DEMAND PROGRESS

December 16, 2020

The Honorable Speaker Robert DeLeo
The Honorable Senate President Karen Spilka
General Court of the Commonwealth of Massachusetts
State House
Boston, MA 02133
via email

Re: Demand Progress Urges Preservation of Section 26 of S.2963

Dear Speaker DeLeo and President Spilka:

On behalf of our 50,000+ affiliated activists in Massachusetts, as well as our 1.5 million+ activists across the country, Demand Progress writes to thank you for sending a police reform bill to Governor Baker's desk with strong language protecting civil rights and civil liberties from unregulated and racially biased surveillance technology. Specifically, we strongly support Section 26 of S.2963, which brings much needed reform to police use of dangerous, racially-biased facial recognition software.

Securing the enactment of Section 26 is critical to both your constituents' privacy and to the fight for privacy across the nation.

We were extremely disappointed to see Governor Baker strike Section 26 in its entirety. The legislature worked for months on this bill, and the regulations you arrived at to govern facial recognition are sensible and wise. This legislation is the product of thousands of hours of lawmaker and constituent labor, and the language you sent to Governor Baker's desk already represents a compromise.

Demand Progress's experience advocating against warrantless surveillance by federal agencies, often powered by your own constituents, underscores the importance of refusing Governor Baker's efforts to undermine this legislation. Governor Baker's position, not unlike Donald Trump's, amounts to a claim of authority that *in the absence* of the prohibition contained in Section 26, law enforcement is authorized to conduct biometric surveillance at staggering scale and without oversight — despite *lacking* authorization from the General Court of the Commonwealth of Massachusetts.

The Trump administration believes the same. Indeed, without Congressional authorization and without notice to the public, Trump's Customs and Border Protection (CBP) operationalized a functionally equivalent legal theory. Specifically, the administration secretly concluded that it would be lawful for CBP and other agencies to purchase location records of people in the United States without a warrant and without oversight.[1]

Sadly, there are other examples of this fringe legal theory in action. Aside from a failure to act by the relevant legislative body, these mass surveillance programs consistently rely on the idea that executive

[1] https://www.vice.com/en/article/n7vwex/cbp-dhs-venntel-location-data-no-warrant

branches are inherently empowered to conduct voluminous surveillance in the absence of express statutory authorization.

These examples serve as disturbing reminders that legislative bodies must stand strong precisely in moments like these. In 1992, Bill Barr (the first time he was Attorney General) authorized the "first known effort to gather data on Americans in bulk" under the Drug Enforcement Administration (DEA)[2] — without legal review.[3] That program operated for **21 years**, but the public only learned of it in 2015, shortly after it had been shuttered. Nonetheless, this program stayed secret long enough to serve as the "the precursor" to the Bush Administration's flagrantly illegal and unconstitutional surveillance program, Stellarwind, the ramifications of which Congress is still investigating.[4] And when some of this surveillance was finally moved under statutory authority, the sum result was revealed **not** to be increased security, but rather the very first scandal disclosed by Edward Snowden: the bulk telephone metadata dragnet.[5]

Governor Baker's rejection of Section 26 must be understood in this framework, because it is not simply a rejection of the will of the General Court, but a claim of inherent authority that is far more likely to subject your constituents to mass, warrantless surveillance than it is to meaningfully contribute to the security of the public. In other words, Governor Baker's opposition to Section 26 is a distraction from the extraordinarily broad authority *he already claims to have*.

As S.2963 wisely contemplates, Governor Baker must be required to secure statutory authorization *before* deploying biometric surveillance. Failure to enact Section 26 now, if Congress's experience is any indication, will lead to decades of lawlessness and disproportionate impacts on people of color — just to get back to where you are standing right now.

We therefore urge you to stand firm and send Section 26 of S.2963 back to Governor Baker's desk.

Sincerely,

Sean Vitka
Senior Policy Counsel
Demand Progress

cc: Representative Carlos González, Representative Claire Cronin, Senator William Brownsberger, Senator Sonia Chang-Diaz

[2] https://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/
[3] https://www.usatoday.com/story/news/politics/2019/03/28/review-finds-phone-data-dragnet-dea-doj-began-without-legal-review/3299438002/
[4] https://www.nytimes.com/interactive/2015/04/25/us/25stellarwind-ig-report.html
[5] https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order