



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Northern
California

Sent via E-mail

April 12, 2024

Chancellor Carol T. Christ
Office of the Chancellor
University of California, Berkeley
200 California Hall # 1500
Berkeley, CA 94720-1500
chancellor@berkeley.edu

Chief Yogananda Pittman
University of California Police Department
1 Sproul Hall
Berkeley, California 94720-1199
chief.of.police@berkeley.edu

Re: Use of Facial Recognition Technology during Cal Day

Dear Chancellor Christ and Chief Pittman:

We write on behalf of the American Civil Liberties Union of Northern California (“ACLU NorCal”) to express alarm over the apparent planned use of facial recognition technology during the upcoming “Cal Day,” scheduled for April 13.¹ We are particularly concerned that this surveillance might be deployed against students who are exercising their rights to protest in a peaceful and lawful manner. This proposed surveillance is intimidating and will likely discourage or chill students from engaging in activity protected by both federal and state law. The surveillance could also expose other students and UC Berkeley guests to invasive monitoring and identification as they move about campus. We write to underscore the serious constitutional issues implicated by this practice and seek written confirmation that UC Berkeley will not use facial recognition in connection with Cal Day or during future campus events.

¹ We understand that UC Berkeley officials recently distributed a policy to students serving as Cal Day tour guides that stated, among other things: “Facial recognition cameras will be activated during Cal Day. Should students be involved in any components of the protest, advisors and/or other campus personnel will be asked to identify specific students.”

1. Facial recognition surveillance is an invasive and dangerous technology.

Facial recognition is a privacy eviscerating technology that threatens our ability to speak freely and exercise core civil rights. It is favored by authoritarian governments around the world, who use it to identify, track, control, frighten, and harass journalists, disfavored ethnic groups, and activists.² Facial recognition technology is also deeply error-prone, and multiple studies show that it misidentifies Black people and people of Asian descent at rates higher than other racial groups.³ Indeed, we already know of at least seven cases—all but one involving misidentification of a Black person—where police agencies have wrongly arrested people because of face recognition errors.⁴ These tragedies have upended individuals' lives and traumatized entire families.

But even in a world where facial recognition might be perfectly accurate, it would still be incompatible with a healthy democracy. It is perverse and dangerous for the government—and by extension the UC system—to operate surveillance technology that automatically scans, tags, and logs people en masse. This, among other reasons, is why cities like Berkeley have prohibited the government's use of this technology.⁵ Dragnet, biometric surveillance is not something to be turned against the public, let alone against university students.

UC Berkeley is an institution with a storied history of activism, speech, and protest. It is bewildering that on a day meant to celebrate and advertise the campus to potential future students, the university would enforce a policy that flies in the face of the free speech principles that, for many, are synonymous with its name.

² See e.g., Lena Masri, "[How facial recognition is helping Putin curb dissent](#)," Reuters, Mar. 28, 2023; Paul Mozur, "[One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority](#)," The New York Times, Apr. 14, 2019.

³ Drew Harwell, "[Federal Study Confirms Racial Bias of Many Facial-Recognition Systems, Casts Doubt on Their Expanding Use](#)," Washington Post, Dec. 21, 2019.

⁴ Johana Bhuiyan, "[Facial recognition used after Sunglass Hut robbery led to man's wrongful jailing, says suit](#)," The Guardian, Jan. 22, 2024; Kashmir Hill, "[Eight Months Pregnant and Arrested After False Facial Recognition Match](#)," The New York Times, Aug. 6, 2023; Elisha Anderson, "[Controversial Detroit facial recognition got him arrested for a crime he didn't commit](#)," Detroit Free Press, July 10, 2020; John Simerman, "[JSO used facial recognition to arrest a man. The tech was wrong](#)," Nola.com, Feb. 2, 2023,

⁵ Sara Merken, "[Berkeley Bans Government Face Recognition Use, Joining Other Cities](#)," Bloomberg News, Oct. 16, 2019.

