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Coming Face-to-Face with Facial Recognition Technology

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Coming Face-to-Face with Facial Recognition Technology

Presented by: Jeffrey N. Rosenthal & Huaou Yan

November 20, 2019

Introduction

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- **Cyberlaw columnist for *The Legal Intelligencer***: "Coming Face-to-Face with Facial Recognition Technology," *THE LEGAL INTELLIGENCER* (July 30, 2019); "Biometrics and the New Wave of Class Action Lawsuits," *THE LEGAL INTELLIGENCER* (Mar. 1, 2019)
- **Presenter**: DATA GOVERNANCE, STEWARDSHIP, AND PRIVACY, Rutgers Law School Fourth Annual Corporate Compliance Institute (Apr. 12, 2019); CLASS ACTION CHECK-UP: ALLEVIATING TCPA RISK FOR HEALTHCARE PROVIDERS, Pennsylvania Bar Institute's 25th Annual Health Law Institute (Mar. 13, 2019); TCPA CLASS ACTIONS: LESSON LEARNED FROM 2017, *The Legal Intelligencer In-House Counsel CLE* (2017); DIALING UP DEFENSES TO TCPA CLASS ACTIONS, *The Legal Intelligencer In-House Counsel* CLE (2016); CLASS ACTION AVOIDANCE STRATEGIES, *The Legal Intelligencer In-House Counsel* CLE (2015)

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Introduction

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Senior Associate, Commercial Litigation

- **Author**: "Coming Face-to-Face with Facial Recognition Technology," *THE LEGAL INTELLIGENCER* (July 30, 2019); "A New Regulatory Function for E-Prescriptions: Linking the FDA to Physicians and Patient Records," NEW AND ENDURING CHALLENGES FOR FDA: SELECTED ESSAYS ON THE FUTURE OF THE AGENCY AND ITS REGULATION OF DRUGS AND NEW TECHNOLOGIES (H.F. Lynch & I.G. Cohen eds., Columbia Univ. Press 2015).

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OVERVIEW

- What is facial recognition technology?
- Where and how is facial recognition technology used?
- Why should you care about facial recognition technology?
- How is facial recognition technology being regulated?
- Private actions involving facial recognition technology.

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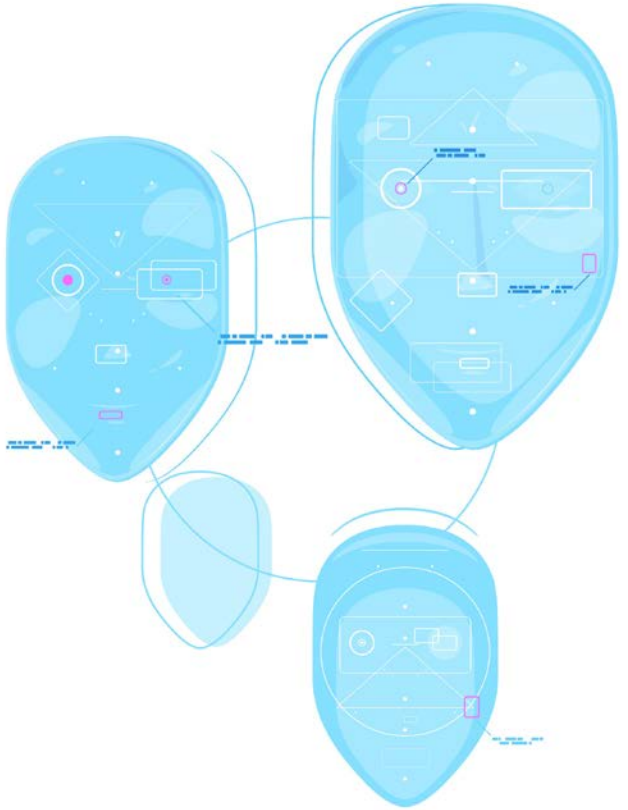
What Is Facial Recognition Technology?

- **Facial recognition technology** analyzes an image of a person's face and identifies the person depicted.
- Facial recognition technology works by breaking down a depicted face into a number of characteristics (*e.g.*, the relative position, shape, contours, texture, size of facial features) and then searching a database of pre-identified faces for matching characteristics.



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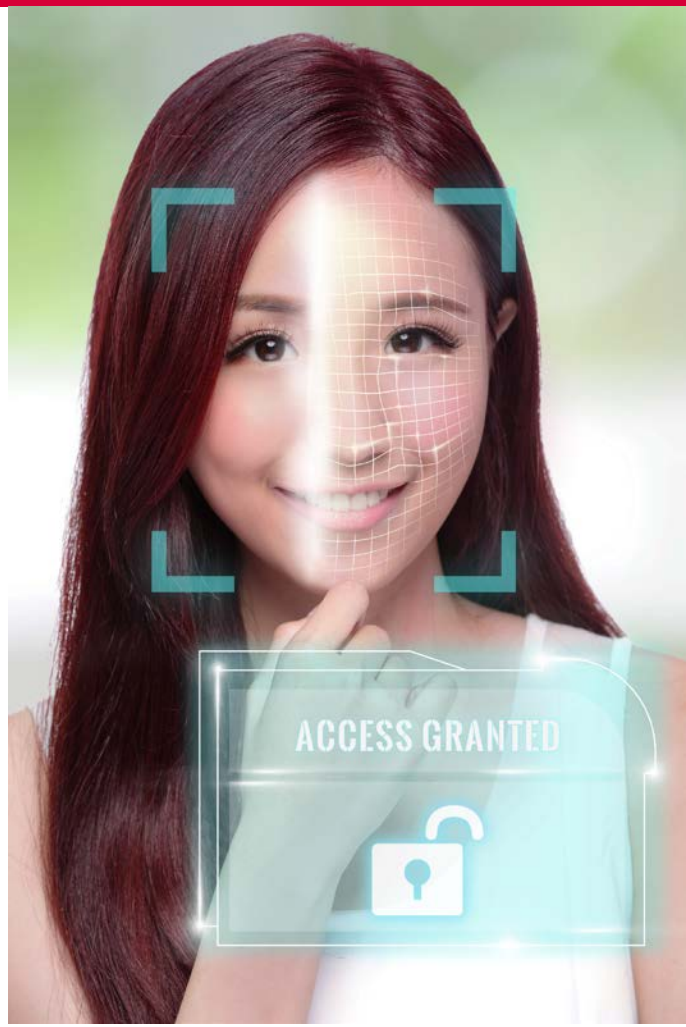
What Is Facial Recognition Technology? (cont.)

