



**Testimony of Janai S. Nelson
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**Before the United State House of Representatives
Committee on Homeland Security**

**Hearing on
Perspectives on TSA's Policies to Prevent Unlawful Policing**

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I. INTRODUCTION

Good Morning Chairman Thompson, Ranking Member Rogers and members of the Committee. My name is Janai Nelson and I am the Associate Director- Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF). Thank you for the opportunity to testify this morning.

LDF is the nation's oldest civil and human rights law organization. LDF was founded in 1940 by Thurgood Marshall, who later became the first Black U.S. Supreme Court Justice. Since its inception, LDF has used litigation, legislative, public education, and other advocacy strategies to promote full, equal, and active citizenship for Black Americans. This work has included litigating seminal cases such as *Brown v. Board of Education* and *Newman v. Piggie Park Enterprises*, which upheld Title II of the Civil Rights Act of 1964 and its prohibition on racial discrimination in public accommodations. LDF has also been on the frontlines of opposing racial profiling, whether practiced by law enforcement agencies, department stores, airlines, or taxicab drivers. LDF has also challenged policies that have a discriminatory impact on Black people because of specific characteristics, including hair type. We have vigorously opposed hair policies that serve as pretexts or justifications for racial discrimination in schools and in the workplace.¹ In just the past two years alone, we challenged a hair policy in a Boston-area charter school that denied Mya and Deanna Cook the right to wear braid extensions at their school, we obtained public records concerning an incident in which Andrew Johnson, a Black high school student in New Jersey, was forced to cut his hair in order to compete in a high school wrestling match,² and we filed an administrative complaint with the Florida Department of Education on behalf of a six-year-old boy, Clinton Stanley Jr., who was denied entry on his first day of school because he wore his hair in locs that extended past his ears.³ LDF has also been involved in lawsuits combatting hair discrimination in the workplace, including *EEOC v. Catastrophe Management Solutions*, in which LDF petitioned the Supreme Court of the United States to review

¹ See, e.g., Brief of NAACP Legal Def. & Educ. Fund, Inc. et al., as Amici Curiae, *EEOC v. Catastrophe Management Solutions*, 2016 WL 7173828 (11th Cir. Dec. 2, 2016).

² See Press Release, LDF Makes Public Records Request in Response to Hair Discrimination Case Involving Buena Regional High School Wrestler (Jan. 7, 2019), <https://www.naacpldf.org/press-release/ldf-makes-public-records-request-response-hair-discrimination-case-involving-buena-regional-high-school-wrestler/>; Press Release, LDF Sends Letters Over Concerns with Discriminatory Hair Policies Stemming from Incident Involving New Jersey High School Wrestler (Feb. 12, 2019), <https://www.naacpldf.org/press-release/ldf-sends-letters-concerns-discriminatory-hair-policies-stemming-incident-involving-new-jersey-high-school-wrestler/>.

³ Letter to Adam Miller from Angel S. Harris, et al., re: Clinton Stanley Jr. Complaint (Nov. 29, 2018), <https://www.naacpldf.org/wp-content/uploads/11.29.2018-Stanley-Complaint-002.pdf>.

the case of Chastity Jones, a Black woman whose job offer was rescinded solely because she wore her hair in locs.⁴

We appreciate the opportunity to testify this morning on the important topic of Transportation Security Administration (“TSA”) policies that profile, single out, and disproportionately burden people of color, as well as persons with disabilities, transgender persons, persons of various religions, and particularly Black women. Black people have historically been discriminated against in ways that impede their mobility in public spaces and discriminated against in various spheres because of their hair. In light of the long and ongoing history of discrimination rooted in Black hair and continuing barriers to Black mobility, we are deeply troubled that the full-body scanners that TSA employs at airports disproportionately single out Black women for additional and burdensome security procedures, including invasive pat-downs, because of their hair.⁵ LDF’s work has long recognized that full citizenship for Black Americans requires the elimination of discrimination in public spaces—schools, transportation, public accommodations—and the transformation of these spaces to protect the dignity of communities of color and their unfettered mobility. As LDF is a national organization, litigating and advocating in states and cities across the country, being able to navigate the nation’s airports without unjustified burdens is also a matter of personal concern for our racially and ethnically diverse staff.

