IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION, SEX WORKERS OUTREACH PROJECT CHICAGO, ILLINOIS STATE PUBLIC INTEREST RESEARCH GROUP, INC., and MUJERES LATINAS EN ACCIÓN,
Plaintiffs,

v.

CLEARVIEW AI, INC., a Delaware corporation,
Defendant.

Case No. 2020-CH-04353
Hon. Pamela McClean Meyerson

BRIEF OF AMICI FIRST AMENDMENT CLINIC AT DUKE LAW AND PROFESSORS OF LAW EUGENE VOLOKH AND JANE BAMBAUER IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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STATEMENT OF INTEREST

The First Amendment Clinic at Duke Law and Professors of Law Eugene Volokh, of the University of California Los Angeles, and Jane Bambauer, of the University of Arizona, frequently engage in research, legal representations, and scholarship pertaining to the intersection of the First Amendment and privacy law. Collectively, amici have authored numerous amicus briefs and articles concerning free speech issues and have a wealth of expertise and knowledge relating to matters relevant to this case.

Amici write in response to arguments raised by the Plaintiffs and amicus briefs in support of the Plaintiffs concerning the interpretation of Illinois' Biometric Information Privacy Act (BIPA), 740 ILL. COMP. STAT. § 14 (2008). Application of BIPA to faceprints derived from publicly accessible photographs is wholly unconstitutional pursuant to the First Amendment. Indeed, the constitutional protection of free speech applies equally to the "upstream" speech-creation activities—such as information gathering and analysis—that make informed expression possible as it does to the ultimate resulting expression. Here, BIPA's restriction of Clearview AI's collection and analysis of publicly available information undermines free speech principles by purposefully halting the production of speech in violation of the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment protects expression and related activities, such as gathering and analyzing information, which are the essential prerequisites of expression. Clearview AI ("Clearview") is engaged in the collection and analysis of publicly available information. BIPA, which prohibits such activities, violates the First Amendment as applied to faceprints derived from publicly accessible photographs.

ARGUMENT

I. The First Amendment Protects The Collection And Analysis Of Publicly Available Information.

The "freedom of speech" protected by the First Amendment is an expansively defined right; it includes not just the end products of speech, such as expression and communication, but also the preceding or "upstream" activities, such as information gathering and analysis, that make that expression possible. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of First Amendment."); *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310, 336 (2010) ("[L]aws enacted to control or suppress speech may operate at different points in the speech process."). This is logical, as activities such as information gathering, research, recording, and analysis are the bedrock of the process of speech creation.

Courts have repeatedly protected the activities of gathering and using public information in a variety of contexts, including by guaranteeing access to courts and public hearings and the right to record the actions of public officials. *See, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (protecting public access to criminal trials); *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (protecting public access to libraries, because "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (plurality opinion) (protecting public access to courtrooms, because "[f]ree speech carries with it some freedom to listen ... '[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated'"); *Pochoda v. Arpaio*, 2009 WL 1407543, at *4 (D. Ariz. 2009) (protecting "observation of [a] demonstration" in a public forum, because the "the right to hear" is "no less protected" than "the right to speak," especially where the observer "was there to safeguard

or support the civil rights of the demonstrators"); *Goldschmidt v. Coco*, 413 F. Supp. 2d 949, 952–53 (N.D. Ill. 2006) (protecting note-taking in courtrooms, because it allows "courtroom monitors and evaluators of judicial performance representing public interest groups," among others, to "revisit what they have heard or read," and thus to "more fully and accurately evaluate and communicate the subject matter"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903–904, 907 (1982) (protecting early activities related to a shaming campaign because "[e]ach of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments"). The expansive protection for the activities that precede expression serves important First Amendment values because each step in the production of speech—from information gathering to analysis to creation to dissemination—is critical to ensuring a healthy marketplace of ideas. *Cf. Bd. of Educ.*, 457 U.S. at 868 ("[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."). As James Madison recognized, both knowledge and the gathering of knowledge are crucial for maintaining an informed electorate and thus an effective democracy. *See* 9 WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."). When the public cannot gather and analyze information, society is deprived of the opportunity to learn about, discuss, and form opinions based on that information. To function, the marketplace of ideas depends on a myriad of uncoordinated insights and information.