- Facial recognition technology takes advantage of the incredible speed at which modern computers can analyze an image of a face and compare it with millions, or potentially billions, of other faces.
- Indeed, the latest recognition technology can even operate in real-time, identifying people as they appear on live video.



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Where and How Is Facial Recognition Technology Used?

- Facial Recognition Technology is increasingly ubiquitous.
- For example, it is used:
  - On iPhone/iPad – Apple's Face ID can automatically unlock a user's iPhone/iPad if it recognizes the user's face.
  - On Facebook – Facebook uses facial recognition technology to analyze uploaded photos to suggest who should be "tagged" in the photo and to notify users when their image has been uploaded.
  - At the airport – JetBlue and Delta have begun using facial recognition technology, in lieu of boarding passes, to validate passengers during the boarding process.

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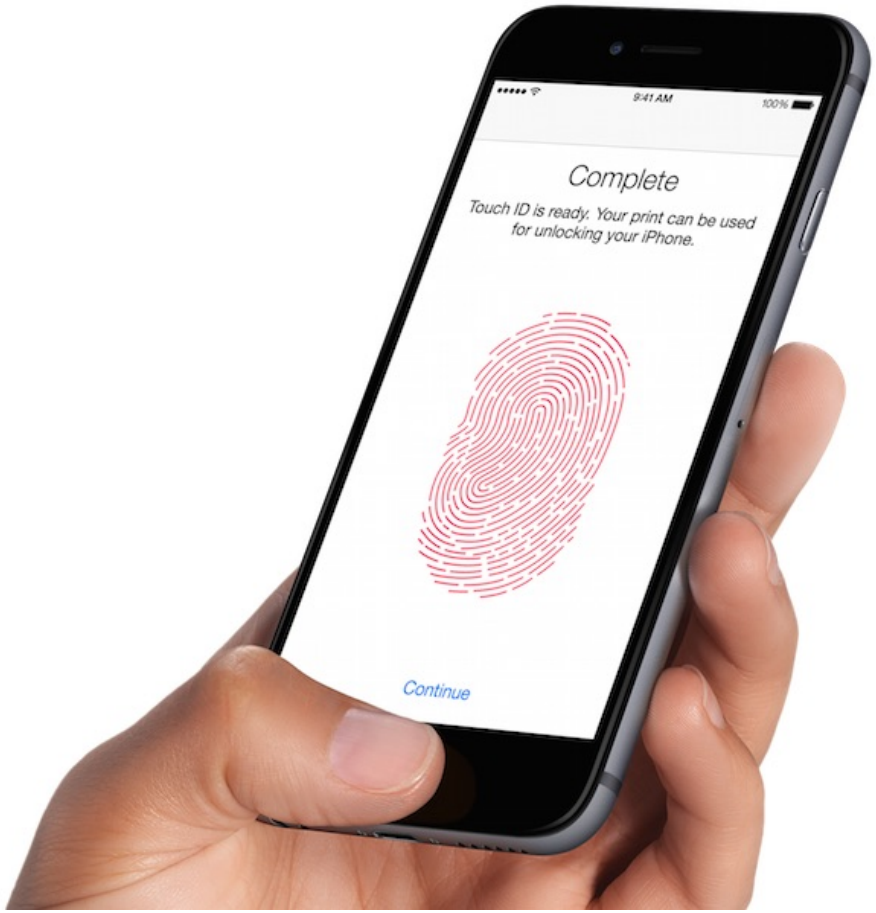
Where and How Is Facial Recognition Technology Used? (cont.)



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Where and How Is Facial Recognition Technology Used? (cont.)

- It is also used:
  - At concerts – Taylor Swift's security team has used facial recognition technology to scan concertgoers for known stalkers.
  - At retailers – Some retailers have experimented with or used facial recognition technology to track known shoplifters.
  - At animal shelters – Facial recognition technology is even being used on animals to find missing pets and to identify found pets and reunite them with their families.

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Where and How Is Facial Recognition Technology Used? (cont.)

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Where and How Is Facial Recognition Technology Used? (cont.)

- One of the most salient uses of facial recognition technology, however, is by law enforcement to identify suspects:
- In a comprehensive, yearlong study conducted by Georgetown Law's Center on Privacy and Technology in 2016, researchers estimated that
  - More than one in four of all American state and local law enforcement agencies have access to a facial recognition system.
  - Over 117 million American adults—nearly one in two—are already "in a law enforcement face recognition network."

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Where and How Is Facial Recognition Technology Used? (cont.)

New York City

- In a June 9, 2019 op-ed in *The New York Times*, James O'Neill, the New York City police commissioner, shared some specifics on how the NYPD is using facial recognition technology.
  - In 2018,
    - NYPD Detectives submitted 7,024 requests to the NYPD's Facial Identification Section (which currently only searches its own database of arrest photos).
    - Those 7,024 requests returned matches in 1,851 cases and
    - Led to 998 arrests.