TSA interacts with millions of people of color each year as they navigate air travel in the United States⁶. An April 2016 report prepared by Ipsos Public Affairs on the “Status of Air Travel in the USA” indicates that 45% of the US adult population traveled by air in 2015. Of those adult flyers, in 2015, 8% were Black or African American, 17% were Latinx and 6% were Asian.⁷ As countless Black people have experienced, the already heightened suspicion and profiling of Black people by security personnel in this country is compounded by TSA technology that singles out Black people in airports, particularly Black women, for invasive and humiliating searches simply because the technology is unable to distinguish contraband from natural Black hair. What we are seeing is part of an ongoing trend at the intersection of race and technology, and the pattern is becoming depressingly familiar. TSA’s full-body scanners are another new, purportedly race-neutral risk-assessment technology that does not ostensibly classify, discriminate, or use any discretion on the front end—yet, on the back end, it perpetuates racial profiling and Black people are disproportionately harmed. And, in the case of TSA hair pat-downs that result from the false positives produced by TSA scanners, it is Black women, Black trans women, Black women with disabilities, Black Muslim women, and those at the intersection of

⁴ <https://www.naacpldf.org/files/about-us/CMS%20-%20Cert%20Petition%20FINAL.PDF>.

⁵ See Brenda Medina, *TSA Agents Say They’re Not Discriminating Against Black Women, but Their Body Scanners Might Be*, ProPublica (Apr. 17, 2019), <https://www.propublica.org/article/tsa-not-discriminating-against-black-women-but-their-body-scanners-might-be>.

⁶ <http://airlines.org/wp-content/uploads/2016/04/2016Survey.pdf>

⁷ <http://airlines.org/wp-content/uploads/2016/04/2016Survey.pdf>

these and other identities who are disproportionately burdened. The burdens these women bear are too often disregarded as a cost of public safety and denied remedy.

We recognize and respect that the TSA performs important security functions at our nation's airports. However, I want to stress in my testimony today that we can maintain security in our nation's airports while maintaining human dignity. We can pursue new technology while not compromising civil and human rights. We can be *safe* in employing best practices for security procedures while also being *sound* in ensuring that the policies and practices we uphold do not discriminate. In fact, these goals can not only coexist, by law, they must. Racial discrimination is a threat to our national security and it violates our constitution and civil rights laws. The recently released Propublica report, as well as multiple anecdotal news accounts, are evidence that TSA practices needlessly burden specific groups of people, namely Black women, whether they are high profile celebrities, business travelers, or general commuters. This systematic infringement on the mobility of Black people by a government agency must be corrected and we are heartened that this committee is taking up the charge.

To be a Black person participating in public life too often means being subjected to a constant barrage of "risk assessments," whether formal or informal, conscious or beneath the surface. And the results of these assessments inevitably reflect this country's deeply rooted biases and racism and the automatic associations made between race and dangerousness. As studies have demonstrated, when people see a Black man and a white man of the same size, they perceive the Black man to be both larger and more threatening.⁸ People likewise perceive Black children to be older, less innocent, and a greater threat than their white counterparts.⁹ A criminal justice system premised on treating Black people as higher risk and more in need of social control has resulted in Black people being 2.5 times more likely to be arrested than white people, and in almost half of all Black men having been arrested at least once by the age of 23.¹⁰ And while Black people comprise only 12.7 percent of the general population, they make up over 41 percent of the federal and state prison population in the United States. The legacy of using law enforcement and state security apparatuses as tools for racially discriminatory control and subordination continues, including in the implementation of purportedly neutral- and objective-sounding programs as risk assessment tools that incorporate racial biases, including

⁸ <https://www.apa.org/pubs/journals/releases/psp-pspi0000092.pdf>.

⁹ See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 540 (2014).

¹⁰ ANGELA J. DAVIS (ED.), *POLICING THE BLACK MAN* XV (2017).

algorithms used to determine pre-trial detention,¹¹ facial recognition security devices, and, indeed, airport full-body scanners.

