New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738

T 212.965.2200
F 212.226.7592

www.naacpldf.org

Washington, D.C. Office
700 14th Street, NW, Suite 600
Washington, D.C. 20005

T 202.682.1300
F 202.682.1312

LDF
DEFEND EDUCATE EMPOWER

July 20, 2021

Submitted via electronic mail (Arya.Hariharan@mail.house.gov)

Chairwoman Sheila Jackson Lee
House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

Ranking Member Andy Biggs
House of Representatives
171 Cannon House Office Building
Washington, DC 20515

RE: July 13, 2021 Subcommittee on Crime, Terrorism, and Homeland Security Hearing on Law Enforcement Use of Facial Recognition Technology

Dear Chairwoman Jackson Lee and Ranking Member Biggs:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we submit this letter for the record in connection with the July 13, 2021 hearing held by the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security titled "Facial Recognition Technology: Examining Its Use by Law Enforcement."

LDF is the nation's first and foremost civil rights legal organization devoted to racial justice. Since its founding in 1940, LDF has worked at the national, state, and local levels to achieve 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 forged longstanding partnerships with advocates, activists, and attorneys to challenge and reform unlawful and discriminatory policing practices across the country, including law enforcement's use of technology and automation in a racially discriminatory manner.[2]

[1] *About Us*, NAACP LDF, https://www.naacpldf.org/about-us/; *see also*, *Shepherd v. Florida*, 341 U.S. 50 (1951) (reversing the convictions of Black men falsely accused of raping a white woman in 1949 after sheriff's deputies brutally beat the men to force them to falsely confess).

[2] *See e.g., LDF Sends Letter Expressing Concerns Over NYPD's Compliance with the P.O.S.T. Act*, NAACP LDF (February 24, 2021), https://www.naacpldf.org/news/ldf-sends-letter-expressing-concerns-over-nypds-compliance-

With this extensive experience, we submit this letter to highlight the disproportionate threat that facial recognition technology imposes on communities of color when used by law enforcement. Due to the concerns highlighted below, law enforcement agencies should not be authorized to use facial recognition technology.

1. Both Historically and in Present-Day, Law Enforcement Practices Have Disproportionately Criminalized Black and Brown Communities

There is a history of police surveilling and racially targeting Black people and communities of color in the United States. Today, law enforcement practices continue to produce racial disparities and police violence towards communities of color.

The first police forces in the United States were infamously formed to patrol enslaved people and preserve the system of slavery.[3] Throughout our history, American law enforcement forces have used state power to track, monitor and control the lives and movements of Black people.[4] Specifically, police have enforced segregation and Jim Crow laws, supported the disenfranchisement of Black Americans, and used their power and tools to inflict brutal force, unlawfully arrest, and criminalize Black and Brown communities.[5] These decades-long patterns

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with-the-post-act/; *Testimony of Janai Nelson before the NYC Automated Decision Systems Task Force* (April 30, 2019), https://www1.nyc.gov/assets/adstaskforce/downloads/pdf/ADS-Public-Forum-Comments-NAACP-LDF.pdf; *Public Comment on the NYPD's Draft Impact & Use Policies for the Criminal Group Database and Social Network Analysis Tools* (February 25, 2021), https://ccrjustice.org/sites/default/files/attach/2021/02/Written%20Comment%20on%20NYPD%27s%20Draft%20and%20Use%20Policies%20for%20the%20Gang%20Database%20and%20Social%20Network%20Analysis%20Tools_BXD_CCR_LAS_LDF.pdf (joining Bronx Defenders, Center for Constitutional Rights, and the Legal Aid Society to address the impact and use of the NYPD's Criminal Group Database and Social Network Analysis Tools).

[3] Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017), https://time.com/4779112/police-history-origins/ ("In the South, however, the economics that drove the creation of police forces were centered not on the protection of shipping interests but on the preservation of the slavery system."); *The History Of Policing And Race In The U.S. Are Deeply Intertwined*, NPR (June 13, 2020), https://www.npr.org/2020/06/13/876628302/the-history-of-policing-and-race-in-the-u-s-are-deeply-intertwined.

[4] *See* Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, AMERICAN BAR ASSOCIATION (January 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/; Jill Lepore, *The Invention of Police,* THE NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police ("Progressive-era policing criminalized blackness . . . police patrolled Black neighborhoods and arrested Black people disproportionately; prosecutors indicted Black people disproportionately; juries found Black people guilty disproportionately; judges gave Black people disproportionately long sentences.").

[5] *See* Waxman, *supra* note 3; *see generally*, ELIZABETH K. HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S (2021).

of discrimination and violence at the hands of law enforcement sparked widespread protests against police brutality in the early 1960s, throughout the 20th century, and they continue today.[6]

Racially discriminatory police practices are still prevalent.[7] While former Minneapolis police officer Derek Chauvin's callous murder of George Floyd and the subsequent widespread public outcry drew the nation's attention to deep-seated racism in policing, many other victims of discriminatory police violence remain unknown. Numerous U.S. Department of Justice (DOJ) investigations, state and federal courts findings, and reports have documented patterns of unconstitutional, unlawful, and/or racially discriminatory policing practices.[8] Police killings are the sixth leading cause of death in Black men,[9] and people of color make up 46% of all arrests and 57% of all those incarcerated nationwide.[10]

Facial recognition technology risks exacerbating these racially discriminatory policing practices by expanding the reach of law enforcement into Black and Brown communities using unreliable and faulty technology. If law enforcement is permitted to continue using these technologies, it will perpetuate and likely increase the systemic racism reflected in historic and current policing practices.

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[6] The Watts Riots of the 1960s are a glaring example of uprisings that spawned from police violence. *See* Morgan Jerkins, *She Played a Key Role in the Police Response to the Watts Riots. The Memory Still Haunts Her—But Black History is Full of Haunting Memories,* TIME (August, 3, 2020), https://time.com/5873228/watts-riots-memory/.

[7] Radley Balko, *There's overwhelming evidence that the criminal justice system is racist. Here's the proof.*, WASHINGTON POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#DrugWar.

[8] *See e.g., Davis v. City of N.Y.*, 10 Civ. 0699 (SAS) (S.D.N.Y. May. 5, 2011); *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* (March 4, 2018), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; Civil Rights Division, U.S. Department of Justice, *Investigation of the Baltimore City Police Department* (Aug. 10, 2016), https://www.justice.gov/crt/file/883296/download; Civil Rights Division, U.S. Department of Justice, *Investigation of the New Orleans Police Department* (March 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf; Civil Rights Division, U.S. Department of Justice, *LAPD Notice of Investigation Letter* (May 8, 2000), https://www.justice.gov/crt/lapd-notice-investigation-letter.

[9] *See* Frank Edwards et. al., *Police: Sixth-leading cause of death for young Black men*, University of Michigan (Aug. 5, 2019), https://news.umich.edu/police-sixth-leading-cause-of-death-for-young-black-men/.

[10] *2019 Crime in the U.S. Report: Arrests by Race and Ethnicity*, U.S. Department of Justice (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-43.

2. Law Enforcement Use of Facial Recognition Technology Risks Disproportionally Exposing Black and Brown People to Misidentification and Perpetuates Heightened Surveillance of Their Communities

Communities of color are over-policed,[11] and law enforcement officers have far too much discretion[12] with insufficient oversight.[13] Permitting law enforcement officers and agencies to use facial recognition technology risks exacerbating already existing racial inequities and the disparate criminalization of Black and Brown people.[14] Already, police have used other forms of technology and automation to disproportionately target Black and Brown communities, reiterating historical

[11] *See* sources cited *supra* note 8; Drew Desilver et al., *10 things we know about race and policing in the U.S.*, PEW RESEARCH CENTER (June 3, 2020) https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/ ("Black adults are about five times as likely as whites to say they've been unfairly stopped by police because of their race or ethnicity.").

[12] *See e.g.,* DOJ investigative report into the Ferguson Police Department (March 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (noting the influx of police arrests of Black residents for charges within the officer's discretion; "Ferguson police 'persistently exercise[d] discretion to the detriment of African Americans'"); *see also* Jeffrey S. Nowacki, *Police discretion, organizational characteristics, and traffic stops: An analysis of racial disparity in Illinois*, 21 INTERNATIONAL JOURNAL OF POLICE SCIENCE AND MANAGEMENT 1, 4-16 (2019), https://journals.sagepub.com/doi/pdf/10.1177/1461355719832617 (noting similar trends of increased police traffic stops and subsequent charges on African American motorists, when the stop or charge relied upon police discretion, prompting the phrase "driving while Black").

[13] *See* Degroff & Cahn, *An Early Assessment of Community Control of Police Surveillance Laws*, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT (February 10, 2021), https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/602430a5ef89df2ce6894ce1/1612984%20485653/New+CCOPS+On+The+Beat.pdf (noting that while some local and state ordinances have begun to require oversight on police use of technology, compliance is limited, and noting the lack of a governing and uniform oversight guidance); *see also,* Petition at 3, *Amnesty International v. N.Y.C. Police Department* (N.Y.S. filed July 15, 2021), https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/60f0cf1946c0d74f87da1cc7/1626394396185/Verified+Petition.pdf (suing New York City Police Department over the agency's refusal to disclose public records about its acquisition of facial recognition technology and other surveillance tools); *see also*, Leandra Bernstein, *America has 18,000 police agencies, no national standards; experts say that's a problem*, WJLA (June 9, 2020), https://wjla.com/news/nation-world/america-has-18000-police-agencies-no-national-standards-experts-say-thats-a-problem.

[14] *See generally* Degroff & Cahn, *supra* note 13; *see also* Radley Balko, *There's overwhelming evidence that the criminal justice system is racist. Here's the proof.*, WASHINGTON POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#DrugWar.

trends. For example, predictive policing tools,[15] drones,[16] license plate readers,[17] aerial surveillance,[18] surveillance cameras,[19] and shot spotters,[20] have all been used disproportionately against, and resulted in heightened surveillance, over-policing, and/or increased arrest or incarceration, of communities of color.[21]

Furthermore, law enforcement use of facial recognition technology has resulted in the wrongful incarceration of people of color. Facial recognition algorithms frequently are unable to recognize or misidentify individuals with darker skin, features often associated with Black individuals, women, and people who are transgender or nonbinary, resulting in increased error rates in the technology's application to these groups.[22] In fact, a report by the National Institute of Standards and Technology found that Black and Asian individuals may be between ten and up to *one hundred* times more likely to be misidentified by facial recognition technology than white

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[15] 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-policingdisclosure; *see also* Will Douglas Heaven, *Predictive Policing Algorithms are Racist. They Need to be Dismantled*, MIT TECHNOLOGY REVIEW (July 17, 2020), https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/.

[16] Faine Greenwood, *How to regulate police use of drones*, BROOKINGS (September 24, 2020), https://www.brookings.edu/techstream/how-to-regulate-police-use-of-drones/ (describing law enforcement's use of drones to spy on alleged drug deals and homeless encampments, and to arrest three Black Lives Matter protesters).

[17] George Joseph, *What Are License-Plate Readers Good For? Automatic plate-readers catch few terrorists or violent criminals, but do plenty of harm to low-income communities of color*, BLOOMBERG NEWS (August 5, 2016), https://www.bloomberg.com/news/articles/2016-08-05/license-plate-readers-catch-few-terrorists-but-lots-of-poor-people-of-color.

[18] Denise Lavoie, *Court finds Baltimore aerial surveillance unconstitutional*, ASSOCIATED PRESS (June 24, 2021), https://apnews.com/article/baltimore-courts-503b2eb629abf94c25edf4111baf64bd.