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Where and How Is Facial Recognition Technology Used? (cont.)

Detroit – Project Green Light

- Since 2016, the Detroit Police Department ("DPD") has partnered with local businesses to deploy high definition cameras that stream video directly to DPD headquarters.
  - Participating businesses display a green light.
  - As of earlier this year, Detroit has installed over 500 surveillance cameras at businesses, parks, schools, churches, abortion clinics, *etc.* and is planning to install cameras at approximately 500 traffic intersections.

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Where and How Is Facial Recognition Technology Used? (cont.)

Detroit – Project Green Light

- In July 2017, Detroit contracted with DataWorks Plus to license its FACE Watch Plus real-time video surveillance software.
  - That facial recognition technology can identify the persons captured on video by searching through approximately 50 million driver's license photographs and 500,000 mugshots in a Michigan police database.
  - FACE Watch Plus purportedly ***can*** operate in real-time, but Detroit Mayor Mike Duggan has stated that the DPD is not presently using facial recognition technology on live video.

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Where and How Is Facial Recognition Technology Used? (cont.)

Detroit – Project Green Light

- The DPD's deployment of facial recognition technology has been controversial because it was used for 2 years without approval of the Board of Police Commissioners (a civilian body that oversees the DPD).
- After several months of debate and protests this year, the Board of Police Commissioners voted in September (8 to 3) to approve the use of facial recognition technology under certain guidelines:
  - Under the guidelines, the DPD cannot use the technology for immigration enforcement, minor crimes, or for identifying protestors.

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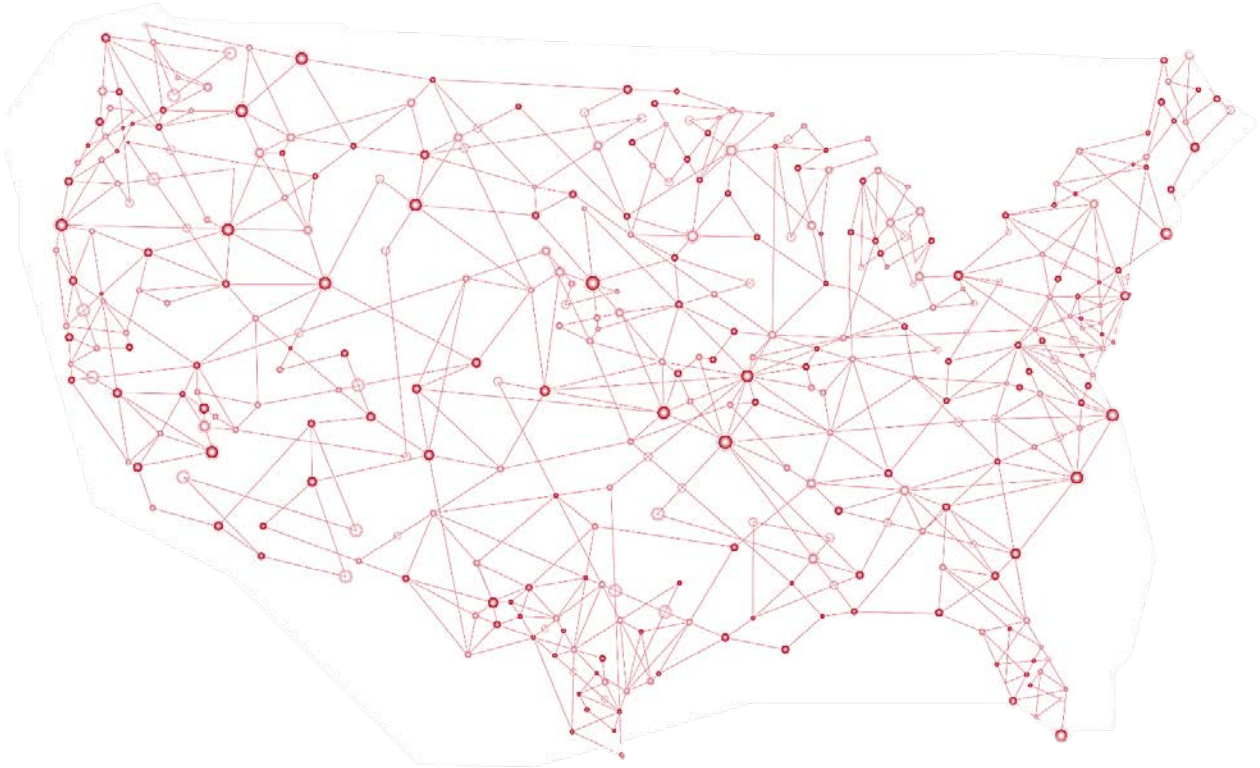
Where and How Is Facial Recognition Technology Used? (cont.)

- Other major cities that employ facial recognition technology in some form include:
  - Las Vegas, Nevada
  - Orlando, Florida
  - San Jose, California
  - San Diego, California
  - Boston, Massachusetts
  - Chicago, Illinois
  - Durham, North Carolina
  - New Orleans, Louisiana