Of course, the instances of racial bias that Black people endure on a daily basis are not relegated to official state action. Indeed, not a week goes by without a new viral video depicting Black people unable to engage in public life without harassment. People have called the police on Black people shopping for prom clothes¹² and office supplies.¹³ Just last week a white person drew a pistol and threatened a black couple who were seeking to have a picnic at a campground.¹⁴ A black guest at a hotel in Portland was presumed to be a trespasser and asked to leave the premises. Hotel staff then called 9-1-1 when he made a phone call in a hotel lobby.¹⁵ Black students have been suspected of and interrogated for trespassing simply for walking around, eating lunch and taking a nap on their college campus.¹⁶ And, the list goes on and on. These “living while Black” indignities range from humiliating to life-threatening. They transform what should be routine, quotidian acts into fraught and potentially dangerous encounters.

Similarly, discriminatory security procedures in airports create a jarring contradiction, juxtaposing the freedom associated with travel and movement with invasive practices that primarily target historically marginalized groups. For most of this nation’s history, Black people could not travel between the states freely and without encountering state sanctioned discrimination. Indeed, the Civil Rights Act of 1964 is built on the foundation that Congress can take action to prohibit the kind of

¹¹ See, e.g., Eric Westervelt, *California’s Bail Overhaul May Do More Harm Than Good, Reformers Say*, NPR (Oct. 2, 2018), <https://www.npr.org/2018/10/02/651959950/californias-bail-overhaul-may-do-more-harm-than-good-reformers-say>.

¹² <https://money.cnn.com/2018/05/08/news/companies/nordstrom-rack-shoplifting/index.html>.

¹³ <https://www.cnn.com/videos/us/2018/08/14/north-carolina-mom-accused-of-trying-to-shoplift-vpx.hln>.

¹⁴ Kelly Taylor Hayes, *White campground worker fired after pulling gun on black visitors in Mississippi*, Fox 5 DC (May 29, 2019), <http://www.fox5dc.com/news/white-campground-worker-fired-after-pulling-gun-on-black-visitors-in-mississippi>.

¹⁵ Keith Allen, *Hotel employees who asked black guest to leave fired*, CNN (Dec. 29, 2018), <https://www.cnn.com/2018/12/28/us/portland-hotel-police-black-guest-trnd/index.html>.

¹⁶ Holly Yan, *Yale student accused of ‘napping while Black’ wants fellow student disciplined*, CNN (May 14, 2018), <https://www.cnn.com/2018/05/14/us/yale-black-grad-student-interview/index.html>; Katie Mettler, *A Black college student went looking for free food. He ended up pinned down by campus officers*. Wash. Post. (Apr. 14, 2019), https://www.washingtonpost.com/education/2019/04/14/video-shows-black-columbia-student-pinned-by-campus-police-after-failing-show-his-id/?utm_term=.6807cb9b6af3; Nicole Chavez, *Smith College student who was racially profiled while eating says the incident left her so shaken she can’t sleep*, CNN (Aug. 3, 2018), <https://www.cnn.com/2018/08/03/us/smith-college-student-police-trnd/index.html>.

discrimination that would impede Black people from traveling throughout the country and engaging in interstate commerce.¹⁷

People who have been subjected to aggressive and humiliating searches and hair pat-downs by TSA may think twice before traveling by plane unless absolutely necessary. When they were flying out of Los Angeles airport in 2017, Reba Perry-Ufele and her 12-year-old daughter, Egypt, both African American,¹⁸ were pulled aside by Transportation Security Officers (TSOs) after going through the scanning machine. Ms. Perry-Ufele was told that TSA personnel would need to conduct a search of her braids. Ms. Perry-Ufele said she did not consent to the search, but was told by TSA agents that it was mandatory “protocol”. During the search, according to Ms. Perry-Ufele, the agents “literally ripped my braids apart until they were a mess and I had to take them out when I got home.” “I was so embarrassed,” she added, “because not only did she humiliate me but she did it in front of the other people.”¹⁹ Ms. Perry-Ufele’s experience is similar to that of many people who the TSA full-body scanners falsely identified as having an object hidden in their hair.