2. Facial recognition surveillance on campus risks violating free speech rights.

Free expression is a cornerstone of our democratic society. *See* U.S. Const. amend. I; Cal. Const. art. I § 2(a).⁶ “[S]peech on matters of public concern” receives the highest level of constitutional protection regardless of whether that speech is inflammatory or offensive. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (internal citations omitted). Indeed, the “principal function of free speech under our system of government is to invite dispute.” *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (citation and quotation marks omitted); *see also N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982).

Contemplated surveillance, and the potential use of recorded activity to threaten or punish protestors, creates a chilling effect—which itself raises the specter of a constitutional violation. The deprivation of free speech rights “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Where government conduct is aimed at chilling constitutionally protected activity, the government can also be liable for retaliation. *See Index Newspapers LLC v. U.S. Marshals Service*, 977 F.3d 817, 827 (9th Cir. 2020). The threat of surveillance at Cal Day seeds fear of disciplinary action, chilling students’ engagement in peaceful and protected free expression. To the extent that there are peaceful protests during Cal Day, participants should not have to fear surveillance, retaliation, or punishment for exercising their constitutional rights.

Furthermore, speculative safety concerns are insufficient to justify restrictions on free speech. It is axiomatic that “the government . . . is not free to foreclose expressive activity in public areas on mere speculation about danger.” *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1228 (9th Cir. 1990). And with respect to college campuses, the Supreme Court has explicitly confirmed that “the acknowledged need for order” does not justify prophylactic invasions into protected speech rights. *Healy v. James*, 408 U.S. 169, 180 (1972). “Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Id.* (internal quotation and citation omitted).⁷

⁶ The free speech clause of the California Constitution is even “broader and more protective than the free speech clause of the First Amendment.” *Snatchko v. Westfield LLC* 187 Cal.App.4th 469, 480 (2010).

⁷ As UC Berkeley should be aware, it is only when the speech is (1) “directed to inciting or producing imminent lawless action” and (2) “likely to incite or produce such action” that the government may take action. *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); *see also id.* (“enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation”).

3. Facial recognition surveillance on campus would impinge on the California Constitutional Right of Privacy.

The use of facial recognition on campus or against student protesters would independently infringe the California constitutional right to privacy, found at Article I, Section 1 of the state constitution. Cal. Const. art. I § 1. This right is particularly concerned with technology-powered invasions of privacy. As the California Supreme Court ruled in the landmark case *White v. Davis*, the constitution “prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.” *White v. Davis*, 13 Cal.3d 757, 774 (1975) (citing ballot materials). The *White* Court further held that UCLA’s surveillance of students and professors, coupled with the creation of dossiers, constituted a prima facie violation of this privacy right. *Id.* at 774-75. The Court recognized that the university’s secretive surveillance and the resultant cataloging of lawful behavior would “inevitably inhibit the exercise of free speech by both professors and students.” *Id.* at 767-68.

Here, as in *White*, UC Berkeley’s apparent planned surveillance would result in the surreptitious collection of personal information from students exercising their rights on campus. This practice and policy would not only chill the exercise of these fundamental rights; it would also fuel the creation of digital dossiers that could contain the names of students that attended protests, their locations on campus, and detailed information about their associates and groups. *See White*, 13 Cal.3d at 761 (accumulation of information attained through secret university surveillance “presents one clear example of activity which [Article I, section 1 of the California Constitution] envisions as a threat to personal privacy and security”). California’s constitutional right to privacy does not allow this.

4. Conclusion

For the reasons above, we strongly urge UC Berkeley to reconsider its potential plans to conduct surveillance during Cal Day. We also seek written confirmation that UC Berkeley will not use facial recognition in connection with any Cal Day or future events.

Sincerely,



Matt Cagle
Senior Staff Attorney
ACLU Foundation of Northern California



Chessie Thacher
Senior Staff Attorney
ACLU Foundation of Northern California