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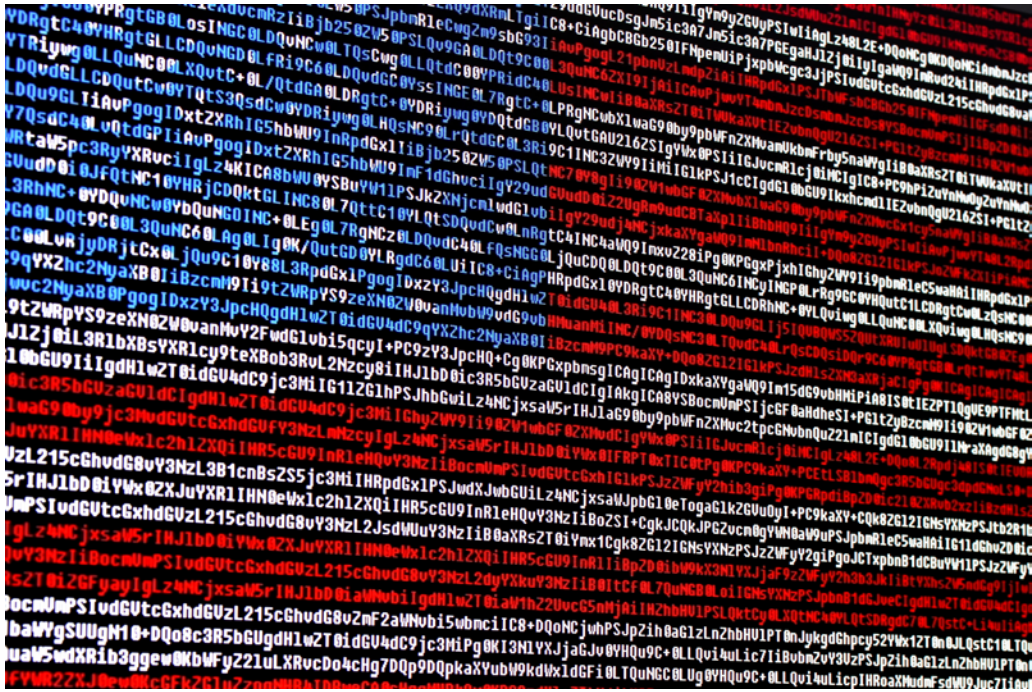
Where and How Is Facial Recognition Technology Used? (cont.)

- At the federal level:
  - According to a recent Government Accountability Office ("GAO") report, the FBI's Facial Analysis, Comparison, and Evaluation ("FACE") Services Unit has run over 390,000 searches using facial recognition technology since 2011.
  - The total number of face photos available in its searchable databases is over 641 million.
    - These photos include driver's license photos from 21 states.
  - The FBI can run these searches without a warrant and without reasonable suspicion.



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Where and How Is Facial Recognition Technology Used? (cont.)

- At the federal level:
  - Since at least 2015, U.S. Customs and Border Protection ("CBP") has been testing and deploying facial recognition technology in airports and other ports of entry as part of an initiative to biometrically verify all travelers entering and exiting the country.
    - Indeed, CBP's goal is to biometrically verify all international travelers in the top 20 U.S. airports by 2021.
      - (But a recent Department of Homeland Security, Office of the Inspector General report questioned if CBP will reach that goal.)

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Where and How Is Facial Recognition Technology Used? (cont.)

- At the federal level:
  - And in July 2019, documents obtained by Georgetown Law's Center on Privacy and Technology revealed that U.S. Immigration and Customs Enforcement requested access to use facial recognition technology to scan driver's license photo databases from at least the following three states that offer licenses to undocumented immigrants:
    - Utah
    - Vermont
    - Washington

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Where and How Is Facial Recognition Technology Used? (cont.)

- In January 2019, the American Civil Liberties Union ("ACLU") sent Freedom of Information Act ("FOIA") requests to the U.S. Department of Justice, FBI, and Drug Enforcement Administration, seeking policies, contracts, and other records relating to their use of facial recognition (and other biometric identification) technology.
- But has not received any responsive records from the government.
- Three weeks ago, the ACLU sued the government in the United States District Court for the District of Massachusetts to compel compliance with its FOIA requests.

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Why Should You Care?

- The benefits of facial recognition technology are obvious.
  - Used properly, it can be an incredibly powerful crime-fighting tool.

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Why Should You Care? (cont.)

- Many, however, are deeply concerned about the concomitant dangers:
  - Facial recognition technology remains far from 100% accurate.
  - Improper use of facial recognition technology, of course, results in inaccurate results.
  - A false positive—where the system identifies the wrong person—may result in the investigation, prosecution, and conviction of innocent people.

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Why Should You Care? (cont.)

- Moreover, studies suggest that current facial recognition technology is less accurate at identifying persons of color:
  - A 2018 study by a researcher at MIT's Media Lab and a scientist at Microsoft Research found that facial recognition technology systems from IBM and Microsoft:
    - Misidentified the gender of images of light-skinned males in a test data set only 1% of the time
    - But misidentified the gender of darker-skinned females up to 34.7% of the time.