On three of Jazzmen Knoderer’s first four air travel experiences, she was pulled aside for full-body and hair pat-downs.²⁰ On at least one of these occasions, Ms. Knoderer had not even gone through a scanner or metal detector before a TSA officer pulled her aside and searched her. Ms. Knoderer aptly noted, “It doesn’t feel random when it happens three times in a row. It doesn’t feel random when you see that all the people around you, who don’t look like you, aren’t asked to step aside . . . I don’t want to change the way my hair grows out of my head.”

As we now know from reporting from Pro Publica and multiple first-hand accounts, experiences like Ms. Perry-Ufele’s and Ms. Knoderer’s are not uncommon. That is why LDF has requested records relating to TSA’s policies and practices regarding full-body scanners and hair pat-downs; to TSA’s August 2018 request for proposals to enhance security, including by “address[ing] capability gaps in civil rights compliance”;²¹ to data and policies regarding “false positives” produced by full-

¹⁷ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

¹⁸ See Tatiana Walk-Morris, *Why is the TSA Still Searching Black Women?*, *Cosmopolitan* (Apr. 24, 2018), <https://www.cosmopolitan.com/lifestyle/a18666534/tsa-black-women-hair-searches/>.

¹⁹ *Id.*

²⁰ Medina, *supra* note 5.

²¹ See Transportation Security Administration, ITF Innovative Demonstrations for Enterprise Advancement (IDEA) 2018 BAA, Solicitation Number 70T04018K9NSTD105, https://www.fbo.gov/index.php?s=opportunity&mode=form&tab=core&id=c64a62edf70b0cbd9297e8aac7e9fc47&_cview=0 (more information regarding request provided in Attachment A, <https://www.fbo.gov/utills/view?id=63a555f1caa4334c21de68cd074502d7>).

body scanners resulting in hair pat-downs; and to the number of illegal and/or unauthorized objects TSA has recovered as a result of hair pat-downs.

Air travel is also a particular burden for people who wear religious head coverings, particularly Muslims. As one Muslim woman, Nyfees Syed, told the New York Times, “I have to go [to the airport] an extra hour before, because it’s not random checking [by TSA]”—and, the majority of the time, she is pulled aside by TSA officers for secondary screenings and for examiners to grip and feel her head through her hijab.²² Airport security can also be extraordinarily difficult and dangerous for transgender passengers, an issue that is only starting to be addressed.²³ In sum, TSA’s policies and practices, specifically the use of scanners, continue a history of discrimination by disproportionately identifying Black women, as well as certain other marginalized groups, as suspicious, subjecting them to demeaning searches and pat-downs, and interfering with their right to travel freely.

There is a long legacy of policing, regulating, and judging natural Black hair in this country. This legacy includes forcing Black women to cover their hair in the antebellum South²⁴ and, in more recent times, the legal approval of hair discrimination, particularly with respect to Black women. In a 1981 case stemming from an airline’s policy, for example, a federal court in New York upheld the right of employers to categorically prohibit employees from wearing “braided hairstyles,” a policy that disproportionately affected Black, female employees.²⁵ Only recently have we as a society—if not as a legal system—begun to understand and address the interplay between racism and misogyny, and how hair discrimination is a particular point of intersection between these two oppressive forces.

In and out of the workplace, Black people in the United States face barriers or judgments when they display their natural hair. Locs in particular have long been the target of deep-seated negative stereotypes about Black people and their hair—mainly, that Black hair is dirty, unprofessional, or unkempt. In fact, the term “dreadlocks” originated from slave traders who described Africans’ hair that had

²² Michael T. Luongo, *Traveling While Muslim Complicates Air Travel*, N.Y. Times (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html>; see also Press Release, Muslim Advocates and LDF Urge Airlines to Institute Anti-Bias Training, NAACP Legal Def. & Educ. Fund (Oct. 12, 2017), <https://www.naacpldf.org/press-release/muslim-advocates-and-ldf-urge-airlines-to-institute-anti-bias-training/>.

²³ See Alex Marzano-Lesenevich, *Flying While Trans*, N.Y. Times (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/opinion/tsa-transgender.html>.