[19] Surveillance city: NYPD can use more than 15,000 cameras to track people using facial recognition in Manhattan, Bronx and Brooklyn, AMNESTY INTERNATIONAL (June 3, 2021), https://www.amnesty.org/en/latest/news/2021/06/scale-new-york-police-facial-recognition-revealed/ (NYC's cameras are concentrated in neighborhoods with 54% Black and 30% Hispanic populations).

[20] Todd Feathers, *Gunshot-Detecting Tech Is Summoning Armed Police to Black Neighborhoods*, VICE (July 19, 2021), https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black-neighborhoods?fbclid=IwAR3W9CjNa1QVLHk8JrutFG85RKIwHYcBAfuqTRVv5iSziwkh-uyC4sa43qg (finding that ShotSpotter frequently generates false alerts and deployed almost exclusively in non-white neighborhoods).

[21] Rashida Richardson, et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 NYU L. REV. 192 (2019), https://www.nyulawreview.org/wpcontent/uploads/2019/04/NYULawReview-94-Richardson-Schultz-Crawford.pdf.

[22] Tom Simonite, *The Best Algorithms Struggle to Recognize Black Faces Equally*, WIRED (July 22, 2019), https://www.wired.com/story/best-algorithms-struggle-recognize-black-faces-equally/; Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU (July 26, 2018), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28; Joy Buolamwini, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, *in* 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1, 1–15 (2018), http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.

men, depending on the algorithm used.[23] In the policing context, these misidentifications are particularly dangerous because they can result in false arrests and wrongful incarceration.[24]

Additionally, despite an algorithm's inaccuracy in identifying people of color, when using facial recognition technologies, law enforcement officers are able to submit *any* photo of an unidentified person to a facial recognition algorithm.[25] This may include a poor and low-quality security camera photo, social media photos covered with filters, hand-drawn composite and artist sketches, and even police-edited photos where officers have digitally inserted, removed, or edited facial features.[26] This calls into question the credibility of the photos used and compounding the risk of misidentification.

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[23] *See* Patrick Grother et al., *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, NATL. INST. STAND. TECHNOL. INTERAG. INTERN. REP. 8280, 2 (December 2019), https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf (evaluating 189 software algorithms from 99 developers on their ability to correctly identify individuals in 1) one-to-one matching and 2) one-to-many matching, two of the most common uses of facial recognition technology); *see also* Nat'l Inst. of Standards & Tech., *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software* (Dec. 19, 2019), https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software.

[24] *See e.g.* Complaint at 1, *Williams v. City of Detroit*, No. 2:19-cv-12538 (E.D. Mich. Mar. 24, 2021), ECF No. 1 https://www.aclumich.org/sites/default/files/field_documents/001_complaint_1.pdf (Mr. Williams' lawsuit against the City of Detroit due to wrongful arrest using facial recognition technology); Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, NEW YORK TIMES (updated Jan, 6, 2021), https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html; Elisha Anderson, *Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn't Commit*, DETROIT FREE PRESS (July 11, 2020), https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-recognition-detroit-michael-oliver-robert-williams/5392166002/.

[25] *See* Clair Garvey, *Garbage In, Garbage Out: Facial Recognition on Flawed Data*, GEORGETOWN CENTER ON LAW AND PRIVACY (May 16, 2019), https://www.flawedfacedata.com/ (noting that NYPD and other agencies have used 3D software to "complete," "normalize" and/or rotate partial images of faces that are turned away from the camera to run a search using facial recognition technology).

[26] *Id.* (citing examples of policing conducting a Google search for Black features and manually adding them onto the photo and also noting that, because the algorithm cannot distinguish between the parts of the face that were in the original photo and the parts that were either computer generated or added in by a detective, the original photo could represent 60% of a suspect's face, and yet the algorithm could return a possible match assigned a 95% confidence rating, suggesting a high probability of a match to the detective running the search); *see also* NYPD, *Real Time Crime Center FIS Presentation: Partial Face* (Sept. 17, 2018), Document pp. 025423, 025466 https://drive.google.com/file/d/18yVMSMAblqcE_nAlGf9XRlUnik8xWOh_/view ("The goal was to create an image which highlighted the pronounced facial features of the suspect in this image. [Hairline, Forehead, Brows, and Nose]. The FIS Investigator utilized the head of [redacted] in the previous case mentioned because of the similarities to the hairline and forehead. Both photos were combined within the Photoshop software and a Virtual Probe was created."); Brendan F. Klare et al., *Matching Forensic Sketches to Mug Shot Photos*, 33 IEEE TRANSACTIONS ON PATTERN ANALYSIS AND MACHINE INTELLIGENCE 639, 645 (March 2011) (addressing the difficulty of using forensic sketches with facial recognition because "[f]orensic sketches are often an incomplete and poor portrayal of the subject's face.").

There are no defined limits on how or when in their investigative processes law enforcement agencies may use these misidentifications or "possible" matches from facial recognition technology to identify, apprehend, or arrest suspects. And even if an agency specifies in its departmental policy that returned matches from facial recognition technology must be coupled with additional evidence corroborating the assumed identity, there are no federal guidelines on what additional evidence is needed before police can arrest the "identified" person from the search.[27] Accordingly, in many instances people of color are being subjected to wrongful criminal arrest and prosecution due to faulty and discriminatory identifications using facial recognition technology.[28] While Mr. Robert Williams testified during the hearing about his harrowing wrongful arrest and detention resulting from police use of facial recognition technology, we do not know how many other people have been similarly impacted.[29] Coupling the risk and harms of facial recognition technology inaccurately identifying communities of color, with the racial biases and discrimination already reflected in law enforcement and the criminal legal system more broadly, makes law enforcement's use of this technology particularly dangerous for Black and Brown communities.[30]

Even if facial recognition technology accurately identified people of all races, ethnicities, and genders, it is still too dangerous to permit its use by law enforcement. Increasingly, law enforcement agencies use tools that facilitate mass surveillance, such as networks of cameras and drones, in predominantly Black and Brown neighborhoods and cities.[31] Complex networks of

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[27] Lauren Feiner and Annie Palmer, *Rules Around Facial Recognition and Policing Remain Blurry*, CNBC (June 12, 2021), https://www.cnbc.com/2021/06/12/a-year-later-tech-companies-calls-to-regulate-facial-recognition-met-with-little-progress.html (Discussing how Congress has not passed any laws regulating police use of facial recognition technology in the year since Amazon, Microsoft, and IBM committed to halting the sale of facial recognition software to police departments).

[28] *See* sources cited *supra* note 24.

[29] *See* Facial Recognition Technology: Examining it's Use By Law Enforcement, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, 117 Cong. (July 13, 2021) (Testimony of Robert Williams), https://docs.house.gov/meetings/JU/JU08/20210713/113906/HMTG-117-JU08-Wstate-WilliamsR-20210713.pdf (Williams, a Black man, testified that police arrested him at his home and held him in jail for over 30 hours based on an erroneous facial recognition identification).

[30] *See* Degroff & Cahn, *supra* note 13; BRIAN JEFFERSON, DIGITIZE AND PUNISH: RACIAL CRIMINALIZATION IN THE DIGITAL AGE (2020), https://www.jstor.org/stable/10.5749/j.ctvz0h9s7 (highlighting the increased number of Black people registered in police databases and therefore exposed to increased criminalization; "[d]igital databases, not detention centers . . . are becoming the leading edge of criminal justice in the United States. While more than 2 million people are incarcerated . . . the Bureau of Justice Statistics estimates that 100,596,300 names are stored in criminal history databases. In some cities, *80 percent* of the black male population is registered in these databases."); *see also* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 139 (2017) ("[R]acial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact but also to the violence of serious bodily injury and death.").

[31] *See* AMNESTY INTERNATIONAL, *supra* note 19 (noting that NYC's cameras are concentrated in neighborhoods with 54% Black and 30% Hispanic populations); *see also* Noah Urban et al., *A Critical Summary of Detroit's Project Green*

thousands of cameras span entire neighborhoods, allowing for the police monitoring of an individual's every move the moment they step outside their homes.[32] Adding facial recognition to these already-invasive law enforcement tools permits the identification of nearly all persons in the surveilled area and allows police to record individuals' daily routines, associations, locations, and movements—all without having any individualized suspicions of criminal activity in violation of the Constitution.[33] For example, the Fourth Circuit recently considered the use of the Baltimore Police Department's aerial surveillance system that "track[ed] every movement' of every person outside in Baltimore" and was akin to "'attaching an ankle monitor' to every person in the city."[34] For the Baltimore residents living in neighborhoods, police now had "'an intimate window' into each person's associations and activities."[35] The Court found that, because the aerial surveillance technology "enable[d] police to deduce from the whole of individuals' movements," the agency's accessing of its data amounted to a warrantless search, violating the Fourth Amendment.[36]

Law enforcement agencies have also used the heightened surveillance abilities that facial recognition technology provides to target Black activists who speak out about biased policing and police brutality, such as members of Black Lives Matter groups.[37] In fact, six federal law enforcement agencies reported using facial recognition technology for criminal investigations related to the 2020 nationwide protests against police brutality.[38] In August 2020 for example,

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Light and its Greater Context, DETROIT COMMUNITY TECHNOLOGY PROJECT (June 9, 2019), https://detroitcommunitytech.org/system/tdf/librarypdfs/DCTP_PGL_Report.pdf?file=1&type=node&id=77&force= ("There is a legitimate fear regarding what [facial recognition] would look like in a majority black city such as Detroit."); Timothy Williams, *Can 30,000 Cameras Help Solve Chicago's Crime Problem?*, NEW YORK TIMES (May 26, 2018), https://www.nytimes.com/2018/05/26/us/chicago-police-surveillance.html ("It's now been normalized for these [low-income] communities to be under constant surveillance, which contributes to the criminalization of people.").

[32] *See* AMNESTY INTERNATIONAL, *supra* note 19; *see also Leaders of a Beautiful Struggle v. Balt. Police Dep't*, No. 20-1495, 2021 U.S. App. LEXIS 18868 (4th Cir. June 24, 2021) (finding the Baltimore Police Department's surveillance system violates the Fourth Amendment because persistent surveillance of outdoor movements invades people's reasonable expectation of privacy).

[33] *Leaders of a Beautiful Struggle*, *supra* note 32; *see also* Amy Harmon, *As Cameras Track Detroit's Residents, a Debate Ensues About Racial Bias,* NEW YORK TIMES (July 8, 2019), https://www.nytimes.com/2019/07/08/us/detroit-facial-recognition-cameras.html.

[34] *Id.* at 24.

[35] *Id.* at 36 (explaining that "allowing the police to wield this power unchecked is anathema to the values enshrined in our Fourth Amendment.").

[36] *Id.* at 4, 34.

[37] Jordan Williams, *Watchdog: Six Federal Agencies Used Facial Recognition Software to ID George Floyd Protesters*, THE HILL (June 29, 2021), https://thehill.com/policy/technology/560805-watchdog-6-federal-agencies-used-facial-recognition-software-to-id-george.

