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**Written Testimony of the
NAACP Legal Defense and Educational Fund, Inc.**

**Submitted to the New York City
Automated Decision Systems Task Force**

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Submitted via email at ADSTaskForce@cityhall.nyc.gov.

Chairperson Thamkittikasem and Members of the Task Force:

On behalf of the NAACP Legal Defense and Educational Fund (LDF), we thank the NYC Automated Decision Systems Task Force (the Task Force) for holding important public forums on April 30 and May 30, 2019 to address the core components of Local Law 49 of 2018 (Local Law 49) concerning accountability, fairness, and transparency.

LDF is the nation's first and foremost civil and human rights law organization. Since its founding nearly eighty years ago, LDF has worked at the national, state, and local levels to pursue racial justice and eliminate structural barriers for African Americans in the areas of criminal justice, economic justice, education, and political participation.¹ As part of that work, LDF has also forged longstanding partnerships with local advocates, activists, and attorneys to challenge and reform unlawful and discriminatory policing in New York City, including serving as co-counsel in *Davis v. City of New York*, a federal class-action lawsuit that challenged the New York Police Department's policy and practice of unlawfully stopping and arresting New York City Housing Authority (NYCHA) residents and their visitors for trespassing without the requisite level of suspicion.²

LDF is deeply concerned about the use of data and technology in perpetuation of racial discrimination, including machine-learning algorithms, biased data, and Automated Decisions Systems (ADSs) that rely on both. The NYPD's deployment and implementation of ADSs threaten to exacerbate racial inequities in New York City. The potential discriminatory impact of these systems raises concerns similar to the racially discriminatory and unconstitutional policing practices that historically motivated—and continue to motivate—LDF's litigation, policy, and public education advocacy.

Given these significant concerns, the Task Force's recommendations to Mayor de Blasio and City Council Speaker Corey Johnson must ensure that all ADSs are fair, transparent, and rigorously evaluated. Critically, ADSs must not undermine the City's commitment to public safety practices that are constitutional and non-discriminatory. Equally important, the process for developing these recommendations must foster robust community dialogue and engagement. Moreover, this process must include mechanisms to ensure community members who are directly impacted by these systems have direct input into shaping the recommendations. While Local Law 49 affects decision-making in a wide variety of

¹ LDF, *About Us*, <https://www.naacpldf.org/about-us/> (last accessed June 10, 2019).

² LDF, *Davis v. City of New York*, <https://www.naacpldf.org/case-issue/davis-v-city-new-york/> (last accessed June 10, 2019).

contexts, including, but not limited to, child welfare, education, healthcare, housing, and immigration, this testimony focuses on its discrete, durable, and disproportionate racial impact in the area of policing and law enforcement. Accordingly, LDF makes the following nine preliminary recommendations to this Task Force:

1. The City Must Adopt a Uniform Definition of ADSs

To ensure necessary accountability and transparency, the Task Force must create a broad, uniform definition of an ADS. Under the current definition in Local Law 49, an agency ADS is defined as an “automated decision system used by an agency to make or assist in making decisions concerning rules, policies or actions implemented that impact the public.” During the May 30 public forum, the Task Force announced that it created a “Checklist for Determining Whether a Tool or System is an ADS/Agency ADS.”³ Under this definition, which Task Force members asserted during the forum did not generate consensus among members, an ADS is defined as “computerized implementation of algorithms, including those derived from machine learning or other data processing or artificial intelligence techniques, which are used to make or assist in making decisions.”⁴ Both of these definitions are too limited and fail to capture the full range of systems that agencies are considering implementing or have already implemented. Indeed, during the May 30 forum, Task Force members agreed with these concerns, explaining that these definitions do not capture the broad range of ADSs deployed and implemented.

We therefore recommend adopting the ADS definition that advocates and experts recommended to the Task Force more than eight months ago.⁵ To capture the full range of ADSs, the group recommended defining an ADS as follows:

An automated decision system is any software, system, or process that aims to aid or replace human decision-making. Automated decision systems can include analyzing complex datasets to generate scores, predictions,

³ NYC AUTOMATED DECISION SYSTEMS TASK FORCE, CHECKLIST FOR DETERMINING WHETHER A TOOL OR SYSTEM IS AN ADS/AGENCY ADS (2018), <https://www1.nyc.gov/assets/adstaskforce/downloads/pdf/ADS-TF-Checklist-for-Determining-ADS-Agency.pdf>.

