**DEFEND EDUCATE EMPOWER**

**NAACP Legal Defense and Educational Fund, Inc. (LDF)**
**Written Testimony**

**New York City Council**
**Committee on Technology**

**November 13, 2020 Hearing on Introduction 1894-2020,**
**Concerning the Ethical Implications of Using Artificial**
**Intelligence and Automated Decision Systems**

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Chairman Holden and members of the Committee:

Thank you for the opportunity to submit written testimony on Introduction 1894-2020 ("Int. 1894"), which seeks to safeguard against bias in the sale and use of automated decision systems ("ADS") within the employment sector.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's oldest civil and human rights law organization. It was founded in 1940 by Thurgood Marshall, who later became the first Black U.S. Supreme Court Justice. During the nearly 80 years since its inception, LDF has used litigation, policy, and public education to promote full, equal, and active citizenship for Black people. Consistent with its mission, LDF has advocated, through policy, litigation, and community engagement, for equal employment opportunities for Black people in the workforce.[1] Similarly, we have opposed technology that supports, exacerbates, or hides biases and discrimination. In May 2019, for example, we testified before the New York City ("NYC" or "the City") Automated Decision Systems Task Force, urging it and other City leaders to implement nine recommendations crucial to fair and accountable use of ADS.[2]

Working closely with other civil rights groups, technology experts, and community stakeholders, LDF co-authored the 2019 Shadow Report to the City's ADS Task Force Report ("Shadow Report"), offering policy and research-based recommendations for ensuring that data-driven technologies eradicate, rather than perpetuate, harmful and discriminatory practices.[3] We also organized the country's first community forum on ADS, aimed at educating communities and learning from their stories regarding the harm caused by ADS. This forum included community members from all five NYC boroughs and addressed the use of ADS within the employment, housing, criminal legal, economic, and other contexts, and their impact on Black and brown communities.[4] Additionally, earlier this year LDF worked with other civil rights, employment and privacy organizations to develop and introduce principles to guide the development, use

[1] *See e.g.,* LDF Press Releases *Federal Court Approves Settlement with Target Over Discriminatory Criminal Background Screening Policy,* Dec. 5, 2019 at https://www.naacpldf.org/press-release/federal-court-approves-settlement-with-target-over-discriminatory-criminal-background-screening-policy/ and
*New Discrimination Lawsuit Filed Against Macy's Inc. over Criminal History Screening Policy,* June 6, 2019, https://www.naacpldf.org/press-release/new-discrimination-lawsuit-filed-against-macys-inc-over-criminal-history-screening-policy/.
[2] *See* Testimony of Janai Nelson (May 6, 2019), available at https://www1.nyc.gov/assets/adstaskforce/downloads/pdf/ADS-Public-Forum-Comments-NAACP-LDF.pdf.
[3] Rashida Richardson, ed., *Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force*, AI NOW INST. (Dec. 4, 2019), https://ainowinstitute.org/AI_Now_2019_Report.pdf.
[4] *Automating Bias: A Community Forum on How Computers are Making Decisions About Your Life,* A free community-led event discussing algorithmic bias in NYC's ADS, Dec. 7, 2019, select portions available at https://beta.nyc/event/automating-bias-how-computers-are-making-decisions-about-your-life/; *see also* https://beta.nyc/event/automating-bias-how-computers-are-making-decisions-about-your-life/.

auditing, and oversight of hiring assessment technologies.[5] These experiences give us a unique perspective into the critical need for legislation that helps ensure that the use of technology does not perpetuate discriminatory practices but rather that it is used in a transparent manner to advance the legal obligations to administer nondiscriminatory hiring and employment practices.

We commend the council's effort to halt deep-seated and discriminatory practices that encompass the employment sector by introducing Int. 1894. However, we feel strongly that without certain enhancements, Int. 1894 may deepen the very inequities it is intended to eliminate. Accordingly, we make the following recommendations.

