third, the government action must cause a fear of punishment that results in an individual refraining from exercising constitutionally protected activities.¹⁰² Article III requires the plaintiff to demonstrate that the challenged government action creates an objective fear of harm to First Amendment rights.¹⁰³ Subjective fear of harm is insufficient to establish a legally cognizable injury.¹⁰⁴ A plaintiff can satisfy the injury-in-fact requirement when the chilling effect arises from an objectively justified fear of real consequences.¹⁰⁵ Article III standing is established by demonstrating a particularized, concrete injury that is caused by the government’s challenged conduct, and can be remedied by a favorable court decision for the plaintiffs.¹⁰⁶ The plaintiff must demonstrate the existence of government surveillance and that they were in fact the target of such surveillance.¹⁰⁷ Lastly, the plaintiff must allege specific harm such as damage to “personal, political, or professional reputation; economic injury; loss of organization membership; decreased or altered communication; or the creation of new communication safeguards.”¹⁰⁸ If a plaintiff establishes they are vulnerable to a particular chilling effect the

99. *See id.* at 556–57; *see also* *Dombrowski v. Pfister*, 380 U.S. 479, 487, 494 (1965); *Freedman v. Maryland*, 380 U.S. 51, 60 (1965).

100. Hughes, *supra* note 84, at 406.

101. *Id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *Id.*

107. *Id.*

108. *Id.*

Court must consider the totality of the circumstances at issue. Courts decide whether a government regulation on First Amendment freedoms has a chilling effect on a case-by-case basis, taking into consideration:

- (1) the severity and scope of the alleged chilling effect . . .
- (2) the likelihood of other opportunities to vindicate such First Amendment rights . . . and (3) the nature of issues which full adjudication must resolve, and the need for factual referents in order properly to define and narrow the issues.¹⁰⁹

II. ANALYSIS

A. *Law Enforcement Use of FRT Chills Free Speech*

Law enforcement use of FRT chills social media activism because the software deters activists from utilizing social media, substantially undermining the effectiveness of their organizing and causing a real curtailment of their rights of speech and assembly.¹¹⁰ Not only are activists deterred from engaging in social media advocacy, they often will not attend protests because they fear surveillance from the government via FRT and the vast databases of social media images that power facial recognition software.¹¹¹ Knowing law enforcement agencies could easily run social media photos from protests through facial recognition software is enough to deter some from even participating in otherwise protected activities.¹¹² For example, Kishon McDonald, a protester against racial injustice, admitted the use of FRT at protests would “cause him to think twice before attending.”¹¹³ The mere fact law enforcement agencies can use FRT on individuals participating in constitutionally protected activities raises First Amendment concerns. Clare Garvie, of Georgetown University Law School’s Center on Privacy and Technology argued that “the use of [FRT] or even the potential use . . . may cause people to alter their behavior in public, self-censor or not

109. *Nat’l Student Ass’n v. Hershey*, 412 F.2d 1103, 1115 (D.C. Cir. 1969).

110. *Jouvenal & Hsu*, *supra* note 43.

111. *See id.*

112. *See id.*

113. *Id.*

participate in constitutionally protected activity.”¹¹⁴ As such, it is important to look at FRT with scrutiny as the use implicates the First Amendment, a fundamental right and cornerstone of our democracy.

The increased use of FRT to aid investigations threatens to chill social media activism, a powerful tool to engage in political debate and discussion because activists alter their behavior in response to FRT use.¹¹⁵ As the Supreme Court said in *New York Times v. Sullivan*, “[the] debate on public issues should be uninhibited, robust, and wide-open,” and thus when a government action infringes on these long-recognized and valued rights, individuals are deterred from engaging in political debate and discussion because they fear retaliation.¹¹⁶ Without social media as an avenue for political discussion, the growing number of Americans that rely on social media to organize and express political ideas are effectively silenced. When the government infringes upon these rights, not only does it threaten our democracy, but it also diminishes the trust that people have for our government, leaving these individuals vulnerable to a chilling effect.¹¹⁷ Individuals should be free to engage in social media activism without the fear of law enforcement agencies using FRT to unlawfully surveil their protected speech.

