

Congress of the United States
Washington, DC 20515

December 6, 2016

The Honorable Tom Wheeler
Chairman
Federal Communications FCC
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Wheeler:

Under your stewardship, the Federal Communications Commission (FCC) has actively advanced access to communications services in historically disadvantaged communities. This honors one of the FCC's fundamental responsibilities: to make communications available "without discrimination on the basis of race, color, religion, national origin or sex."¹ From efforts to modernize the Lifeline program to capping inter- and intra-state prison phone rates, the FCC has sought to ensure these communities are not left behind as communications technology and networks grow.

Despite these efforts, however, there is still much work to be done. In particular, we urge the FCC to address communications-based surveillance technology that disproportionately harms low-income and minority communities.

We are especially troubled by law enforcement agencies' use of cell-site simulators ("CS simulators") – surveillance technology that operates over cellular networks that fall squarely within the FCC's jurisdiction. A recent complaint² filed with the FCC regarding the Baltimore City Police Department illustrates the harmful effects CS simulators have on communities, specifically in low-income and minority neighborhoods. The complaint alleges that many police departments use CS simulators to transmit over licensed spectrum without appropriate federal licenses. In addition, the complaint indicates that CS simulators likely disrupt nearby cell phones' ability to make and receive calls, including emergency calls. Surveillance based on race is especially concerning given that CS simulators are used in every day practice, and not just emergency, situations.³ For example, in Annapolis, Maryland, the police deployed a CS

¹47 U.S.C. § 151.

² *In re Baltimore City Police Department, Baltimore, Maryland*, Complaint for Relief Against Unauthorized Radio Operation and Wilful Interference with Cellular Communications and Petition for an Enforcement Advisory on Use of Cell Site Simulators by State and Local Government Agencies (FCC Aug. 16, 2016), <https://www.fcc.gov/ecfs/filing/10816659216934/document/10816659216934dd54>; see also Memorandum in Support Of Complaint for Relief Against Unauthorized Radio Operation and Willful Interference with Cellular Communications and Petition for an Enforcement Advisory on Use of Cell Site Simulators by State and Local Government Agencies (FCC Sept. 1, 2016).

³ See e.g., Nathan Freed Wessler, *Police Citing "Terrorism" to Buy Stingrays Used Only for Ordinary Crimes*, ACLU Free Future Blog (Oct. 23, 2015), <https://www.aclu.org/blog/free-future/police-citing-terrorism-buy-stingrays-used-only-ordinary-crimes>; *Over the Air Intercepts (2008–2015)*, New York Police Department, http://www.nyclu.org/files/summary_overtheairintercept_web.pdf (obtained via public records request by the New York Civil Liberties Union); Brad Heath, *Police Secretly Track Cellphones to Solve Routine Crimes*, USA Today

simulator to solve a pizza delivery robbery where the robber stole 15 chicken wings and 3 subs.⁴ This is in stark contrast to assurances made by CS simulator manufacturers that their devices will only be used in emergency situations.⁵

Alarming, these invasive devices are reportedly used with greater frequency against people exercising their First Amendment rights, specifically people of color. CS simulators have been reported at protests against police brutality & racial injustice and have been used to block phone signals during these events.⁶ Such use allows law enforcement to gather intelligence and pursue specific people, such as known political organizers, based not on criminal activity, but on their participation in activities protected by the Constitution.

The FBI has disclosed before Congress that it flew surveillance aircraft over Ferguson and Baltimore during the protests following the police killings of Michael Brown and Freddie Gray.⁷ In April, Black Lives Matter activist Elsa Waithe told *The Intercept* that she believes police surveillance in New York – where the NYPD was recently revealed to have used CS simulator more than 1000 times without a warrant – is designed to chill dissent and gather information in order to better target organizers.⁸ Activist DeRay Mckesson, who recently ran for mayor in Baltimore, said, “Some of this surveillance is meant to scare us and potentially to figure out what people’s next steps are.”⁹ In Los Angeles, the Stop LAPD Spying Coalition has described an “architecture of surveillance” which disproportionately targets people of color and includes, among other things, the use of CS simulators, “predictive” policing, and a Suspicious Activity Reporting (“SAR”) program.¹⁰ In Lansing, Michigan, neighborhoods selected for video surveillance based on reported crime rates were found to have approximately 15 percent more

(Aug. 24, 2015), <http://www.usatoday.com/story/news/2015/08/23/baltimore-police-stingray-cell-surveillance/31994181/>; Courtney Mabeus, *Battlefield Technology Gets Spotlight in Maryland Courts: Secrecy and Defense Concerns Surround Cell Phone Trackers*, Capital News Service (May 3, 2016), <https://web.archive.org/web/20160504160050/http://cnsmaryland.org/interactives/spring-2016/maryland-police-cell-phone-trackers/index.html>.