II. The Use/Conduct Distinction Is Inapplicable When A Law Targets Information Gathering, Analysis, And Creation.

BIPA is impermissible as applied to faceprints derived from publicly accessible photographs because information gathering, analysis, and creation are protected by the First Amendment. In some other contexts, the Supreme Court has had to draw difficult lines when a state punished conduct with significant expressive value. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376 (1968) (burning of draft cards). However, the distinction is largely inapplicable to the information gathering and analysis stages of the speech creation process. Protecting the creative process is tantamount to protecting the end product; the speech right is meaningless without protection for the production of that speech. *Cf. Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (holding that both the "broadcast" and the "production of the broadcast" were protected by the First Amendment); *Anderson v. Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) ("[N]either the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of pure speech . . . and the product of these processes . . . in terms of the First Amendment protection afforded.").

As circuit courts around the country have recognized, the right to gather and use non-private information is inextricably intertwined with the right to produce the speech upon which that information is based. *See e.g., Fields v. Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos, videos, and recordings and for this protection to have meaning the Amendment must also protect the act of creating that material. There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them.") (internal citation omitted); *ACLU v. Alvarez,* 679 F.3d 583, 596 (7th Cir. 2012) ("[T]here is no fixed First Amendment line between the act of creating speech and the speech itself.").

For example, in the Seventh Circuit the public has a clearly established right to make audiovisual recordings in public. *Alvarez,* 679 F.3d at, 595–96. In *Alvarez,* the Seventh Circuit refused to apply Illinois' all-party consent wiretap statute against people who sought to monitor police conduct by recording the police officers' performance of their official duties. *Id.* The statute's requirement of all-party consent burdened individual speech and press rights by restricting the creation of information "at the front end of the speech process." *Id.* at 596. Such a restriction on information gathering "suppresses speech just as effectively as restricting the dissemination of the resulting recording." *Id.*

The use of mechanical means such as a camera does not negate First Amendment protection for information gathering. Prohibitions on the use of mechanical devices serve only to "limit[] the information that might later be published or broadcast" and thus burden free speech rights. *Id.* at 596–97. Other circuits have protected the right to record in public using similar reasoning. *See, e.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) ("[A]udiovisual recordings are protected by the First Amendment."); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688–89 (5th Cir. 2017) (finding a First Amendment right to record and create speech in the context of publicly recording law enforcement); *Fields*, 862 F.3d 353, 359 ("To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately. Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media."); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) ("First Amendment principles apply equally to the filming of a traffic stop and the filming of an arrest in a public park."); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("[Plaintiff] had a First Amendment right … to photograph or videotape police conduct. The First Amendment protects the right to gather

information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing plaintiff was exercising his "First Amendment right to film matters of public interest" when filming activities of police officers during a public protest march).

Finally, a state cannot burden the creation of specific types of speech by prohibiting or limiting the collection and use of specific types of research data. *See, e.g.*, *West. Watersheds Project v. Michael*, 869 F.3d 1189, 1192 (10th Cir. 2017) ("Although trespassing does not enjoy First Amendment protection, the statutes at issue target the 'creation' of speech by imposing heightened penalties on those who collect resource data."); *PETA v. Stein*, 2020 WL 3130158, at *9 (M.D.N.C. June 12, 2020) (holding that the government cannot avoid First Amendment analysis by regulating the collection and use of data rather than publication); *Animal Legal Def. Fund, v. Otter*, 44 F. Supp. 3d 1009, 1023 (D. Idaho 2014) (holding that unauthorized audiovisual recording qualifies as the creation of speech and is subject to First Amendment scrutiny); *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 8–9, 15–16 (D.D.C. 2018) (holding that the CFAA did not survive First Amendment intermediate scrutiny at the motion to dismiss phase when applied to researchers who wished to use audit testing and data scraping to determine whether a website discriminates against members of a protected class because "the First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw") (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). Neighboring jurisdictions have used strict scrutiny to analyze content-based prohibitions that target the collection of specific types of information. For example, in *PETA v. Stein*, a North Carolina statute that prohibited the recording and capturing of employer records in a manner that violated an employee's duty of loyalty to his

employer failed strict scrutiny and thus violated the First Amendment. *PETA*, 2020 WL 3130158, at *5, *14, *25.