⁴ *Id.*

⁵ Letter from Andrew G. Ferguson, Professor, UDC David A. Clarke School of Law, et al., to the NYC Automated Decision Systems Task (Aug. 17, 2018), http://assets.ctfassets.net/8wprhvhvnpfc0/1T0KpNv3U0EKAcQKseIsqA/52fee9a932837948e3698a6586a8d50/NYC_ADS_Task_Force_Recs_Letter.pdf.

classifications, or some recommended action(s), which are used by agencies to make decisions that impact human welfare.⁶

This more expansive definition helps to ensure that *all* ADSs that affect New Yorkers will be subject to the appropriate scrutiny and that the public will be protected from unfair and inequitable consequences resulting from these systems. During both public forums, community members, organizational representatives, and Task Force members expressed concerns that agency accountability and fairness cannot be meaningfully addressed by the current, narrow definition of ADSs. Accordingly, LDF urges the Task Force to adopt this proposed definition immediately.

2. The City Must Clarify that *All* ADSs and *All* Agencies Using an ADS are Within the Task Force’s Purview and Subject to its Recommendations

At its core, Local Law 49 seeks to ensure that policies and procedures are in place to provide community members and elected officials with tools to analyze and review these systems, as well as to provide structures to ensure community members are involved in decision-making processes. Accordingly, any agency that plans to implement, or has implemented, an ADS is within the Task Force’s purview and subject to its recommendations, including the NYPD.

Indeed, given the far-reaching consequences of technological advances in the NYPD, coupled with the Department’s well-documented history of discriminatory and unconstitutional policing and enforcement practices, any decision to exclude the NYPD from the Task Force’s purview or recommendations would be antithetical to Local Law 49’s intent and purpose. New York City therefore cannot achieve accountability, fairness, or transparency in the implementation of ADSs if some systems are excluded from the Task Force’s purview.

Accordingly, the City must confirm that all ADSs and all agencies using ADSs fall within the Task Force’s ADS review. Failing that, it must create an independent review process before any system can be exempt from the Task Force’s purview and recommendations, which includes an opportunity for the public to challenge the exemption.

3. The City Must Commit to Full Transparency and Disclose Information About the NYPD’s ADSs

According to a chart of known ADSs used by City agencies created by AI

⁶ *Id.*

Now at NYU University,⁷ the NYPD has already implemented or considered implementing the following ADSs without meaningful community engagement or oversight: Automated License Plate Readers,⁸ Facial Surveillance,⁹ Predictive Policing,¹⁰ and Social Media Monitoring.¹¹ This list, however, is most likely underinclusive because the NYPD routinely conceals and fails to disclose the development and use of ADSs, such as Domain Awareness System's place-based predictive policing, from both public and governmental oversight.¹² By concealing its use of ADSs, the NYPD prevents the public from adequately studying the

⁷ *Automated Decision Systems: Examples of Government Use Cases*, AI NOW AT NYU UNIVERSITY 1, 1-4 (2019), <https://ainowinstitute.org/nycadschart.pdf>.

⁸ Information about the NYPD's license plate reader is available at <https://www.nydailynews.com/new-york/nyc-crime/ny-metro-license-plate-reader-grab-20190119-story.html>. For more information on automated license plate readers generally, see *Automated License Plate Readers (ALPRs)*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/pages/automated-license-plate-readers-alpr>.

⁹ George Joseph and Kenneth Lipp, *IBM Used NYPD Surveillance Footage To Develop Technology That Lets Police Search By Skin Color*, THE INTERCEPT, (Sept. 6, 2018), <https://theintercept.com/2018/09/06/nypd-surveillance-camera-skin-tone-search/>. For additional information the NYPD's use of facial recognition analysis, see Clare Garvie, *Garbage in, Garbage Out: Face Recognition on Flawed Data*, GEORGETOWN LAW CENTER ON PRIVACY AND TECHNOLOGY (May 16, 2019), <https://www.flawedfacedata.com/>.

¹⁰ Rachel Levinson-Waldman and Erica Posey, *Court: Public Deserves to Know How NYPD Uses Predictive Policing Software*, THE BRENNAN CENTER (Jan. 26, 2018), <https://www.brennancenter.org/blog/court-rejects-nypd-attempts-shield-predictive-policing-disclosure>.