As discussed in the preceding section, politically unpopular groups are most vulnerable to a chilling effect because the software is notoriously bias against marginalized groups, whose political views are more progressive.¹¹⁸ The use of FRT is particularly concerning because the technology misidentifies people of color, women, children, and the elderly at disproportionately high rates.¹¹⁹ Moreover, the mere perception that law enforcement agencies use FRT and power the software with photos from social

114. *Id.*

115. See Michelman, *supra* note 62, at 96.

116. *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

117. See Michelman *supra* note 62, at 78–79.

118. See *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 556–57 (1963).

119. Drew Harwell, *Federal Study Confirms Racial Bias of Many Facial Recognition Systems, Casts Doubt on their Expanding Use*, WASH. POST (Dec. 19, 2019), <https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/> [<https://perma.cc/Z6U7-4E6L>].

media is enough to deter an individual from expressing their political views online.¹²⁰ There is concern among activists and journalists that the government will use FRT to conduct surveillance at political protests and then individuals associated with politically unpopular ideas will face punishment.¹²¹

The scope of law enforcement use of FRT is largely unknown, making it especially difficult to challenge for its chilling effect on free speech. Until recently, law enforcement agencies did not even disclose to defendants when investigators use FRT during an investigation.¹²² After the arrest of a protester in summer 2020, prosecutors revealed in court documents for the first time that officials used FRT to identify the individual accused of assaulting a police officer.¹²³ Without the help of FRT, law enforcement may never have identified the suspect. These instances are increasingly common; in Miami, police used FRT to identify a protester accused of throwing rocks at officers; the NYPD used FRT to identify and harass a protester who yelled at police with a megaphone; the Philadelphia police used FRT and images from social media to identify protestors accused of vandalism.¹²⁴

While the actual scope of law enforcement use of FRT is not clear, the consensus is that even sharing photos and videos of protestors on social media could expose activists to potential misidentification, harassment, and arrest.¹²⁵ As such, activists are deterred from using social media, a crucially important tool for modern activists, to organize and engage in political discussion. Nevertheless, the next section will discuss whether this deterrence amounts to a legally cognizable injury where a plaintiff could challenge FRT for its chilling effect.

120. Heather Kelly & Rachel Lerman, *America is Awash in Camera, a Double-Edged Sword for Protesters and Police*, WASH. POST. (June 3, 2020), <https://www.washingtonpost.com/technology/2020/06/03/cameras-surveillance-police-protesters/> [<https://perma.cc/K9GE-9XTF>].

121. *Id.*; see also Telephone Interview by Jannie Jackson with Claire Garvie, Senior Associate, Ctr. on Privacy & Tech. at Geo. L. (June 26, 2020).

122. See Jouvenal & Hsu, *supra* note 43.

123. *Id.*

124. *Id.*

125. See Harwell, *supra* note 119.

B. *Deterrence from Social Media Activism as an Injury-in-Fact*

While the subjective fear of future surveillance via FRT is insufficient to create standing, if activists refrain from using the powerful tool of social media to engage in political debate and discussion because of FRT, this could give rise to a legally cognizable injury.¹²⁶ Without a credible threat of punishment or actual harm caused by FRT, any plaintiff seeking to challenge FRT would not have standing as Article III requires.¹²⁷ This section will discuss how activists' deterrence from social media activism could amount to actual harm, sufficient to establish a legally cognizable injury because a crucial tool for organizing has been effectively stripped from the hands of activists due to credible fears of FRT.¹²⁸