Here, BIPA implicates Clearview's First Amendment rights by limiting Clearview's ability to collect or analyze publicly available information using a mechanical process. A clear analogy can be drawn between the activity of making audiovisual recordings and Clearview's information gathering activities. Making audiovisual recordings is the collection and retention of public information for the purpose of further uses, including analysis, speech-creation, and ultimately expression. Similarly, Clearview captures publicly available information and retains it in its databases for the purpose of analysis and speech-creation.

Further, Clearview's production of a faceprint is analogous to upstream creative processes that generates new information and expression in the world. Using machine learning, Clearview analyzes the publicly available images it has collected and produces faceprints. The process of analyzing and creating a faceprint is equivalent to the creative processes that unavoidably precede expressive activity. *See Anderson v. Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) ("The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds.").

Finally, Clearview's information gathering and analysis ultimately results in expressive activity. Using its database of faceprints, Clearview runs searches that compare photographs and find matching faces. Clearview then disseminates the results of its searches by sending them to clients (in this case, law enforcement in Illinois). Like regulation of a painting process or a writing method, restriction of Clearview's use of faceprints restricts speech by preventing Clearview from creating new information. Illinois cannot circumvent the First Amendment by having its

restrictions act earlier in the speech process. Restricting speech is just as nefarious at the information gathering and creation stages as at the publication stage.

III. The Appropriate Standard Of Review In This Case Is Strict Scrutiny.

BIPA is a facially content-based restriction on the speech-creation process, and thus on speech, and therefore is subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015). BIPA explicitly prohibits faceprints of human faces, but not of any other type of face; Clearview can produce faceprints from pictures of cats without any legal impediment, but nonconsensual faceprints generated from pictures of human Illinois residents are restricted. Thus, the restriction of the law turns on the content of the faceprint—whether it refers to a human subject. *See Barr v. American Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346 (2020) ("A robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. That is about as content-based as it gets."). Accordingly, under *Reed*, strict scrutiny is presumptively required.

There are no justifications for applying a lower level of scrutiny. Amicus Electronic Frontier Foundation (EFF) concedes that the creation of faceprints is protected speech, but argues that the appropriate level of review is intermediate scrutiny because the creation of faceprints is a matter of purely private concern and solely in the interest of the speaker and its business audience. EFF Br. at 6 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 n.8 (1985). The analogy to *Dun & Bradstreet* is unconvincing because the recipients of Clearview's information are police departments who engage Clearview's services to pursue their public duty in the enforcement of criminal laws. The public has an obvious interest in the prompt and accurate identification of criminal suspects. Given that the precise name of a rape victim was presumed to

be a "matter of public significance" in *Florida Star*, the identity of a suspect or perpetrator should qualify as well. *Florida Star v. B.J.F.* 491 U.S. 524, 536 (1989).

Further, the distinction between the protection for speech of "public concern" and "purely private concern" is difficult to maintain in a principled way and its application risks substantially undermining free speech protections. As the Illinois Supreme Court has said, "*most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." *People v. Relerford*, 104 NE 3d 341, 354 (Ill. 2017) (quoting *United States v. Stevens,* 559 U.S. 460, 479 (2010)); *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1066 (10th Cir. 2020) (holding that even casual conversations between jogging friends are fully protected by the First Amendment). Thus, circuit courts have found that private questions and conversations between doctors and patients are fully protected by the First Amendment, as are the doctor's ability to take notes about patients. *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1302–03 (11th Cir. 2017); *Conant v. Walters*, 309 F.3d 629, 637–38 (9th Cir. 2002).