¹¹ *America's Cops Take an Interest in Social Media*, THE ECONOMIST (Feb. 21, 2019), <https://www.economist.com/united-states/2019/02/21/americas-cops-take-an-interest-in-social-media>; Annie McDonough, *Privacy Advocates Score Win Against NYPD Over Surveillance Technology*, CITY & STATE NEW YORK (Jan. 22, 2019), <https://www.cityandstateny.com/articles/policy/technology/privacy-advocates-score-win-against-nypd-over-surveillance-technology>; Clay Dillow, *NYPD Creates Facebook-Police Task Force to Mine Social Media for Clues*, POPULAR SCIENCE (Aug. 10, 2011), <https://www.popsci.com/technology/article/2011-08/nypds-facebook-police-mine-social-media-clues-about-crime>.

¹² Steven Melendez, *NYPD Unveils Controversial Algorithm to Track Crime Patterns*, FAST COMPANY (Mar. 20, 2019), <https://www.fastcompany.com/90321778/nypd-unveils-controversial-algorithm-to-track-crime-patterns>; Laura Nahmias, *Police Foundation Remains a Blind Spot in NYPD Contracting Process, Critics Say*, POLITICO (July 13, 2017), <https://www.politico.com/states/new-york/city-hall/story/2017/07/13/police-foundation-remains-a-blind-spot-in-nypd-contracting-process-critics-say-113361>; Ali Winston, *NYPD Attempts to Block Surveillance Transparency Law with Misinformation*, THE INTERCEPT (July 7, 2017), <https://theintercept.com/2017/07/07/nypd-surveillance-post-act-lies-misinformation-transparency/>; *Private Donors Supply Spy Gear to Cops*, PROPUBLICA (Oct. 13, 2014); <https://www.propublica.org/article/private-donors-supply-spy-gear-to-cops>.

impact of these systems and shields itself from accountability. Moreover, concealing this information prevents necessary debate and dialogue, while further sowing mistrust between the NYPD and community members.

Equally alarming, the NYPD plans to continue embedding ADSs in their decision-making processes at a disturbingly aggressive pace. For example, on April 3, 2019, at NYU School of Law, the NYPD's Deputy Chief of Policy and Programs, Thomas Taffe, explained that the Department hired more than 100 civilian analysts since 2017 to use ADS software to analyze the NYPD's crime data.¹³ Moreover, based on information and belief, the NYPD also appears to be building its own ADSs. The NYPD is thus poised to continue building its capacity to rapidly scale up its use of ADSs without public accountability or oversight.

Importantly, the Task Force must also address concerns that the NYPD may circumvent complying with recommendations because doing so would interfere with "law enforcement investigation or operations."¹⁴ The NYPD has relied on this rationale to justify withholding information from the public under New York State Freedom of Information Laws. Without addressing these concerns, which were brought up by community members at the May 30 forum, the NYPD can continue building and testing these technologies on residents without public accountability and oversight—a result that is antithetical to Local Law 49's intent and purpose.

For these reasons, at a minimum, the Task Force must recommend that the NYPD publicly identify, categorize, and share a list of all ADSs that the Department has implemented, plans to implement, or is developing. Once created, this list of ADSs should be continuously updated in real time, and as discussed below, it must be subject to public scrutiny.

4. The City Must Ban the Use of Data Derived from Discriminatory and Biased Enforcement Policies and Practices in ADSs

Because algorithms learn and transform through exposure to data, an algorithm is only as good as the data that is selected to inform it. In other words, ADSs, like all machine-learning technologies, inherit the biases of the data and commands they are given. An ADS's algorithm, therefore, will replicate any biases

¹³ See Zolan Kanno-Youngs, *NYPD Number-Crunchers Fight Crime with Spreadsheets*, THE WALL STREET JOURNAL (July 23, 2018), <https://www.wsj.com/articles/nypd-number-crunchers-fight-crime-with-spreadsheets-1532381806>.

¹⁴ As an example, see section 1(6) of Local Law 49, noting that compliance with the Task Force's recommendations is not required if such compliance would "interfere with a law enforcement investigation or operations."

within its training data—a phenomenon called “training bias.”¹⁵ In other words, bias in, bias out. Training bias can lead to discrimination in at least two ways: (1) reproducing the biases in the data and (2) drawing inferences from, and thus prioritizing, the biases in the data.¹⁶ In the policing context, this means that data derived from and reflecting any of the NYPD’s practices that are discriminatory, illegal, and unconstitutional will infect any algorithm and ADS that is trained with that data. The resulting algorithm or ADS will then carry out and perpetuate that same discrimination—making all decisions either produced by the ADS or relied on based on ADS-generated predictions flawed.