### 1. Broaden the Definition of Automated Employment Decision Tools

Black and brown candidates for employment or promotion already experience bias and discrimination in the workforce at alarming rates.[6] Incorporating technologies into this same workforce to assess, sort, exclude, and screen candidates, with little to no oversight, safeguards, or limits will undoubtedly replicate those biases. ADS and automated employment decision ("AED") technologies are being developed and implemented at an increasingly rapid pace. The breadth and reach of these technologies is also growing. Accordingly, to ensure that Int. 1894 achieves its desired impact it must be applied broadly to encompass all current and future technological tools that replace traditionally human decisions and aide in determining whether a candidate has access to financial or professional opportunities.

Int. 1894's current definition of AED tools is underinclusive. It excludes applicant tracking systems, digital versions of psychological and personality assessments, and other AED tools that can automate employment bias. Rather than attempting to list every possible AED in an updated definition, we recommend adopting the purposefully broad AED definition in the Shadow Report:

> "any software, system, or process that aims to automate, aid, or replace human decision-making relevant to employment. Automated Employment Decision Tools can include both tools that analyze datasets to generate scores, predictions, classifications, or some recommended action(s) that are

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[5] LDF Press Release, *Civil Rights Groups Call for Strong Guardrails in Hiring Assessment Technologies*, July 29, 2020, at https://www.naacpldf.org/press-release/civil-rights-groups-call-for-strong-guardrails-in-hiring-assessment-technologies/.

[6] U.S. Equal Employment Opportunity Commission, Employment Tests and Selection Procedures, noting that "[t]he number of discrimination charges raising issues of employment testing, and exclusions based on criminal background checks, credit reports, and other selection procedures, reached a high point in FY 2007 at 304 charges," at https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures; *see also* Transcript of the Minutes of the Committee on Civil Rights at 10 (Dec. 3, 2014) (statement of Council Member Jumaane Williams), available at http://legistar.council.nyc.gov/View.ashx?M=F&ID=3410594&GUID=5FE2433E-1A95-4FAA-AECC-D60D4016F3FB.

used by employers to make decisions regarding employees, contractors, and jobs candidates."[7]

Adopting this definition ensures broad protection against bias and disparate impact and makes clear that all employment tools that track, assess, sort, select, exclude, or screen applicants based on their background, employment history, personality, credit score, facial expressions, body language, or other criteria fall within Int. 1894's reach.

### 2. Ensure Bias Audits are Independent, Evaluate Disparate Impact and Racial Equity, and are Transparent

Consistent audits of AED tools are critical for exposing gaps, failures, and biases within a tool or employer's use. When done properly, audits can help identify and eliminate discrimination and ensure vendors and employers are held accountable for discriminatory employment methods. While there is no current standard for the areas a bias audit should evaluate, there is a general consensus that, at a minimum, the following widely recognized principles should be incorporated into any bias audit: impartiality, fairness, transparency, and accountability.[8] This means bias audits should be conducted by independent third parties, evaluate disparate impact and racial inequities, and be transparent to the public. These requirements represent the floor of bias audits, not the ceiling.

As currently drafted, Int. 1894 rightly requires annual pre- and post-sale bias audits of AED tools however, it fails to ensure the audits meet the baseline principles listed above.

#### a) Independent

Int. 1894 defines its mandated bias audit as an "impartial evaluation" but does not detail what makes an audit impartial. Vendors, employers, and others who stand to profit, in any way, from the sale or use of the AED tool being audited are not, by the very nature of their role, impartial and cannot conduct an impartial audit. Requiring that audits be conducted by an independent third-party removes the likelihood of an unfair audit and prioritizes communities at risk of experiencing employment discrimination through AED tools over vendors and employers.[9] Of course, an independent third-party audit does not preclude vendors, employers, and others from also auditing AED tools as well. In fact, to ensure compliance with § 8-107[10] employers should conduct self-audits of

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[7] Richardson, ed., *supra* note 3, at 20; *see also* August 17, 2018 letter to NYC ADS Task Force Chairs Newman and Saunders, where advocates and experts noted various recommendations for addressing ADS in NYC, including broadening the definition of ADS, at https://www.nyclu.org/sites/default/files/field_documents/nyc_ads_task_force_letter_8.17.18.pdf.