Nor can faceprints be characterized as commercial speech. Speech is given less protection if it does no more than propose a commercial transaction. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65–66 (1983). The factors identified in *Bolger* include three characteristics which, in combination, support a conclusion that the document at issue constitutes commercial speech, including: (i) their advertising format, (ii) their reference to a specific product, and (iii) the underlying economic motive of the speaker. The only factor relevant to Clearview is the third, and that factor could apply equally well to the *New York Times* or any book publisher. A financial interest does not alone convert fully protected speech into lesser protected commercial speech. *See IMDb.com, Inc. v. Becerra*, 2018 WL 979031, at *1 (N.D. Cal. Feb. 20, 2018), *aff'd*, 962 F.3d

1111 (9th Cir. 2020) ("The fact that IMDb has a financial interest in people's reliance on IMDb.com for information doesn't transform the age-related information restricted by AB 1687 into commercial speech."); *Dex Media West, Inc. v. Seattle*, 696 F.3d 952, 957 (9th Cir. 2012) (finding that the Yellow Pages are not commercial speech).

In any case, BIPA as applied to Clearview would not satisfy intermediate review either because the interest in privacy raised by comparing two publicly available images of faces is not sufficient to meet the heightened scrutiny of requirements of the *Central Hudson* test. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

IV. BIPA Is Not Well-Tailored To An Important Privacy Interest.

To the extent that BIPA protects privacy interests, those interests are not applicable to Clearview's activity, which only uses publicly available information. In the interest of protecting personal privacy, some limits can be placed on gathering information for speech purposes. For example, privacy interests justify restrictions on collection methods like illegal wiretapping of private conversations. *Bartnicki v. Vopper*, 532 U.S. 514, 533–35 (2001). The balance between free speech and privacy is struck by drawing a clear distinction between the collection of public information and the harvesting of private and sensitive information (e.g., a private conversation or information that, by its very nature, is particularly sensitive such as medical and financial records).

Wiretapping and other illicit collection methods implicate privacy interests because they capture the words, images, or both of individuals who are not aware that their conversations and actions are being monitored. *See ACLU v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012) ("[B]ut surreptitiously accessing the private communications of another by way of trespass or nontrespassory wiretapping or use of an electronic listening device clearly implicates recognized privacy expectations."). In contrast, the collection of publicly available images is the virtual

equivalent of filming, photographing, or recording behavior in a public forum. *Cf. id.* at 605–06 ("Simply put, these privacy interests are not at issue here. The ACLU wants to openly audio record police officers performing their duties in public places and speaking at a volume audible to bystanders. Communications of this sort lack any 'reasonable expectation of privacy' for purposes of the Fourth Amendment."). The distinction between public and private information depends on the reasonable expectations of privacy of the person whose information is being gathered, and the public exposure of information usually destroys any reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

Here, Clearview is not violating reasonable expectations of privacy because it has built its database of faceprints from photographs that have been made publicly available on the Internet. Clearview creates biometric data using publicly available information—photographs and other identifying information—which people have voluntarily posted online. Because of the publicly available nature of these photos, users do not have a reasonable expectation of privacy in their content, including their distinctive facial features. To prevent Clearview from collecting and using publicly available photographs is the same as preventing Clearview from capturing recordings from pedestrians in the town square. An image may be captured because the subject is out in public, or because her photograph is already available on the public Internet, but in both cases, the subject has no right to control the decision of others to capture a photograph. Therefore, there are no countervailing privacy interests that would favor BIPA's application to Clearview.

The briefs of the Plaintiffs and amici challenge the traditional public/private distinction. In essence, they assert a laudable purpose for a biometric privacy statute like BIPA to preserve a certain level of obscurity so that our faces and bodies cannot be used for instant identification.

Under this conception, BIPA is designed to interfere with the development and use of facial-recognition technologies so that a person will not be recognized by anyone other than his real-life acquaintances. The fallacy of this argument is that it converts a descriptive account into a prescriptive one. The descriptive account is undeniable; it was once difficult to identify a stranger based only on her face or appearance while she was out in public unless you happened to know her. But the prescriptive account ("therefore we should be free from easy identification of our faces") is less convincing. Rather, it is an instantiation of status quo bias—an assumption that the amount of obscurity and exposure we are accustomed to right now is just the right amount.