With respect to law enforcement use of FRT, there is no direct evidence to support an allegation that officers use FRT on individuals peacefully exercising their First Amendment rights or that the government has used FRT in a way that would directly cause harm.¹²⁹ Like the plaintiffs in *Laird*, who argued the Army's data gathering system chilled their First Amendment rights but failed to establish standing because the fear was speculative, a plaintiff challenging FRT for its chilling effect faces this same hurdle.¹³⁰ While the threat of future harm concerns activists because law enforcement agencies can misuse FRT in ways that would compromise civil rights and thus, deter people from engaging in such constitutionally protected activities, like the plaintiffs in *Laird*, these subjective concerns are not adequate to establish standing because there is no claim of a specific present objective harm or a threat of specific future harm to those peacefully exercising their First Amendment rights.¹³¹

An activist seeking to challenge FRT for its chilling effect on his First Amendment rights could overcome the Article III hurdle if he can demonstrate that he chose not to engage in social media activism because of FRT, or otherwise altered his behavior because

126. See *Meese v. Keene*, 481 U.S. 465, 473, 475 (1987).

127. See Michelman, *supra* note 62, at 84–85.

128. See *infra* Part II.B.

129. “[T]he system is never used to gather intelligence on peaceful demonstrations . . .” Jouvenal & Hsu, *supra* note 43.

130. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1971).

131. *Id.*

of FRT.¹³² An activist would satisfy the injury-in-fact requirement only when the chilling effect arises from an objectively justified fear of real consequences.¹³³ For example, if an activist took steps to privatize their social media platform to prevent law enforcement agencies from using his photos and videos to run facial recognition matches, this would be sufficient.¹³⁴ Like the plaintiffs in *Presbyterian Church v. United States*, who the Court found suffered legally cognizable harm once members canceled church activities, withdrew their financial contributions and participation, and were “less open” during prayer and confession services because of the INS’ presence at their meetings, an activist who takes steps to prevent the government from accessing their political activism on social media has suffered a legally cognizable injury.¹³⁵ Like the church members who had standing because they undertook efforts to circumvent tangibly oppressive government surveillance, an activist who privatizes their platform because he is afraid of government retaliation as a result of their social media activism, has suffered legally cognizable harm to his First Amendment rights.¹³⁶ The next hurdle this plaintiff encounters however is proving that the government’s use of FRT deterred their social media activism when the government is not even required to disclose its use of FRT during an investigation.¹³⁷

While the government is starting to disclose when it uses FRT on protestors accused of wrongdoing, the concern is that when law enforcement agencies use FRT on those who are peacefully exercising their First Amendment rights, the agency would not disclose its use.¹³⁸ For example, the FBI at this juncture denies using FRT on peaceful demonstrators and maintains that FRT is only deployed

132. See *Meese v. Keene*, 481 U.S. 465, 473 (1987).

133. See Michelman, *supra* note 62, at 106.

134. See *Meese*, 481 U.S. at 473.

135. *Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989).

136. *Id.*

137. See Jouvenal & Hsu, *supra* note 43.

138. For example, “public defenders, defense attorneys and facial recognition experts were unaware of the existence of the National Capital Region Facial Recognition Investigative Leads System.” Jouvenal & Hsu, *supra* note 43. Its use was disclosed in court documents following the arrest of a protester in Lafayette Square. See *id.*

on protestors when a crime was allegedly committed.¹³⁹ The ACLU has alleged that the FBI is using FRT to conduct surveillance of a group identified as “Black Identity Extremists,” without evidence of an actual threat or organization under that designation.¹⁴⁰ In 2018, at a hearing to discuss the FBI’s “Black Identity Extremist” designation, Representative Bass argued that the term used in the FBI’s assessment “could be applied to ‘all protestors demonstrating [to] end police violence against Black people.’”¹⁴¹ If the FBI is using FRT to surveil Black activists the fear of punishment becomes a much more credible threat. The FBI failed to provide the requested documents, which are now the subject of a Freedom of Information Act lawsuit the ACLU and Center for Media Justice filed.¹⁴² These records, if produced, could constitute a specific present objective harm to the subjects of the surveillance by exposing the government’s use of FRT to conduct unlawful surveillance. The FBI’s designation coupled with advanced FRT will have chilling constitutional implications if it is not addressed.