For decades, the NYPD engaged in widespread racial profiling against Black and Latinx residents. Between 2004-2012, the NYPD conducted an astounding 4.4 million stops of City residents as they engaged in their daily lives.¹⁷ A staggering 88 percent of these stops resulted in no further action—meaning a vast majority of those stopped were not engaged in unlawful conduct.¹⁸ In about 83 percent of cases, the person stopped was Black or Latinx, even though the two groups combined accounted for just over one-half the city population.¹⁹ When these discriminatory practices were challenged in *Floyd v. City of New York*, a federal court found the NYPD liable for violating the Fourth Amendment rights of New Yorkers to be free from unreasonable searches and seizures. The court also found that the NYPD’s policies and practices were racially discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment.²⁰

Similarly, in *Davis v. City of New York*, the NYPD unlawfully stopped and arrested people of color who lived in or visited NYCHA apartments, without reasonable suspicion or probable cause.²¹ The NYPD justified its racially discriminatory arrests by alleging the residents and their visitors were “criminally trespassing” despite the lack of evidence to support officers’ suspicions. Currently,

¹⁵ Solon Barocas and Andrew Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. R. 671, 680-81 (2016).

¹⁶ *Id.* at 680-87.

¹⁷ *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES, (Aug. 12, 2013), <https://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Floyd v. City of New York*, 959 F.Supp.2d 540, 660-665 (S.D.N.Y. 2013).

²¹ Complaint, *Davis v. City of New York*, 2010 WL 9937605 (S.D.N.Y. 2011) (No. 1), https://dev.naacpldf.org/wp-content/uploads/Complaint-1.pdf?_ga=2.49083558.141431006.1559743995-2134253651.1504725451.

the Department’s aggressive, military style gang “takedowns” primarily target public housing residents, the overwhelming majority of whom are people of color.²² Prior to executing these sweeping gang takedowns, the NYPD conducts criminal investigations relying, in part, on a secret database that erroneously designates thousands of New Yorkers as members of gangs or local street “crews,” often without informing the individual or offering any due process protections.²³ Officers executing gang policing strategies rely on vague and troubling terms and generalizations to justify their frequently erroneous designation of individuals as gang members.²⁴

Of equal concern is the Department’s manipulation of its data. For example, it has been reported that the Department made arrests and issued summonses as part of a monthly quota system until as recently as December 2018.²⁵ Additionally, the federal monitor overseeing the NYPD confirmed that the Department is also undercounting street stops.²⁶ Both of these examples underscore how the NYPD’s

²² NYPD’s Gang Takedown Efforts before the NYC City Council’s Comm. on Public Safety (June 13m 2018) (statement of Marne L. Lenox, Associate Counsel, LDF, and Darius Charney, Senior Staff Attorney, the Center for Constitutional Rights), <https://www.naacpldf.org/wp-content/uploads/City-Council-Testimony-combined-6.13.18.pdf>.

²³ *Id.*

²⁴ The NYPD provided its IDS Gang Entry Street and the criteria by which gang members are certified in response to Professor Babe Howell’s Freedom of Information Law request, filed on September 2, 2011. In addition to these criteria, the NYPD may certify someone as a gang member if an individual admits membership during a debrief or if, through the course of an investigation, an individual is reasonably believed to belong to a gang and is identified as such by two independent sources, which could include other New York City agencies. K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 UNIV. DENVER. CRIM. L. R. 1, 16 (2015).

²⁵ George Joseph, *NYPD Commander’s Text Messages Show How The Quota System Persists*, THE APPEAL (Dec. 12, 2018), <https://theappeal.org/nypd-commanders-text-messages-show-how-the-quota-system-persists/>; Jake Nevins, *‘We Didn’t Ask Permission’: Behind an Explosive NYPD Documentary*, THE GUARDIAN (Aug. 23, 2018); <https://www.theguardian.com/film/2018/aug/23/nypd-documentary-crime-and-punishment-stephen-maing>; Rocco Parascandola & Thomas Tracy, *NYPD Demands All Uniform Officers Undergo ‘No Quota’ Training for Arrests, Tickets*, DAILY NEWS (Feb. 15, 2018), <https://www.nydailynews.com/new-york/nypd-demands-uniformed-officers-undergo-no-quota-training-article-1.3823160>.