Amicus EFF suggests that the ambit of BIPA is justified because it could hypothetically result in a surveillance state: "Once remote and secret surveillance is possible on a mass scale, face recognition, like location tracking, will make it possible to identify and track people throughout their lives, including at lawful political protests and other sensitive gatherings, revealing not only a person's 'particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" EFF Br. at 14. The problem with this argument is that the same logic applied, and would have had emotional appeal, at the advent of hand-held cameras. And it also applies to search engines, which facilitate searching for a person's name and image. While there may indeed be uses of faceprints and facial recognition technology that can cause unjustified informational harm to society, it is premature to assume that the technology as a whole must be closely regulated, particularly since faceprints only augment what humans can already do with their own eyesight and perception. The potential misuse of an information technology cannot justify the restriction of *all* uses of that technology. Instead, a privacy statute must be designed to carefully minimize harmful information practices without unduly burdening other forms of speech.

Significantly, the Plaintiffs and amici aim to quash an emerging information technology before its implications and benefits are understood, under the pessimistic assumption that future lawmakers will be unable to harness the benefits of facial recognition technology while eliminating the most harmful uses through more finely targeted laws. Surely there are some contexts where the harms from identifying a previously unidentified person clearly outweigh the benefits. A narrow law prohibiting the use of facial recognition technologies near the entrance of doctor's offices or by online services offering sensitive and confidential advice might be good policy and may comfortably fit within the reasoning of existing First Amendment precedent. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 726–27 (2000). But a blanket prohibition on the creation of faceprints puts serious constraints on facial recognition technologies without a full understanding of its risks and benefits.

Indeed, it is precisely the uncertainty about the effects of new information that motivated the Illinois legislature to draft the BIPA. The law is explicitly designed to stymie innovation and maintain a technological status quo. For example, one of the stated justifications of the law is that "the full ramifications of biometric technology are not fully known." 740 ILL. COMP. STAT. § § 14–15(f) (2008); *see In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1171 (N.D. Cal. 2016) (endorsing this purpose of BIPA). Given that the state was responding to the vague risk of "unknown" technological intrusions, the Illinois BIPA and other similar biometric privacy statutes cannot withstand First Amendment scrutiny. *See Wollschlaeger*, 848 F.3d at 1312 (striking down a Florida law limiting doctor speech related to gun ownership in part because the evidence of the privacy problem consisted of "six anecdotes and nothing more. There was no other evidence, empirical or otherwise, presented to or cited by the Florida Legislature.").

V. Privacy Laws Must Be Crafted And Interpreted Carefully To Avoid Conflict With The First Amendment.

BIPA's restriction on the faceprinting of publicly available information is not narrowly crafted to avoid conflict with the First Amendment. In the United States, privacy laws cannot ban the collection, analysis, or subsequent disclosure of information that is already in public view without conflicting with the First Amendment.[1] *Florida Star*, 491 U.S. at 534. This logic carries over to information available on the public Internet, the ultimate modern public square. *Sandvig*, 315 F. Supp. at 8–9, 11–12. Unless personal information is unusually sensitive or was learned through a special relationship, people are generally free to say whatever they want about others without the other person's cooperation or consent. *See generally* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049 (2000); Jane Bambauer, *The Relationships Between Speech and Conduct*, 49 U.C. DAVIS L. REV. 1941, 1947 (2016). In privacy tort actions, courts constrain liability to situations that concern the involuntary disclosures of sensitive, nonpublic information. *See, e.g.*, *Sidis v. F-R Pub Corp.*, 34 F. Supp. 19, 25 (S.D.N.Y. 1938); *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 228–29 (Cal. 1953).

First Amendment principles and precedents restrict the government from recognizing expansive rights of control over information. Thus, to avoid conflict with the First Amendment, privacy laws must be narrowly crafted to apply to particular contexts where the risks of informational injury outweigh the benefits of free speech, even when intermediate scrutiny applies. The Tenth Circuit, for example, has explained that "the government cannot satisfy the [substantial

[1] In contrast, the international trend in privacy regulation is to recognize expansive rights for individuals to control the collection, access, and use of information that describes them. *See, e.g.*, E.U. General Data Protection Regulation.

interest] prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and the interest served .... The specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1234–35 (10th Cir. 1999).