When a plaintiff seeking to challenge a government action for its chilling effect demonstrates that he or she was in fact the target of government surveillance and alleges specific harm such as damage to “personal, political, or professional reputation; economic injury; loss of organization membership; decreased or altered communication; or the creation of new communication safeguards” that plaintiff has suffered a legally cognizable injury.¹⁴³ An activist seeking to challenge FRT for its chilling effect would have to demonstrate not only that the government is using FRT to conduct surveillance of politically unpopular groups but allege specific harm resulting from the government action like the financial

139. *Id.*

140. *Leaked FBI Documents Raise Concerns About Targeting Black People Under “Black Identity Extremist” and Newer Labels*, ACLU (Aug. 9, 2019), <https://www.aclu.org/press-releases/leaked-fbi-documents-raise-concerns-about-targeting-black-people-under-black-identi-1> [https://perma.cc/H7JJ-57ZU].

141. *Freedom of Information Act Request for FBI Records on So-Called “Black Identity Extremists,”* ACLU (March 21, 2019), https://www.aclu.org/sites/default/files/field_document/aclu_cmj_analysis_of_foia_documents_on_so-called_black_identity_extremists_final.pdf [https://perma.cc/T9FE-A6J7].

142. *Id.*

143. See Michelman, *supra* note 62, at 84 n.56.

consequences of not sharing political content or taking steps to privatize social media to evade surveillance.¹⁴⁴ Nevertheless, because establishing standing under these circumstances presents unique difficulties for a plaintiff seeking to challenge the government's use of FRT, the executive or legislative branches are best suited to address the constitutional implications of FRT.

C. *Mitigating the Chilling Effect*

Law enforcement agencies having unregulated access to FRT threatens to chill free speech for any politically unpopular group and thus, the legislative and executive branches must take action to mitigate the threat to protected speech.¹⁴⁵ As discussed above, establishing standing to challenge a government action is a difficult hurdle and is more complicated due to the lack of information about the scope of law enforcement use of FRT.¹⁴⁶ While a full moratorium on FRT is not a practical solution, there are steps the legislative and executive branches can take to mitigate the chilling effect FRT has on free speech.¹⁴⁷ This section will weigh the benefits of FRT against the potential chilling effect the software has.

After the January 6, 2021, attack on the U.S. Capitol Building, authorities were quick to utilize the powerful tools at their disposal to aid the investigation, including FRT.¹⁴⁸ In fact, officials cited the combination of top-notch security footage and incriminating photographs with videos posted on social media as an "ideal data set for facial recognition."¹⁴⁹ Investigators' use of FRT undoubtedly made it easier to identify those involved with the attack on the U.S. Capitol.¹⁵⁰ Former FBI special agent Doug Kouns compared the attack

144. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

145. See *Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology*, *supra* note 2.

146. See *supra* nn. 111–22.

147. See *Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology*, *supra* note 2.

148. Craig Timberg, Drew Harwell & Spencer S. Hsu, *Police Let Most Capitol Rioters Walk Away But Cellphone Data and Videos Could Now Lead to More Arrests*, WASH. POST (Jan. 8, 2021, 5:37 PM), <https://www.washingtonpost.com/technology/2021/01/08/trump-mob-tech-arrests/> [<https://perma.cc/FY28-S37U>].

149. *Id.*

150. *Id.*

to September 11, 2001, and emphasized that “[the FBI will] use every resource they can to bring these people to justice.”¹⁵¹

The role of FRT in identifying those involved with the attack on the U.S. Capitol points to an important question: are there times when authorities should use such advanced technology? On one hand, there is strong public policy that supports law enforcement access to FRT for investigations.¹⁵² The software can help authorities locate missing persons, deter terrorism, and investigate crimes like human trafficking.¹⁵³ Unfortunately, the risk of abuse—the software could chill free speech—complicates these potential benefits.¹⁵⁴ Law enforcement agencies across the country were quick to utilize FRT to identify and charge those involved in the January 6, 2021, attack.¹⁵⁵ The combination of security footage and social media posts made it much easier to identify and charge those involved.¹⁵⁶ Not only does the U.S. Capitol Building have advanced security cameras, many of those involved posted incriminating photographs and videos on social media.¹⁵⁷ As discussed before, the clear shots of the faces, combined with good lighting and many different angles, is an “ideal data set for facial recognition.”¹⁵⁸