[8] *See e.g.*, The Leadership Conference Education Fund, *Civil Rights Principles for Hiring Assessment Technologies*, July 2020, http://civilrightsdocs.info/pdf/policy/letters/2020/Hiring_Principles_FINAL_7.29.20.pdf.

[9] Richardson, ed., *supra* note 3.

[10] N.Y. Admin. Code § 8-107 (2020).

their AED tools and uses, including a holistic view at the criteria it uses, whether the specific criteria is necessary for successful job performance, and the criteria's ability to wrongly exclude protected groups from employment or promotional opportunities.

Independent third-party auditors may find it difficult to procure, review, or evaluate the algorithms and/or underlying datasets utilized in AED tools due to trade secrecy and confidentiality claims. To address this issue, many jurisdictions have introduced legislation or enacted laws prohibiting vendors from asserting trade-secret or other intellectual-property protections.[11]

Accordingly, we recommend Int. 1894 mandate that all bias audits be conducted by an independent third-party auditor. Because a refusal to showcase an AED's data sources effectively shields AEDs from independent validation and prevents meaningful bias assessments, legislators and City leaders, such as the Human Rights Commission ("Commission") can—and should—discourage and disincentivize the sale or use of any AED tool with such secrecy attached.[12]

### b) Evaluate Disparate Impact and Racial Equity

In the short time that ADS and AED tools have become prominent they have committed countless unexpected and unintentional discriminatory and harmful actions, including targeting Black people, women, and other protected groups. From facial recognition technology failing to recognize Black faces[13] or falsely reading Black expressions as angry,[14] to Amazon's recruiting tool excluding women,[15] it is clear that even facially neutral technologies can have a disparate impact on protected groups.[16] Machine learning algorithms can detect even subtle correlations between candidates and begin using facially neutral criteria as proxies for otherwise discriminatory

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[11] *See* Richardson, *supra* note 3 at 29.

[12] *Id.* at 48.

[13] Kade Crockford, *How is Facial Recognition Surveillance Technology Racist?*, AM. CIVIL LIBERTIES UNION (June 16, 2020), https://www.aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist/.; *see also* Devin Coldewey, *Sen. Harris Tells Federal Agencies to Get Serious About Facial Recognition Risks*, TECH CRUNCH (Sep. 18, 2018), https://techcrunch.com/2018/09/18/sen-harris-tells-federal-agencies-to-get-serious-about-facial-recognition-risks/.

[14] Lauren Rhue, *Emotion-Reading Tech Fails the Racial Bias Test*, THE CONVERSATION (Jan. 3, 2019, 6:23 AM), https://theconversation.com/emotion-reading-tech-fails-the-racial-bias-test-108404.

[15] Rachel Goodman, *Why Amazon's Automated Hiring Tool Discriminated Against Women*, AM. CIVIL LIBERTIES UNION (Oct. 12, 2018, 1:00PM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/why-amazons-automated-hiring-tool-discriminated-against.

[16] *See e.g.,* Angela Chen, *Computers Can't Tell If You're Happy When You Smile*, MIT TECH. REV. (July 26, 2019), https://www.technologyreview.com/2019/07/26/238782/emotion-recognition-technology-artifical-intelligence-inaccurate-psychology/ (noting that the expressions that have been "learned to associate with emotions are stereotypes, and technology based on those stereotypes doesn't provide very good information. Getting emotion recognition right is expensive and requires collecting a lot of extremely specific data—more . . . than anyone has so far).

categorizations. Accordingly, regularly searching for, identifying, and removing discriminatory practices is the only way to ensure that ADS are not perpetuating biases.[17]

This is particularly critical in the employment context, as bias can be introduced at every stage in the hiring process, including recruitment, interview, and formal hiring. AED tools may be used to steer job ads toward certain candidates, flag passive candidates for recruitment, parse and score resumes, or help hiring managers assess candidate competencies. [18]Additionally, hiring assessments may measure facially neutral criteria that are not related to or necessary for job performance, often resulting in superfluous and discriminatory barriers to employment.[19] All of these actions must be thoroughly assessed during a bias audit.