[38] *See* United States Government Accountability Office, *Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks* GAO-21-518 at 17-18 (June 2021), https://www.gao.gov/assets/gao-21-518.pdf ("Following the death of George Floyd while in the custody of the Minneapolis, Minnesota police department on May 25, 2020, nationwide civil unrest, riots, and protests occurred. Six

officers used facial recognition technology to cross-reference footage from protests with online images to identify Derrick Ingram, a Black activist who led a protest against police brutality in June 2020.[39] This resulted in over 50 police officers surrounding Ingram's apartment and according to him, officers deployed drones, police dogs and two helicopters for several hours before leaving.[40] While police surveillance and violence against Black protestors is not new,[41] law enforcement's ability to identify protestors at the scale that facial recognition allows is a new and dangerous phenomenon. Law enforcement's unfettered use of this technology during protests risks chilling protected First Amendment activity of targeted groups which frequently include religious and ethnic minorities,[42] and subjects them to a greater risk of police harm.[43]

Overall, law enforcement's use of facial recognition technology creates a great risk that communities of color will increasingly be wrongly identified and subject to disparate criminal enforcement or a "surveillance state" where law enforcement monitors and tracks their movements, associations *en masse*, and chills their dissent.

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agencies told us that they used images from these events to conduct facial recognition searches during May through August 2020 in order to assist with criminal investigations.").

[39] Aristos Georgiou, *Black Lives Matter Activist Hunted by NYPD Facial Recognition Technology*, NEWSWEEK (August 8, 2020), https://www.newsweek.com/black-lives-matter-activist-hunted-facial-recognition-technology-1525335.

[40] *Id.*; *see also* Adrienne Green, *The Room Where It Happened: Derrick Ingram is still shut inside the Hell's Kitchen apartment the police tried to invade*, NEW YORK MAGAZINE (May 25, 2021), https://nymag.com/intelligencer/2021/05/derrick-ingram-nypd-standoff.html (describing the 5 hour encounter and noting that though police later charged Ingram with third degree assault, it was reduced to a misdemeanor and eventually dismissed), and Katie Shepherd, *An artist stopped posting protest photos online to shield activists from police. Then, he was arrested.*, WASHINGTON POST (August 3, 2020), https://www.washingtonpost.com/nation/2020/08/03/philadelphia-arrest-protest-photos/ (describing others targeted by police after police used facial recognition technology to identify them from footage derived from protests).

[41] Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAGAZINE (July 27, 2017), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/ ("Aggressive dispersion tactics, such as police dogs and fire hoses, against individuals in peaceful protests and sit-ins were the most widely publicized examples of police brutality in that era. But it was the pervasive violent policing in communities of color that built distrust at a local, everyday level.").

[42] KIen Klippenstein, *Leaked FBI Documents Reveal Bureau's Priorities Under Trump*, THE YOUNG TURKS (August 8, 2019), https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR ("The documents, . . . reference a mysterious plan to mitigate the threat of 'Black Identity Extremists' with a program codenamed 'IRON FIST' involving the use of undercover agents.").

[43] *See* Facial Recognition Technology (I): Its Impact on Our Civil Rights and Liberties: Hearing Before the Committee on Oversight and Reform, 116th Cong., at 5–6 (2019) (statement of Andrew G. Ferguson, Professor of Law, University of the District of Columbia, David A. Clarke School of Law); *id.* at 7–9 (statement of Clare Garvie, Senior Associate, Georgetown University Law Center, Center on Privacy & Technology); *id.* at 9–11 (statement of Neema Singh Guliani, Senior Legislative Counsel, American Civil Liberties Union).

3. Law Enforcement's Expansive Use of Facial Recognition Technology is Largely Hidden, Allowing Police to Collect, Disclose, and Run an Individual's Personal Information Against Multiple Databases Without Their Knowledge, Implicating Privacy Concerns and Leaving Impacted Victims Unable to Contest or Remedy Resulting Harms

The opacity surrounding facial recognition technology—its creation, and the boundaries (or lack thereof) on its use—largely leaves the public in the dark about its use.[44] Additionally, because law enforcement agencies publicly report little to no information about officers' searches or use of technology, this also creates an obstacle in accessing information about the extent of law enforcement use of facial recognition technology.

At least one facial recognition technology company, Clearview AI, mines public platforms and/or photo databases, such as social media platforms and security footage for the datasets supporting its technology—all without the captured person's knowledge or consent.[45] A person's face could be used to create and train a facial recognition algorithm without them ever uploading a photo or consenting to its use.[46] When facial recognition technology is then shared with law enforcement agencies, police may run hundreds of thousands of searches for an identification, using any photo, against a broad range of available databases, without those in the database ever being informed of law enforcements' access to these photos, or use of such searches.[47] If the technology correctly identifies the individual, their identifying biometric information is then available for use across multiple law enforcement agencies, at the discretion of police, at the push

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[44] *See* Feiner and Palmer, *supra* note 27; *see also* Andrew Wyrick, *NYPD sued for refusing to disclose records about facial recognition use*, DAILY DOT (July 21, 2020), https://www.dailydot.com/debug/nypd-facial-recognition-lawsuit-stop/.

[45] Kashmir Hill, *The Secretive Company That Might End Privacy As We Know It*, NEW YORK TIMES, (Updated March 18, 2021), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html; *see also* Drew Harwell, *This facial recognition website can turn anyone into a cop – or a stalker*, WASHINGTON POST (May 14, 2021), https://www.washingtonpost.com/technology/2021/05/14/pimeyes-facial-recognition-search-secrecy/; James Moore, *Facial recognition under scrutiny as Clearview AI's practices ruled illegal in Canada*, IFSEC GLOBAL (Feb. 16, 2021), https://www.ifsecglobal.com/video-surveillance/facial-recognition-under-scrutiny-as-clearview-ais-practices-ruled-illegal-in-canada/ (the Canadian government ruled that Clearview's collection of biometric information from its citizens without their knowledge or consent is illegal).

[46] *See e.g.,* Joseph Goldstein and Ali Walker, *She Was Arrested at 14. Then Her Photo Went to a Facial Recognition Database.*, NEW YORK TIMES (August 1, 2019), https://www.nytimes.com/2019/08/01/nyregion/nypd-facial-recognition-children-teenagers.html.

[47] Katie Canales, *Thousands of US police officers and public servants have reportedly used Clearview's controversial facial recognition tech without approval*, BUSINESS INSIDER (April 6, 2021), https://www.businessinsider.com/clearview-ai-facial-recognition-thousands-police-departments-2021-4; *S.T.O.P. Condemns NYPD for 22K Facial Recognition Searches*, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT (Oct. 23, 2020), https://www.stopspying.org/latest-news/2020/10/23/stop-condemns-nypd-for-22k-facial-recognition-searches.

of a button.[48] The FBI revealed that it has access to over 400 million photos for face matching, including the driver's license databases of over fifteen states and passport application photos.[49] And just last year, Immigration and Customs Enforcement (ICE) used facial recognition technology to mine millions of drivers' license photos without the license-holders' knowledge, allowing for a broad targeting of immigrants.[50] Since few states restrict or prohibit ICE's access to personally identifying data, and the majority allow law enforcement officials to request similar searches against their driver's license databases,[51] these intrusive warrantless searches occur in most states.[52] The combination of facial recognition technologies incorporating publicly available photo datasets and law enforcement's unrestricted use of the technology exposes people to government identification and tracking[53] without their knowledge, and largely without independent oversight.[54]

Additionally, there is very little data collected and made publicly available about the activities of individual law enforcement officers or agencies, including their use of facial recognition technology, that would permit public oversight. For example, data or information is not uniformly collected or shared publicly about officers or agencies' use of facial recognition technology to search databases and identify individuals.[55] The public does not know the demographic characteristics of persons searched, the justification for each search, what technology was used, how the search was conducted, or the outcomes of searches.[56] Subsequently, individuals

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[48] Alfred Ng, *Police Say They Can Use Facial Recognition, Despite Bans*, THE MARKUP (January 28, 2021), https://themarkup.org/news/2021/01/28/police-say-they-can-use-facial-recognition-despite-bans (explaining that the current patchwork of local bans on facial recognition technology still allows law enforcement agencies to easily share information gathered via facial recognition technology).

[49] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-267, FACE RECOGNITION TECHNOLOGY: FBI SHOULD BETTER ENSURE PRIVACY AND ACCURACY (May 2016), https://www.gao.gov/assets/680/677098.pdf.

[50] Catie Edmundson, *ICE Used Facial Recognition to Mine State Driver's License Databases*, NEW YORK TIMES (July 9, 2017), https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html.

[51] *See* Testimony Before the Comm. on Oversight and Reform, House of Representatives, *Facial Recognition Technology: DOJ and FBI Have Taken Some Actions in Response to GAO Recommendations to Ensure Privacy and Accuracy, But Additional Work Remains* GAO-19-579T at 2, 5-6 (2019) (statement of Gretta L. Goodwin), https://www.gao.gov/assets/gao-19-579t.pdf (since 2011 the FBI has logged more than 390,000 facial recognition searches of federal and local databases, including state DMV databases).

[52] *See* Edmundson, *supra* note 50.

[53] Ryan Mac et al., *Clearview's Facial Recognition App Has Been Used By The Justice Department, ICE, Macy's, Walmart, And The NBA*, BUZZFEED NEWS (February 27, 2020), https://www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement.

[54] Clare Garvie, *Garbage In, Garbage Out: Face Recognition On Flawed Data*, GEORGETOWN CENTER ON LAW AND PRIVACY (May 16, 2019), https://www.flawedfacedata.com ("There are no rules when it comes to what images police can submit to face recognition algorithms to generate investigative leads.").

[55] *See supra* note 32.

[56] *See* Garvie, *supra* note 54 ("The NYPD made 2,878 arrests pursuant to face recognition searches in the first 5.5 years of using the technology [,] Florida law enforcement agencies . . . run on average 8,000 searches per month of the Pinellas County Sheriff's Office face recognition system, [but] many other agencies do not keep close track of how many times their officers run face recognition searches and whether these searches result in an arrest.").

have little room to understand the extent that facial recognition played in law enforcement activity, recourse to challenge its use, or the ability to contest abuses or errors.[57]

Law enforcement's unfettered use of facial recognition technology allows for an expansive reach that raises serious privacy concerns because it allows law enforcement officials to collect, disclose, and use an individual's personal information from multiple databases without their knowledge.[58] As explained above, the burden of this harm falls disproportionately on Black and Brown communities.

4. Law Enforcement Officers and Agencies Should Not Be Permitted to Use Facial Recognition Technology

In the wake of the murder of George Floyd and the resulting outcry, much remains to be done to end systemic racism[59] and police violence in our public safety systems. Law enforcement's use of facial recognition technology cannot be addressed without a reckoning of the systemic racism and police violence in our current public safety systems in the United States. Until we transform our public safety systems, law enforcement's use of facial recognition technology will only exacerbate the systemic harm that officers and agencies cause to communities of color even without such technology.