⁴ Courtney Mabeau, *Battlefield Technology Gets Spotlight in Maryland Courts: Secrecy and Defense Concerns Surround Cell Phone Trackers*, Capital News Service (May 3, 2016), <http://cnsmaryland.org/interactives/spring-2016/maryland-police-cell-phone-trackers/index.html>.

⁵ See, e.g., Nicole A. Ozer, *Documents Suggest Maker of Controversial Surveillance Tool Misled the FCC*, ACLU of Northern California Blog (Sept. 17, 2014), <https://www.aclunc.org/blog/documents-suggest-maker-controversial-surveillance-tool-misled-fcc> (“[T]he purpose of [our CS simulator] is only to provide state/local law enforcement officials with authority to utilize this equipment in emergency situations.”).

⁶ See Mike Krauser, *Activists Say Chicago Police Used ‘Stingray’ Eavesdropping Technology During Protests*, CBS Chicago (Dec. 6, 2014), <http://chicago.cbslocal.com/2014/12/06/activists-say-chicago-police-used-stingray-eavesdropping-technology-during-protests/>. In 2012, Chicago NATO summit protesters suspected police used CS simulators to monitor their activities; these suspicions were later confirmed through FOIA requests. See Mike Dumke, *Chicago Police Are Spying on Citizens*, Chicago Reader (Mar. 18, 2015), <http://www.chicagoreader.com/chicago/chicago-police-spying-surveillance-first-amendment-protesters-nato/Content?oid=16893815>.

⁷ See Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights*, American Civil Rights Union (Oct. 30, 2105), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>

⁸ George Joseph, *Undercover Police Have Regularly Spied on Black Lives Matter Activists in New York*, *The Intercept* (Aug. 18, 2015), <https://theintercept.com/2015/08/18/undercover-police-spied-on-ny-black-lives-matter/>

⁹ *Id.*

¹⁰ The Center for Media Justice, *The Relentless “Eye”* (June 16, 2016), <http://centerformediajustice.org/resources/the-relentless-eye/>

black residents than non-surveilled neighborhoods.¹¹ In other cases, racial bias could be embedded in surveillance technology itself.¹²

Given reports of systemic racial discrimination within law enforcement agencies, it is clear that there is a widespread problem of law enforcement behavior and decision-making is disproportionately harming communities of color. This is exacerbated by the advancements in surveillance technology. A survey by the American Civil Liberties Union revealed that at least sixty-six agencies in twenty-three states and the District of Columbia own CS simulators.¹³ A number of these agencies, including the NYPD and LAPD, also have a similarly well-known history of racial discrimination.¹⁴ For example, in Tucson, Arizona, the police department deliberately prolonged traffic stops in an effort to verify individuals' immigration status, which is in direct conflict with the Tucson Police Department's own policies.¹⁵ In Oakland, California, African-Americans make up 28 percent of the population, but accounted for 57 percent of car stops and 69 percent of pedestrian stops between November 2015 and May 2016.¹⁶ In Boston, Massachusetts, a 2014 review commissioned by the Boston Police Department found that despite African-Americans accounting for only 25 percent of the population, two-thirds of police stops involved black residents.¹⁷ These examples further demonstrate how the disproportionate police surveillance of low-income and minority communities is widespread.