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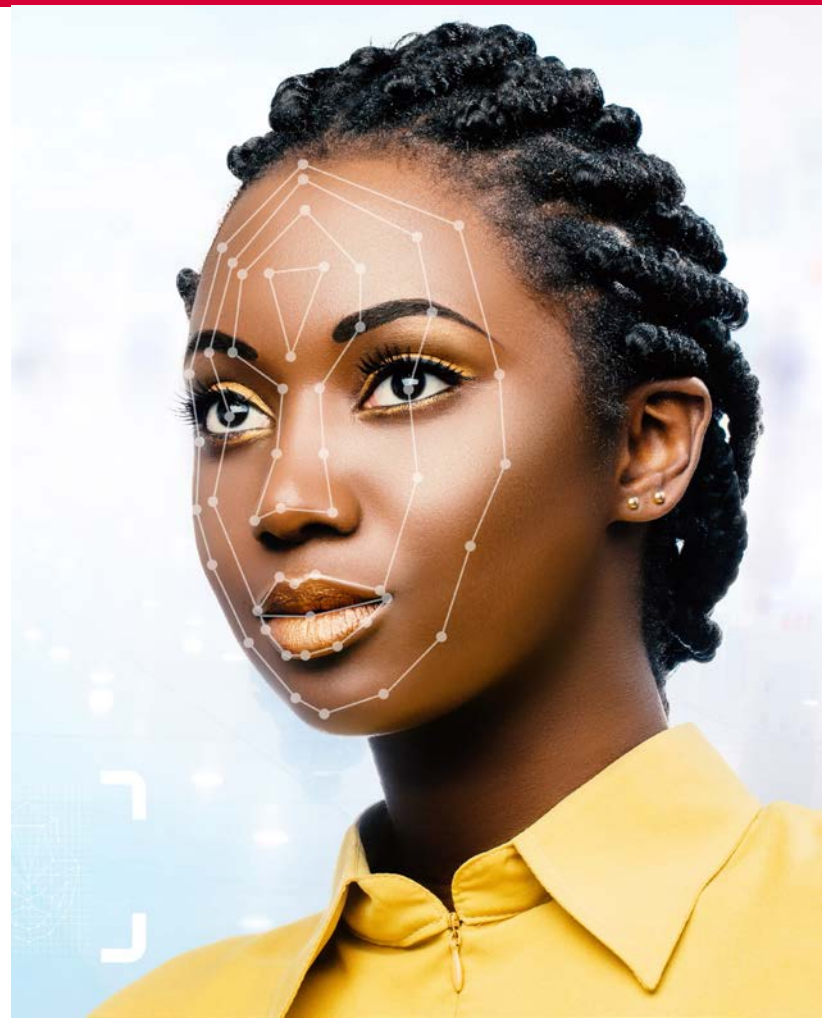
Why Should You Care? (cont.)

- A subsequent study released this year found Amazon's facial recognition system, Rekognition,
  - Did not misidentify the gender of any light-skinned males in the test data set
  - But misidentified the gender of darker-skinned females up to 31.37% of the time.



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Why Should You Care? (cont.)

- But even if facial recognition technology were 100% accurate, the existence of technology that enables the government (or any user) to easily monitor, identify, and track those in public is deeply concerning to some because it can easily be abused.
- For example, government actors could use it to target perceived political opponents and chill speech.
    - In the United States, during the protests following Freddie Gray's death in police custody, the Baltimore Police Department used facial recognition technology to identify protestors with outstanding warrants and arrest them from the crowd.

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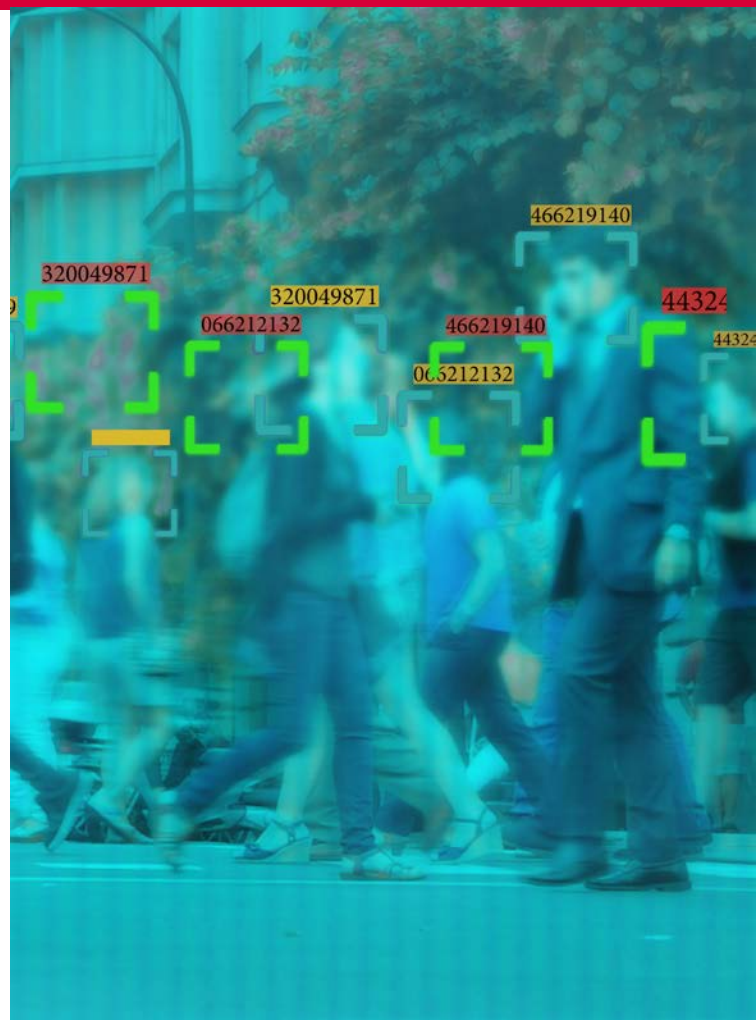
Why Should You Care? (cont.)

- In China, the government is using facial recognition technology on a massive, nationwide scale to systematically track and control the Uighurs, an ethnic minority group.
  - *The New York Times* reported earlier this year that "[t]he facial recognition technology, which is integrated into China's rapidly expanding networks of surveillance cameras, looks exclusively for Uighurs based on their appearance and keeps records of their comings and goings for search and review."



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Why Should You Care? (cont.)

- Even setting aside the more egregious potential abuses, there is something fundamentally intrusive about surveillance cameras capturing and scanning your face in public.
- Presently, government actors generally do not need a warrant, probable cause, or reasonable suspicion to employ facial recognition technology.
- To the extent we believe in some right to privacy over public movements—*i.e.*, a right to go about one's day-to-day life in public with some degree of anonymity—the unfettered ability for the government to identify and track people in public is unavoidably inimical to that right.

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How Is Facial Recognition Technology Being Regulated?

- Currently, there is no federal law on facial recognition technology.
  - However, several Congresspersons are considering bills regarding facial recognition technology.
- Four U.S. cities have banned the use of facial recognition technology by police and other local government agencies:
  - San Francisco, CA
  - Oakland, CA
  - Somerville, MA
  - Berkeley, CA

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How Is Facial Recognition Technology Being Regulated? (cont.)