It is important to distinguish using FRT to assess credible public safety concerns from using the software to conduct surveillance of protestors. While the government has a legitimate interest in using FRT to investigate, if the means of doing so is premature and infringes on the constitutionally protected activities of others, the use is overinclusive. For example, using FRT at a protest because there is a potential for illegal activity, the use could chill the constitutional rights of those peacefully protesting. In contrast, when authorities used FRT to aid their investigation of the January 6, 2021,

151. *Id.*

152. See Bernard Marr, *Facial Recognition Technology: Here Are the Important Pros and Cons*, FORBES (Aug. 19, 2019, 12:31 AM), <https://www.forbes.com/sites/bernardmarr/2019/08/19/facial-recognition-technology-here-are-the-important-pros-and-cons/?sh=68a005c214d1> [<https://perma.cc/G9WW-Y8Z2>].

153. *See id.*

154. *See* Jouvenal & Hsu, *supra* note 43.

155. *See* Timberg, Harwell & Hsu, *supra* note 148.

156. *See id.*

157. *See id.*

158. *See id.*

attack, this was after-the-fact to investigate those who had already engaged in illegal conduct and incited an attack on the United States government. Reflecting on the incident, Evan Greer, deputy director of Fight for the Future argued that when a crisis occurs “people are more willing to accept government overreach,” suggesting the public would approve of FRT use to investigate the January 6, 2021, incident because the attack was so severe.¹⁵⁹

There are clear benefits of FRT, but civil rights activists and legal scholars argue the success of FRT to investigate the January 6, 2021, attack will lead to expanded use, without proper measures to protect the marginalized groups that are disproportionately at risk of misidentification and most vulnerable to experiencing a chill to free speech.¹⁶⁰ As such, if law enforcement agencies intend to expand the use FRT, the legislative and executive branches must step in to regulate its use and mitigate the technology’s chilling effect on free speech. For example, in a coalition letter to President Biden, the ACLU urged the Administration to place a moratorium on all federal use of FRT until Congress can enact safeguards to protect privacy interests and prevent bias.¹⁶¹ Other proposed solutions include asking the Biden Administration to support the Facial Recognition and Biometric Technology Act, which would impose a moratorium on FRT use and limit the use of federal funding to pay for FRT.¹⁶² If Congress enacted safeguards to protect the First Amendment rights of citizens and laid out specific circumstances where law enforcement agencies can use FRT, these safeguards would mitigate the harms of the technology. In sum, the legislative and executive branches are best suited to regulate FRT because proving an injury-in-fact and a justiciable controversy is nearly impossible without full disclosure of FRT use.

CONCLUSION

Law enforcement’s use of FRT threatens freedom of speech and association because it deters individuals from engaging in constitutionally protected activities. While any challenge to FRT for its

159. *Id.*

160. *See supra* nn. 41–50.

161. *See Civil Rights Groups Call on Biden to Halt Federal Use of Facial Recognition Technology, supra* note 2.

162. *See id.*

chilling effect may not give rise to a legally cognizable injury as there is no specific or credible threat to those peacefully exercising First Amendment rights, based on information available to the public about the scope of law enforcement use of FRT, the threat warrants swift action. Law enforcement's continued use of FRT will cause irreparable harm to politically unpopular groups because these individuals are most at risk of experiencing a chilling effect to their First Amendment rights. As such, Congress and the Biden Administration must take action to mitigate the threat of FRT as its continued use will cause irreversible damage to our democracy as the technology will discourage individuals from engaging in political debate and discussion; drive brutal policing; and perpetuate the mistrust marginalized groups have for the government.