In general, privacy statutes are compatible with the First Amendment *only* if they narrowly target a particular risk to personal information. The cases upholding privacy laws come in two overlapping categories. Some place restrictions on sensitive non-public information such as financial and health data. *See Trans Union Corp. v. FTC*, 245 F.3d 809, 815 (D.C. Cir. 2001) (financial information); *Boelter v. Hearst Communs., Inc.*, 192 F. Supp. 3d 427, 447–48 (S.D.N.Y. 2016) (magazine subscriber lists); *Boelter v. Advance Magazine Publishers*, 210 F. Supp. 3d 579, 602 (S.D.N.Y. 2016) (personal reading information). Other laws tether restrictions to specific professional or business relationships that produce large quantities of (often sensitive) personal data that are not otherwise publicly available. *See, e.g.*, *National Cable & Telecommunications Ass'n v. FCC*, 555 F.3d 996, 997, 1000 (D.C. Cir. 2009) (telecommunications providers); *Trans Union*, 295 F.3d at 46 (same); *Individual Reference Services Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 41–42 (D.D.C. 2001) (financial institutions).

Amicus EFF cites to only one case where a court upheld a statutory restriction on the use of publicly available information. *King v. Gen. Info. Servs., Inc.*, 903 F. Supp. 2d 303, 306–07 (E.D. Pa. 2012) (upholding statute that restricts disclosure of old criminal records in credit reports using commercial speech analysis). This case is inapposite to BIPA for two reasons. First, its reasoning is in considerable tension with *Florida Star* and does not reflect the predominant

constitutional analysis of laws restricting the redisclosure of information that is publicly available. *See Florida Star*, 491 U.S. at 524. Second, the court upheld the statute because it balanced the speech and privacy interests in the special context of credit reports and their relation to federal employment and nondiscrimination policies. *King*, 903 F. Supp. 2d at 312. Other courts have indicated that privacy laws are more likely to survive First Amendment scrutiny if they are the product of a legislative or regulatory process that carefully balances the conflicting societal interests in privacy and speech. *See ACA Connects - America's Communs. Ass'n v. Frey*, 2020 U.S. Dist. LEXIS 118293, at *17 (D. Me. July 7, 2020) (holding that the thoroughness the legislature's consideration in weighing of privacy concerns is an important factor in the court's substantial interest analysis); *Individual Reference Services Group, Inc.*, 145 F. Supp. 2d at 42–43 ("[T]he record indicates that the agencies have carefully weighed the benefits and harms of imposing the privacy-based regulations.").

BIPA sweeps much too broadly by prohibiting the faceprinting of publicly available information. As applied to Clearview, BIPA seriously burdens the collection and reuse of information that is already available to the public without adequately weighing the benefits of the expressive value of faceprinting against the harms to the public. To the extent that BIPA protects privacy interests at all (which is modest, given that the information it uses is already publicly available), those interests are outweighed by the burden on Clearview's rights of expression.

VI. The First Amendment Protects The Use Of Innovative Mechanical Technologies In The Creative Process.

Expression does not forfeit its First Amendment protections simply because innovative or mechanical technologies are used in its creation. At its essence, Clearview's technology recreates, in mechanical form, the analytical process of comparing two images to determine and then express whether they are similar. When humans look at photographs of faces, they create mental maps of

facial geometry and distinguishing features for the purpose of recognizing them later.[2] When humans compare photographs, the mental processes of viewing, consideration, analysis, and determination are processes protected by the First Amendment. That protection does not change simply because the process is performed by mechanical means. It is axiomatic that the "basic principles" of the First Amendment "do not vary when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 790 (2011). Similarly, the efficiencies afforded by computers and machine learning do not change the rules of First Amendment scrutiny. *Reno v. ACLU,* 521 U.S. 844, 876, 880 (1997) (protecting indecent speech on the Internet even though the accessibility of the Internet makes access by children very likely to occur).