Recognizing these dangers, multiple cities across the country[60] have rightfully implemented a complete ban on law enforcement's use of facial recognition technology.[61] San Francisco's "Stop Secret Surveillance Ordinance" warned of its propensity to "exacerbate racial injustice and threaten our ability to live free of continuous government monitoring."[62] Similarly, Maine enacted the country's strongest statewide facial recognition law, banning the use of the technology in most areas of government, and explicitly applying the ban to law enforcement

[57] Aaron Mak, Facing Facts: A case in Florida demonstrates the problems with using facial recognition to identify suspects in low-stakes crimes, SLATE (January 25, 2019), https://slate.com/technology/2019/01/facial-recognition-arrest-transparency-willie-allen-lynch.html.
[58] *See e.g.*. Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2921 (2002) (outlining privacy protections for citizens' personal information); *see also* GAO Report, *supra* note 51 (discussing the privacy implications of federal agencies use of facial recognition technology).
[59] *See* sources cited *supra* note 8 (listing multiple DOJ investigation and federal and state court decisions, all finding racially discriminatory police practices in police departments across the country).
[60] David Gutman, *King County Council bans use of facial recognition technology by Sheriff's Office, other agencies*, SEATTLE TIMES (June 1, 2021), https://www.seattletimes.com/seattle-news/politics/king-county-council-bans-use-of-facial-recognition-technology-by-sheriffs-office-other-agencies/.
[61] *Ban Facial Recognition Map: Bans*, FIGHT FOR THE FUTURE, https://www.banfacialrecognition.com/map/.
[62] Sarah Emerson, *San Francisco Bans Facial Recognition Use by Police and the Government*, VICE (May 14, 2019), https://www.vice.com/en/article/wjvxxb/san-francisco-bans-facial-recognition-use-by-police-and-the-government.

agencies.[63] At least 7 states have prohibited some law enforcement use[64] and multiple other jurisdictions have imposed at least a moratorium on law enforcement's use of facial recognition technology.[65] Amazon, Microsoft, and IBM, stopped selling facial recognition technology to law enforcement agencies.[66] These governmental and private actions to cease supporting law enforcement use of facial recognition were taken due to concerns regarding the legitimate dangers of such use. The federal government should follow suit.

Conclusion

Allowing law enforcement agencies to use this invasive and faulty technology threatens to exacerbate, and effectively ignores the documented dangers of systemic racism in America's law enforcement.[67] We must not equip law enforcement with the tools to weaponize data and technology against our communities, particularly when such use reinforces racial bias and discriminatory conduct. We urge this Subcommittee to address police accountability, brutality, and the over-policing of Black and Brown communities before authorizing law enforcement use of facial recognition technology. Attempts to address law enforcement's use of facial recognition technology must confront and first end racially disparate policing practices that have been found in agencies nationwide and the police violence disproportionately experienced by communities of color.

Thank you for considering these recommendations. We look forward to continuing to work with this Subcommittee on this critical issue of law enforcement use of facial recognition technology. If you have any questions, please contact Katurah Topps, Policy Counsel, at

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[63] L.D. 1585 (H.P. 1174), An Act to Increase Privacy and Security by Regulating the Use of Facial Surveillance Systems by Departments, Public Employees and Public Officials (June 17, 2021) http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1174&item=2&snum=130.

[64] Julie Carr Smyth, *States Push Back Against Use of Facial Recognition by Police*, U.S. NEWS AND WORLD REPORT (May 5, 2021), https://www.usnews.com/news/politics/articles/2021-05-05/states-push-back-against-use-of-facial-recognition-by-police; Susan Crawford, *Facial Recognition Laws Are (Literally) All Over the Map*, WIRED (Dec. 16, 2019), https://www.wired.com/story/facial-recognition-laws-are-literally-all-over-the-map/ ("California joined New Hampshire and Oregon in prohibiting law enforcement from using facial recognition and other biometric tracking technology in body cameras. Illinois passed a law that permits individuals to sue over the collection and use of a range of biometric data, including fingerprints and retinal scans as well as facial recognition technology. Washington and Texas have laws similar to the one in Illinois, but don't allow for private suits.").

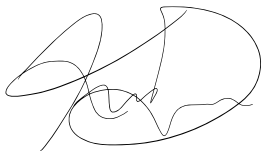
[65] *Ban Facial Recognition Map: Other Laws, State & Local*, FIGHT FOR THE FUTURE, https://www.banfacialrecognition.com/map.

[66] Rebecca Heilweil, *Big tech companies back away from selling facial recognition to police. That's progress.*, VOX (June 11, 2020), https://www.vox.com/recode/2020/6/10/21287194/amazon-microsoft-ibm-facial-recognition-moratorium-police.

[67] Emily Kwong, *Short Wave: Why Tech Companies Are Limiting Police Use of Facial Recognition*, NATIONAL PUBLIC RADIO (Feb. 18, 2021), https://www.npr.org/2021/02/17/968710172/why-tech-companies-are-limiting-police-use-of-facial-recognition.

ktopps@naacpldf.org or (212) 965-2200, or Puneet Cheema, Manager of the Justice in Public Safety Project at pcheema@naacpldf.org or (646) 574-5666.

Sincerely,



Lisa Cylar Barrett, Director of Policy

Puneet Cheema, Manager of Justice in Public Safety Project

Katurah Topps, Policy Counsel

cc: Members of the Subcommittee on Crime, Terrorism, and Homeland Security

New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738

T 212.965.2200
F 212.226.7592

www.naacpldf.org

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Washington, D.C. Office
700 14th Street, NW, Suite 600
Washington, D.C. 20005

T 202.682.1300
F 202.682.1312

September 10, 2021

Submitted via electronic mail (ai-bias@list.nist.gov)

National Institute for Standards and Technology
Attn: Information Technology Laboratory
100 Bureau Drive
Gaithersburg, MD 20899-2000

RE: Comments on NIST Special Publication 1270 "A Proposal for Identifying and Managing Bias in Artificial Intelligence"

To Whom It May Concern:

On behalf of the NAACP Legal Defense & Educational Fund, Inc. ("LDF"), we submit the following comments in response to the National Institute of Standards and Technology's ("NIST") Special Publication 1270, "A Proposal for Identifying and Managing Bias in Artificial Intelligence" ("Proposal").

Founded by Thurgood Marshall in 1940, LDF is the nation's first and premier civil rights legal organization devoted to racial justice. Since its founding, LDF has worked at the national, state, and local levels to pursue racial justice and eliminate structural barriers for Black people in America in the areas of criminal justice, economic justice, education, and political participation.[1] In each of these areas, emerging technologies, including artificial intelligence ("AI") and machine learning, have directly threatened the rights, freedoms, and dignity of Black people and other marginalized communities. In collaboration with advocates, activists, and attorneys, LDF has challenged these practices and the use of technology and automation in a racially discriminatory manner.[2] With this experience, we submit the below comments and recommendations to improve

[1] *About Us*, NAACP Legal Def. & Educ. Fund, https://www.naacpldf.org/about-us/; *see also Shepherd v. Florida*, 341 U.S. 50 (1951) (reversing the convictions of Black men falsely accused of raping a white woman in 1949 after sheriff's deputies brutally beat the men to force them to falsely confess).

[2] *See e.g.*, NAACP Legal Def. & Educ. Fund, *LDF Sends Letter Expressing Concerns Over NYPD's Compliance with the P.O.S.T. Act* (February 24, 2021), https://www.naacpldf.org/news/ldf-sends-letter-expressing-concerns-over-nypds-compliance-with-the-post-act/; Press Release, NAACP Legal Def. & Educ. Fund, *Civil Rights Groups Call for Strong Guardrails in Hiring Assessment Technologies* (July 29, 2020) https://www.naacpldf.org/press-release/civil-rights-groups-call-for-strong-guardrails-in-hiring-assessment-technologies/; Letter from LDF, AI Blindspot, and other civil rights, consumer, technology, and advocacy organizations to Fed. Banking Reg. Agencies, (July 1, 2021), https://nationalfairhousing.org/wp-content/uploads/2021/07/Federal-Banking-Regulator-RFI-re-AI_Advocate-Letter_FINAL_2021-07-01.pdf (regarding the agencies' request for information and comment related to financial institutions' use of artificial intelligence); Letter from Megan Haberle, Sr. Policy Counsel., NAACP Legal Def. & Educ. Fund, to Kathleen M. Pennington, Acting Assoc. Gen. Counsel. for Fair Housing, (Aug. 23, 2021) https://www.regulations.gov/comment/HUD-2021-0033-0215; *Testimony of Janai Nelson before the NYC Automated*

New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738
T. (212) 965 2200
F. (212) 226 7592
www.naacpldf.org

LDF
DEFEND EDUCATE EMPOWER

Washington, D.C. Office
700 14th Street, NW,
Suite 600
Washington, D.C. 20005
T. (202) 682 1300
F. (202) 682 1312

the Proposal and ensure that AI developers, as well as practitioners, experts, community stakeholders, and impacted communities, are best positioned to prevent AI systems from perpetuating systemic racial injustice.

We commend NIST for its creation of the Proposal and its larger commitment to develop standards and a comprehensive framework to address the prevalence of bias within AI systems. The Proposal seeks to manage AI bias by evaluating the three stages of an AI lifecycle: 1) the pre-design stage, 2) the design and development stage, and 3) the deployment stage. This approach, however, excludes several critical dimensions which are necessary to protect the rights of people who will be impacted by AI, including: (a) accounting for the historic and contemporary context of systemic racial bias and discrimination and its relationship to technology; (b) the application of civil and human rights law to AI design and use; (c) an expansion of the parameters used to determine when AI tools should not be developed or deployed, including a holistic analysis of law enforcement agencies' use of AI tools, and (d) the incorporation of expertise from impacted communities and remedial approaches, such as reparative justice, that address both individual and community-level harms that result from AI bias and discrimination.

I. The Proposal Should Include Greater Context on the Historic and Contemporary Relationship Between Racial Inequality and Technological Innovation.

The Proposal recommends that developers design front-end technical fixes to AI models to mitigate demographic statistical disparities. However, even when front-end fixes are included, the use of AI in a system with pre-existing bias and discrimination will likely result in AI tools exacerbating those pre-existing disparities, unless those pre-existing disparities and discrimination are accounted for and addressed beforehand.[3] Genuine efforts to reduce bias from AI tools or their use must begin with an in-depth understanding of historic and contemporary practices that perpetuate systemic bias and harm in the context that the AI tool at issue will be deployed. Racial

Decision Systems Task Force (April 30, 2019), https://www1.nyc.gov/assets/adstaskforce/downloads/pdf/ADS-Public-Forum-Comments-NAACP-LDF.pdf; Public Comment on the NYPD's Draft Impact & Use Policies for the Criminal Group Database and Social Network Analysis Tools (February 25, 2021), https://ccrjustice.org/sites/default/files/attach/2021/02/Written%20Comment%20on%20NYPD%27s%20Draft%20and%20Use%20Policies%20for%20the%20Gang%20Database%20and%20Social%20Network%20Analysis%20Tools_BXD_CCR_LAS_LDF.pdf (joining Bronx Defenders, Center for Constitutional Rights, and the Legal Aid Society to address the impact and use of the NYPD's Criminal Group Database and Social Network Analysis Tools).

[3] *See infra*, Section III, noting the various ways that pre-existing forms of racial bias in law enforcement practices are exacerbated by and replicated in law enforcement use of AI tools; *see generally* Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 BERKELEY TECH. L. REV. 101, 119-20 (2021) [hereinafter Racial Segregation]; Charlton McIlwain, *Of Course Technology Perpetuates Racism, It Was Designed That Way*, MIT TECH. REV. (June 3, 2020), https://www.technologyreview.com/2020/06/03/1002589/technology-perpetuates-racism-by-design-simulmatics-charlton-mcilwain/ [hereinafter McIlwain].