²⁶ *Monitor’s Seventh Report*, NYPD Monitor 1, 4,8 (Dec. 13, 2017), http://nypdmonitor.org/wp-content/uploads/2017/12/2017-12-13-FloydLigonDavis-Monitor-Seventh-Report_EAST_80301353_1.pdf; *Monitor’s First Report*, NYPD Monitor 1, 48 (July 9, 2015); see also Al Baker, *City Police Officers Are Not Reporting All Street Stops, Monitor Says*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/nyregion/nypd-stop-and-frisk-monitor.html>; J. David Goodman and Al Baker, *New York Police Department is Undercounting Street Stops, Report Says*, N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/10/nyregion/some-new-york-police-street-stops-are-going-undocumented-report-says.html>.

data, as well as crime data, may be skewed and inaccurate due to the Department's actions. Indeed, there is a litany of examples when NYPD officers unlawfully arrested, charged, and jailed innocent people who are disproportionately people of color.²⁷

As a result of these and many other racially discriminatory practices, we have substantial concerns that the NYPD's datasets are infected with deeply rooted biases and racial disparities. Consequently, we are likewise concerned that any predictions or output from an ADS that relies on such data, in any capacity, will reproduce and reinforce these biases and disparities.

Further, merely inputting NYPD data into an ADS does not eliminate or remove the embedded biases. This misperception—so-called “tech washing”—invites unwarranted agency deference and the belief that data can be cleansed by putting it into an ADS, thereby producing “accurate,” “objective,” or “neutral” predictions.²⁸ However, because NYPD datasets and others are likely tainted by illegal, discriminatory, and unconstitutional practices, they should be categorized as “dirty data,” meaning, the underlying data is “inaccurate, skewed, or systemically biased.”²⁹ The term “dirty data” is “commonly used in the data mining research community to refer to ‘missing data, wrong data, and non-standard representation of the same data.’”³⁰ However, LDF endorses Rashida Richardson, Jason Schultz, and Kate Crawford's recommendation to expand the definition to include this new category of data that is “derived from or influenced by corrupt, biased, and unlawful practices, including data that has been intentionally manipulated . . . as well as data that is distorted by individual and societal biases.”³¹

We are skeptical that such “dirty data” can ever be cleansed to separate the “good” from the “bad,” the tainted from the untainted.³² Therefore, in committing

²⁷ Rashida Richardson, Jason Schultz, & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. R. 192 (May 2019).

²⁸ Ingrid Burrington, *What Amazon Taught the Cops*, THE NATION (May 27, 2015), <https://www.thenation.com/article/what-amazon-taught-cops/>.

²⁹ Richardson, *supra* note 27, at 193-96.

³⁰ *Id.* at 195.

³¹ *Id.*

³² Vincent Southerland, *With AI and Criminal Justice, The Devil is in the Data*, ACLU (Apr. 9, 2018), <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data>.

to exclude any data classified as “dirty” from all ADSs,³³ the Task Force should adopt this definition of “dirty data” and make clear that ADSs stemming from or operated by agencies with a history of biased or discriminatory practices or data, begin with the presumption that such data and the resulting ADSs include bias and are therefore unrepresentative. This method, as discussed at both the April 30 and May 30 forums, places the burden on the agency to show that no racial bias or discriminatory impact is present in its underlying datasets or the ADSs’ use, rather than placing the burden on the City’s residents, either as individuals or community members. It also ensures that no ADS incorporates or uses any data which are reasonably suspected to have been derived from discriminatory or biased practices.

5. The City Must Adopt Processes for Determining if an ADS has a Racially Disproportionate Impact on Communities of Color

To avoid discriminatory ADSs, the Task Force’s recommendations should make clear that any data derived from discriminatory, illegal, or unconstitutional policing enforcement or practices, and informs or is incorporated into an ADS, should be presumed invalid due to the likely disproportionate impact on communities of color. It will also require, at a minimum, that an independent third-party conduct a racial equity impact assessment.³⁴ In addition, for all data used in any ADS—including data that is purportedly not derived from discriminatory, illegal, or unconstitutional practices and data that comes from sources other than the NYPD—the following oversight must occur to determine the possible racially disparate impact of an ADS or ADS-generated predictions:

- A racial equity impact assessment;³⁵
- A surveillance impact assessment and report;³⁶

³³ Richardson, *supra* note 27, at 193-98.

³⁴ A Racial Equity Impact Assessment (REIA) is a “systematic examination of how different racial and ethnic groups will likely be affected by a proposed action or decision. REIAs are used to minimize unanticipated adverse consequences in a variety of contexts, including the analysis of proposed policies, institutional practices, programs, plans and budgetary decisions. The REIA can be a vital tool for preventing institutional racism and for identifying new options to remedy long-standing inequities.” THE CENTER FOR RACIAL JUSTICE INNOVATION, *Racial Equity Impact Assessment*, (2019), https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment_v5.pdf.