If Illinois law had prohibited the comparison of faces *by any means,* including when a human being looks at two pictures and decides whether they are the same person or not, the impingement on freedom of thought and expression would be obvious. BIPA does not, of course, forbid a person from making a mental map of a person's face, nor does BIPA prohibit the taking of a photograph. It applies only to technologically-assisted recognition of faces. But, because courts have consistently determined that faceprints derived from photographs are biometric information covered by the Illinois BIPA, the law effectively prohibits comparing photographs by using computers.

The briefs filed by the Plaintiffs and Professor Fotterman both implicitly endorse a technologically-dependent version of the First Amendment; both would have this court believe

[2] In fact, people afflicted with face blindness are impaired in this precise way—they do not log these "biometric identifiers" and therefore lack the library needed to recognize people later. Richard Le Grand et. al, *What aspects of face processing are impaired in developmental prosopagnosia?,* 2006 BRAIN COGN. 61(2)139-58, https://pubmed.ncbi.nlm.nih.gov/16466839/.

that the mechanical nature of Clearview's speech-creation diminishes its constitutional protection. Professor Fotterman's amicus brief asserts that Clearview's service "is a form of analysis that does not implicate Clearview's speech rights, just as any industrial process that touches on communicative material does not automatically implicate the First Amendment." Fotterman Br. at 2. Similar reasoning, which treats data like a "commodity with no greater entitlement to First Amendment protection than beef jerky," has already been rejected by the Supreme Court. *Sorrell*, 564 U.S. at 570 (internal quotation marks deleted). To the contrary, "the creation and dissemination of information are speech within the meaning of the First Amendment" even when that information is dry data. *Id.* When a commercial enterprise is prohibited based solely on the fact that it creates and distributes certain types of information, that prohibition is a direct burden on speech, not an incidental one. *See Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) (finding that a statute that required students to have received a GED in order to enroll in only certain types of post-secondary education courses based on the content of the education failed strict scrutiny analysis.).

The Plaintiffs make a similar mistake, characterizing Clearview's operations as the "capture of faceprints" and arguing that the process is at most expressive conduct entitled to a lower degree of First Amendment protection. Plaintiffs' Br. at 14. Plaintiffs further argue that BIPA is not aimed at suppressing the expressive elements of faceprinting: "BIPA proscribes nonconsensual faceprinting because it presents a privacy and security risk—not 'because it has expressive elements.'" Plaintiffs' Br. at 20. However, BIPA does target the informational and expressive aspects of faceprinting because privacy and data security risks are risks of *informational* injuries and harms. The government cannot ban insults because of the potentially harmful impact of the speech; similarly, BIPA cannot escape First Amendment scrutiny by reference to the

potentially harmful impact of information generated by the analytical processes of faceprinting. *See Wollschlaeger*, 848 F.3d at 1308 ("Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation.").

The Plaintiffs acknowledge that "[p]hotographs do not themselves count as biometric identifiers because, if they did, any entity operating in Illinois (like a newspaper) would violate BIPA simply by collecting photographs of people. That would be absurd." Plaintiffs' Br. at 24. But banning the use of cameras only looks "absurd" in hindsight. It would not have seemed absurd at all to Samuel Warren and Louis Brandeis. The innovative technology that inspired their famous article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and launched the legal recognition of a right to privacy, was the portable camera. *Id.* at 193 ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; . . . the law must afford some remedy for the unauthorized circulation of portraits of private persons") (internal quotation marks omitted); *see also* Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 8 (1979). Thus, the First Amendment ensures that courts protect new communications technologies from well-intentioned regulations today because the fears that drive them will look "absurd" in one hundred years.

CONCLUSION

For the foregoing reasons, this Court should grant Clearview's motion to dismiss consistent with the protections guaranteed by the First Amendment.

Dated: December 3, 2020

Amici Curiae First Amendment Clinic at Duke Law and Professors Eugene Volokh and Jane Bambauer

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CERTIFICATE OF SERVICE

Pursuant to 735 ILCS 5/1 – 109 of the Code of Civil Procedure, I hereby certify that I caused a copy of the Brief of Amici First Amendment Clinic at Duke Law and Professors of Law Eugene Volokh and Jane Bambauer in Support of Defendant's Motion to Dismiss to be served upon the following:

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