New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738
T. (212) 965 2200
F. (212) 226 7592
www.naacpldf.org

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Washington, D.C. Office
700 14th Street, NW,
Suite 600
Washington, D.C. 20005
T. (202) 682 1300
F. (202) 682 1312

bias infects nearly every area of American life, including housing,[4] education,[5] employment,[6] family services,[7] healthcare,[8] and more. The introduction of AI into the systems, actors, and decisions in each of these areas will likely replicate and entrench structural racial disadvantages. While we agree that biased datasets and other technical dimensions of AI development drive racially-biased outcomes, and therefore should be addressed when exploring solutions to reduce bias and discrimination, doing so without addressing the decades of documented discriminatory practices engrained in American systems turns a blind eye to the role of AI in perpetuating racism.[9]

To fully understand the contemporary challenges of AI bias and racial discrimination, it is necessary to examine and account for the longstanding, historical relationship between science and technology and systems of racial oppression. In the antebellum period, the plantation economy was sustained through data management and actuarial techniques to predict the decline in productivity over the lifespan of an enslaved person.[10] This historic relationship persisted through the turn of the century with the growing popularity of scientific racism, which deployed racist pseudoscience to justify and reproduce racial hierarchies based upon quantified notions of racial difference.[11] Scientific racism was a predicate to a host of atrocities, including forced sterilizations

[4] Danyelle Solomon et. al, *Systemic Inequality: Displacement, Exclusion, and Segregation, How America's Housing System Undermines Wealth Building in Communities of Color*, CENTER FOR AMERICAN PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/.

[5] *See e.g.*, Press Release, NAACP Legal Def. & Educ. Fund, *LDF Defends Black High School Student Against Discriminatory Hair Policy in Preliminary Injunction Hearing*, (July 22, 2020) https://www.naacpldf.org/press-release/ldf-defends-black-high-school-student-against-discriminatory-hair-policy-in-preliminary-injunction-hearing/.

[6] Danyelle Solomon et. al, *Systemic Inequality and Economic Opportunity*, CENTER FOR AMERICAN PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/.

[7] Vivek Sankaran, *With Child Welfare, Racism is Hiding in the Discretion*, The Imprint, (June 21, 2021), https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616.

[8] Khiara M. Bridges, *Implicit bias and Racial Disparities in Healthcare*, American Bar Association, Human Rights Magazine, Vol. 43 No. 3, The State of Healthcare in the United States.

[9] *See e.g.*, *Racial Segregation supra* note 3; Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 633–71 (2017).

[10] Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. Times Mag., (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html.

[11] Yeshimabeit Milner and Amy Traub, *Data Capitalism + Algorithmic Racism* 8-9, DATA FOR BLACK LIVES & DEMOS (2021), https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf [hereinafter Data Capitalism].

New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738
T. (212) 965 2200
F. (212) 226 7592
www.naacpldf.org

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700 14th Street, NW,
Suite 600
Washington, D.C. 20005
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for Black people,[12] race-based medical experimentation,[13] eugenics,[14] and segregation.[15] The relationship between science and technology and racial oppression can also be seen in the development of various media technologies. Some of the earliest viral videos, sounds, and images of the 20th century coincided with the production and dissemination of racist iconography in film, radio and photography.[16] In the 20th century, public agencies, such as the Fair Housing Authority, continued to deploy innovative practices in data science to support racist practices such as redlining.[17] This history demonstrates how the development of science and technology in the United States contributed to, and provided validation for, systemic racial oppression and continues to contribute to current inequities. The Proposal must ensure that the development and management of AI investigates and confronts this historical context and take deliberate steps to end discriminatory practices.

The Proposal also does not sufficiently frame the current magnitude of racial bias and discrimination emanating from existing AI systems. The Proposal notes that, without management, historic data and measurement biases "*may* produce unjust outcomes for racial and ethnic minorities."[18] However, AI bias and discrimination impose deep and long-lasting, present-day challenges in all areas of life for people impacted by them. In fact, algorithmic bias and discrimination are among the most urgent challenges to protecting the civil and human rights of Black communities.[19] Despite this, public and private actors increasingly rely on AI systems to

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[12] *See e.g.*, Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS: INDEP. LENS (Jan. 29, 2016) https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/; Prelim. Rep., The Governor's Task Force to Determine the Method of Compensation for Victims of North Carolina's Eugenics Board, to the Governor of the State of North Carolina, 5-6 (2011) (noting how Black women accounted for a disproportionate amount of those sterilized at the hands of North Carolina's Eugenics Board), available at https://ncadmin.nc.gov/about-doa/special-programs/welcome-office-justice-sterilization-victims.

[13] *See* HARRIET A. WASHINGTON, THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT (2008).

[14] *Id*.; *see also* Dorothy Roberts, Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-First Century (2012).

[15] *See generally*, Racial Segregation, *supra* note 9; Data Capitalism *supra* note 11.

[16] ETHNIC NOTIONS (Marlon Riggs 1992); *see generally* Karen Sotiropoulos, Staging Race: Black Performers in Turn of the Century America (2008).

[17] *See Educational Redlining*, Student Borrower Protection Ctr., (Feb. 2020), https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf; Danielle Douglas-Gabriel, *Senate Democrats Raise Concerns About Educational Redlining in Student Lending*, WASH. POST, (July 31, 2020), https://www.washingtonpost.com/education/2020/07/30/senate-democrats-raise-concerns-about-educational-redlining-student-lending/.

[18] Reva Schwartz et. al., Draft NIST Spec. Pub. 1270, *Proposal for Identifying and Managing Bias in Artificial Intelligence*, National Institute for Standards and Technology, at 3-4, https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270-draft.pdf [hereinafter NIST Proposal].

[19] *See* Sahajveer Baweja & Swapnil Singh, *Beginning of Artificial Intelligence, End of Human Rights*, LSE (July 16, 2020) https://blogs.lse.ac.uk/humanrights/2020/07/16/beginning-of-artificial-intelligence-end-of-human-rights/ (noting how "[t]hese phenomena of bias and discrimination – rooted in a cluster of technologies and embedded in social systems – are a threat to universal human rights," specifically highlighting that since "AI disproportionally affects the human rights of vulnerable individuals and groups by facilitating discrimination," that AI presents "a new form of oppression rooted in technology"); Peter K. Yu, *The Algorithmic Divide and Equality in the Age of Artificial*

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40 Rector Street, 5th Floor
New York, NY 10006-1738
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automate a range of decision-making processes that impact access to services in systems with historic and contemporary racially discriminatory practices—like housing,[20] employment,[21] credit,[22] and education,[23] to name a few—resulting in automated bias. The ubiquitous embrace of automated technologies within systems that are "already known to be discriminatory" is not only an "obvious risk," as the Proposal states,[24] but also comes at a time when we are only beginning to understand the range of harms that the combination of powerful technologies and discriminatory systems impose.

AI technologies continue to be deployed in ways that threaten the lives of Black and Brown people by enlarging systems of mass surveillance, falsely criminalizing them, and threatening their democratic participation. [25] These threats reveal a core dilemma with AI technology – AI tools rely on technical processes that transpose patterns of historic oppression into unjust futures. This challenge is at the heart of why efforts to regulate technologies must proceed with explicit considerations of the historic and contemporary systems of racial bias and oppression in which AI will be deployed.

Intelligence, 72 Fla. L. Rev. 331, 333-34 (2020) ("Despite the tremendous promise of machine learning and artificial intelligence, algorithms and intelligent machines do not provide equal benefits to all.").

[20] Compl. at 2, 31-32, *Nat'l. Fair Hous. All. v. Facebook*, No. 1:18-cv-02689 (S.D.N.Y. 2018) (alleging discriminatory practices that allow advertisers to preclude certain demographic populations from receiving Facebook housing ads based on familial status, gender, disability, and national origin).

[21] *See* Alex Engler, *Auditing Employment Algorithms For Discrimination*, BROOKINGS, (Mar. 12, 2021), https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination/; Allison Koenecke et. al., *Racial Disparities In Automated Speech Recognition*, Institute for Computational & Mathematical Engineering, Stanford University (April 7, 2020), https://www.pnas.org/content/pnas/117/14/7684.full.pdf.

[22] Press Release, LDF, NAACP Legal Defense and Educational Fund and Student Borrower Protection Center Announce Fair Lending Testing Agreement with Upstart Network (Dec. 1, 2020) https://www.naacpldf.org/press-release/naacp-legal-defense-and-educational-fund-and-student-borrower-protection-center-announce-fair-lending-testing-agreement-with-upstart-network/.

[23] Neil Bedi and Kathleen McGrory, *Pasco's Sheriff Uses Grades and Abuse Histories to Label Schoolchildren Potential Criminals. The Kids and Their Parents Don't Know*, TAMPA BAY TIMES, (Nov. 19, 2020), https://projects.tampabay.com/projects/2020/investigations/police-pasco-sheriff-targeted/school-data/ [hereinafter Pasco County Sheriff]; Todd Feathers, Major Universities Are Using Race as a "High Impact Predictor" of Student Success, THE MARKUP (Mar. 2, 2021, 8:00 AM), https://themarkup.org/news/2021/03/02/major-universities-are-using-race-as-a-high-impact-predictor-of-student-success.

[24] NIST Proposal *supra* note 18, at 7.

[25] *See* Leadership Conf. on Civ. and Human Rts. et. al., *Civil Rights Concerns Regarding Law Enforcement Use of Face Recognition Technology*, (June 3, 2021), https://newamericadotorg.s3.amazonaws.com/documents/FINAL_Civil_Rights_Statement_of_Concerns_LE_Use_of_FRT_June_2021.pdf; Claire Garvey et. al., *The Perpetual Line-Up*, The Center on Privacy & Technology at Georgetown Law, (Oct. 18, 2016), https://www.perpetuallineup.org/; *see generally* BRIAN JEFFERSON, DIGITIZE AND PUNISH: RACIAL CRIMINALIZATION IN THE DIGITAL AGE (2020), https://www.jstor.org/stable/10.5749/j.ctvz0h9s7 [hereinafter Digitize and Punish].

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II. The Proposal Should Be Grounded in Civil and Human Rights Principles and Law and Offer Guidance for Designing Remedies in Response to Biased and Discriminatory Practices.

The Proposal must embrace existing civil and human rights legal principles to prevent bias within AI and other emerging technologies, and these legal principles must be applied throughout the entire lifecycle of AI technologies. The Proposal must also include steps that developers and practitioners should undertake to ensure AI systems are compliant with civil and human rights principles and law.

Grounding the Proposal's definition(s) of bias in existing civil and human rights legal principles is critical for several reasons. First, antidiscrimination law imposes concrete legal obligations that actively shape how AI technologies must be developed, marketed, and deployed.[26] AI technologies cannot be designed or deployed in ways that violate civil and human rights, irrespective of the system's technical capacities. Further, noncompliance can expose developers and practitioners to legal action. Despite this, the Proposal does not meaningfully address existing legal obligations beyond the risk management framework for AI systems.[27] And notably, the Proposal contains scarce reference to the vast body of statutes, regulations, judicial opinions, and other authoritative sources that have refined and developed concepts of bias and discrimination in the law.[28] The absence of an analysis on *AI discrimination*, especially racial discrimination, within the Proposal is an alarming omission. AI systems routinely facilitate legally cognizable forms of discrimination across each stage of the AI life cycle, making AI-generated discrimination, in addition to AI bias, one of the most urgent civil rights challenges.[29]

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[26] *See* Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, FTC Blog (Apr. 19, 2021), https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai. *See generally* U.S. Gov't Accountability Off., GAO-21-518, *Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks* (2021), https://www.gao.gov/assets/gao-21-518.pdf [hereinafter GAO Report].

[27] While the Proposal addresses AI bias in a general sense, it fails to address the challenges presented by AI discrimination as distinct from AI bias.