³⁵ *Id.*

³⁶ David Wright & Charles D. Raab, *Constructing a Surveillance Impact Assessment*, 28 COMPUTER L. & SECURITY R. 613 (2012).

- A pre-acquisition, development, or implementation procedure to ensure non-agency experts, representatives from affected communities, and the public at large is consulted before and during the development of an ADS; and
- Agencies’ maintenance of a public record of external participation.

As a starting point, these initial recommendations should be adopted and proposed to community members during any public engagement.

In addition to the above recommendations, no ADS—including those ADSs already implemented—should be used without a thorough review and analysis of (1) all underlying data and (2) the effects the system has on vulnerable communities. This analysis should benefit from the significant input of social science experts, as well as communities who have fallen victim to NYPD’s biased actions in the past. We therefore strongly urge the Task Force to recommend that the City commit to not use any ADS that relies on “dirty data” or has a discriminatory impact. This commitment, along with the above recommendations, is a strong starting point for the City and Task Force to fight against the racial bias present in many agencies today, including racial bias through data and technology.

6. The City Must Remedy and Account for Proxy Factors that Also Produce Discriminatory Results

An agency’s unsupported assertion that it has “scrubbed” either its data or its algorithm of data derived from discriminatory, illegal, or unconstitutional practices is not enough to establish that the algorithm and the ADSs are not biased. First, many agencies will find it difficult to properly identify all the biases in their training data. Second, if directly confronted with their own bias, some agencies may even deny it, rather than attempting to address and scrub the biased data.³⁷ Third, even if all biased data is removed from an algorithm, algorithms can learn biased behavior through proxy factors—factors that may appear neutral but reflect societal and structural biases.³⁸ For example, an algorithm may purposefully exclude all input for race and ethnicity. However, if the algorithm still considers factors that, due to societal constructs, correlate to race—such as

³⁷ Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

³⁸ Even when removing “dirty data,” ADSs often reflect the very discriminatory behavior we sought to avoid because “[w]hat we’re doing is using the idea of eliminating individual irrational bias to allow this vast structural bias to sneak in the back door of the system.” Dave Gershgorn, *Algorithms Can’t Fix Societal Problems—and Often Amplify Them*, QUARTZ (Oct. 17, 2018), <https://qz.com/1427159/algorithms-cant-fix-societal-problems-and-often-amplify-them/>.

low-income neighborhoods or employment history—the algorithm’s outputs may nonetheless be racially skewed.³⁹ To protect against racial discrimination and bias by proxy, the Task Force must also develop recommendations, after consultation with experts and community members, so that agencies can address societal and systemic factors that contribute to discriminatory ADSs and to determine ways to mitigate the influence of proxy factors in ADSs.

7. The City Must Establish Procedures for Addressing Harms When ADSs Have an Improper Disproportionate Impact on Communities of Color or Harm Individuals Based on Biased Data

Continuing to rely on ADSs without any pre-implementation processes or safeguards,⁴⁰ such as the recommendations suggested here, risks subjecting entire communities to continued discriminatory and unconstitutional enforcement and policing practices. ADSs could be used to justify disparate treatment of communities of color in terms of how “suspicion” is defined, who is chosen as “targets” for increased enforcement and surveillance, and where these machine-learning tools are deployed—all raising significant constitutional concerns under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. The use of ADSs threatens to distort reasonable suspicion, expectation of privacy, and freedom of speech doctrines.

The use of predictive policing software, especially when combined with increased surveillance, may curtail people’s freedom of association and speech under the First Amendment. If mere association with friends and family members or “hanging out” in a “chronic crime” or “gang-prone” neighborhood are used as a factor to justify police contact and surveillance, people will be forced to alter their behavior to avoid being subjected to unwarranted police intrusion. This type of surveillance will cast an undue level of suspicion on communities, especially communities of color, that are already vulnerable to racially biased policing.

³⁹ Angwin et al., *supra* note 37; *see also* Virginia Eubanks, *A Child Abuse Prediction Model Fails Poor Families*, WIRED (Jan. 15, 2018) (noting that, though the Allegheny County Family Screening Tool intentionally took steps to avoid racial disparities in its child welfare system, the system was nevertheless biased and produced racially discriminatory results because the developers ignored a major area of societal bias in the child welfare system overall—that people report Black and biracial families to child welfare offices 350 percent more than white families, creating an influx of Black family child welfare cases at the outset), <https://www.wired.com/story/excerpt-from-automating-inequality/>.