²⁴ See U.S. Dep’t of the Interior, Nat’l Park Service, African American Heritage & Ethnography—Africans in French Americas, <https://www.nps.gov/ethnography/aah/aaheritage/FrenchAmA.htm> (“[w]omen of color had to wear a scarf or handkerchief over their hair as a visible sign of belonging to the slave class, whether they were enslaved or not. Those women affected by the law did, in fact, cover their hair, but they did it with elaborate fabrics and jewels- an action which technically meant the letter of the law but also allowed them to maintain their standards of fashion and beauty.”).

²⁵ *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981).

naturally formed into locs as “dreadful.”²⁶ For Black women in particular, these stereotypes often compel them to undertake costly, time-consuming, and harsh measures to straighten their hair to conform to the predominant white culture and standards of professionalism and beauty. The pressure to take such measures in order to be treated equally in the workplace is deeply lamentable, and it is a pressure exacerbated by TSA’s practices and policies. Dorian Wanzer, for example, a Black woman whose job requires frequent travel and has testified/reported that “almost every time she steps out of an airport body scanner,” she is pulled aside so TSA officers can conduct a hair pat-down.²⁷ This consistent treatment has prompted Ms. Wanzer to query, “When you find yourself in that kind of situation, it makes you wonder, is this for security, or am I being profiled for my race?”²⁸ Black women are too often denied the ability to participate in the workplace equally because of their natural hair, both because of bias in their place of employment, and because of external burdens and discrimination like TSA hair pat-downs making it that much more difficult for Black women like Ms. Wanzer to do their jobs.

The stereotype that Black natural hairstyles are dirty or unkempt and therefore not appropriate for more formal settings remains unfortunately widespread. For example, until 2014, the U.S. military banned a number of common Black hairstyles, including cornrows and braids.²⁹ School administrators and dress codes also often restrict Black natural hairstyles and punish students for wearing them.³⁰ In one dramatic episode, a school principal reportedly took scissors to a Black student’s locs.³¹ More recently, as noted earlier, a high school wrestling referee with

²⁶ Brown White, *Releasing the Pursuit of Bouncin’ and Behavin’ Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 Int’l J. Media & Cultural Pol. 295, 296 n.3 (2005).

²⁷ See Medina, *supra* note 5.

²⁸ *Id.*

²⁹ David S. Joachim, *Military to Ease Hairstyle Rules After Outcry from Black Recruits*, N.Y. TIMES (Aug. 14, 2014), <https://www.nytimes.com/2014/08/15/us/military-hairstyle-rules-dreadlocks-cornrows.html>.

³⁰ See, e.g., Press Release, Civil Rights Groups Retained to Represent African American Teens Punished for Wearing Braids at Massachusetts Charter School, NAACP Legal Def. & Educ. Fund (May 22, 2017), <https://www.naacpldf.org/press-release/civil-rights-groups-retained-to-represent-african-american-teens-punished-for-wearing-braids-at-massachusetts-charter-school/>.

³¹ David Moye, *Mom Accuses Principal of Cutting Her Son’s Hair Without Permission*, HUFF. POST (Mar. 28, 2018), https://www.huffingtonpost.com/entry/mississippi-boy-hair-locs-cut-principal_us_5abbfa33e4b03e2a5c78e34d; see also Kayla Lattimore, *When Black Hair Violates the Dress Code*, NPR (July 17, 2017), <https://www.npr.org/sections/ed/2017/07/17/534448313/when-black-hair-violates-the-dress-code> (describing two Black students punished for wearing braids); Crystal Tate, *16-Year- Old Black Student with Natural Hair Asked by School to “Get Her Hair Done,”*

a history of making racist comments forced a Black student athlete to cut his locs in order to compete, even though doing so was not required by district policy.³²

While these incidents are particularly troubling and stark examples of hair discrimination, the underlying myths and judgments about Black natural hair are pervasive in both professional and social contexts and in people's attitudes. A 2017 study, for instance, found that white women, on average, show explicit bias against "black women's textured hair," rating it "less professional than smooth hair."³³ This same study, perhaps not surprisingly, found that Black women feel particular pressure to straighten their hair for work.³⁴ In the words of Professor Paulette Caldwell, "I marvel[] with sadness that something as simple as a black woman's hair continues to threaten the social, political, and economic fabric of American life."³⁵