- At the state level:
  - California and Oregon have passed bills prohibiting the use of facial recognition technology on video captured by law enforcement body cameras.
  - Several other states are considering legislation restricting the use of facial recognition technology by government actors.

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Private Actions Regarding Facial Recognition Technology

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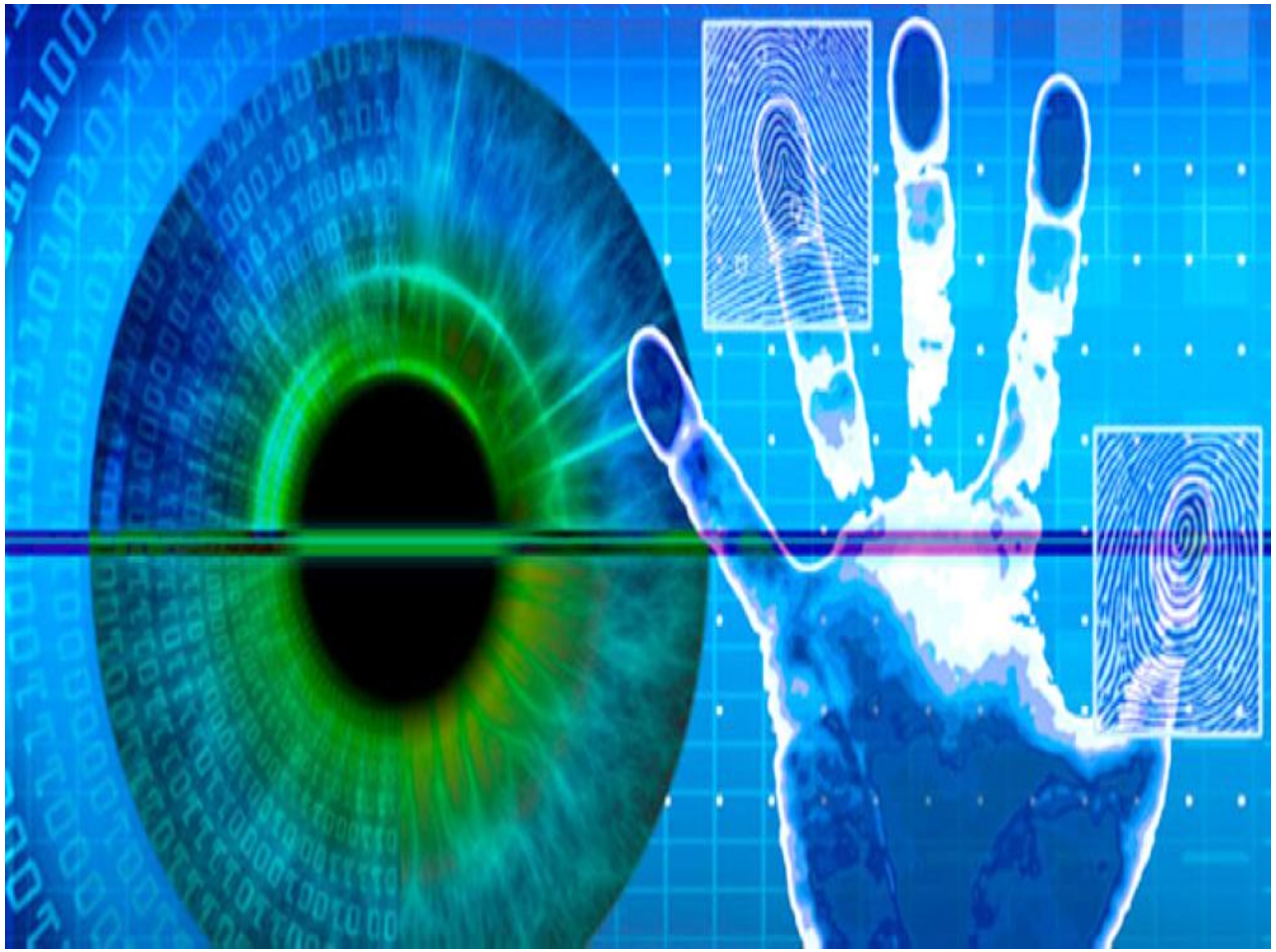
What Are Biometrics, and How Are They Used?

- **Biometrics** are measurements of a person's physical characteristics.

- **Biometric systems** analyze unique physical or behavioral characteristics to verify identity.



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What Types of Biometric Information Can Be Collected?

- **Biometric Identifiers**:
  - Fingerprint Scans
  - Voice Recognition
  - Facial Recognition
  - Retina/Iris Scans
  - DNA Scans
- **Biometric Information**:
  - Any information based on a biometric identifier used to identify an individual

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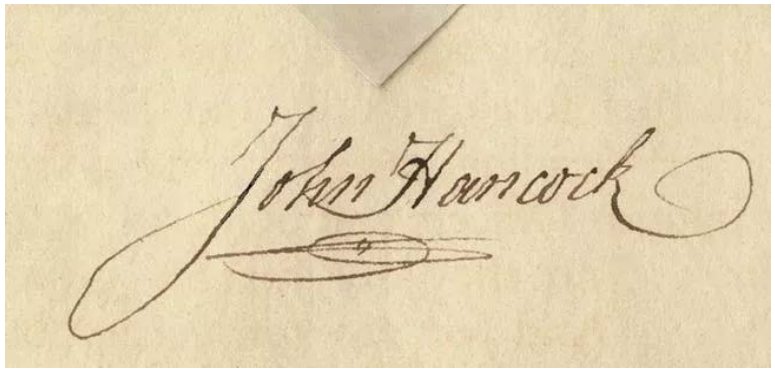
What Types of Biometric Information Can Be Collected? (cont.)