⁴⁰ The recommendations in this section should also apply retroactively to ADSs that were implemented without the Task Force’s recommended procedural safeguards.

Further, even outside of the policing context, ADSs are being used to track and surveil communities of color in nearly every space. New York landlords have begun placing facial recognition software in buildings with predominately Black and Latinx residents.⁴¹ Indeed, at the May 30 public forum, City residents stated their landlords have installed invasive facial recognition software without their consent in the buildings where they reside, which primarily comprise Black and Latinx tenants.

Similarly, school districts throughout the country, including in New York State, are considering implementing facial recognition technology as a solution to school safety concerns.⁴² But as described above, these systems will likely reproduce racial and gender biases.⁴³ Moreover, subjecting students to constant surveillance will redefine students' experience, especially for Black and Latinx students who are already subjected to disproportionate levels of discipline and law enforcement contact in schools.⁴⁴

Finally, the City should provide individuals who may be subject to harmful decision-making that results from racially biased data a platform and procedures for redressing that harm simply and swiftly.

These potential constitutional harms further underscore why the Task Force must make bold and expansive recommendations to create procedures and safeguards to protect the public, especially vulnerable communities of color, from potential constitutional and other violations. These safeguards must be created with vulnerable communities in mind, and thus include clear, easily accessible processes for understanding the underlying data used in an ADSs, the agency responsible, and a timely option for refuting the ADSs' implementation.

⁴¹ Erin Durkin, *New York Tenants Fight as Landlords Embrace Facial Recognition Cameras*, THE GUARDIAN (May 30, 2019), <https://www.theguardian.com/cities/2019/may/29/new-york-facial-recognition-cameras-apartment-complex>.

⁴² Ava Kofman, *Face Recognition is Now Being Used in Schools, But It Won't Stop Mass Shootings*, THE INTERCEPT (May 30, 2018), <https://theintercept.com/2018/05/30/face-recognition-schools-school-shootings/>.

⁴³ Joy Buolamwini, *When the Robot Doesn't Seek Dark Skin*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/opinion/facial-analysis-technology-bias.html>.

⁴⁴ Moriah Balingit, *Racial Disparities in School Discipline are Growing, Federal Data Shows*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html?utm_term=.37019ac1be8f; see also Ajmel Quereshi and Jason Okonofua, *Locked Out of the Classroom: How Implicit Bias Contributes to Disparities in School Discipline*, LDF (2017), https://www.naacpldf.org/files/about-us/Bias_Reportv2017_30_11_FINAL.pdf.

8. The City Must Create Accountability Structures that Empower All Community Members to Participate in Pre- and Post- Acquisition Decisions About ADS

The City is experimenting on its residents by relying on ADSs to make predictions and decisions without fully understanding how these systems will affect community members. Worse, the City has not required complete ADS transparency or meaningful community engagement, thus excluding the important perspectives and opinions of the very communities that will be affected by ADSs. To date, the City has not provided sufficient mechanisms for non-agency experts and community members to be educated about, and thoroughly evaluate, all ADSs prior to implementation. The City must reaffirm its commitment to accountability and transparency by creating structures that center community members—not machines—in the decision-making process and provide them with meaningful opportunities to give feedback and input about ADSs.

9. The ADS Task Force Should Move Swiftly to Issue Its Recommendations and Request Additional Time, If Needed

Lastly, we stress the Task Force’s duty to thoroughly research and understand the many ways ADSs affect the City’s most vulnerable residents—including low-income communities and communities of color. The Task Force also has the important responsibility of ensuring that the City’s residents—including the most vulnerable ones—are well-educated about ADSs, understand how ADSs will affect their everyday life and, importantly, have ways to meaningfully voice their concerns and feedback. Finally, the Task Force must issue critical recommendations that incorporate community feedback, prevent bias and discrimination in ADS use, and establish procedures for ADS accountability and transparency. Equally important, these recommendations must include clear and concrete procedures that provide City’s residents who are impacted, or likely to be impacted, by an ADS and its underlying algorithm with the power to (1) challenge any agency’s proposed use of an ADS prior to the ADS’s implementation, (2) have access to the information and data necessary to determine whether an ADS is being implemented with or without bias, and (3) hold any City agency accountable when an ADS is not fair and equitable.⁴⁵

Commissioned in May 2018, the Task Force has only until November 16, 2019 to fulfill its mandate pursuant to Local Law 49.⁴⁶ To the extent that it

⁴⁵ NYC AUTOMATED DECISION SYSTEMS TASK FORCE, *See About ADS*, (2019), <https://www1.nyc.gov/site/adstaskforce/about/about-ads.page>.