Realizing the pernicious and demonstrably harmful effects of hair discrimination, some states and cities are starting to take action. In February of 2019, the New York City Human Rights Commission released Guidance on Race Discrimination on the Basis of Hair, noting that "Bans or restrictions on natural hair or hairstyles associated with Black people are often rooted in white standards of appearance and perpetuate racist stereotypes that Black hairstyles are unprofessional" and that "[s]uch policies exacerbate anti-Black bias in employment, at school, while playing sports, and in other areas of daily living."³⁶ And the California Senate recently passed a bill, the CROWN Act (SB 188), that would prohibit schools

ESSENCE (May 16, 2017), <https://www.essence.com/hair/natural/black-student-natural-hair-asked-to-get-hair-done>.

³² See Press Release, LDF Makes Public Records Request in Response to Hair Discrimination Case Involving Buena Regional High School Wrestler (Jan. 7, 2019), <https://www.naacpldf.org/press-release/ldf-makes-public-records-request-response-hair-discrimination-case-involving-buena-regional-high-school-wrestler/>; Press Release, LDF Sends Letters Over Concerns with Discriminatory Hair Policies Stemming from Incident Involving New Jersey High School Wrestler (Feb. 12, 2019), <https://www.naacpldf.org/press-release/ldf-sends-letters-concerns-discriminatory-hair-policies-stemming-incident-involving-new-jersey-high-school-wrestler/>.

³³ See ALEXIS M. JOHNSON, ET AL., THE "GOOD HAIR" STUDY: EXPLICIT AND IMPLICIT ATTITUDES TOWARD BLACK WOMEN'S HAIR 6, PERCEPTION INSTITUTE (Feb. 2017), <https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf>.

³⁴ *Id.* at 12.

³⁵ Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 367 (Apr. 1991).

³⁶ New York City Commission on Human Rights, NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair (2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf>.

and employers from discriminating against natural hairstyles associated with race.³⁷ According to the sponsor of the bill, Sen. Holly J. Mitchell, “There are still far too many cases of Black employees and applicants denied employment or promotion—even terminated—because of the way they choose to wear their hair. I have heard far too many reports of Black children humiliated and sent home from school because their natural hair was deemed unruly or a distraction to others.”³⁸ We commend these jurisdictions for taking action against pervasive discrimination against Black hair and ask TSA to similarly incorporate these principles into its policies and practices.

Most disturbing, perhaps, is that top TSA officials do not recognize that a system that singles out and disproportionately targets Black women is discriminatory. In its investigation, ProPublica reported that “[a] senior TSA official said in an interview that hair pat-downs are not discriminatory and are done when a body scanner indicates that a passenger has an object in his or her hair. ‘I get a hair pat-down every time I travel. I’m a white woman,’ said the official, who agreed to be interviewed on the condition that she not be named.”³⁹ The implications here—that supposedly objective technology cannot be discriminatory, and that a system cannot be racially discriminatory if it also affects white people—are misguided. We are past the point of asking whether software, algorithms, machines, and other forms of technology can perpetuate racism. Of the numerous examples of technology-based discrimination, two from Google Images include incidents in which the website featured almost all Black people in response to a query about “unprofessional hairstyles,”⁴⁰ and one in which the website “labeled black people as gorillas, likely because those were the only dark-skinned beings in the training set.”⁴¹ The data that is fed into this kind of technology is susceptible to the biases of the humans who choose that data and shape the development of the technology: “Software is written by humans, who have bias, and training data is also generated by humans who have bias.”⁴² Our focus now should be on studying the disparate outcomes produced by

³⁷ See Kristin Lam, *California’s CROWN Act seeks to end racial discrimination based on hairstyles*, USA Today (Apr. 23, 2019), <https://www.usatoday.com/story/news/nation/2019/04/23/california-bill-end-racial-discrimination-hairstyle/3557231002/>.

³⁸ “Senate OKs Sen. Mitchell’s bill to protect against discrimination based on hair texture, styles,” YouTube.com (Apr. 22, 2019), https://www.youtube.com/watch?time_continue=182&v=Ty69wWU-M7E.

³⁹ Medina, *supra* note 5.