Evaluating disparate impact should be the first method used to determine bias in AED tools. The disparate impact standard is the legal standard required under the City's human rights law and Title VII. However, since disparate impact assessments measure discrimination through the results (i.e., how many Black candidates an employer hired overall, in relation to white candidates), it may overlook biases occurring at various stages. To account for this gap, the bias audit should also include a racial impact and equity assessment.

We therefore recommend Int. 1894 specify that bias audits must include:

- A racial impact and equity assessment;
- Review of the tool's underlying datasets and algorithms for biased or discriminatory data or trends;
- An evaluation of all screening, selection, and sorting criteria for bias, disparate impact, job-relatedness, and adherence to local, state, and federal law.[20] Post-sale audits of AED tools should also review and test employer-mandated criteria that has previously resulted in disparate impact, such as educational tests, criminal and background checks, employment experience, credit checks, and anything else the employer deems important when selecting or excluding a candidate;
- A review of the employer's use of the AED tool's decisions to ensure the employer's responses are not administered in a way

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[17] *See* Miranda Bogen, *All the Ways Hiring Algorithms Can Introduce Bias*, HARVARD BUS. REV. (May 6, 2019), https://hbr.org/2019/05/all-the-ways-hiring-algorithms-can-introduce-bias (noting "Unfortunately, most hiring algorithms will drift toward bias by default. While their potential to help reduce interpersonal bias shouldn't be discounted, only tools that proactively tackle deeper disparities will offer any hope that predictive technology can help promote equity, rather than erode it.").
[18] *Id.*; *see also* Genie Barton, Nicol Turner Lee, & Paul Resnick, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS (May 22, 2019), https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/.
[19] *See* Civil Rights Principles for Hiring Assessment Tech., *supra* note 8.
[20] Including the Consumer Protection law and Fair Chance Act. *See* N.Y.C. Admin. Code § 20-701 (2020) and N.Y.C. Admin. Code § 8-107(11-a) (2019).

that unlawfully excludes or discriminates against protected individuals or fails to provide reasonable accommodation;

- A collection and evaluation of employer data and use of AED tool to calculate the impact of affect, facial, and biometric recognition in the hiring process.[21]

*c) Transparent*

Vendors and employers rarely ensure the public knows or understands the auditing process for employment related technologies. Requiring public transparency will ensure the public can hold vendors and users of biased and discriminatory tools accountable. Even the best bias audits are unhelpful if the results are not readily accessible. Accordingly, Int. 1894 should require that the findings of the annual bias audits be publicly reported and include a plain-language statement of whether the evaluated AED tool, or the vendors and employer's use of the tool, violated any local, state, or federal law.

While the above bias audit recommendations may require more capacity and resources than the Commission or other City agencies are able to deliver in the wake of COVID-19, they are imperative for ensuring that discrimination does not deepen within the workplace. Without incorporating these recommendations, New Yorkers will undoubtedly continue to experience unchecked bias and discrimination in the workplace.

If the City is truly committed to removing racial disparities from employment, and protecting the digital rights of vulnerable communities, it must show this through action. This does not mean the City must do it all itself. While civil rights leaders and technology and policy experts agree that a robust bias audit is necessary, we do not expect the City must conduct the audit itself.[22] Instead, it can and should partner with reputable, independent organizations who specialize in this work. These groups, supported and assisted by the Commission, can ensure bias audits conform to all of the recommendations above and are lawful. If the city is unwilling to engage experts to evaluate and remove racial discrimination from technologies used within the employment sector and does not have the resources or capacity to meaningfully do so itself, then it should prohibit the use of these AED tools. Allowing unchecked automation to potentially exacerbate racial and other disparities is not an unacceptable option. *Any* level of bias and discrimination is unacceptable, particularly when it can be avoided with commonsense safeguards and legislative mandates.