⁴⁶ “No later than 18 months after such task force is established, it shall electronically submit to

appears unlikely that the Task Force will be able to complete its charge within this timeframe, including soliciting robust public engagement through a transparent process in which the public has the information necessary evaluate the impact of ADSs on their communities, it should seek to extend its deadline.

To date, the Task Force has not implemented a public education campaign nor solicited robust public engagement. Aside from the experts who testified during the public forums and the transcripts of these forums, the Task Force has only created a single educational resource.⁴⁷ While the “Checklist” is helpful, there are no materials identifying ADSs and explaining how agencies are using them. During both public forums, community members discussed how this lack of transparency undermines any meaningful and robust community participation. For example, how can community members meaningfully discuss and share insight about ADSs when they do not have minimal basic information about ADSs being used by agencies and how those ADSs operate? Indeed, during the May 30 forum, one Task Force member agreed that failing to include this foundational information undermines soliciting community input. Instead, community members generally remain unaware of the implications that ADSs may have on their daily lives.

Moreover, although it has been more than a year since the creation of the Task Force, it has yet to hold a community session events, or even release details—for example, dates, times, and locations—about holding any community sessions. The Task Force must do better. The Task Force cannot successfully understand the impact of ADSs on the New Yorkers who have and will continue to be targeted and exploited with ADSs—which are primarily communities of color—without rigorous, targeted, and substantive outreach, education and engagement in these communities.

Additionally, the Task Force should tailor its efforts to educate and include community members in its deliberations to ensure New Yorkers will understand the gravity of ADSs. The Task Force should ensure it and its experts use plain language to educate the public about ADSs, rather than academic or technical language, and that events are publicized well in advance and held in locations or frequented by and easily accessible to the communities likely to be affected by biased ADSs.

Overall, the Task Force has significant work to do in the next five months. Because this work is critical and affects all New Yorkers, we urge the Task Force to dedicate the time and resources to it that this task merits. By the same token,

the mayor and the speaker of the council a report” Local Law 49.

⁴⁷ Checklist, *supra* note 3.

however, the longer the Task Force takes to issue its recommendations, the longer ADSs will operate in New York without necessary guidance on fairness, transparency, and accountability. Accordingly, we strongly urge the Task Force to move swiftly and diligently in issuing its recommendations without compromising the necessary information gathering and careful study that this undertaking requires, and the City's residents deserve. Further, given the limited transparency about ADSs, coupled with the well-documented concerns and harms, the Task Force should consider issuing interim recommendations that use of all ADSs be suspended until the Task Force completes its charge.

Conclusion

In closing, the NYPD's use of ADSs already creates an unprecedented expansion of police surveillance. While the expansion implicates all residents' privacy rights, the burdens and harms are not evenly shared among City residents. Communities of color, particularly Black and Latinx residents, will continue to be disproportionately subjected to profiling, policing, and punishment to the extent that ADSs replicate the biases of the current criminal legal system and law enforcement practices.

Worse, these harms are not limited to the criminal legal system alone. Other City agencies are relying on ADSs to make decisions about education enrollment, child welfare risk and safety assessment, public benefits enforcement, risk assessment for pre-trial decisions, and much more. These systems impact a majority of New York City residents' lives.

Nevertheless, to date, the City has failed to provide necessary public education and information about these systems. Moreover, these systems are being deployed without effective mechanisms for public participation in pre- and post-acquisitions decisions and without regard for the widely known societal and structural racism that persists in nearly every area of life in the City. This current situation is untenable. Residents cannot be subjected to experimental testing of new technology that is being used to guide decision-making processes without rigorous safeguards to ensure accountability and transparency. Implementing and relying on these systems without understanding their impact, particularly their racial justice impact, will exacerbate the current inequities throughout the City.

The rapid, unchecked deployment of ADSs without effective mechanisms for public input, independent oversight, or the elimination of racial discrimination and bias is unacceptable. Data and technology should not be weaponized by New York City against its residents. Accordingly, this Task Force should make recommendations that hold agencies accountable for ensuring that all ADSs—including ADSs currently in use and any future ADSs—are transparent, fair, and

free from racial discrimination and bias.

Thank you for considering these recommendations. If you have any questions, please contact us at 212-965-2200.

Respectfully submitted,

A handwritten signature in blue ink, consisting of a stylized, cursive 'J' followed by a horizontal line extending to the right.

Janai Nelson
Associate Director Counsel