- **<u>NOT Biometric Identifiers</u>:**
  - Writing samples
  - Written signatures
  - Photographs
  - Demographic data
  - Tattoo descriptions
  - Height, weight, hair color, or eye color



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Where Is Biometric Technology Used?

- *Anywhere* employees use a fingerprint-based punch clock system

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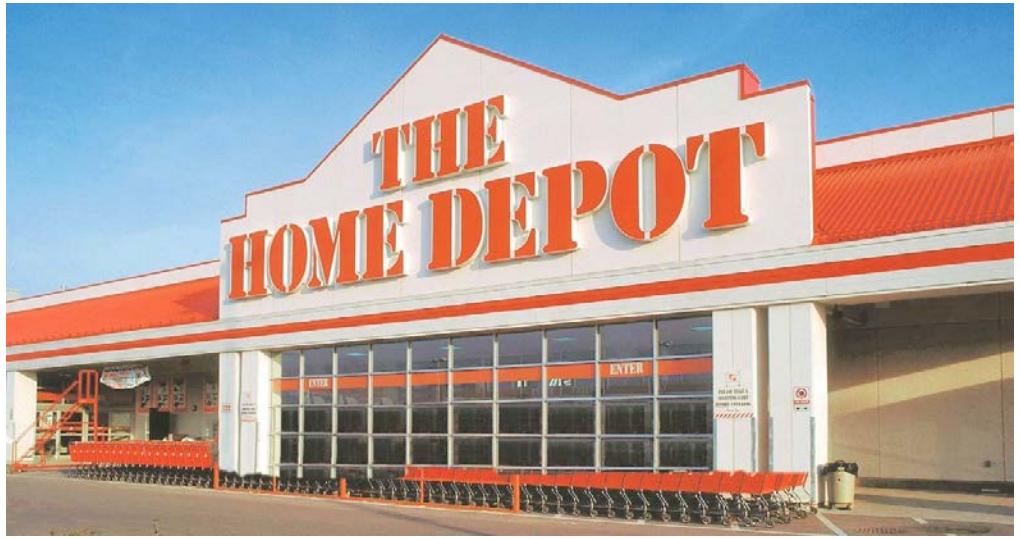
Where Is Biometric Technology Used? (cont.)

- *At certain retailers* that are alleged to have augmented in-store security cameras with software that tracks an individual's movements throughout the store using a unique scan of face geometry



Brunson v. Lowe's Home Cntrs., LLC, Cook County, IL Case No. 2019CH10251;
Brunson v. The Home Depot, Inc., N.D. Ga. Case No. 1:19-cv-03970

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How Is Biometric Information Used?

- Track employee work hours using a punch clock system
- Track consumer visits to physical locations
- Track customer activity and purchases
- Identity authentication/fraud protection

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Why Should Companies Care About Biometrics?

- Laws affect all companies that in any way collect/use biometric data
- Number of class action lawsuits are on the rise.
  - Current docket of over **200 biometrics** lawsuits
- Exposure could include a nationwide class action seeking **uncapped statutory damages** with **no showing** of "actual harm" required!

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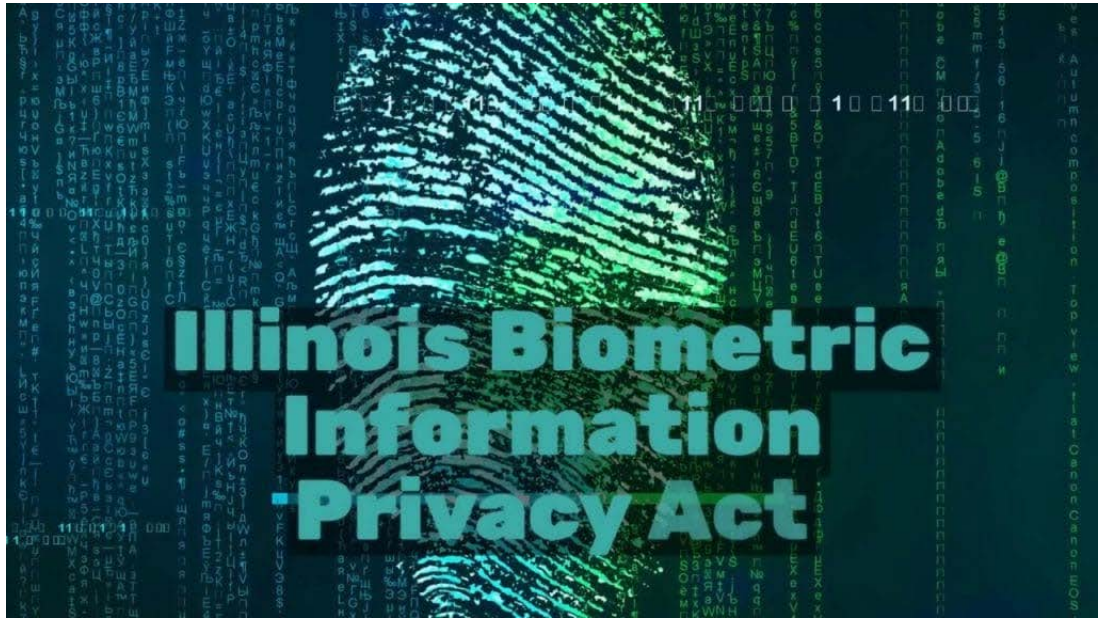
Illinois Biometric Privacy Act, 740 ILCS/14 ("BIPA")

- Enacted in 2008, BIPA makes it unlawful for private entities to collect, store or use Biometric Information without obtaining written, informed consent and taking precautions to secure the information.