In the United States, race-based discrimination and control have frequently been at the center of surveillance: from slave pass laws; to 19th century Jim Crow laws that enforced racial segregation; to the 20th century where federal and local agencies targeted political activists and civil rights leaders. As 45 civil rights and racial justice organizations explained in a letter earlier this year urging Chairman Wheeler to investigate and address the disproportionate impact of CS simulators on historically disadvantaged communities: "New technological tools that amplify police power can amplify existing biases in policing. Lack of effective oversight and supervision . . . in the use of this technology may lead to even greater invasions of privacy and subversions of rights in communities of color that are already the targets of biased policing."¹⁸

¹¹ American Civil Liberties Union of Michigan, *Eyes in the Sky: Lansing Residential Surveillance and its Intrusion on Privacy* (2012), <http://bit.ly/1WQjaXg>

¹² Clare Garvie & Jonathan Frankle, *Facial Recognition Software Might Have a Racial Bias Problem*, *The Atlantic* (Apr. 7, 2016), <http://www.theatlantic.com/technology/archive/2016/04/the-underlying-bias-of-facial-recognition-systems/476991/>

¹³ *Stingray Tracking Devices: Who's Got Them?*, ACLU, <https://www.aclu.org/map/stingray-tracking-devices-whos-got-them> (last visited Oct. 26, 2016).

¹⁴ See The Leadership Conference on Civil and Human Rights, *Resorting a National Consensus: The Need to End Racial Profiling in America*, (March 2011), available at <http://www.civilrights.org/publications/reports/racial-profiling2011/the-reality-of-racial.html>.

¹⁵ See Maria Ines Taracena, *ACLU of Arizona: Tucson Police Unlawfully Prolong Traffic Stops to Investigate People's Immigration Status*, *Tucson Weekly* (May 2, 2016), <http://www.tucsonweekly.com/TheRange/archives/2016/05/02/aclu-of-arizona-tucson-police-unlawfully-prolong-traffic-stops-to-investigate-peoples-immigration-status>.

¹⁶ See David Debolt, *Report: Oakland police stop African American residents at rate higher than other racial groups*, *The Mercury News* (Aug. 22, 2016), <http://www.mercurynews.com/2016/08/22/report-oakland-police-stop-african-american-residents-at-rate-higher-than-other-racial-groups/>.

¹⁷ See Marina Carver, *Study finds Boston police target African-Americans disproportionately*, *CNN* (Oct. 9, 2014), <http://www.cnn.com/2014/10/09/us/boston-police-stop-frisk/>.

¹⁸ http://www.media-alliance.org/downloads/FinalStingrayLetter_3-14-2016_45.pdf

The FCC cannot fulfill Section 151's mandate if it allows local law enforcement to continue to willfully interfere with communications networks through the operation of cell site simulators. We ask the FCC to take swift action to protect historically disadvantaged communities from the harms caused by CS simulators.

We thank you for your consideration and look forward to your timely response.

Sincerely,



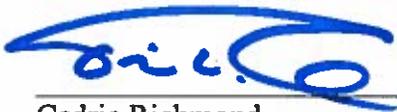
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Cedric Richmond
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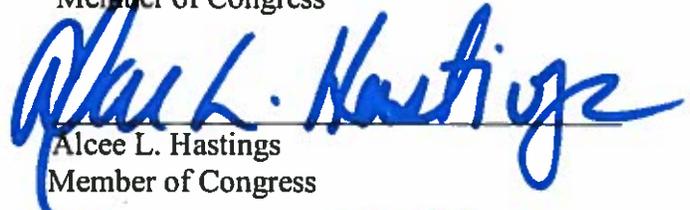
Barbara Lee
Member of Congress



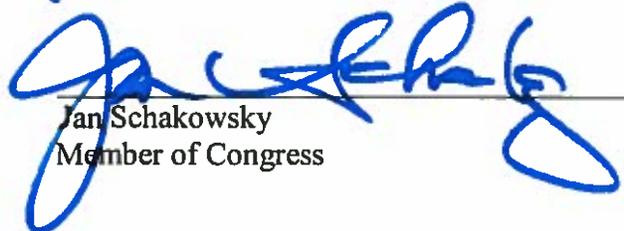
Michael M. Honda
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Lucille Roybal-Allard
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Alcee L. Hastings
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Jan Schakowsky
Member of Congress

cc: The Honorable Mignon Clyburn, Commissioner, Federal Communications Commission
The Honorable Ajit Pai, Commissioner, Federal Communications Commission
The Honorable Michael O'Rielly, Commissioner, Federal Communications Commission
The Honorable Jessica Rosenworcel, Commissioner, Federal Communications Commission