[28] *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); Voting Rights Act, 52 U.S.C.S. §§ 10301-311; Civil Rights Act of 1968, Publ. Law 90-284, 82 Stat. 73; Fair Housing Act, 42 U.S.C. 3601; Equal Credit Opportunity Act, 15 U.S.C. 1691 et seq.; Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

[29] *See e.g.*, *Civil Rights Advocates Settle Lawsuit with Facebook: Transforms Facebook's Platform Impacting Millions of Users*, NAT'L. FAIR HOUS. ALL. (Last visited Sept. 3, 2021 at 11:13 AM EST). https://nationalfairhousing.org/facebook-settlement/; *HireVue, Facing Complaint from EPIC, Halts Use of Facial Recognition*, ELEC. PRIV. INFO. CTR. (Jan. 12, 202), https://epic.org/2021/01/hirevue-facing-ftc-complaint-f.html; Press Release. New Report Warns of "Educational Redlining" by FinTech Student Lender Systematically Overcharging Borrowers Who Attend Historically Black Colleges and Universities, NAACP LEGAL DEFENSE AND EDUC. FUND, (Mar. 25, 2021), https://www.naacpldf.org/press-release/new-report-warns-of-educational-redlining-by-fintech-student-lender-systematically-overcharging-borrowers-who-attend-historically-black-colleges-and-universities/; Cyrus Farivar, *Tenant Screening Software Faces National Reckoning*, NBC NEWS, (Mar. 14, 2021). https://www.nbcnews.com/tech/tech-news/tenant-screening-software-faces-national-reckoning-n1260975; Complaint *Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols.*, (Apr. 24, 2018), https://www.documentcloud.org/documents/20454612-govuscourtsctd12502110.

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Embracing civil and human rights law offers NIST critical, interdisciplinary guidance that is lacking from the Proposal's current conceptualization of AI bias. For example, the Proposal describes how AI developers' use of "proxy" criteria, such as "criminality" and "employment suitability," obscures normative choices made about the types of data incorporated into models.[30] The Proposal further notes that the use of such proxy criteria raises a host of ethical and technical concerns related to the validity and accuracy of these data heuristics, as well as fundamental questions about whether existing AI and algorithmic technologies are even capable of capturing complicated, and often contested, social concepts.[31] However, beyond ethical and technical concerns, civil and human rights law imposes a range of legal obligations with respect to the use of proxies—obligations that the Proposal failed to address. For example, the Equal Credit Opportunity Act, Fair Credit Reporting Act, and the Fair Housing Act prohibit intentional discrimination against protected classes, and these prohibitions apply to close proxies for those protected classes.[32] Civil and human rights principles and legal obligations are essential guardrails to the development of AI systems. The Proposal must make clear that these obligations extend across the lifecycle of AI technologies and that failure to comply with those obligations can expose developers and practitioners to legal action.

NIST should borrow more explicitly from the interdisciplinary insights offered by the civil and human rights community and work in a collaborative fashion to translate those concepts into shared language, future standards and measurements, and concrete remedies to redress potential harms. As the Proposal correctly notes, algorithmic bias and discrimination can impact both individuals *and* communities in ways that warrant accountability and redress. However, the Proposal does not outline how AI developers and practitioners can approach designing remedies for biased and discriminatory practices. For example, the Proposal provides the example of a hypothetical ride-sharing app that charges customers higher prices for destinations in low-income communities of color.[33] Such differentiated pricing has a direct impact on the entire community, irrespective of whether community members use the service or not.[34] These community-level harms are particularly alarming because oftentimes machine learning and AI systems rely on historic data, rife with historic patterns of racial bias and discrimination, to operationalize their

[30] NIST Proposal *supra* note 18, at 3.

[31] *Id.*

[32] *See* Relman Colfax, *Fair Lending Monitorship of Upstart Network's Lending Model: Initial Report of the Independent Monitor*, at 6-8 and n 12, (Apr. 14, 2021), https://www.relmanlaw.com/media/cases/1088_Upstart%20Initial%20Report%20-%20Final.pdf; *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n. 23 (9th Cir. 2013); *Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994) ("Where a government erects a local preference that has the effect of filtering only a small percentage of minorities to the locally preferred area, such government action is suspect to being a proxy for race and therefore a barrier to racial minorities who wish to integrate into suburban life. This allegation is sufficient to show injury and causation for purposes of Article III standing on the constitutional claims.").

[33] NIST Proposal *supra* note 18, at 10.

[34] For example, neighborhood business owners may lose potential customers, or families in the community may be impacted because of the stigma that the differentiated pricing suggests about the safety or desirability of the neighborhood.

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technologies, further perpetuating systemic discrimination.[35] One approach to address these challenges is the application of a reparative justice lens onto future standards and frameworks.[36]

III. The Proposal Must Broaden its "Reject Development" Parameters to Include Technologies That May Result in Discriminatory Harm, Particularly When Used by Law Enforcement.

The Proposal's current framework for reducing bias in AI primarily centers around technological fixes for each stage of an algorithm's life cycle. However, this method misses a critical factor: the use of AI by systems and actors who engage in biased or discriminatory practices—such as law enforcement agencies—and the ways their use of these technologies may impact marginalized communities.

Since its inception, policing in the United States has reflected racially discriminatory practices against Black communities.[37] From patrolling and capturing slaves and enforcing segregation and Jim Crow laws, to the hyper-criminalization, surveillance, and mass incarceration of communities of color, police in America have used their power to disproportionately target, oppress, brutalize, and control.[38] Coupling these law enforcement practices with law enforcement agencies' use of modern technology reinforces racialized police violence and the disparate

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[35] *See generally*, Rashida Richardson, et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. Rev. 192 (2019) https://www.nyulawreview.org/wp-content/uploads/2019/04/NYULawReview-94-Richardson-Schultz-Crawford.pdf [hereinafter Dirty Data]; Julia Angwin, et. al., Machine Bias, PROPUBLICA (May 23, 2016) https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing; *Liberty at Risk : Pre-Trial Risk Assessment Tools in the U.S.* at 3, ELEC. PRIV. INFO. CTR. (Sept. 2020), https://epic.org/LibertyAtRisk/LibertyAtRisk-Sept2020.pdf.

[36] Reparative justice is a remedial approach embraced by a growing set of institutional actors seeking to address the systemic harms emanating from their participation in historic patterns of racial injustice. *See Exploring the Path to Reparative Justice in America: Hearing on H.R. 40 Before the H. Subcomm. on the Const., Civ. Rts., and C.L. of the H. Comm. on the Judiciary*, 117th Cong. (2021), available at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4367; Georgetown University, *Georgetown Reflects on Slavery, Memory, and Reconciliation*, (last visited Sept. 8, 2021), https://www.georgetown.edu/slavery/.

[37] Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017), https://time.com/4779112/policehistory-origins/; Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, AM. BAR ASSOC., (Jan. 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimaginingpolicing/how-you-start-is-how-you-finish/.

[38] *See e.g.*, Hassett-Walker, *supra* note 38; Brita Belli, *Racial Disparity in Police Shootings Unchanged Over 5 Years*, YaleNews, (Oct. 2020), https://news.yale.edu/2020/10/27/racial-disparity-police-shootings-unchanged-over-5-years; Deidre McPhillips, Deaths From Police Harm Disproportionately Affect People of Color, U.S. News, (June 3, 2020), https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color; Frank Edwards et al., *Police: Sixth-leading Cause of Death for Young Black Men*, University of Michigan (August 5, 2019), https://news.umich.edu/police-sixth-leading-cause-of-death-for-young-black-men/German Lopez, *There are Huge Racial Disparities in How US Police Use Force*, (Nov. 14, 2018), https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities.

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criminalization of Black and Brown people.[39] For example, law enforcement agencies across the country have concentrated entire networks of sophisticated surveillance cameras in predominantly Black cities and neighborhoods, allowing officers to monitor and surveil entire communities with technology. [40] The intricate aerial surveillance system in Baltimore, for example, "track[ed] every movement of every person outside in Baltimore" and was akin to "attaching an ankle monitor' to every person in the city."[41] Similarly, law enforcement agencies have filled digital databases with extensive lists of Black and Brown residents, their photos, and identifying information—often without their awareness.[42] Placement in police databases is then used to justify increased police encounters, violent police raids, harsher sentences, and other intrusive law enforcement

[39] McIlwain, *supra* note 3; Nick Cummings-Bruce, *U.N. Panel: Technology in Policing Can Reinforce Racial Bias*, N.Y. Times (Dec. 7, 2020), https://www.nytimes.com/2020/11/26/us/un-panel-technology-in-policing-can-reinforce-racial-bias.html; Dirty Data, *supra* note 34, at 8-12, 40-42.

[40] *See, e.g., Leaders of a Beautiful Struggle v. Balt. Police Dep't.*, No. 20-1495, 2021 U.S. App. LEXIS 18868 (4th Cir. June 24, 2021) [hereinafter Leaders of a Beautiful Struggle]; Alfred Ng, In the "Blackest City in America," a Fight to End Facial Recognition, CNET, (July 2, 2020) (finding that Detroit, a city that is 80% Black, uses a system of surveillance that disproportionately focuses on the city's Black residents despite yielding a high rate of false alarms and relatively few arrests), https://www.cnet.com/news/in-the-blackest-city-in-america-a-fight-to-end-facial-recognition; Amnesty Int'l, *Surveillance City: NYPD Can Use More than 15,000 Cameras to Track People Using Facial Recognition in Manhattan, Bronx and Brooklyn*, (June 3, 2021) (reporting that New York City's most heavily surveilled neighborhood, East New York, is 84.4% Black and Hispanic and just 8.4% white), https://www.amnesty.org/en/latest/news/2021/06/scale-new-york-police-facial-recognition-revealed [hereinafter Surveillance City]; Press Release, Ban Dangerous Facial Recognition Technology that Amplifies Racist Policing, Amnesty Int'l, (Jan. 26, 2021) (finding that, "Black people are also most at risk of being misidentified by facial recognition systems."), https://www.amnesty.org/en/latest/press-release/2021/01/ban-dangerous-facial-recognition-technology-that-amplifies-racist-policing.

[41] *Leaders of a Beautiful Struggle*, *supra* note 41, at 24 (finding BPD's surveillance system violates the Fourth Amendment because persistent surveillance of outdoor movements invades people's reasonable expectation of privacy and for the Baltimore residents, police now had "'an intimate window' into each person's associations and activities.").

[42] Over 95% of the people in Chicago and New York City's police departments' gang databases are Black and Brown. *See* Janaé Bonsu and Andy Clarno, *Tracked and Targeted: Early Findings on Chicago's Gang Database* at 2, POLICING IN CHI. RSCH. GRP. (Feb. 2018), https://soc.uic.edu/wp-content/uploads/sites/197/2018/07/Tracked-Targeted-0217-r.pdf, (finding that Chicago's "CLEAR" gang database "include[ed] over 128,000 individuals, 90,208 of whom are Black, 31, 873 are Hispanic and less than 6,000 are White."); K. Babe Howell, Gang Policing: *The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 UNIV. OF DENVER CRIM. L. REV. 1, 16 (2015), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1067&context=cl_pubs (finding that "[a]pproximately 48% of the individuals added to the [NYPD's Gang Database] between 2003 and 2013 were identified by the NYPD as [B]lack, another 42% Hispanic[.]"). Similarly, California's statewide gang database is 90% Black and/or Hispanic. *See* Zak Cheney-Rice, *California Police Are Falsely Labeling People as Gang Members. It's Part of a Bigger Crisis*, INTELLIGENCER (Jan. 7, 2020), https://nymag.com/intelligencer/2020/01/lapd-falsely-labeling-gang-members.html (stating that "[t]he database is roughly 90 percent people of color (who comprise 45 percent of the state's population) and is notoriously opaque."). The City of Los Angeles has been banned from using the gang database because of its racially disproportionate impact. *See* Anita Chabria et al., *California Bars Police from using LAPD Records in Gang Database. Critics Want it Axed.*, L.A. TIMES (July 14, 2020), https://www.latimes.com/california/story/2020-07-14/california-bars-police-from-using-lapd-records-in-gang-database-as-scandal-widens (discussing the revocation of the Los Angeles Police Department's access to "about a quarter of the records in the secretive database, which contains names and personal information of about 80,000 people, mostly Black and Brown men).