- Legislative response to Pay By Touch bankruptcy.



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What's Covered by BIPA?

- "Retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry" that is used to identify an individual.

- Possess, collect, capture, purchase, receive through trade, or otherwise obtain. Very broad categories of activity regulated.

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How Costly Is BIPA?

- Damages
  - Negligent violation: greater of actual damages or **$1,000** statutory penalty
  - Intentional or reckless violation: **$5,000** statutory penalty
- Attorneys' fees
- Expert witness fees
- Litigation costs

Enforceable by both the attorney general and "any person aggrieved by a violation"

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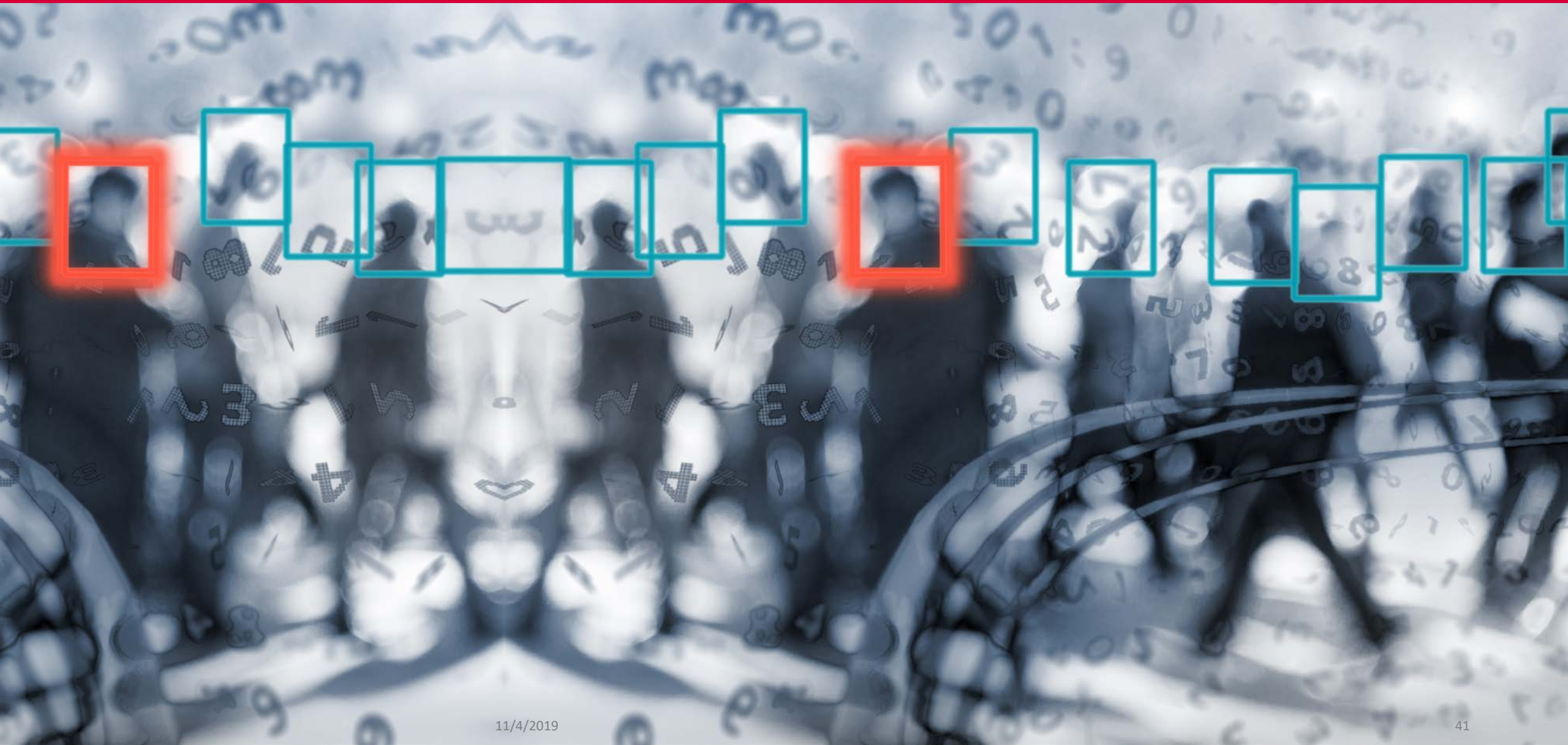
BIPA Class Actions



Rosenbach v. Six Flags Entertainment Corp.

No actual injury required for liability under BIPA

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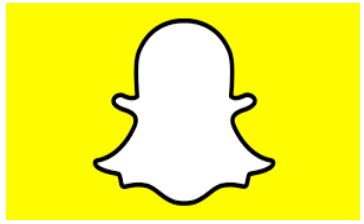
Industries Targeted for Biometric Lawsuits

- **Social Media Websites**

- **Employers**




$1.6 million [proposed] settlement (May 9, 2019)

- **Retailers/Service Providers**





$1.5 million settlement (December 1, 2016)

Compliance with Biometric Privacy Laws Are Key

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Compliance with Biometric Privacy Laws Are Key

- ✓Develop a written policy for retaining and destroying biometric identifiers and information.
- ✓Make the written policy publicly available.
- ✓Before collecting, storing or using any biometric identifiers or information, inform the person whose identifiers and information is being collected—in writing—that such identifiers/information is being collected, stored or used and the specific purpose/length of time for such collection, storage and use.
- ✓Obtain a written release from all persons providing biometric identifiers or information.
- ✓Store all biometric identifiers and biometric information in a manner which is, at a minimum, more secure than the manner in which other confidential association information is stored.

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Source: https://www.ksnlaw.com/blog/5-tips-bipa/

QUESTIONS?

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