⁴⁰ Andrew Leung, *If you Google ‘Unprofessional Hairstyles for Work,’ these are the problematic results*, Mic.com (Apr. 6, 2016), <https://www.mic.com/articles/140092/if-you-google-unprofessional-hairstyles-for-work-these-are-the-problematic-results#.KKA0LXRdd>.

⁴¹ Maya Kosoff, *Alexandria Ocasio-Cortez says algorithms can be racist. Here’s why she’s right.*, LiveScience (Jan. 29, 2019), <https://www.livescience.com/64621-how-algorithms-can-be-racist.html>.

⁴² *Id.*

these technologies and ensuring that we are not simply automating human biases while relying on “objective technology” to escape culpability for the racially unequal results. A longer and expanded inquiry is warranted to ensure that this country’s history of discrimination and racial bigotry does not continue to be perpetuated by technology.

Indeed, the compromising of passengers’ civil rights at TSA security points in airports is not new, and TSA has been aware of the problem in various forms for years. In fact, over four years ago, TSA entered into an agreement with the ACLU of Northern California over the racial profiling of Black women’s hair.⁴³ Since this agreement, the problems that motivated the initial complaint have reemerged, but are now treated as an issue of technological inefficiency rather than as a violation of passengers’ civil rights. These issues of racial bias in TSA technology must be addressed particularly as TSA moves toward increased reliance on other forms of technology, including facial recognition tools⁴⁴, which have already been proved to operate in manner that discriminates based on race.⁴⁵

Recent reports and articles on TSA’s policies and procedures related to profiling have been a laudable and much-needed step in understanding the problem, though the problem’s scope is far from understood. One of the ways to bring greater transparency to the issue of racial profiling in TSA technology and TSA’s policies and practices more generally is to promote the complaint process. It is likely that many people about to board a plane may not take the time to file a formal complaint with TSA. And, more troubling, according to ProPublica, “most people [they] heard from said they had not known they could make a complaint.”⁴⁶ We urge TSA to continue studying the scope of this problem, both by reviewing complaints and proactively soliciting feedback from passengers. TSA, particularly its Office for Civil Rights & Liberties, Ombudsman & Traveler Engagement (CRL/OTE), as well as its Innovation Task Force, should be actively engaged in monitoring and collecting data on how the implementation of technology like full-body scanners disproportionately affects certain passengers. Given TSA’s constant contact with the public—contact that at times can be of a highly personal and invasive nature—public engagement and responding to public input is critical.

Further, to the extent that TSA asserts that its current policies and practices regarding full-body scanners and hair pat-downs are necessary as a matter of security, we urge TSA to be transparent in explaining why that is so and to confirm that there are no less discriminatory measures. To our knowledge, TSA has not

⁴³ Letter from Bryan W. Hudson, TSA, https://www.aclunc.org/sites/default/files/2015.01.12%20Singleton%20TSA%20resolution_0.pdf.

⁴⁴ <https://www.theverge.com/2018/10/15/17979688/tsa-precheck-facial-recognition-airport-cbp-biometric-exit>

⁴⁵ <https://www.theverge.com/2019/1/25/18197137/amazon-rekognition-facial-recognition-bias-race-gender>

⁴⁶ Medina, *supra* note 5.

provided any data on the number of weapons or other contraband, if any, it has discovered through the process of hair pat-downs. Against the voluminous evidence that TSA procedures are disproportionately burdening people of color, TSA has failed to adequately show that these procedures are actually necessary, or even helpful, in enhancing security, or that there are no less burdensome alternative procedures. TSA has also not shown that it is effective for TSA officers to spend time tending to the many false positives produced by full-body scanners, which cannot tell the difference between a weapon in a person's hair and a Black woman's locs as opposed to other security measures.

We appreciate TSA's role in maintaining safe travel, as well as its attention to the ongoing problems discussed in this testimony and those shared by others today. TSA's obligation to treat all passengers with dignity and to protect their constitutional and civil rights, as well as their safety is a critical one. LDF looks forward to continuing to engage on these issues and would welcome the opportunity to work with TSA on finding innovative solutions that serve the needs of TSA while protecting the dignity and civil rights of all travelers.

Thank you for your consideration of this important issue and for the opportunity to speak to you today.