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[21] *See* Richardson, ed., *supra* note 3 (noting that "[r]egulators should ban the use of affect recognition in important decisions that impact people's lives and access to opportunities. . . . Given the contested scientific foundations of affect recognition technology . . . it should not be allowed to play a role in important decisions about human lives, such as who is interviewed or hired for a job").

[22] Having understaffed, under resourced, and inexperienced city staff conduct these audit would be contrary to these goals.

### 3. Empower Candidates Subject to AED Tools Through Public Education, Transparency, and a Private Right of Action

Exposure of racism in the workforce without AED tools often comes from job applicants or employees experiencing disparate treatment firsthand and filing a formal grievance or lawsuit. However, with automation, candidates are typically unaware of the design and impacts of the AED tools used to evaluate them, or the employer's hiring practices in connection with the tool. Given this reality, relying on candidates to self-report when the bias or discrimination has occurred as a result of the use of technology will not work. It also ignores the vast power imbalance between those creating and deploying AED tools, and the job or promotion candidates who are subject to them.

To remedy this, we urge the Committee to collaborate with civil rights leaders and community stakeholders to create public education events to help the broader New York City community understand when and how AED tools and ADS are used. Int. 1894 should also require employers to provide candidates with meaningful disclosures about how the employer uses AED tools to make employment decisions *before* the candidates are subject to AED tools. If a candidate is uncomfortable with the tool, they should have the opportunity to reject its use during their assessment.[23] If a candidate is evaluated by an AED tool, they should be provided with timely feedback regarding their performance under the AED tool.

To empower candidates to take action when they have experienced bias or discrimination, we strongly recommend Int. 1894 include a private right of action for candidates biased by AED tools. Additionally, when an AED tool is determined to have had a disparate impact on certain candidates, employers must notify candidates previously assessed by the biased tool in clear, plain language.[24]

At the November 13 hearing, Councilwoman Cumbo made clear that the purpose of Int. 1894 is to prioritize applicants and protect their livelihood. To do so, they must be empowered to understand where and how bias may be injected into the hiring process, how to spot this, and the options available for recourse.

### 4. Conclusion

Int. 1894 commendably attempts to regulate the sale and use of AED tools to ensure a fair, equitable, and transparent workforce. However, its extensive ambiguity will undoubtedly leave organizations, candidates, and enforcement agencies in the dark,

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[23] Int. 1894's general requirement that applicants be notified within 30 days that that they were assessed by an AED tool that requires an annual bias audit does not guarantee candidates are informed about the AED tool *before* they are subject to it. This means candidates are unable to determine, in advance, whether they need to seek reasonable accommodations, without disadvantaging themselves. This places candidates with disabilities, different learning styles, and those who do not exactly fit the status quo at a severe disadvantage.
[24] The Leadership Conference Education Fund *supra* note 8.

as they try to apply civil and human rights protections to complex technologies with limited information and guidance.

Therefore, while we support the goals of Int. 1894, we oppose it in its current form. We encourage the Committee and bill sponsors to, in addition to incorporating the above recommendations, and those of our colleagues submitted to this Committee and Int. 1894's sponsors,[25] collaborate with civil rights leaders, policymakers, vulnerable workforce communities, and other experts to amend Int. 1894 so it is an effective deterrent to discriminatory practices. Without such critical amendments, we are concerned that vendors and employers may use Int. 1894 as an easy regulatory checkmark justifying meager employee protections and willful ignorance of the harm their tools cause vulnerable groups.

LDF is committed to continuing to work alongside the counsel and other City leadership to ensure all New Yorkers have fair and equal access to employment.

Thank you for considering this testimony. If you have any questions, or would like any additional information, please do not hesitate to contact Katurah Topps at 212-965-2200 or ktopps@naacpldf.org.

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[25] *See* Attachment A to Nov. 13, 2020 Statement of Albert Fox Cahn Esq. before New York City Council Committee on Technology, available at https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5faec95d48fd365a10bd70b0/1605290333927/2020-11-13+Testimony+on+employment+ADS+Final.pdf.