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activities.[43] This practice of stopping, collecting data from, and later tracking Black and Brown individuals through police databases is so common that, while more than 2 million people are currently incarcerated, the Bureau of Justice Statistics estimates that over 100 million names are stored in criminal history databases, with *80 percent of the black male population registered in these databases* in some cities.[44]

Further, law enforcement agencies consistently deploy algorithmic technologies in ways that are wholly inconsistent with ethical science and good governance.[45] For example, despite repeated warnings that popular facial recognition systems exhibit racial bias and enhance racialized surveillance, a recent Government Accountability Office report revealed that at least 20 different federal law enforcement agencies owned or used facial recognition technologies and face matching databases containing over 800 million images.[46] Another report revealed that over 1,800 agencies, including hundreds of law enforcement agencies, piloted the use of Clearview AI's facial recognition software.[47] This is despite Clearview's controversial database encompassing more than 3 billion images scraped without the permission or awareness of the individual pictured and its use across law enforcement agencies without regulations or civilian or government oversight.[48] Notably, several law enforcement agencies have been found to have misused facial recognition technology by creating false images of Black faces and facial features to run against the software

[43] *See e.g.*, Testimony of NAACP Legal Defense & Edu'l Fund, Inc. and Center for Const'l. Rights before the NYC Council on the NYPD's Gang Takedown Efforts (June 13, 2018) https://web.archive.org/web/20181009111929/http://www.naacpldf.org/files/case_issue/City%20Council%20Testimony%20combined%206.13.18.pdf.

[44] *See* Digitize and Punish *supra* note 24 (highlighting the increased number of Black people registered in police databases and therefore exposed to increased criminalization and noting that "[d]igital databases, not detention centers . . . are becoming the leading edge of criminal justice in the United States. While more than 2 million people are incarcerated . . . the Bureau of Justice Statistics estimates that 100,596,300 names are stored in criminal history databases. In some cities, *80 percent* of the black male population is registered in these databases."); *see also* Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2014 at 30, Criminal Justice Information Policy, (Dec. 2015) https://www.ojp.gov/pdffiles1/bjs/grants/249799.pdf (finding that there were over 100,500,000 names in U.S. criminal databases.).

[45] *See, e.g.*, Kathleen McGrory and Neil Bedi, *Targeted: Pasco's Sheriff Created a Futuristic Program to Stop Crime Before It Happens. It Monitors and Harasses Families Across the Country*, TAMPA BAY TIMES (Sept. 3, 2020), https://projects.tampabay.com/projects/2020/investigations/police-pasco-sheriff-targeted/intelligence-led-policing/; Ángel Díaz, *New York City Police Department Surveillance Technology*, BRENNAN CTR. FOR JUST. (Oct. 7, 2019), https://www.brennancenter.org/sites/default/files/2019-10/2019_NewYorkPolicyTechnology.pdf.

[46] GAO Report *supra* note 25 at 16, 18.

[47] The 1,803 publicly funded agencies whose employees are listed as having used or tested Clearview's controversial policing tool between 2018 and February 202, overwhelmingly includes local and state police, and the US Immigration and Customs Enforcement. The agencies also include the Air Force, state healthcare organizations, offices of state attorneys general, and public schools. *See* Ryan Mac et al., *Surveillance Nation*, BUZZFEED NEWS, (Apr. 9, 2021), https://www.buzzfeednews.com/article/ryanmac/clearview-ai-local-police-facial-recognition [hereinafter Clearview in Hundreds of US Police Depts.].

[48] *Id.* (noting that Clearview's datasets are derived from online photos online, such as those on Facebook, Instagram, and LinkedIn); Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Mar. 18, 2021), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html.

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to facilitate enforcement actions against a Black person.[49] To date, law enforcement agencies have disproportionately used facial recognition,[50] predictive policing software,[51] drones,[52] license plate readers,[53] autonomous aerial surveillance,[54] surveillance cameras,[55] and gunshot detection technology[56] in Black and Brown communities which results in increased surveillance, harassment, and criminalization.[57]

These examples make clear that AI tools, even those without "dirty" datasets or technical failings, will nevertheless produce racially biased outcomes if law enforcement uses them to

[49] *See* Clair Garvey, *Garbage In, Garbage Out: Facial Recognition on Flawed Data*, GEORGETOWN CENTER ON LAW AND PRIVACY (citing examples of police conducting Google searches for Black features and manually adding them onto a photo because the algorithm cannot distinguish between the parts of the face that were in the original photo and the parts that were either computer generated or added by a detective, in addition to other technological manipulations to return a possible match); *see also NYPD, Real Time Crime Center FIS Presentation: Partial Face* (Sept. 17, 2018), Document pp. 025423, 025466 (highlighting additional examples of officer manipulation of facial recognition technology).

[50] *Facial Recognition Technology: Examining it's Use by Law Enforcement*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, 117 Cong. (July 13, 2021) (Testimony of Robert Williams, a Black man, that police arrested him at his home and held him in jail for over 30 hours based on an erroneous facial recognition identification), available at https://docs.house.gov/meetings/JU/JU08/20210713/113906/HMTG-117-JU08-Wstate-WilliamsR-20210713.pdf.

[51] Electronic Frontier Foundation, *Technology Can't Predict Crime, It Can Only Weaponize Proximity to Policing*, https://www.eff.org/deeplinks/2020/09/technology-cant-predict-crime-it-can-only-weaponize-proximity-policing.

[52] Faine Greenwood, *How to regulate police use of drones*, BROOKINGS (September 24, 2020), https://www.brookings.edu/techstream/how-to-regulate-police-use-of-drones/ (describing law enforcement's use of drones to spy on alleged drug deals and homeless encampments, and to arrest three Black Lives Matter protesters).

[53] George Joseph, *What Are License-Plate Readers Good For? Automatic plate-readers catch few terrorists or violent criminals, but do plenty of harm to low-income communities of color*, BLOOMBERG NEWS (August 5, 2016), https://www.bloomberg.com/news/articles/2016-08-05/license-plate-readers-catch-few-terrorists-but-lots-of-poorpeople-of-color [hereinafter George Joseph].

[54] *Leaders of a Beautiful Struggle supra* note 41.

[55] Surveillance City *supra* note 41(noting a concentration of surveillance cameras in Black and Brown neighborhoods).

[56] Todd Feathers, *Gunshot-Detecting Tech Is Summoning Armed Police to Black Neighborhoods*, VICE (July 19, 2021), https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black-neighborhoods?fbclid=IwAR3W9CjNa1QVLHk8JrutFG85RKIwHYcBAfuqTRVv5iSziwkh-uyC4sa43qg (finding that ShotSpotter frequently generates false alerts and deployed almost exclusively in non-white neighborhoods).

[57] *See e.g.*, Jane Chung, *Racism In, Racism Out: A Primer on Algorithmic Racism*, PUBLIC CITIZEN, 2021, https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/Racism-in-Racism-out.pdf; Shira Ovide, *A Case for Banning Facial Recognition*, N.Y. Times, (Aug. 1, 2021), https://www.nytimes.com/2020/06/09/technology/facial-recognition-software.html; Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need to be Dismantled*, MIT TECH. REV. (July 17, 2020), https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/; Ezekiel Edwards, *Predictive Policing Software Is More Accurate at Predicting Policing Than Predicting Crime*, ACLU, (Aug. 31, 2016) https://www.aclu.org/blog/criminal-law-reform/reforming-police/predictive-policing-software-more-accurate-predicting; George Joseph, *supra* note 54; Naomi Ishishaka, Is Surveillance Tech Widening America's Racial Divide?, SEATTLE TIMES (Oct. 28, 2019), https://www.govtech.com/public-safety/is-surveillance-tech-widening-americas-racial-divide.html; *see also supra* Section I.

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40 Rector Street, 5th Floor
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support racially biased practices or in a racially discriminatory manner. As law enforcement agencies continue to use AI tools to execute racially discriminatory practices, Black and Brown communities will continue to suffer from irreversible harms.[58] Moreover, when viewed through the lens of historic and current anti-Black racism that plagues American policing, discriminatory results from law enforcement agencies' use of AI tools are not just "possible," but inevitable, unless active steps are taken to prevent the disparate impact and discrimination that is likely to result from the use of these technologies.

Vendors that develop and market policing technologies have been embroiled in legal controversies where impacted parties have cited a diverse set of violations, injuries, and harm. NIST must expand its proposal to consider the harm that will result from law enforcement's uniquely powerful use of AI tools. As noted above, this consideration should likewise account for the historical and contemporary role of bias and discrimination in law enforcement practices and be ground in a civil rights framework,[59] and must include the explicit option to reject a tool's development if the tool or its use risks racial discrimination.

The Proposal acknowledges that some tools' potential harms outweigh the benefits of their creation and provides a non-exhaustive set of circumstances when developers should "reject [its] development."[60] But the Proposal defines these as "extreme cases" where the technologies are "fraudulent, pseudoscientific, prey on the user, or generally exaggerate claims."[61] It also includes instances where there is "poor problem framing, basing technology on spurious correlations from data-driven approaches, failing to establish appropriate underlying mechanisms, or generally technically flawed."[62] Notably, this list excludes AI tools that directly result in discrimination. This glaring omission highlights NIST's failure to ground the Proposal in a civil and human rights framework or to factor in the magnitude of systemic racial bias into its calculations.

Against this backdrop, the Proposal's current parameters are far too narrow. Some AI tools—either independently or combined with human decision making—disproportionally subject certain groups to harmful discriminatory effects. For tools that may be used to facilitate discrimination against vulnerable or marginalized groups, bias mitigation is not sufficient.[63] In

[58] *See e.g.*, Garance Burke, et al., How AI-Powered Tech Landed Man in Jail with Scant Evidence, ASSOCIATED PRESS (Aug. 19, 2021), https://apnews.com/article/artificial-intelligence-algorithm-technology-police-crime-7e3345485aa668c97606d4b54f9b6220.

[59] *See infra* Sections I and II.

[60] NIST Proposal *supra* note 18, at 7.

[61] *Id.*

[62] *Id.*

[63] Public agencies and the courts have increasingly imposed liability on entities that use AI and other emerging technologies to facilitate systemic rights violations. See *Leaders of a Beautiful Struggle supra* note 41; Nathan Sheard, *Banning Government Use of Face Recognition Technology: 2020 Year in Review*, EFF (Jan. 3, 2021) https://www.eff.org/deeplinks/2020/12/banning-government-use-face-recognition-technology-2020-year-review; Elisa Jillson, *Aiming for Truth, Fairness, and Equity In Your Company's Use of AI*, FTC: BUS BLOG, (Apr. 19, 2021, 9:43AM) https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai (noting that under ECOA, it is illegal for a company to use a biased algorithm that results in

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New York, NY 10006-1738
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particular, given the high risk of racially discriminatory use and effect, tools that may be used by law enforcement agencies should be carefully reviewed to determine discriminatory impact.[64] The rights of people impacted by technology must be centered and prioritized when considering whether technology should be developed. This "reject development" principle is essential and has been adopted by other countries. For example, the EU applies a risk-based framework that prohibits the use of AI systems when the system or the use of that system: "contravene[es] [European] Union values," including "violating fundamental rights," or having a "significant potential to . . . exploit vulnerabilities of specific vulnerable groups," among other criteria.[65] NIST should broaden its application and fully develop this principle to provide better guidance that offers AI developers a structured process to identify when the potential harm caused by AI is too great and should not be developed.

That guidance should include common techniques, approaches, and circumstances that consistently lead to discriminatory outcomes and, therefore, should be prohibited, including the following:

1) Law enforcement use of AI for practices that may have discriminatory effects;
2) Developing AI for systems, institutions, or actors with demonstrated patterns or practices of systemic civil and human rights violations;
3) Ignoring audits, assessments, or validation studies that demonstrate discriminatory outcomes; and
4) Facilitating technological redlining.[66]

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discrimination on the basis of race, color, religion, and more); Press Release, NAACP, LDF Files Amicus Brief Supporting Rehearing *En Banc* in Lawsuit Challenging the Baltimore Police Department's Aerial Surveillance Program, (Nov. 30, 2020) https://www.naacpldf.org/press-release/ldf-files-amicus-brief-supporting-rehearing-en-banc-in-lawsuit-challenging-the-baltimore-police-departments-aerial-surveillance-program/; Michael Isaac Stein, *New Orleans City Council Bans Facial Recognition, Predictive Policing and Other Surveillance Tech*, LENS (Dec. 18, 2020) https://thelensnola.org/2020/12/18/new-orleans-city-council-approves-ban-on-facial-recognition-predictive-policing-and-other-surveillance-tech/; *ACLU v. Clearview AI* – Complaint, ACLU, (last visited Sept. 8, 2021), https://www.aclu.org/legal-document/aclu-v-clearview-ai-complaint; Irina Ivanova, I*mmigrant Rights Group Sue Facial Recognition Company Clearview AI*, CBS (Mar. 9, 2021) https://www.cbsnews.com/news/clearview-ai-facial-recognition-sued-mijente-norcal-resist/.

[64] See for example, The Proposal For A Regulation of the European Parliament and of the Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts, at Title II Section 5.2.2 (carving out specific prohibitions on the use of certain biometric identification AI systems used "for the purpose of law enforcement."), available at https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence [hereinafter European Proposal].

[65] *Id.* at sections 5.2.2 and 5.2.3 (prohibiting specific uses of AI and AI practices based on the AI systems' risk of harm to vulnerable communities and noting that "the classification [of an AI system] as high-risk does not only depend on the function performed by the AI system, but also on the specific purpose and modalities for which that system is used.").

[66] "Technological redlining" is a concept developed by Dr. Safiya Noble which describes how automated decision-making can reinforce oppressive social relationships and enable new forms of systemic racial inequality. See generally, SAFIYA NOBLE, ALGORITHMS OF OPPRESSION (2018); *see also* Nat'l Fair Hous. All., *National Fair Housing Alliance Challenges Harmful Trump Administration Reversal of Fair Housing Rule* (Oct. 22, 2020), https://nationalfairhousing.org/2020/10/22/national-fair-housing-alliance-challenges-harmful-trump-administration-

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IV. The Proposal Should Draw Upon and Incorporate the Expertise of a Broad Set of Stakeholders, Including Impacted Individuals and Communities, Civil and Human Rights Organizations, and Other Agencies with Relevant Experience.

The Proposal's current 3-prong framework for AI bias (addressing the three stages of the AI life cycle) disproportionately privileges the voices and experiences of AI developers and designers. The Proposal must instead draw upon and incorporate insight and knowledge from voices outside technology firms, media, academics, and researchers. In developing tailored guidance on the standards and risk-management frameworks for AI systems in compliance with civil and human rights, we urge NIST to collaborate with a broad set of stakeholders who bring deep expertise, including communities directly impacted by these systems and organizations advocating on their behalf, as well as public agencies with experience protecting the rights of impacted communities and with expertise in civil and human rights.

Around the country, communities continue to defy algorithmic injustice and offer alternative visions to technology-enabled systems of oppression.[67] NIST should directly engage with communities impacted by bias and discrimination, and incorporate those perspectives into this Proposal and subsequent resources, standards, and measurements. In particular, we urge NIST to consult with Black and Brown communities, organizers, and activists who are grappling with the harms of algorithmic injustice in their lives. These community stakeholders are in Baltimore,[68] New York City,[69] Pasco County, Florida.[70] and countless other jurisdictions[71] and can offer essential insights to inform NIST's approach to these issues. Civil and human rights organizations that frequently represent impacted communities may also have valuable input and should be consulted.

Interdisciplinary and interagency collaboration is also particularly important in terms of harmonizing NIST's new guidance and standards on AI bias with preexisting legal and regulatory approaches for assessing, quantifying, and measuring statistical disparities in the context of legal discrimination and bias. Federal agencies—such as the Equal Employment Opportunity

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reversal-of-fair-housing-rule/ (discussing an LDF legal challenge to a Trump-era HUD rule that severely limited the ability of plaintiffs to challenge housing discrimination in court, in part, by offering housing providers new affirmative defenses to housing discrimination, including the use of algorithms in housing decisions).

[67] *See, e.g.*, Erin Durkin, *New York Tenants Fight As Landlords Embrace Facial Recognition Cameras*, GUARDIAN (May 30, 2019, 1:00PM), https://www.theguardian.com/cities/2019/may/29/new-york-facial-recognition-cameras-apartment-complex.

[68] *Leaders of a Beautiful Struggle supra* note 41.

[69] *See, e.g.*, Communities United for Police Reform, https://www.changethenypd.org/; Grassroots Advocates for Neighborhood Groups & Solutions ("NYC G.A.N.G.S. Coalition"), https://gangscoalition.org/.

[70] *See, e.g.*, P.A.S.C.O. Coalition: People Against the Surveillance of Children and Overpolicing, S. POVERTY L. CTR., (last visited Sept. 8, 2021) https://www.splcenter.org/PASCOcoalition.

[71] *See, e.g.*, *A Critical Summary of Detroit's Project Green Light and Its Greater Context*, DETROIT CMTY. TECH. PROJECT (June 9, 2019) https://detroitcommunitytech.org/?q=content/critical-summary-detroit%E2%80%99s-project-green-light-and-its-greater-context; Eye on Surveillance, https://eyeonsurveillance.org/; Stop LAPD Spying Coalition, (last visited Sept. 8, 2021) https://stoplapdspying.org/.

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Commission, the U.S. Department of Labor, the U.S. Department of Housing and Urban Development, and the U.S. Department of Education, among others—have historically offered guidance about statistical analysis to prevent disparate outcomes impacting the rights of protected classes.[72] Courts have also developed various methods for addressing quantitative approaches for assessing disparate impact and disparate treatment. And the Federal Trade Commission has also offered guidance on ensuring algorithms are used equitably and fairly.[73] These perspectives should be incorporated into NIST's future publications related to AI bias and discrimination in the context of civil and human rights.

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Given the Proposal's failure to address the (a) historic and contemporary context of systemic racial bias and discrimination in technology; (b) the application of civil and human rights law to AI design and use; (c) a holistic analysis of when AI tools should not be developed, including a specific risk evaluation in the context of law enforcement agencies' use of AI tools, and (d) the targeted incorporation of expertise from impacted communities and other key stakeholders, we urge NIST to incorporate the following recommendations:

V. Recommendations

1. *NIST should (1) confront the historic and present-day methods of racial bias around all development and evaluation of AI and (2) center its framework on civil and human rights and develop supplemental guidance specifically addressing the implication of civil and human rights in AI. This should include interdisciplinary insights from impacted communities, relevant public agencies, and civil and human rights experts.*

2. *NIST should unequivocally state that algorithmic discrimination is unlawful, and that AI developers and practitioners have legal obligations across the lifecycle of AI to ensure rigorous compliance with civil and human rights law.*

3. *NIST should create specific processes to determine whether the development or dissemination of AI tools and systems risks civil and human rights violations. This should apply across all contexts but carry special consideration for areas with histories of racialized harm, such as law enforcement.*

4. *NIST should proactively seek out individuals with first-hand experience of AI bias and discrimination, leaders, activists, organizers, and others within marginalized communities.*

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[72] *See* EEOC Uniform Guidelines on Employee Selection Procedures 29 CFR § 1607 (1978) https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines; U.S. Dep't of Just., Just. Manual §7 (2021) https://www.justice.gov/crt/fcs/T6Manual7; V*ill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252 (1977).

[73] *See* Andrew Smith, *Using Artificial Intelligence and Algorithms*, FTC: BUS. BLOG (Apr. 8, 2020, 9:59AM) https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.

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In addition, NIST should conduct a series of targeted field visits to frontline communities to ensure the voices of those impacted by algorithmic bias and discrimination are centered.

5. *NIST should ensure that its future guidance incorporates guiding principles on the development of AI in the context of civil and human rights. Among these guiding principles, NIST should include:*

- **Transparency, Democratic Oversight, and Inclusive Design:**

AI systems are often deployed without transparency and oversight. It is imperative that NIST emphasize to the AI community that AI technologies affecting fundamental rights be fully transparent and accessible to members of the public.[74] AI developers and vendors routinely claim a proprietary interest in the underlying algorithms to their technologies which remains a major impediment to public disclosure and oversight.[75] Technologies that are deployed in ways that affect the rights of the public should be subject to public disclosure and oversight, as these are the most direct route to ensuring the voices of end-users are integrated into each phase of the lifecycle of AI systems.

- **Remedial Procedures and Reparative Justice**:

Future NIST guidance should offer the AI community concrete strategies for redressing both discrete instances and systemic patterns of AI bias and discrimination. Reparative justice is well-suited as a guiding principle here because the AI community itself benefits from the perpetuation of histories of injustice through the reliance on "dirty" data sets.

VI. Conclusion

The development of AI and emerging technologies presents an unprecedented array of challenges to protecting the civil and human rights of Black and Brown communities. Nevertheless, such civil and human rights protections must be prioritized in governing new technologies. Federal policymakers must play a more active role to protect the bulwark of our national civil rights infrastructure from being overrun by the unethical and discriminatory development and deployment of AI systems. AI technologies did not build the conditions of racial inequality in the United States, but without urgent intervention by policymakers and technologists, these technologies threaten to encode systemic racism and social inequality into our future. We urge NIST and other federal agencies, alongside Congress and the Biden Administration, to prioritize the enactment comprehensive legislation and regulations for the development of AI and other emerging technologies that respects the civil and human rights of all people.

[74] This should include emphasis on pushing practitioners to ensure members of the public are aware of their exposure to an AI tool, there must be a mechanism learn more about the context of that exposure, review mandated data reports and assessments, and critically, dispute or contest the tool's use or effect.

[75] *See* Racial Segregation, *supra* note 9, at 134-35.

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F. (202) 682 1312

Thank you for considering these comments. If you have any questions, please contact Katurah Topps, Policy Counsel, at ktopps@naacpldf.org or (212) 965-2200, or Puneet Cheema, Manager of the Justice in Public Safety Project at pcheema@naacpldf.org or (646) 574-5666.

Sincerely,

/s/ Katurah Topps

Lisa Cylar Barrett, Director of Policy
Puneet Cheema, Manager, Justice in Public Safety Project
Katurah Topps, Policy Counsel
Clarence Okoh, Equal Justice Works Fellow
NAACP Legal Defense & Educational Fund, Inc.
40 Rector St. 5th Floor,
New York, New York 10006